

Appellate Tribunal for Electricity
(Appellate Jurisdiction)
Appeal No. 51 of 2010

Dated: 8th Aug, 2011

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

In The Matter Of

1. M/s. Rohit Ferro Tech Limited,
35, Chittaranjan Avenue,
Kolkata-700 012
2. M/s. Concast Bengal Industries Limited,
21, Hemanta Basu Sarani,
5th Floor, Kolkata-700 001
3. M/s. Modern Indian Concast Limited,
18 D, Everest House,
46C, Jawaharlal Nehru Road,
Kolkata-700 071
4. M/s. Sri Vasavi Industries Limited,
1/433, Gariahat Road,
Jodhpur Park,
Kolkata-700 068
5. M/s. Sri Gayatri Minerals Private Limited,
Room No.1, 5th Floor,
19 Pollock Street,
Kolkata-700 001

6. M/s. Rashmi Metaliks Limited,
39, Shakeshpere Sarani,
Premlata, 6th Floor,
Kolkata-700 017

... Appellant(s)

Versus

1. M/s. West Bengal Electricity Regulatory Commission,
Poura Bhavan, 3rd Floor,
Block FD, 415-A, Bidhannagar,
Kolkata-700 016

2. M/s. West Bengal State Electricity
Distribution Company Ltd.
Vidyut Bhavan (4th Floor),
DJ- Block, Sector II,
Salt Lake, Kolkata-700 091

....Respondent(s)

Counsel for Appellant(s): Mr. Jayant Bhushan, Sr. Adv.
Mr. Buddy A. Ranganadhan,
Mr. Amit Kapoor,
Ms. Poonam Verma

Counsel for Respondent(s): Mr. Pratik Dhar (For R-1),
Mr. C.K Rai (for R-1),
Mr. M. Shyam (for R-1)
Mr. Krishnan Venugopal, Sr. Adv
(For R-2),
Mr. Sakya Chaudhari (for R-2),
Mr. Vishal Anand (for R-2),
Mr. Avijeet K. Lala (for R-2),
Mr. Abir Phukan (for R-2),
Mr. Sidharth (for R-2),
Mr. Udai Rathore (for R-2),

JUDGMENT

HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

The Appellants are engaged in the manufacture of Ferro Alloy and Steel, having their industries in Bankura District in the State of West Bengal.

2. They are bulk consumers of the electricity of the West Bengal Distribution Company (R-2) which is a Distribution Licensee for distribution of retail supply of electricity in the State of West Bengal.

3. Aggrieved by the order dated 25.11.2009, passed by the West Bengal State Commission, the first respondent, allowing the Distribution Licensee (R-2) to recover the additional tariff from the Appellants and other consumers on ad-hoc basis, the Appellants have filed this Appeal.

The short facts are as follows:-

4. West Bengal Distribution Licensee (R-2) filed its Annual Revenue Requirement and Tariff Proposals before the State Commission as per West Bengal Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2007. On 30.9.2008, the State Commission determined the Annual Revenue Requirement of the Distribution Company for distribution and retail supply of electricity on a multi year basis i.e. for the years 2008-09, 2009-10 and 2010-11 and tariff for FY-2008-09. This included the determination of Power Purchase Cost admissible to the Distribution Licensee (R-2) for the purchase of Power from West Bengal Power Development Corporation Limited, a State owned generating Company, as well as from other sources.

5. The Appellants and other consumers as per the order dated 30.9.2008 have been paying the tariff for the Distribution and Retail Supply of the Electricity. On

24.7.2009 the State Commission issued the tariff order for Respondent No.2 for FY-2009-10 approving an aggregate revenue of Rs.6456 crores of which the power purchase cost was 5126 crores.

6. During the middle of the tariff year, i.e. on 23.9.2009, the Licensee (R-2) filed an application before the State Commission praying for an ad-hoc increase of Rs.1,526 Crores towards Power Purchase Cost. Respondent-2 filed another application on 30.10.2009 for increase of price of electricity supplied by NPTC and DVC due to increase in price of coal.

7. Having entertained this application from the Distribution Licensee, the State Commission straightway proceeded to pass the impugned order on 25.11.2009 allowing an ad hoc increase of Rs.1,720.11 Crores thereby an increase in the tariff for the Appellants from Rs.3 per unit to Rs.3.78 per unit causing the tariff impact of 78

Paise per unit tariff on the consumers. This order was passed on the application filed by the Distribution Company without holding any public hearing and without giving an opportunity to the consumers including the Appellants.

