A BIHAR STATE ELECTRICITY BOARD
v.
M/S PULAK ENTERPRISES & ORS.
(Civil Appeal Nos.7220-7239 of 2000)

APRIL 15, 2009

B **[DR. ARIJIT PASAYAT AND TARUN CHATTERJEE, JJ.]**

Electricity (Supply) Act, 1948 :

s.49 – Fixing of tariff – Bihar State Electricity Board
C *Notification dated 21.6.1993 – Clauses 16.10.3, 16.10.3.1 and 17 – Amendment to – Levy of 'Fuel surcharge' – Formula – Held : Though fuel surcharge is a part of tariff, fixing rate of fuel surcharge under Clause 16.10 of Tariff Notification is different from fixing tariff u/s 49 of the Act – Where fixing rate*
D *of fuel surcharge is just an arithmetical exercise, giving opportunity of hearing would not serve any purpose – Electricity Board is entitled to levy fuel surcharge on the consumers receiving high Tension supply leaving out the consumers coming in other categories – Validity of the*
E *formula has already been upheld – Fuel surcharge has to be calculated strictly within the framework of the formula – Administrative Law – Subordinate Legislation – Principle of natural justice – Opportunity of hearing – Constitution of India, 1950 – Article 14.*

F **The instant appeals were filed against the judgment of the High Court in writ petitions filed by the consumers challenging the levy and collection of fuel surcharge by the Bihar State Electricity Board.**

Dismissing the appeals of the Board and allowing
G **those of the consumers, the Court**

HELD: 1.1. The significance of the question as to whether fixing the rate of fuel surcharge is a legislative function or a non-legislative function is that if the function

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is held to be legislative, in the absence of any provision in that regard the principles of natural justice would not be applicable and the scope of judicial review would also be limited to the plea of discrimination i.e. violation of Article 14 of the Constitution of India, 1950. [Para 21] [311-C, D]

Prag Ice and Oil Mills v. Union of India **AIR 1978 SC 1296; Rohtas Industries v. Bihar State Electricity Board AIR 1984 SC 657 and** *Kerala State Electricity Board v. M/s S.N. Govind Prabhu & Brothers* **AIR 1986 Supreme Court 1999, relied on.**

Saraswati Industrial Syndicate Limited v. Union of India **AIR 1975 SC 460;** *Union of India v. Cynamide India Ltd.* **AIR 1987 SC 1802 and** *Shri Sitaram Sugar Company Ltd. v. Union of India* **1990 (3) SCC 223, referred to.**

1.2. In a sense, fixing rate of fuel surcharge under clause 16.10 of the Tariff notification is different from fixing the tariff u/s 49 of the Electricity (Supply) Act. Fuel surcharge is undoubtedly a part of tariff. But fixing rates of consumption charges or the guaranteed charges or the fixed charges or the delayed payment surcharge etc. and fixing rates of fuel surcharge do not stand on par. Though rates of consumption charges etc. are based on objective materials, there is enough scope for flexibility in fixing the rates. It also involves policy to fix different rates for different categories of consumers. Such is not the position with the fuel surcharge. [Para 26] [313-B, C]

1.3. Clause 16.10.1 specifies the categories coming in the net of the levy and clause 16.10.3 provides the formula. The formula envisages addition of units generated or purchased and increased average cost of fuel and average unit rate of purchase rates and division of the total by the quotient is the average fuel surcharge per unit (expressed in terms of paise) described by denominator S1 in the formula. The whole exercise, it

A would appear, involves arithmetical accounting. There is no scope for exercise of any discretion or flexibility. If fixing rate of fuel surcharge is just an arithmetical exercise, giving opportunity of hearing would hardly serve any useful purpose. [Para 26] [311-D, E]

B 1.4. Where the fixation of rate or determination of the amount is made individually, depending on the context in which this is to be done, there may be justification or necessity to give opportunity of hearing to the person(s) concerned. But where the rate is fixed for persons at C large the only way by which such opportunity can be given is to notify the rates and then invite objections. There is no such provision. In the absence of any mechanism provided in the Tariff notification, it would not be feasible at all. [Para 27] [315-F, G]

