Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 175 of 2011 &
I.A. No. 263 of 2011

Dated: 14th March, 2012

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

In the matter of:

Silvassa Industries Association,
Through its President Mr. Sanjeev Kapoor,
Plot No. 55, Vanwati Park Society,
Marat Road, Samarvani,
Silvassa-396230 .... Appellant

Versus

1. Joint Electricity Regulatory Commission
Through Secretary,
2nd Floor, HSIIDC Office Complex,
Vanijya Nikunj Complex,
Udyog Vihar, Phase-V,
Gurgaon, (Haryana) – 122 016

2. Electricity Department,
Through Secretary,
Union Territory of Dadra & Nagar Haveli,
Silvassa, 66 KV Road, Opp. Secretariat,
Amli, Silvassa-396230 ... Respondents

Counsel for the Appellant(s): Mr. Sakesh Kumar

Counsel for the Respondent(s): Mr. Dinesh Kapoor for R-1
Mr. M.G. Ramachandran
Mr. Anand K. Ganesan
Ms. Sneha Venkataramani for R-2

JUDGMENT

HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

The present appeal has been filed by Silvassa Industries Association against the tariff order dated 13.9.2011 passed by the Joint Electricity Regulatory Commission for the State of Goa and Union Territories ("Joint Commission") in Petition No. 32 of 2011 determining the Annual Revenue Requirement and tariff determination for the Union Territory of Dadra & Nagar Haveli for the financial year 2011-12.

2. The appellant is an Association of Industries at Silvassa having members who are consumers of the Electricity Department of Union Territory of Dadra & Nagar Haveli. The Joint Commission is the first respondent. The Electricity Department, responsible

for distribution of electricity in the Union Territory of Dadra & Nagar Haveli, is the second respondent.

3. The facts of the case are as under:

3.1. On 8th March, 2011, the respondent no. 2 filed petition for approval of ARR for the financial year 2011-12. The Joint Commission, after the public hearing, passed the impugned order dated 13.09.2011 deciding the ARR and retail supply tariff for the FY 2011-12 applicable from 1.6.2011. Though by the impugned tariff order the Joint Commission has maintained the tariff of the HT category to the previous year level, it has provided for power purchase cost adjustment allowing the utility to recover the charges according to Power Purchase Cost Adjustment formula from the consumers during the currency of the tariff year. Aggrieved by the impugned order, particularly the provision for power purchase cost adjustment by

the respondent no. 2 during the currency of the tariff year, the appellants have filed this appeal.

3.2. The learned counsel for the appellant has submitted as under:

(i) The Joint Commission after giving fixed tariff moved on to make it variable, giving a tool in the hands of utility to ask for surcharge in the name of adjustment of power purchase cost even though it is not within the domain of the Joint Commission to fix the tariff of the Central Generating Stations, which is determined by the Central Commission. The Joint Commission could have passed on the fuel cost as determined by the Central Commission in the tariff of the Central Power Generating Stations during the next tariff year. However, the Joint Commission has wrongly allowed the power purchase cost adjustment

against the spirit of the Electricity Act, 2003 , the National Electricity Policy and Tariff Policy.

ii) The outcome of power purchase cost adjustment is that the appellant could not make any budgetary plan due to variable tariff determined by the Joint Commission. In the current bills, surcharge has been imposed by the respondent no. 2 to the tune of 91 paise per unit increasing the bills by more than 25% retrospectively. The respondent no. 2 has incorrectly taken into consideration the UI charges in the power purchase cost adjustment which was not permissible.

iii) Apart from the main contention regarding power purchase cost adjustment, the Joint Commission has failed to take into account the failure of the utility to comply with the directions given by it in the last tariff order for the FY 2010-11 e.g. the Joint Commission

has allowed depreciation of about Rs. 2.1 crores and interest on working capital to the tune of Rs. 13.24 crores without having any data. The distribution losses have been allowed to the tune of 7.9% and no benefit has been passed on to the industry despite significant reduction in distribution losses which is directly attributable to the HT industry. Further no account for the employees cost has been submitted by the respondent no. 2 but in spite of that the Joint Commission has allowed the increase in employees cost from Rs. 2.95 crores to Rs. 3.25 crores. The Joint Commission has also failed to take into account the surplus earned by the Government of India from 2000 to 2011 and has not been given adjustment in the tariff year even though the accumulated surplus should have been passed on to the consumer in a phased manner.