8. In view of the substantial increase in the tariff, the Appellants being the bulk supply consumers have filed these Appeals challenging the impugned order dated 25.11.2009.

9. The Learned Counsel for the Appellant has urged the following grounds while assailing the order impugned:

(i) Though the impugned order was said to have been passed under the Fuel and Power Purchase Cost Adjustment (FPPCA), actually it is not FPPCA determined under the Formula and on the other hand, the order impugned is a tariff order increasing

the tariff by way of amendment. Such an order can not be passed without giving an opportunity to the consumers and without hearing from the affected parties as per the mandatory requirements u/s 64 (3) and 86 (3) of the Electricity Act, 2003.

(ii) The impugned order is not a Fuel and Power Purchase Cost Adjustment order but it is a tariff order for the following reasons:

(a) There is inclusion of the capacity charges for the newly commissioned units of West Bengal Power Development Corporation.

(b) There is inclusion of the amount said to be payable to the State and other agencies supplying power to the distribution licensee (R-2) which were not earlier included in the Annual Revenue Requirements of the R-2.

(c) There is inclusion of other amounts payable for Power Purchase cost which were admittedly not included in the earlier tariff order for the year 2009-10.

(iii) The inclusion of the capacity purchase in the impugned order is beyond the Regulation 4.8.8 and also 2.8.7.3 of West Bengal Tariff Regulations. There is absolutely no reasons given in the impugned order as to why the capacity purchase was not included in the main tariff order for the year 2009-10. Such capacity charges which were not included in the main tariff order ought not to have been included in the mid-year, that too while applying a Fuel and Power Purchase Cost Adjustment Formula.

(iv) The State Commission has blindly accepted the claim of the Distribution Licensee

without going into the details. Further, the calculation of Power Purchase Cost attributable to sale of power within the State is wrong. The total amount attributable to power purchase for sale within the State has been calculated at Rs.148346.62 lacs. But it should actually be Rs.143174.43 lacs. Hence, the Power Purchase Cost attributable to sale inside the State is overstated to the extent to Rs.5172.19 lacs. It is a wrong calculation. Consequent to this the exorbitant increase in the tariff would result in significant tariff shock to the Appellants and other similarly placed consumers affecting their activities substantially.

(v) On 25.7.2009, the State Commission issued a Tariff Order for the year 2009-10 approving an aggregate revenue of Rs.6456 Crores out of which Power Purchase Cost

approved was Rs.5126 Crores. At that stage, immediately after two months, the Distribution Licensee (R-2) filed an application on 23.9.2009 praying for the ad-hoc increase of Rs.1526 Crores towards Power Purchase Cost. Again on 30.10.2009, the Distribution Licensee filed another application for increase of price of electricity supplied by the NTPC and DVC. The State Commission on these two applications had passed the impugned order dated 25.11.2009 without any public hearing and without giving an opportunity to the consumers increasing the tariff from Rs.3 per unit to Rs.3.78 Paise per unit. Thus, within four months of issuance of tariff order dated 24.7.2009, the State Commission has hastened to pass the impugned order making an ad-hoc tariff increase of Rs.1720.11 Crores to the Consumers.

(vi) The State Commission has colourably exercised its powers by issuing the impugned order purportedly allowing the Fuel and Power Purchase Cost Adjustment to the Distribution Company against the power purchase cost formula and a huge proportion of tariff charged by the Distribution Licensee from the consumers. This increase in tariff would construe to be an amendment of tariff which requires the observance of the principle of natural justice.

10. In reply to these submissions, the Learned Counsel for the Commission as well as the Distribution Licensee, have made the following submissions in justification of the impugned order:-

(i) The State Commission while determining the tariff through MYT Order dated 30.9.2008, had duly

published the same calling for the objections in line with the procedure specified u/s 64 of the Act. In the said order, the State Commission has specifically recorded that in addition to the tariff determined under the said tariff order, the Distribution Company would be further entitled to the additional sum towards enhanced fuel and power purchase cost, after the date from which the tariff order takes places. The similar findings have been given by the Commission even in the subsequent order dated 24.7.2009. Having observed the procedure contemplated u/s 64 for the main tariff order, it is not necessary for the State Commission to follow the very same procedure for the provisional increase towards the power purchase cost.