D 2.1. The validity of the formula had been upheld earlier. High Court noted that though by the impugned circular dated 31.5.1999 the rates of fuel surcharge have been fixed for the years 1993-94 (July 1993 to March 1994) to 1997-98, the correctness of the rates fixed for the years E 1993-94 (July 1994 to March 1994) to 1995-96 were not challenged and correctness of the rates for the subsequent years only was under challenge. [Para 29] [317-C, D]

F *Bihar State Electricity Board and anr. v. Bihar* **440** *Volt Vidyut Upbhokta Sangh and Ors.* **1997 (11) SCC 380 and** *Kerala State Electricity Board v. S.N. Govind Prabhu & Brothers* **AIR 1986 SC 1999, referred to.**

2.2. The Electricity Board is entitled to levy fuel G surcharge on the consumers receiving high tension supply leaving out the consumers coming in other categories. [Para 30] [317-F]

Maharashtra State Electricity Board v. Kalyan Borough Municipality **AIR 1968 SC 991;** *M/s Rohtas Industries Limited* H

v. Chairman, Bihar State Electricity Board **AIR 1984 SC 657, relied on.**

3.1. It is not in dispute that TVNL came into existence in 1996-97 whereas while calculating the electricity 1991-92 is to be treated as the base year. As a matter of fact, it was on that ground, namely, that a different base year i.e. 1992-93 was provided for computing the increase in the average unit rate of purchase of electricity from external sources, that the High Court directed the Board to consider amending clause 16.10.3 so as to provide for the same base year i.e. 1991-92 with respect to both the increase in the average cost of generation and increase in the rates of purchase, and accepting the verdict of the High Court the Board amended the last part of clause 16.10.3. Purchase of electricity from TVNL which admittedly came into existence in the year 1996-97, therefore, cannot be treated as component of H3 i.e. increase in the average unit rate of purchase of electricity from "any other source". As a matter of fact, the case of writ petitioners was that the TVNL is nothing but a unit of the Board in disguise of a subsidiary company and, therefore, could not be treated as a component of H3. It may not be necessary to go behind the veil of the separate legal character of the TVNL. The fact that TVNL did not exist in the year 1991-92 and came into existence only in the year 1996-97 is sufficient to justify its deletion as component of H3. [Para 33] [319-F, G, H; 320-A, B, C]

3.2. The relevant clause of the formula, after amendment, reads, "the said increase to be calculated with respect to the year 1991-92" (last para of clause 16.10.3). The amendment has been made in the light of the decision of the High Court which rightly held that it is not possible to allow the Board to include purchase of electricity as a component of H3 without suitably amending the formula in accordance with law. [Para 33] [320-F, G, H; 321-A]

A 3.3. As regard "deemed supply" by the Board to TISCO, the High Court noticed that under a tripartite agreement between the Board, the DVC and the TISCO, with the consent of the State Government, the electricity is being supplied directly by the DVC to the TISCO but B such supply is treated as made by the Board to the TISCO. High Court held that the Board cannot treat the sale of electricity by the DVC to the TISCO as a separate class or category for the purpose of computing D3. The computation of D3 to this extent, was rightly held to be C not correct. [Para 34] [321-A, B; 322-D]

4.1. The computation of the rates of fuel surcharge by the impugned circular for the years 1996-97 and onwards so far as it relates to the purchase of electricity from TVNL and "deemed supply" by the Board to TISCO D thus does not appear to be in accordance with the formula. Fuel surcharge has to be calculated strictly within the framework of the formula. If any extraneous element has crept in, the computation to that extent must be held to be not in accordance with law and accordingly E modified. [Para 35] [322-E, F]

4.2. The fact that the Board has had to pay large amounts as delayed payment surcharge (DPS) to the external agencies from which it has been purchasing electricity is more or less an admitted position. The case F of the Board, however, is that the default in payment was mainly on account of defaults committed by the consumers themselves. High Court found substance in the stand of the Board. The fact that the consumers at large have not been paying the dues on time and many G of them have been making only part payment on the strength of interim orders of Courts are facts which are not disputed. If the consumers do not pay the dues to the Board, they cannot be heard to make any complaint against payment of DPS by the Board to the external H agencies. [Para 37] [323-E, F, G, H]