4. The learned counsel for the respondent no. 2 has submitted as under in support of the findings in the impugned order:

i) In the present appeal, there cannot be any challenge on the actual implementation of the Power Purchase Cost Adjustment formula as such contention needs be raised only in an appropriate forum and not before the Tribunal;

ii) The Joint Commission has rightly covered the scope of the Power Purchase Cost Adjustment in the Tariff Order consistent with the provisions of the Electricity Act, 2003 and the judicial precedence laid down by the Tribunal;

iii) He also referred to the findings of the Tribunal in its order dated 11.11.2011 in Suo Motu O.P. no. 1 of 2011, judgment dated 18th May, 2011 in Appeal no. 172 of 2010 and judgment reported as

2011 ELR (APTEL) 137. He also referred to the provisions of the Tariff Policy. He also denied that the formula specified by the Joint Commission in the Tariff Order does not cover any adjustment other than the fuel surcharge. The formula itself is related to Power Purchase Cost Adjustment and not simpliciter fuel surcharge adjustment. Further the formula itself provides for adjustments between the average cost taken by the Commission in the Tariff Order and the average rate of power purchase to be adjusted, namely, the difference between the two to be adjusted.

iv) The contention of the appellant regarding alleged surplus for the past period is misconceived. The surplus alleged by the respondent no. 2 does not in any manner arise from the Regulatory tariff determination by the Joint Commission. The respondent no. 2 is a department of the Government of

India and does not have any separate legal existence. All funds are allocated to the respondent no. 2 from the funds of the Government of India and all the revenues after meeting the expenses are credited to the Consolidated Fund of India. There was no tariff determination for the years from 2000 as the Joint Commission was not constituted till August, 2008. In the circumstances, all the funds of the respondent no. 2 for the past period have been credited year on year to the Consolidated Fund of India. Thus, there is no question of any surplus in the hands of the respondent no. 2 which is to be passed on to the consumers. Further, the Joint Commission has no jurisdiction for the period prior to its constitution.

5. After considering the contentions of the learned counsel for the parties, the following questions would arise for our consideration:

i) Whether the distribution licensee can be permitted by the Joint Commission to realize power purchase cost adjustment from the consumers in accordance with the formula decided by the Joint Commission in the tariff order without getting the tariff amended?

ii) Whether the Power Purchase Cost Adjustment mechanism determined by the Joint Commission was valid and correct?

iii) Whether the respondent no.1 was correct in raising power purchase cost adjustment bills retrospectively from June, 2011?

iv) Whether the State Commission has erred in determining depreciation, employees cost, interest on working capital and transmission & distribution losses and not accounting for the surplus of respondent no. 2 for the past years in the ARR for the FY 2011-12?

6. The first three issues have already been decided by this Tribunal in its Judgment dated 29th February, 2012 in Appeal no. 169 of 2011 in the matter of Daman Industries Association vs. Electricity Department of Daman & Diu & Anr. The relevant extracts of the above judgment on the first issue are as under:

"9.3 Let us first examine section 62(4) of the Electricity Act, 2003.

"62.Determination of Tariff

.....

"(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.

According to section 62(4), the tariff may not ordinarily be amended more frequently than once in a financial year, except any changes expressly permitted in terms of the fuel surcharge formula specified by the Appropriate Commission. Variation in price of fuel of a generator supplying power to a distribution licensee will affect the Power Purchase Cost of the distribution licensee. Thus the change in Power Purchase Cost due to variation in fuel cost could be permitted by amending tariff in terms of the fuel surcharge formula specified by the State

Commission more frequently than once in a financial year.