(ii) The ad-hoc power purchase cost adjustment order has been passed under the Regulation 2.8.7.3 of the Tariff Regulation. Under this Regulation, the

State Commission has got the discretion to allow the ad-hoc FPPCA provisionally in the course of any year either on suo-moto or on the application filed by the Distribution Company.

(iii) Admittedly, the application had been filed by the Distribution Licensee under Regulation 2.8.7.3 for allowing an ad-hoc increase in Power Purchase Cost. The impugned order was also passed to recover the additional power purchase cost on ad-hoc basis subject to the final adjustments in determination of FPPCA for the year 2009-10.

(iv) Regulation 22 and 31 of the Conduct of Business Regulation, 2007 would confer the powers of discretion to the Commission to decide whether a hearing is required for any particular proceedings in terms of the said Regulation. The similar powers have been conferred in 2.8.7.3 and 4.8.8 of the Tariff Regulations, 2007. Therefore, the order permitting

the Distribution Company to charge an additional amount under the Fuel and Power Purchase Cost Adjustment can not be said to be invalid as it does not involve any determination of tariff.

(v) The perusal of Sections 61 and 64 of the Act would make it clear that procedure in sec 64 would apply only when an applicant makes an application for tariff determination. This is not a tariff determination and is only additional fuel and power purchase cost which is expressly permitted under the terms of any Fuel Surcharge Formula u/s 62 (4). Sec 62 (4) does not deal with the requirement of hearing. It is well settled that when the Statute provides for application of principles of natural justice in a particular manner, the courts will not go beyond the expressed provisions of the Statutes.

(vi) As indicated above, Regulation 2.8.7.3 which deals with the Fuel and Power Purchase Cost

Adjustments, it does not require the Commission to provide a hearing and/or to follow the notice and common procedure. Further, though the licensee in this application sought for consideration of the Regulatory assets, the Commission has not allowed anything other than the increase in Power Purchase Cost. Therefore, the impugned order is perfectly justified.

11. In the light of the rival contentions urged by the Learned Counsel for both the parties, the following question would arise for consideration:

(a) What is the scope and extent of Regulation 2.8.7.3 of the Tariff Regulations 2007 on the aspect of Fuel and Power Purchase Cost increases?

(b) Whether the State Commission is justified in allowing the entire Fuel and Power Purchase Cost

Adjustments claimed by the R-2 (Distribution Company) including provisional Capacity Charges for the new units of West Bengal Development Corporation and Adjustments of the past deficiency for the year 2007-08 fully ignoring tariff shock which would result to a consumer by virtue of such an increase?

(c) Whether the State Commission has acted contrary to the provisions of Sec 64 (3) of the Electricity Act, 2003 and contrary to the well settled principle of natural justice by not undertaking a public hearing and opportunity to the affected persons or to the public to make their objections/suggestions on the claims of the Distribution Licensee (R-2).

12. In elaboration of these questions, the Learned Senior Counsel for the Appellant would strenuously

submit that the State Commission under the guise of Regulation 2.8.7.3 of the Tariff Regulations, 2007 has made an ad hoc increase to the substantial amount i.e. 78 Paise per unit by wrongly including the various aspects such as the Capacity Charges payable for the new generating units relating to the previous period as a part of the mid term adjustments to be undertaken for Fuel and Power Purchase Cost without considering the fact that the Regulation 2.8.7.3 applies only for the Adjustments of the Fuel Cost or Power Purchase Cost and the same cannot be invoked for other purposes, that too without a proper public hearing and without giving an opportunity to the Appellant and other interested parties to raise the objections thereby causing significant tariff shock to the Appellants and other similarly placed consumers.

13. While dealing with the merits of this contention, it is appropriate to recall the relevant facts containing the

chronological events leading to the passing of the impugned order. They are as follows:

(a) The West Bengal State Commission notified the WBERC (Terms and Conditions of Tariff) Regulation, 2007, provided for the adjustment in tariff in terms of various Regulations. This notification was issued on 9.2.2007. This apart, the West Bengal Commission on 5.3.2007, notified WBERC (Conduct of Business) Regulations, 2007 to regulate the proceedings before it such as Regulation 22 to 31 of the Conduct of Business.

(b) On 15.10.2007, the State Commission disposed of Distribution Company's application for adjustments for the years 2003-04, 2004-05 and 2005-06.