5.As regards the non-accounting of Rs.100 Crores paid by Coal Companies to the Board, the High Court observed that payment of the amount would be relevant consideration while calculating the rate of fuel surcharge for the year 1998-99 and not 1997-98. It is directed that adjustment of Rs.100 crores be worked out accordingly. [Para 45] [326-A, C, D]

6. Nothing material could be highlighted as to how the reasons of the High Court suffer from any infirmity. [Para 44] [325-G]

Case Law Reference:

1997 (11) SCC 380	**referred to**	**para 2**
AIR 1978 SC 1296	**relied on**	**para 21**
AIR 1984 SC 657	**relied on**	**para 22**
AIR 1986 Supreme Court 1999	**relied on**	**para 22**
AIR 1975 SC 460	**referred to**	**para 23**
AIR 1987 SC 1802	**referred to**	**para 24**
1990 (3) SCC 223	**referred to**	**para 25**
AIR 1968 SC 991	**relied on**	**para 30**
AIR 1984 SC 657	**relied on**	**para 30**
AIR 1986 SC 1999	**referred to**	**para 31**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7220-7239 of 2000.

From the Judgment & Order dated 26.06.2000 of the High Court of Judicature at Patna in CWJC No. 5542, 2009, 2087, 1655, 1807, 1971, 1861, 5592, 5624, 5728, 5819, 5861, 5993, 6054, 6079, 6248, 6249, 6275, 6358 and 6490/1999.

WITH

C.A. Nos. 2560/2009, 2561/2009, 2555-2559/2009.

A V.R. Reddy, Mir Jha, Sunil Kumar, Harish N. Salve, D.A. Dave, Navin Prakash, Sumant Bhardwaj, Anita Kanungo, Mridula Ray Bharadwaj, L.K. Bajla, Praveen Kumar, Gopal Prasad, R.N. Karanjawala, Nandini Gore, Debmalya Banerjee, Bharat Singh, Manik Karanjawala, Jayant Mohan, Pragya Singh
B Baghel, Ajit Kumar Sinha, Shree Prakash Sinha, Sunita Sharma, Manjula Gupta, Gopal Prasad, S. Chandra Shekhar, Himanshu Shekhar, Gopal Singh, Vivek Singh for the appearing parties.

The Judgment of the Court was delivered by

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DR. ARIJIT PASAYAT, J. 1. Leave granted in Special Leave Petitions.

2. These appeals are directed against the common judgment of the Patna High Court allowing the batch of writ
D petitions. The dispute relates to fuel surcharge. The validity of levy has been upheld by this Court in *Bihar State Electricity Board and Anr. v. Bihar 440 Volt Vidyut Upbhokta Sangh and Ors.* (1997 (11) SCC 380). Therefore, the dispute before the High Court related to method of calculation and in substance
E the rate of fuel surcharge.

3. The Board has its own power generation units namely, Patratu Thermal Power Station, Barauni Thermal Power Station and Muzaffarpur Thermal Power Station. The power generating from these units is not sufficient and, therefore the Board
F purchased from other sources in order to meet the requirements of power supply to its consumers. The sources from which the Board purchases power are Damodar Valley Corporation, National Thermal Power Corporation, Tenughat Vidyut Nigam Ltd., Uttar Pradesh Electricity Board, Orissa
G State Electricity Board, Power Grid Corporation of India Ltd. According to the Board, the power purchased from outside sources forms the bulk of the total power supplied by the Board. In other words, power generated by the generating units of the Board is much less in comparison to the purchased power from
H outside sources.

4. The Tariff framed by the Board in exercise of its powers conferred upon it under the provisions of Section 49 of the Electricity (Supply) Act, 1948 (in short the 'Act') vide Tariff Notification dated 21.6.1993 published in the Bihar Gazette on 23.6.1993 which came into effect from 1.7.1993 prescribes rates for supply of power to the consumers of the Board. Because of infrequent revision of tariffs and in order to neutralize increase in the cost of generation and purchase of power, the 1993 Tariff provides for levy and collection of fuel surcharge from the consumers of the Board.