9.4 We shall now examine the provision of the Tariff Regulations, 2007 of the Joint Commission. The relevant Regulation 7 is reproduced below:

7. Fuel Surcharge Formula

(1) The fuel cost revisions for the generating companies/units owned by the licensee that are due to reasons beyond the control of the generating companies/the licensee be in accordance with the fuel surcharge formula as may be decided by the Commission from time to time.

(2) The generating company or the licensee may determine such charge in accordance with the specified formula and recover the same from such categories of consumers or the licensees, as the case may be after following procedure and the terms and conditions attached thereto.

The revision in fuel price at the generating station supplying power to a distribution licensee affects the Power Purchase Cost of the distribution licensee. The Regulation 7 provides for determination of the charge due to such revision in fuel price by the distribution licensee in accordance with the formula decided by the State Commission and recovery from the consumers as per the terms and conditions decided by the Joint Commission.

9.5 *Let us now examine the provisions of section 61 of the Act. Section 61 is reproduced below:*

"61. Tariff regulations

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

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

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

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

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

(e) the principles rewarding efficiency in performance;

(f) multi year tariff principles;

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

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

(i) the National Electricity Policy and tariff policy:"

Sub sections (a), (b), (d) and (i) of section 61 of the 2003 Act stipulate that the appropriate Commission shall be guided by the principles and methodologies specified by the Central Commission, follow commercial principles, safeguard the consumers interest and at the same time ensure recovery of cost of electricity in a reasonable manner, and the National Electricity Policy and Tariff Policy.

9.6 The Central Commission in its Tariff Regulations for the generating companies has specified a formula for computation of energy charge rate which accounts for actual landed price of fuel and gross calorific value of the fuel as fired. Accordingly, the NTPC, a central generating company which is a major supplier of power to the

respondent no.1, recovers the energy charges based on its actual fuel price from the respondent no.1 on month to month basis. Rule 8 of the Electricity Rules, 2005 stipulates that the tariff determined by the Central Commission for generating companies under clause (a) or (b) of the Sub-Section (1) of Section 79 of the Act shall not be subject to redetermination by the State Commission in exercise of its functions under clause (a) or (b) of Sub-Section (1) of Section 86 of the Act.

9.7 The Tariff Policy stipulates that the controllable costs which include the fuel costs and power purchase cost should be recovered speedily. The relevant paragraph of the Tariff Policy under clause 5.3(4) is reproduced below:-

"4) Uncontrollable costs should be recovered speedily to ensure that future consumers are

not burdened with past costs. Uncontrollable costs would include (but not limited to) fuel costs, costs on account of inflation, taxes and cess, variations in power purchase unit costs including on account of hydro-thermal mix in case of adverse natural events."

9.8 According to section 45 of the Electricity Act, 2003, the distribution licensee is empowered to recover charges for the electricity supplied by him and such charges shall be fixed in accordance with the methods and the principles as may be specified by the concerned State Commission.

9.9 Thus if a Power Purchase Cost Adjustment formula is specified by the Commission taking into account the variation in power purchase cost due to revision in price of fuel at the generating station the same has to be recovered by the distribution licensee from its consumers. Power

purchase cost is a major expenditure of the distribution licensee. Allowing the distribution licensee to recover variation in power purchase cost during the course of the tariff year, would ensure that the uncontrollable cost is passed on as speedily as possible in terms of the Tariff Policy to avoid cash flow problem to the distribution licensee.

9.10. It has to be noted that the authority given to the distribution licensee to recover the Power Purchase Cost Adjustment is not absolute without any regulatory control. Firstly, the distribution licensee has to compute the adjustment in tariff strictly as per the Power Purchase Cost Adjustment formula specified by the Joint Commission and the terms and conditions decided by the Joint Commission.