(c) On 2.6.2008, the Distribution Company filed a petition seeking the approval of the Annual Revenue

Requirements and Tariff proposal as per the Tariff Regulations.

(d) On 30.9.2008, the State Commission determined the Revenue Requirement for distribution and retail supply of electricity for the years 2008-09, 2009-10 and 2010-11 and tariff for FY 2008-09. This included determination of power purchase cost admissible to the Distribution company for the purchase of power from various sources.

(e) On 24.7.2009, the State Commission issued tariff order for R-2 (Distribution Company) for the year 2009-10 approving the aggregate revenue of Rs.6456 crores of which power purchase cost approved was Rs.5126 crores, on the basis of the ARR already approved in the Multi Year tariff order with adjustment of Rs.130 Crores on account of CTU

charges which were not considered in its order dated 30.9.2008.

(f) Subsequently, the Distribution Licensee (R-2) on 23.9.2009, filed an application before the State Commission praying for ad hoc increase of Rs.1526 crores towards the Power Purchase Cost. The following prayers were sought for in the said application:

(i) Reversal of Regulatory assets of Rs.127 crores created in the tariff order dated 28.7.2009.

(ii) Payment of fixed cost allowed to West Bengal power Development Corporation Ltd(WBPDCL) the state owned generating company, for FY-2009-10 in respect of new generating units in the State Commission's order

dated 13.2.2009, aggregating to Rs.523.32 crores.

(iii) Adjustment of Rs.175.88 crores towards Fuel Cost Adjustment for WBPDCCL based on order dated 21.4.2009.

(iv) Claim of additional amounts on account of Power Purchase Cost to DPL, DPSCL, CESC and WBPDCCL due to hike in coal prices that is taking place from 16.10.2009 aggregating to Rs.64.91 crores.

(v) Increase in Power Purchase Cost of NTPC due to fuel cost adjustment aggregating to Rs.272.86 crores.

(vi) Increase in power purchase bill of DVC mainly due to fuel cost adjustment aggregating to Rs.50.61 crores.

(vii) Ad hoc increase in tariff for the power sold by the WBPDC; Rs.438.96 crores in its petition before the State Commission.

g) When this application was pending before the State Commission, the Distribution Licensee (R-2) on 30.10.2009, filed another petition for increase of price of electricity supplied by NTPC and DVC due to increase in coal prices. Both these applications were taken-up together. However, the State Commission did not choose to hold any public hearing and did not offer any opportunity to the Appellants or any consumers on the above applications but passed the final order on 25.11.2009 allowing an ad hoc increase of Rs.1720.11 crores in favour of the Distribution Licensee causing the tariff impact of Rs.78 Paise per unit tariff to the consumers.

h) The State Commission has, however, allowed the tariff increase prospectively w.e.f. November,2009 and not retrospectively w.e.f. 1.4.2009 as claimed by the Respondent distribution licensee.

14. The Appellant, aggrieved by the impugned order allowing provisional additional Power Purchase Cost of Rs.1720.11 crores resulting in the hike of over 26% in the then prevailing tariff i.e. 78 Paise per unit within four months of issue of tariff order dated 24.7.2009, has filed this Appeal.

15. According to the Appellant, the impugned order which is purported to have been issued under Fuel and Power purchase cost adjustments, is virtually an order issued in exercise of the powers under section 61, 62, 64 and 86 of the Act read with the Tariff Regulations and such an order could not have been passed without complying with the mandatory requirements of transparency,

predictability and due process which are required under Section 64 (3) and 86 (3) of the Act.

16. According to the Respondent, Distribution Licensee, the impugned order has been passed under the Power Purchase Cost Adjustment and in these matters, the hearing is not mandatory and as per the Regulation, the State Commission has got the jurisdiction to dispense with hearing and the relevant Regulation confers the discretion to the State Commission to consider the materials available on record placed by the Distribution Company and pass the appropriate order without hearing the parties and as such, the impugned order is legal. The Learned Counsel for the Respondent referred to Regulation 22 and 31 of the Conduct and Business Regulation, 2007 and Regulation 2.8.7.3 and 4.8.8 of the Tariff Regulation under which the State Commission could allow ad-hoc fuel and power purchase cost either suo motu or on the basis of application filed by the

Licensee by passing a provisional order subject to final adjustment, even without hearing the parties.