5. It is submitted that fuel surcharge is a part of tariff and, in reality, a surcharge levied to meet the increased cost of generation and purchase of electricity. This Court in a number of decisions has upheld levy of fuel surcharge.

6. The 1993 Tariff provides for a formula for levy and collection of fuel surcharge from the consumers of the Board from time to time. The validity of the formula for levy of fuel surcharge has been upheld by this Court in *Bihar State Electricity Board's* case (supra).

7. Section 49 of the Act empowers the Electricity Board to frame tariff and lay down the terms and conditions of supply of electricity as it thinks fit. In exercise of the said power the Bihar State Electricity Board (hereinafter referred to as the 'Board') framed tariff vide notification dated 21.6.1993, published in the Bihar Gazette on 23.6.1993 superseding the earlier tariff notifications dated 26.8.1991 and 3.7.1992. The tariff notification dated 21.6.1993 is effective from 1.7.1993. Under clause 16.10.1 of the said tariff the consumers of the categories specified therein are required to pay operational surcharge at a rate to be determined every year in accordance with the formula prescribed, in addition to other charges as laid down in the tariff schedule. In terms of clause 16.10.2 the operational surcharge consists of two elements (i) fuel surcharge and (ii) other operational surcharge. Clause 16.10.3 lays down the formula for determining fuel surcharge applicable

during the financial year in terms of paise per unit. Clause 16.10.4 prescribes the formula for determination of 'other operational surcharge'. It may be mentioned here itself that the provision regarding 'other operational surcharge' has been held to be arbitrary and struck down. Clause 16.10.5 provides that the operational surcharge for a financial year shal be calculated by the Board after the expiry of the financial year. Till actual calculation of the operational surcharge for a financial year is made, operational surcharge during the financial year may be levied at a rate provisionally calculated on monthly or quarterly or half-yearly basis as the Board may decide. In case of short or excess realisation the amount is to be adjusted in the next bill be served on the consumers. Clause 17 lays down that the existing rate of fuel surcharge notified in letter no.AVCS/Costing-44/92-93/397 dated 29.3.1993 amounting to 32 paise per unit has been merged in the tariff. Any increase in the operational surcharge thereafter only shall be levied.

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

S1 = A1xA3+B1xB3+C1xC3+D1xD3+ E1xE3xF1xF3+G1 xG3+H1xH3 (A2+B2+C2+D2+E2+F2 +G2+H2)....

Whereas,

S1	=	Average Fuel Surcharge per unit in paise applicable during the financial year.
A1 , B1 ,C1	=	Unit generated from PTPS, BTPS & MTPS respectively.
D1,E1,F1,G1,H1	=	Unit purchased from DVC, UPSEB,OSEB,NTPS,PGCL and any other source respectively.
A2,B2,C2	=	Unit sold out of sent out from PTPS,

BTPS & MTPS on which fuel surcharge is leviable.

D2,E2,F2,G2,H2 = Unit sold, out of purchased from DVC, UPSEB, OSEB, NTPC, PGCL and any other source respectively during the year on which Fuel Surcharge is leviable.

A3,B3,C3 = Increase in average cost of Fuel Surcharge in paise per unit computed for Board's Generation at PTPS, BTPS and MTPS

D3, E3,F3,G3,H3 = Increase in average unit rate of purchase of energy from DVC, UPSEB, OSEB, NTPC, PGCL & any other source respectively during the year for which the surcharge is to be calculated.

The said increase to be calculated with respect to the year 1992-93 (after amendment, read 1991-92)

(In the above, PTPS stands for Patratu Thermal Power Station, BTPS for Barauni Thermal Power Station, MTPS for Muzaffarpur Thermal Power Station. They are Board's own generating stations. Likewise, DVC stands for Damodar Valley Corporation, UPSEB for Uttar Pradesh State Electricity Board, OSEB for Orissa State Electricity Board, NTPC for National Thermal Power Station and PGCL for Power Grid Corporation of India Limited. They are external sources of supply of electricity to the Board.)