Secondly, the final Power Purchase Cost to be allowed to the distribution licensee is subject to prudence check at the true-up stage by the Joint Commission. In our opinion, the computation of the Power Purchase Cost Adjustment by the licensee is by mechanical application of the formula specified by the Joint Commission and there would be no illegality in the Joint Commission permitting the distribution licensee to recover the Power Purchase Cost Adjustment computed by the distribution licensee from the consumers in accordance with the specified formula and other terms and conditions decided by the Joint Commission. In case of Daman & Diu, the Joint Commission's Tariff Regulations specifically provide for determination of such charges by the distribution licensee in

accordance with the specified formula and recovery of the same from the consumers as per the terms and conditions decided by the Joint Commission.

9.11 In case, the increase in price charged by the distribution licensee is inconsistent with the Power Purchase Cost Adjustment Mechanism as specified by the Commission resulting in over recovery, the distribution licensee would be liable to refund the excess amount charged from the consumers with interest in terms of Section 62(6) of the Electricity Act. Section 62(6) of the Act reads as under:-

"62. Determination of Tariff

(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."

9.12 Delay in allowing the Power Purchase Cost Adjustment will entitle the distribution licensee to charge the carrying cost which will ultimately be borne by the consumers. Besides, the distribution licensee may also face cash flow problem affecting its operations. Thus, delay in recovery of power purchase cost will not be in the interest of the consumers. The Power Purchase Cost Adjustment mechanism permitting the distribution licensee to recover the fuel cost adjustment as per the PPCA formula will help in passing on the uncontrollable cost to the distribution licensee speedily to help in smooth

operation of the distribution system which will also benefit the consumers.

9.13 This Tribunal in suo motu OP No.1 of 2011 dated 11.11.2011 has held as under:

"64. We also notice that most of the State Commissions have not provided in their Regulations Fuel & Power Purchase Cost Adjustment Formula for allowing the increase in fuel and power purchase cost during the tariff year. The fuel and power purchase cost adjustment mechanism provided in most of the states is after completion of the financial year through a separate proceeding which takes a long time. The power purchase cost is a major expenditure in the ARR of the distribution licensee. The fuel and power purchase cost is also uncontrollable and it has to be allowed as

quickly as possible according to the Tariff Policy. The Electricity Act, 2003 under Section 62(4) has specific provision for amendment of the tariff more frequently than once in any financial year in terms of Fuel Surcharge Formula specified by the Regulations. A major part of power procured by the distribution company comes from the Central Sector Generating Companies whose tariff is regulated by the Central Commission and the State owned Generation Companies whose tariff is regulated by the State Commissions. The Central Commission in its Tariff Regulations has already provided a formula for fuel price adjustment and the charges of the generation companies are increased as and when the fuel prices are increased. In view of the present precarious financial conditions of the distribution companies, it would be necessary that the State

Commissions also to provide for Power Purchase Cost Adjustment Formula as intended in the section 62(4) of the Act to compensate the distribution companies for the increase in cost of power procurement during the financial year. In the above situation, as indicated above it has become necessary for this Tribunal to give appropriate directions, to correct this situation by invoking the powers under Section 121 of the Act which is permissible under law. So, the second question is also answered accordingly.

65. In view of the analysis and discussion made above, we deem it fit to issue the following directions to the State Commissions:

(vi) Fuel and Power Purchase cost is a major expense of the distribution Company which is uncontrollable. Every State Commission must

have in place a mechanism for Fuel and Power Purchase cost in terms of Section 62 (4) of the Act. The Fuel and Power Purchase cost adjustment should preferably be on monthly basis on the lines of the Central Commission's Regulations for the generating companies but in no case exceeding a quarter. Any State Commission which does not already have such formula/mechanism in place must within 6 months of the date of this order must put in place such formula/ mechanism."