17. In the light of the submissions made by the Learned Counsel for the Respondent, let us quote the relevant Regulations:

- *“WBERC (Conduct of Business) Regulations 2007 – Regulations 22 and 31*

“Proceedings before the Commission:

“22(1) The Commission may, from time to time, hold such proceedings which may or may not involve hearings or inviting objections from the affected person through press notification etc. as it may consider appropriate in the discharge of its functions.

(2) The Commission may, from time to time, hold such public consultation or circulate consultative papers on broad macro issues to solicit the views, comments, suggestions, critical assessment etc. from the public and other stakeholders etc. as it may consider appropriate in discharge of its function. The decision of the Commission to hold or not to hold such consultation on any issue shall be final and binding.

(3) The proceedings before the Commission may relate to any of the following matters:

(a) Determination of tariff;

(b) Issue of licence or amendments in the licence or cancellation of licence or any matter relating thereto;

(c) Adjudication or resolution of dispute;

(d) open access, use of surplus transmission facilities, supply of electricity other than by distribution licensee or any matter relating thereto;

(e) regulation of purchase and procurement process of electricity or any matter relating thereto;

(f) investigation of generating company or licensee etc. or any matter relating thereto including market domination;

(g) complaint against contravention of Act or Rules or Regulations or directions or the order of the Commission including matters which fall under Section 129 of the Act;

(h) Any other matter provided under the Act.”

“Hearing of the matter

31(1) The Commission may determine the requirement, the extent, the stage, the manner, the place, the date and the time of the hearing of the matter including the persons who may be permitted in

the hearing at its sole discretion and dispose of the matter as expeditiously as possible”.

WBERC (Tariff) Regulations 2007

“2.8.7.3 The Commission may, at any time, at its discretion, allow an ad hoc fuel cost or power cost provisionally in any year to a generating company or a licensee suo-moto or on the basis of an application filed by the generating company or licensee subject to adjustment of the same in the “FPPCA” for that year”.

“4.8.8 In case of any increase in price of fuel or railway freight or taxes/duties/royalty/cess on fuel at any time after issue of a tariff order for a year or due to sourcing of coal in terms of regulations 4.8.2 to 4.8.7 in larger quantity than that admitted in the Tariff order, the Commission may, in order to reduce future tariff rise, allow provisionally an ad hoc fuel cost and/or power purchase cost either suo-moto or on the basis of an application filed by a generating company or a licensee subject to final determination of such charges on receiving application for determination of FPPCA for that year and in such case such ad-hoc cost shall be considered a part of the tariff prevailing at that time”.

18. The perusal of these Regulations would make it evident that these Regulations provide discretionary

powers with the Commission to decide about the necessity of hearing in any of the particular proceedings. But it should not be forgotten that the said powers vested on the State Commission by the said Regulations has to be exercised consistent with the parent statute and subject to the Act. If the Act were to require a public hearing for a particular purpose, as provided u/s 64 of the Act, the State Commission would not dispense with such requirements arbitrarily without adducing any reasons for the same. Even for dispensing with the due process as well as the principles of natural justice required by the Act, the State Commission has to apply its mind and then to decide whether such an opportunity to the consumers and the mandatory requirements to be complied with have to be dispensed with or not.

19. In this context, it would be worthwhile to refer to the judgement of the Hon'ble Supreme Court in Bharathidasan University vs. All India Council for

Technical Education reported in (2001) 8 SCC 676 in which it is held that the courts are bound to ignore Rules or Regulations which are not in conformity with the statutory provisions. The relevant observations are as follows:

“The fact that the Regulations may have the force of law or when made have to be laid down before the legislature concerned does not confer any more sanctity or immunity as though they are statutory provisions themselves. Consequently, when the power to make Regulations is confined to certain limits and made to flow in a well-defined canal within stipulated banks, those actually made or shown and found to be not made within its confines but outside them, the courts are bound to ignore them when the question of their enforcement arises and the mere fact that there was no specific relief sought for to strike down or declare them ultra vires, particularly when the party is sufferance is a respondent to the lis or proceedings cannot confer any further sanctity or authority and validity which it is shown and found to obviously and patently lack”.

20. So this decision would make it clear that if the Regulations which may have the force of law can not prevail over the main statutory provisions. That apart, as

laid down by the Hon'ble Supreme Court in the PTC case reported in (2010)4 SCC 603, this Tribunal can adjudicate upon an Appeal involving 'interpretation' of Regulations. It is a settled position of law that "reading down" is a process of "interpretation" and that did not amount to challenge the vires of the Regulations.