9. The manner of calculation of increase in average cost of fuel in Board's own generating stations i.e. A3, B3 and C3, and increase in average unit rate of purchase from outside sources i.e. D3; E3 etc. is laid down in clause 16.10.3.1. As

A regards the former, the calculation is to be made in the following manner.

"(a) Patratu Thermal Power Station:- The rate in paise per unit shall be based on the average cost of 9270.08 paise per 10,00,000 K.Cal. of fuel delivered at the bunkers of the B Board's generating station at Patratu. In the event of rise or fall in the aforesaid cost, at any time, the rate per unit will be increased or decreased as the case may be, by 0.3537 paise for each one per cent variation in the cost of fuel per 10,00,000 K.Cal. In the cost of fuel per C 10,00,000 K.Cal. In calculating the above variation, percentage variation of 0.5 and above will be treated as next higher percentage and percentage variation, below 0.5 will be ignored.

D (b) Barauni Thermal Power Station:- The rate in paise per unit shall be based on an average cost of 17407.97 paise per 10,00,000 K.Cal. of fuel delivered at the bunkers of the 'Board's generating station at Barauni. In the event of rise or fall in the aforesaid cost, at any time, the rate per unit E will be increased or decreased, as the case may be by 0.8539 paise for each one per cent variation in the cost of fuel per 10,00,000 K.Cal. In calculating the above variation, percentage variation of 0.5 and above will be treated as next higher percentage and percentage F variation below 0.5 will be ignored.

(c) Muzaffarpur Thermal Power Station:- The rate in paise per unit shall be based on an average cost of 18166.04 paise per 10,00,000 K.Cal. of fuel delivered at the bunkers of the Board's generating station at Muzaffarpur. In the event of rise or fall in the aforesaid cost , at airy time, the rate per unit will be increased or decreased, as the case may be by 0.7368 paise for each one percent variation in the cost of fuel per 10,00,000 K.Cal. In calculating the above variation, percentage variation of 0.5 and above, will H be treated as next higher percentage and percentage

variation below

0.5 will be ignored."

As, regards the latter :i.e. electricity purchased from external sources the clause says that the actual increase in the average unit rate of purchase will apply, that is to say, will be the basis.

10. On 4.4.1994 the Board issued circular stating that on final calculation the fuel surcharge for the period 1992-1993 had been determined as 26.14 paise per Kwh. On 5.1.95 the Board issued another circular calculating the fuel surcharge for the period July 1993 (i.e. after coming into force of the new tariff) to March 1994 to be 25.98 paise per Kwh. I am not referring to the rate of other operational surcharge under clause 16.10.4 which was also notified by the same circular because that has already been struck down. The consumers were billed accordingly. Writ Petitions were filed challenging the rates in CWJC No.2771 of 1995(R) and analogous cases. During the pendency of the said writ petitions the Board proposed certain amendments in clauses 16.10.3, 16.10.3.1 and 17, vide letter no.135 dated 28.12.1995. I shall refer to the salient features of the proposed amendment later. The implementation of the circular dated 5.1.1995 was kept pending vide circular dated 8.2.1995 in the meantime. On 8.3.1995 and 17.4.1995 circulars were issued directing payment @ 15 paise/Kwh from 1.7.1993 to 31.3.1995 instead of 25.98 paise per Kwh as fuel surcharge as stipulated in circular dated 5.1.1995. However, by circular dated 20.9.1995 the said circulars dated 8.3.1995 and 17.4.1995 were withdrawn and the earlier circular dated 5.1.1995 by which fuel surcharge @ 25.98 paise/Kwh had been fixed was restored

11. The writ petitions, CWJC No.2771 of 1995(R) and analogous came up for hearing in October 1996. With the consent of the Board, on 17.10.1996 the High Court constituted a High Level Committee consisting of two nominees each of