In OP 1 of 2011, this Tribunal after hearing the State/Joint Commissions has directed the State/Joint Commissions to allow Fuel and Power Purchase Cost Adjustment as per the specified formula preferably on the monthly

basis on the lines of the Central Commission's Regulations but in no case exceeding a quarter.

9.14 This Tribunal in its judgment dated 18.05.2011 in 2010 in the matter of Bihar Steel Manufacturers Association Vs BSEB has held as under:-

"7. Against these facts it is now contended by the appellant as follows:

…….

e) The orders impugned are violative of section 64 and section 86(3) of the Act read with Regulation 18 and 19 of the Tariff Regulations.

f) The said impugned orders are again in violation of the Regulation 21 of the Tariff Regulations mandating therein that the formula must be "specified "in terms of the regulations notified by the Commission. Under section 2(62) of the Electricity Act the word "specified" means to be specified by the regulations to be made by the Commission.

…….

The matter of the fact is that in the present appeal the formula is challenged

not on the ground that the formula as such is bad or illegal but on the ground that it violates the provision of section 62(4) of the Act which provides "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".*** *The word 'specified' has been defined in section 2 (62) as: "specified means by Regulations made by appropriate Commission or the authority, as the case may be, under this Act"*

……

16.2 Thirdly, the FPPCA in terms of section 62 (4) is required to be specified in the Regulations which has not been done in this case and as a result where there is no regulation providing for FPPCA the Commission cannot lay down any formula in a tariff order. When, it is argued by Mr. Kapur, that law requires a thing to be done in a particular way the thing has to be done in that way or not at all.

……

Whether specification in the regulation has to be seen from where the formula has got its berth. If the purpose of the inclusion of the formula in the

Regulations is to make one likely to be affected aware of the formula then the purpose in instant case is well served when the Commission formulates the formula in the tariff order which was pronounced in due construed as a mandate of the Legislature and the consequence of non compliance has to be made the formula non acceptable and nugatory is the question before us. Would the impugned orders fail on that count is to be considered. Inclusion of the formulae in the Regulations has a underlying purpose, it being that all concerned are in a position to know beforehand as to what the formula was or was about. It is only to facilitate the persons concerned or parties concerned to know the formula before fuel surcharge is made in terms of the formula that the Legislature provides for publication of the formulae in the notified Regulations. Instead of the Regulations it is the tariff order dated in compliance with the provisions of section 64 and section 86(3) of the Act. In this connection it is relevant to mention the observation of the Hon'ble Supreme Court In PTC India Ltd., Vs CERC, reported in (2010)4 SCC 603 where it has been observed that framing of regulation is not a condition of making a tariff order. To quote the words of the Hon'ble Court "Making of a regulation under section

178 is not a precondition to passing of an order levying a regulatory fee under section 79(1)(g). However, if there is a regulation under section 178 in that regard, then the order levying fees under section 79(1)(g) has to be in consonance with such regulation."

……

34. *In the premises we do not find that the appeal can succeed. We hold that:*

a) *The impugned orders are not in violation of sections 64 and 86(3) of the Act and regulations 18 and 19 of the Tariff Regulations.*

b) *The FPPCA formula as have been laid down in tariff order dated 26th August, 2008 cannot be defeated because of not being specified in the tariff regulations in terms of regulation 21 thereof.*

c) *The Commission has not ignored the provisions of section 61 (a) and section 62(4) of the Act.*

d) *Principle of natural justice has not been violated.*

e) *The question of approval of parameters before implementation of the FPPCA formula does not arise because*

operational parameters have been laid down in the tariff order itself.

f) Computation of the FPPCA though it is related to the chapter on determination of tariff is virtually a mechanical application of the formula already specified and made known to all concerned.

g) Principle of constructive res judicata and the provision of Order 2 Rule 2 CPC are applicable vis-à-vis the earlier two appeals where FPPCA as formulated in the tariff order dated 26th August, 2008 was not challenged."

By the above judgment the Tribunal upheld the Fuel and Power Purchase Cost Adjustment as per the formula decided by the State Commission in the Tariff Order.