21. As held by the Supreme Court in the case of Morvi Municipality vs State of Gujarat (1993) 2 SCC 520 and in the case of Delhi Transport Corporation vs DTC Mazdoor Congress & Ors (1990) Supp 1 SCC 600 it has to be concluded that discretionary powers conferred to the State Commission as to whether to have a hearing or not must be exercised in a manner consistent with the parent statute namely section 61, 62, 64 and 86 (3) failing which the action would be bound to be in violation of the Act.

22. Under Section 62 (4) of the Electricity Act, 2003, the State Commission could make changes to the tariff more

than once a year in accordance with a 'fuel surcharge formula' specified. If the State Commission chooses to include within such 'fuel surcharge items that are not limited to 'Fuel and Power Purchase Cost' but items properly ascribable to 'tariff', the State Commission is bound to follow the procedure for determination of tariff under Section 64(3) of the Act.

23. We will deal with the question as to whether the ad-hoc increase in tariff allowed by the State Commission is exclusively to cover the fuel and power purchase cost, as specified in the Regulations.

24. Let us now examine the scheme for Fuel and Power Purchase Cost Adjustment(FPPCA) according to the Regulations. The relevant Regulations 2.8.7.1. to 2.8.7.3 and 4.8.8 are reproduced below:-

“2.8.7 Fuel and Power Purchase Cost Adjustment

2.8.7.1 For 2008-09 and for each subsequent ensuing year or base year the fuel and power purchase cost admissible under the process of FPPCA in respect of a generating company or a licensee shall be worked out as per the relevant formula as specified in Schedule-7, as amended, and that shall also include the impact of gain-sharing as per schedule - 9B related to the parameters of fuel cost, power purchase cost and transmission and distribution loss. Any variation in expenditure on account of FPPCA arising out of variation of price for fuel or heat value of fuel or power purchase cost etc. or an FPPCA against old power purchase liabilities, arising from earlier period's purchase of power shall be either adjusted with the ARR of the next earliest available ensuing year during the stage of tariff determination for recovery / refund through tariff or allowed to be recovered from or

refunded to the consumers through a separate order of the Commission, as the Commission may decide.

2.8.7.2 A generating company or a licensee shall submit its FPPCA claim for any year within forty five days of the completion of its accounts for that year with necessary statutory audited data and a copy of the statutorily audited Annual Accounts for that year. If a generating company or a licensee does not submit its FPPCA claim for any year within the specified date, the Commission may suo-moto undertake FPPCA for the generating company or licensee for that year on the basis of available records. If the Commission, undertakes FPPCA for any base year or ensuing year suo-moto, no subsequent claim from the generating company or licensee regarding FPPCA for that base year or ensuing year shall be entertained in future.

2.8.7.3 The Commission may, at any time at its discretion, allow an ad hoc fuel cost or power purchase cost provisionally in any year to a generating company or a licensee suo-moto or on the basis of an application filed by the generating company or licensee subject to adjustment of the same in the FPPCA for that year.”

“4.8.8. In case of any increase in price of fuel or railway freight or taxes/ duties / royalty/ cess on fuel at any time after issue of a tariff order for a year or due to sourcing of coal in terms of regulations 4.8.2 to 4.8.7 in larger quantity than that admitted in the tariff order, the Commission may in order to reduce future tariff rise, allow provisionally an adhoc fuel cost and/or power purchase cost either suo-moto or on the basis of an application filed by a generating company or a licensee subject to final determination of such charges on receiving application for determination of FPPCA for that year and in such case such ad hoc cost shall be considered as part of the tariff prevailing at that time”.

25. Thus the admissible Fuel and Power Purchase Cost is to be determined by the State Commission at the end of the year on the basis of actual accounts as per the formula specified in Schedule-7. Any variation on account of a FPPCA shall be either adjusted in the ARR of next earliest ensuing year or allowed to be recovered from or refunded to the consumers through a separate order,

as the Commission may decide. However, the State Commission, at any time, at its discretion, can allow ad hoc fuel cost or power purchase cost provisionally subject to adjustment of the same in FPPCA for that year.