A the consumers and the Board and two independent members. The Committee was directed to calculate the fuel surcharge in terms of 1993 tariff, particularly taking into account clause 17, and submit report by 31.1.1997 to the Chairman of the Board, The writ petitions, were thus disposed of. The High Court made B it clear that after submission of such report, anybody feeling aggrieved may move the appropriate forum or court of law. From the records of the case it appears that an interlocutory application was made by the concerned petitioners of the case making a grievance that certain vital documents had not been C made available by the Board to the Committee vide order dated 29.1.1997 the High Court recorded the submission of the counsel for the Board that the documents required shall be furnished within two weeks. Time for submission of the report was accordingly extended to 31.3.1997 and the earlier order D dated 17.10.1997 was modified to this extent.

12. At this stage the Board issued circular dated 5.2.1997 notifying the provisional rates of fuel surcharge as 43.89 paise/ Kwh for 1994-95, 72.12 paise/Kwh for 1995-96 and 102 paise/ Kwh from 1.4.1996 onwards. This led to fresh writ petitions E being CWJC Nos.1632 of 1997 and analogous cases. On 12.3.1997 when the cases came up for preliminary hearing dispute again arose as to circumstances in which the aforesaid Committee had not finalised the report. After hearing counsel for the parties, however, a consent order was passed to the F effect that the Committee shall finalise its report on 14.3.1997 when it was scheduled to meet next, on the basis of documents already on record and submit the report to the High Court on 17.3.1997. On 16.3.1997 the Committee submitted its report. On 21.3.1997 when the matter came up for further hearing the G High Court noted that the findings reached by the members of the committee were not unanimous. While four members of the Committee had worked out the fuel surcharge @ 12.38 paise/ Kwh for the period from July 1993 to March 1994, 21.33 Paise/ Kwh for the period 1994-95 and 44.00 paise/Kwh (provisional) H for the period 1995-96, the other two members who were

Board's nominees, had worked out the same @ 25.98 paise, 43.98 paise and 72.12 (provisional) paise per Kwh for the aforesaid periods respectively. As an interim measure the High Court directed the petitioners to pay fuel surcharge for the periods July 1993 to March 1994 and 1994-95 at the rates worked out by four members of the committee, which were in their favour, and for the periods-1995-96 and 1996-97 @ 46.37 paise/Kwh and 56.37 paise/kwh offered by them. CWJC Nos. 1632 of 1997 and analogous cases were finally heard and decided by judgment dated 30.6.1998.

13. At this stage it may be relevant to advert to the Board's letter dated 28.12.95, referred to above, suggesting certain amendments in clauses 16.10.3, 16.10.3.1 and 17. The substance of the proposed amendment was that instead of calculating the increase in the average unit rate of purchase of energy from DVC, UPSEB, OSEB, NTPC, PGCL and any other source with respect to the year 1992-93, as prescribed in clause 16.10.3 the same should be calculated with respect to the year 1991-92, and similarly with respect to the year 1991-92, and similarly in clause 16.10.3.1 the average cost of fuel in respect of energy generated at Board's own generating stations be computed on the base rate of 1991-92 and not 1992-93. In other words, the base year with respect to these two sets of components was sought to be changed from 1992-93 to 1991-92. Clause 17 was also proposed to be amended by that in accordance with the instructions issued by the Government of Bihar to the Board, the increase in the rate of fuel surcharge between January 1992 and June 1993 which came to 20 paise (12 paise as in January 1992 and 32 paise as in June 1993) had been merged in the tariff and thus any increase in the fuel surcharge thereafter only shall be levied after accounting for the increase already merged in the tariff.