9.15 This Tribunal in Rohit Ferro Alloys Vs West Bengal Electricity Regulatory Commission reported in 2011 ELR (APTEL)137 has decided as under:-

"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.

……

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.

……

30. *We notice that all the above costs relate to Power Purchase Cost of the Second Respondent. The capacity charge of WBPDCL is also a component of its generation tariff and is a power purchase cost for the distribution licensee (R-2). WBPDCL 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 WBPDCL 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 unadmissible 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"

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In the above judgment the Tribunal held that the Ad-hoc increase in tariff due to Fuel and Power Purchase Cost in terms of the formula specified by the State Commission during the tariff year 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.

9.16 According to the decision of the Tribunal, the Power Purchase Cost Adjustment is required to be allowed to the distribution licensee on monthly basis on the lines of the Central

Commission's Regulations for the generating companies but in no case exceeding a quarter.

9.17.Thus, the first question is answered against the appellant."

7. In the light of the above findings of the Tribunal, the first question is answered against the appellant.

8. The second issue regarding the correctness of the PPCA formula has been decided in the above judgment and the relevant paragraphs are reproduced below:

"*10.1 Let us now examine the relevant portion of the impugned order.*

10.2 We notice from paragraph 5.9.2 of the impugned order that the Joint Commission has computed the power purchase cost of the appellant on the basis of tariff charges as approved by the Central Commission for the FY 2011-12. The fixed costs approved by the Central Commission for various central stations have been obtained

from the website of the Central Commission. Variable charges per unit have been taken from the bills of the respective central generating stations for the month of July, 2011. The cost of power from other sources has also been estimated. Accordingly, the average power purchase cost per unit excluding the arrears to be paid by the appellant has been computed by the Joint Commission as Rs.2.73 per kwh.

10.3 The Joint Commission has also specified a Power Purchase Cost Adjustment (PPCA) formula to allow increase in power purchase cost. The formula and the conditions as decided by the Joint Commission in the impugned order are reproduced below:

"6 Power Purchase Cost Adjustment

The Electricity Department, Daman and Diu (ED-DD) depend for its power entirely on Central Power Generating Stations, viz., NTPC, NPC and NSPCL, Bhillai. ED-DD has no control over any increase in price of the power from these sources due to any increase in fuel costs etc. The Commission is of the view that any increase in power purchase cost on account of increase on fuel cost etc., has to be passed over the consumer as per approved formula.

The approved power purchase cost adjustment (PPCA) formula is given below

$$PPCA\ (Rs/kWh) = \frac{QPP(RPP_2 - RPP_1)}{QPP\ X\ (1-L) - PSE}$$

Where:

QPP = Quantum of power purchase from different sources and fed to ED-DD system (in MUs)

RPP1= Average rate of power purchase as approved by the Commission (in Rs./KWH)

RPP_2 = Average rate of power purchase during the adjustment period (in Rs./KWH)

L=T&D loss as approved by the Commission or actual whichever is lower

***PSE**=Power sold to exempted categories.*

The approved (PPCA) formula is subject to the following conditions:

(i) The basic nature of PPCA is 'adjustment' i.e. passing on the increase or decrease, of Fuel cost.

(ii) Any cost increase by the ED-DD by way of penalty interest due to delayed payment etc., and due to operational inefficiency shall not be allowed.

(iii) PPCA charges shall be levied on all categories of consumers, except LIG (BPL) Category and agricultural consumers.

(iv) The data in support of PPCA claims shall be duly authenticated by an officer of the ED-DD authorized for the purpose.

(v) Variation of PPCA charge will be allowed only when it is five (5) paise and more per unit.

(vi) The PPCA charges shall be revised by the ED-DD Quarterly from the date of implementation of the order.

(vii)The approved formula is subject to review as the Commission may deem fit."