26. In the present case the State Commission has allowed power purchase cost provisionally under the Regulation 2.8.7.3. Let us now analyse if the cost allowed by the State Commission falls under the Fuel & Power Purchase Cost. According to the learned counsel for the Appellant, inclusion of fixed cost for new power project of WBPDC, amount payable to the State and other agencies supplying power to the second Respondent, inclusion of other amounts for power purchase cost which were not included in the earlier tariff order for FY 2009-10 and reversal of regulatory asset could not be included in the FPPCA under Regulation 2.8.7.3.

27. We have noticed that the State Commission has not allowed the prayer of the second Respondent to reverse the Regulatory Asset created as per Tariff Order dated 28.7.2009. Further, the capacity charge of new units of WBPDCCL, the State owned generating company, allowed by the State Commission by its order dated 13.2.2009 is nothing but a component of its generation tariff which is power purchase cost for the second Respondent. The formula in Schedule-7 for calculating Fuel and Power Purchase Cost according to which the State Commission has to determine the final FPPCA after the end of the year includes the Power Purchase Cost of the distribution licensee which covers the fixed charges for the generating unit supplying power to the distribution licensee.

28. The amount payable by the second Respondent to WBPDCCL, CESC, DPL and DPSCL also pertains to difference in rate at which the second Respondent is purchasing power from these agencies and that allowed in

the ARR. Normally, this amount should have been adjusted at the end of the FY 2009-10 according to the Regulations 2.8.7.1 & 2.8.7.2. However, the State Commission under Regulation 2.8.7.3 is empowered to allow the power purchase cost provisionally during the year. In this case the distribution licensee (R-2) has filed the petition on 23.9.2009 praying for ad hoc increase of power purchase cost inbuilt in the tariff for FY 2009-10 in terms of regulation 2.8.7.3 as it was experiencing severe cash flow problem. The State Commission accordingly determined the FPPCA for the FY 2009-10 and decided the provisional tariff increase. However, the State Commission allowed the recovery at the enhanced tariff prospectively w.e.f. November 2009 and not from 1.4.2009 as prayed by the second respondent. In this way effectively only a part (5/12th) of the total FPPCA has been allowed provisionally during the FY 2009-10. Thus, the State Commission has also not revised the tariff w.e.f. 1.4.2009 and allowed the FPPCA

prospectively according to Regulation 2.8.7.3. The State Commission has decided that the admissible amount on account of FPPCA for the period April-October 2009, will be considered while determining the FPPCA for the FY 2009-10.

29. The additional power purchase cost allowed provisionally by the State Commission comprises the following:

<u>S.No.</u>	<u>Source of Purchase</u>	<u>Additional Power purchase Cost</u> <u>'Rs. Crores'</u>
1.	West Bengal Power Development Corporation (Old units)	Rs. 803.4660
2.	NTPC Ltd.	Rs. 285.9400
3.	Damodar Valley Corpn.	Rs. 22.7500
4.	Other Licensees of the State	Rs. 84.6385
5.	Charges for new units of WBPDCCL	
	• Capacity charge	Rs. 52.332
	• Fuel charge	Rs. 0.000
	Total:	<u>Rs.1720.1145</u>

30. We notice that all the above costs relate to Power Purchase Cost of the Second Respondent. The capacity charge of WBPDCCL is also a component of its generation tariff and is a power purchase cost for the distribution licensee (R-2). WBPDCCL is a state owned generating company which supplies its output to the second Respondent at a tariff which is regulated by the State Commission. Thus, any expenses allowed by the State Commission to WBPDCCL will be reflected in its generation tariff and have to be a pass through for the second Respondent as power purchase cost. Thus the ad hoc increase in tariff allowed by the State Commission in the impugned order is on account of Power Purchase Cost.

31. According to Section 62(4) of the Act, the State Commission could amend the tariff more than once in a financial year in respect of charges permitted under any fuel surcharges formula as specified. The State Commission's Regulations provide for FPPCA at the end of

the year based on a formula but also allow under Regulation 2.8.7.3 ad-hoc fuel cost or power purchase cost at any time subject to adjustment of the same in FPPCA for that year. Thus such ad-hoc increase in fuel and power purchase cost under Regulation 2.8.7.3 may not require pre-publication and inviting objections and suggestions from public and their consideration as envisaged for tariff order under section 64(3) of the Act.