Paragraph 6 of the impugned order clearly specifies that the increase in power purchase cost on account of increase in fuel cost for the generation stations supplying power to the respondent no.1 has to be allowed to be passed over to the consumer. The Joint Commission in its counter affidavit has also submitted that only fuel surcharge due from 01.06.2011 onwards is

recoverable as per the formula. Regulation 7(1) of the Tariff Regulations also permits fuel cost revisions for the generating companies to be recovered by the licensee as per the fuel surcharge formula.

10.4 However, the formula devised by the Joint Commission applies to the Power Purchase Cost Adjustment on quantity of power purchased from different sources on the basis of the difference between the average rate of power purchase during the adjustment period and the average rate of power purchase as approved by the Commission in the impugned order. Thus the formula specified is not in consonance with the intent and conditions indicated in paragraph of 6 of the impugned order. The formula as specified by the State Commission also cannot be

mechanically applied to calculate the variation in Power Purchase cost per kwh on account of revision in fuel cost as charged by the generating companies from the respondent no.1. By mechanical application of the specified formula the variation in entire Power Purchase Cost of the respondent no.1 which includes fixed and variable charges will be recoverable from the consumer whereas the intent and the conditions specified by the Joint Commission and the Regulation indicate PPCA to be recovered on account of revision in fuel cost at generating stations only. No wonder, the respondent no.1 has worked the Power Purchase Cost Adjustment taking into account the entire variation in Power Purchase Cost including the

UI charges for the adjustment period, which was not admissible.

10.5 Thus, the formula devised by the State Commission is inconsistent with the Tariff Regulations and the conditions specified in the PPCA clause. Accordingly, the PPCA formula specified by the Joint Commission in the impugned order is set aside.

10.6. The Joint Commission is directed to re-determine the formula taking into account the Regulations and the conditions specified under the PPCA formula. The formula should be such that there is no scope for ambiguity and it determines the PPCA by mechanical application of the formula. The State Commission may also direct the respondent no.1 to display the computation for PPCA in a consumer friendly format on its website

for the benefit of the consumers. As the FY 2011-12 is going to end shortly, the State Commission is also at liberty to decide the PPCA for the FY 2011-12 and consequential modification in retail supply tariff after hearing the concerned parties and our directions for specifying the correct formula may be noted for future.`"

This issue is also decided accordingly.

9. The third issue regarding raising of PPCA bills retrospectively does not survive in view of our findings setting aside the PPCA formula.

10. The fourth issue is regarding determination of depreciation, employees cost, etc., and adjustment of the surplus for the previous years.

10.1. According to Ld. counsel for the appellant, the Joint Commission has allowed depreciation of Rs.2.11 crore, interest on working capital of Rs. 13.24 crores without having any data whatsoever before it. The distribution losses have been allowed to the tune of 6.9% and no benefit has been passed on to the industry, while low losses are attributable to the HT industry. Employees cost has also been raised to Rs. 3.25 crore from Rs. 2.95 crore without the respondent no.2 submitting any account. Further, the State Commission should have taken into account the surpluses earned by the Government of India from the year 2000 to year 2011 to pass on the benefit to the consumers.

10.2. Ld. Counsel for the Joint Commission has submitted that the Joint Commission considered all

the objections and gave detailed reasons for all the above issues in the impugned order.

10.3. Regarding depreciation, the Joint Commission has allowed depreciation of Rs. 2.11 crore as against Rs.20.134 crore projected by the respondent no.2. We notice that the Joint Commission has not accepted the gross fixed assets as projected by the respondent no.2 at the end of March, 2011 on account of the respondent no.2 not maintaining any Asset Register and Depreciation Register and not submitting any proforma accounts or audited accounts. Thus the State Commission has allowed the depreciation on Rs.19.94 crore capitalized during the FY 2010-11, considered as opening balance for the FY 2011-12, and the capitalization of Rs.40.14 crore approved for the FY 2011-12. We thus do not find any

substance in the contention of the appellant as far as depreciation is concerned.