32. Let us now consider the provisional enhancement of tariff on merit. Learned Senior Counsel for the Appellant has not established that the Power Purchase Costs as allowed by the State Commission are unreasonable and if they had been heard by the State Commission they could have established that certain costs were unreasonable or inadmissible for inclusion in Fuel & Power Purchase Cost for the FY 2009-10. It is noticed that all the components of costs allowed by the State Commission are components which have to be allowed in the formula for Fuel & Power

Purchase Cost given in Schedule-7 of the Regulations according to which the FPPCA has to be allowed at the end of FY 2009-10 in terms of Regulations 2.8.7.1 & 2.8.7.2.

33. We find that the provisional increase in tariff has been worked out by the State Commission by simple addition/subtraction and division, which does not require any application of mind. In any case it is only a provisional increase in tariff allowed only for 5 months out of 12 months of FY 2009-10 for which it was claimed by the second respondent and is subject to final determination of FPPCA after taking into account the actual cost of fuel and power purchase incurred by the second Respondent during the FY 2009-10, subject to prudence check by the State Commission.

31. We have now been informed by the learned counsel for the Respondents that the final FPPCA order has since

been passed by the State Commission for FY 2009-10 based on the audited accounts of the second Respondent on 30.6.2010. According to the order dated 30.6.2010, the final fuel and power purchase cost will be considered during the APR of FY 2009-10 and given effect through tariff during the ensuing year 2011-12.

34. Learned Senior Counsel for the Appellant has argued that the order dated 30.6.2010 does not mention the true-up of any of the items of Fuel and Power Purchase cost included in the impugned order. It is noticed that the order dated 30.6.2010 indicates the total quantum of energy purchased from various sources and source-wise and total power purchase cost incurred by the second respondent. In this order the State Commission has determined the amount of allowable Fuel and Power Purchase cost for the FY 2009-10 according to the formula specified in Schedule-7 of the Tariff Regulations. According to the Regulations, the re-determined fuel and

power purchase cost is to be considered in the APR to find out the total revenue entitled to be recovered/refunded after taking into consideration the revenue realized during the concerned period. Accordingly, the State Commission in its order dated 30.6.2010 has decided to consider the amount allowed towards fuel and power purchase cost along with the Annual Performance Review for the FY 2009-10 and give effect of that in the tariff for FY 2011-12. Thus in case any excess amount has been allowed by the State Commission as ad-hoc FPPCA in the impugned order, the same has to be adjusted with interest in the ARR for FY 2011-12 to provide necessary relief in tariff to the Appellants and other consumers of the second respondent who were subjected to ad-hoc tariff increase by the impugned order. The State Commission is accordingly directed.

35. Summary on Findings

- i) All the costs allowed provisionally by the State Commission under Regulation**

2.8.7.3 in the impugned order are the additional power purchase cost of the second respondents. The capacity charge for new units of the WBPDCCL is a component of generation tariff which is nothing but power purchase cost for the second respondent.

- ii) Section 62(4) of the Act, permits revision of tariff under any fuel surcharge formula as specified. The State Commission's Regulation provide for Fuel & Power Purchase Cost Adjustment at the end of the year based on a formula but also permit under Regulation 2.8.7.3, ad-hoc fuel and power purchase cost at any time provisionally subject to final adjustment of the same in FPPCA for that year. Thus ad-hoc increase in fuel and power purchase cost under Regulation 2.8.7.3 may not require pre-publication and inviting objections and suggestions from public as envisaged for tariff order under Section 64 of the Act.**

iii) The State Commission has since determined the Fuel and Power Purchase Cost for FY 2009-10 for the second respondent by its order dated 30.6.2010 according to the formula specified in Schedule-7. The State Commission has also decided to consider the amount allowed towards fuel and power purchase cost along with the APR for FY 2009-10 and give effect to FPPCA in the tariff for FY 2011-12. In case it is found that any excess amount has been recovered by the second respondent as a result of the impugned order, the same will be adjusted with interest in the ARR for FY 2011-12 to give necessary relief in tariff to the appellants and other consumers who were subjected to ad-hoc increase in tariff by the impugned order. The State Commission is accordingly directed.

36. In view of the above, the Appeal is dismissed with directions to the State Commission as given in paragraph 34 above. No order as to cost.

37. Pronounced in the open court on this 8th day of August,2011.

(Justice P.S. Datta)
Judicial Member

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 8th Aug, 2011

REPORTABLE/NON-REPORTABLE