10.4. As regards the Interest on Working Capital we find that the Joint Commission in the impugned order has determined the interest on working capital taking into account the Regulation 29(3) of Tariff Regulations, 2009. On the other hand, the contention of the appellant is vague.

10.5. Regarding distribution losses, we notice that the State Commission has fixed the same as 6.25% for FY 2011-12. Similarly, the transmission losses have been fixed at 4.16%. The State Commission has given a speaking order for determination of transmission and distribution losses in paragraph 5.7 of the impugned order. We do not find any infirmity in the order. The losses as decided by the State Commission

cannot be considered high by any standard. The Joint Commission has also reduced the T&D loss target gradually w.e.f. FY 2009-10. Thus, we do not find any reason to interfere with the order.

10.6. As regards the employees cost, the Joint Commission has approved the employees cost of Rs.3.25 crore as against Rs.3.50 crore projected by the Joint Commission. We notice that the Joint Commission has taken into account the actual expenditure for the FY 2009-10 and 2010-11 and then decided the employees expenses for the FY 2011-12 keeping in view the expected increase in DA. We do not find any infirmity in the order. On the other hand the grounds raised by the appellant are vague.

10.7. As regards the surplus for the year 2000 to 2008, learned counsel for the respondent no.2 has

submitted that the surplus as alleged by the appellant are only imaginary and does not arise from the Regulatory Tariff determined by Joint Commission. All the revenue during the period 2000 to 2008 after meeting the expenses was deposited by respondent no.2 with the Consolidated Fund of the Government of India.

10.8. We notice that the Joint Commission was not constituted till August, 2008 and there was no tariff determination from the years 2000 to 2008 by the Joint Commission. In view of the explanation given by the respondent no.2, we do not find any substance in the contention of the appellant, as far as accounting of surplus, if any, of the period 2000 to 2008. For the subsequent period for which tariff was determined by the Joint Commission, the true up has not been carried out in the impugned order. The Joint

Commission is directed to carry out the true up of the financials for the past period for which tariff was determined and account for the surplus/deficit in the future tariff.

11. Our findings are summarized as under:

(i) In view of the provisions of the 2003 Act, Tariff Policy, Tariff Regulations and findings of the Tribunal in OP 1 of 2011 and other judgments, there is no illegality in the Joint Commission permitting the Electricity Department (R-2) to compute the Power Purchase Cost Adjustment according to the formula and conditions specified by the Joint Commission and recover the same from the consumers. Computation of PPCA is only by mechanical application of the formula.

The authority given to the distribution licensee is not absolute without any regulatory control of the Commission. The final Power Purchase Cost to be allowed to the distribution licensee is subject to prudence check at the true up stage by the Joint Commission.

(ii) The formula specified by the Joint Commission in the impugned order is set aside as it is inconsistent with the conditions specified therein and the Tariff Regulations. The Joint Commission is directed to re-determine the formula taking into account the Regulations and the conditions specified under the PPCA formula. The formula should be such that there is no scope for ambiguity and it

determines the PPCA by mechanical application of the formula. The State Commission may also direct the respondent no.2 to display the computation for PPCA in a consumer friendly format on its website for the benefit of the consumers. As the FY 2011-12 is going to end shortly, the State Commission may decide the PPCA for the FY 2011-12 and consequent modification in retail supply tariff after hearing the concerned parties and our directions for specifying the correct formula may be noted for future.

(iii) The third issue regarding retrospective increase in tariff due to PPCA does not

survive in view of our findings in (ii) above.

(iv) There is no reason for us to interfere in the findings of the Joint Commission with regard to determination of depreciation, employees cost, T&D losses and adjustment of surplus for the previous years.

12. In view of above, the appeal is allowed in part as indicated above without any cost.

13. Pronounced in the open court on this **14th day of March, 2012.**

(Justice P.S. Datta)
Judicial Member

(Rakesh Nath)
Technical Member

REPORTABLE / NON-REPORTABLE

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