14. From the judgment dated 30.6.1998 disposing of CWJC Nos.1632 of 1997 and analogous case, it appears that the validity of the rates of fuel surcharge was challenged mainly

A on two grounds:- (a) the cost of: generation at the Board's own generating stations, namely, Patratu, Barauni and Muzaffarpur Thermal Power Stations had been worked out treating 1991-92 as the base year but the cost of the unit purchased from DVC, NTPC etc. had been calculated on the basis of 1992-93 B rates. According to the writ petitioners in working out the rate the values to be taken into account must correspond to the same year lest determination could become irrational and arbitrary: (b) the merger of fuel surcharge as on 1.7.93 in terms of clause 17 of the tariff was not correct. The High Court noted C that the objections of the petitioners were in consonance with the Board's own decision vide letter dated 28.12.1995 (supra) by which the Board had suggested certain amendments in the relevant clauses of the tariff to the State Government. The High Court, however, took the view that in terms of the order dated 17.10.1996 passed in CWJC No.2771 of 1995(R) the D Committee was required to submit its report to the Chairman of the Board and not to the High Court. Observing that the report of the committee would assist the Board in coming to fair and just decision, and if the Board was satisfied that the tariff modification requires any modification it was open to it to E modify the tariff in accordance with law, the High Court instead of finally deciding the issues itself directed the Board to consider the report of the committee submitted before the High Court on 16.3.1997, and in consultation with the State Government, take a final decision, by reasoned order, on the F points:-

(i) Whether any modification of clause 16.10.3 of the tariff notification published on 23.6.93 is required so that the increase in the average unit rate of G purchase of energy from DVC, NTPC etc. should be calculated with respect to the year 1991-92 instead of the year 1992-93.

(ii) Whether in terms of clause 17 of the aforesaid tariff notification, 20 paise per Kwh the increase in fuel

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surcharge which has been merged in the basis tariff should be considered for adjustment, instead of 32 paise, in terms of clause 17 of the aforesaid notification. If so, whether the impugned circular dated 5.2.97 be not withdrawn and the consumers be given the benefit of discredit to the period July 1993 to March 1994 and thereafter, and clause 17 of the tariff notification under section 93 be amended appropriately.

15. The High Court directed that till the Board takes a final decision in the matter, the interim order passed by the Court on 21.3.1997, referred to above, shall operate. Thereafter, the petitioners shall be liable to pay fuel surcharge in accordance with the decision that may be taken by the Board. Any person aggrieved by the decision of the Board will be at liberty to challenge the same in accordance with law.

16. The submission of the writ petitioners that the Board has not passed a 'reasoned order' or otherwise failed to implement the direction of the High Court was rejected. It was observed that the High Court had directed the Board to decide whether any modification in clause 16.10.3 of the tariff notification was required so as to make the base year with respect to average unit rate of purchase of energy from DVC, NTPC etc. at par with the increase in cost of generation at Board's own generating stations and to adjust the merger of the existing fuel surcharge of 20 paise/Kwh, by a reasoned order. A favourable decision having been taken and the aforesaid clauses suitably amended, the High Court felt that there is no scope for further argument in this regard. As far as the requirement of passing a "reasoned order" is concerned, the facts and figures contained in the agenda notes dated 26.11.1998 and 6.1.1999 which were the basis of the proposed amendments and revision in the rates, can be treated as reasons for the same. The direction of the High Court to pass a reasoned order cannot be interpreted as a direction to set

A out reasons for fixing the particular rates of fuel surcharge which is merely an arithmetical exercise to be worked out in accordance with the prescribed formula. The Board is a body corporate and it takes its decision on the basis of the facts and figures furnished to it in the agenda notes supported by B materials. It is apparent that after the decision of the High Court the matter was examined at different levels and finally the said agenda notes dated 26.11.1998 and 6.1.1999 were put up for consideration which were approved respectively on 14.12.1998 and 21.1.1999. High Court did not find any substance C whatsoever in the contention that the Board failed to implement the direction of the High Court, by not passing a reasoned order or otherwise.

17. The submission that the dispute should be referred to a Committee of experts was rejected by the High Court D considering the nature of the dispute. It was of the view that such a course should be taken only when the Court cannot decide the dispute. There may be justification to constitute a committee and refer the dispute to it when the relevant data have to be gathered or facts have to be ascertained without E which the dispute cannot be resolved. This normally is done in public interest litigation. In adversary litigation it is for the parties to produce materials in support of their respective claim. The Court is not supposed to make a roving enquiry for allowing or disallowing the claim of one or the other party. It is true that on F the previous occasion in CWJC No.2771 of 1995 ®, the High Court did constitute a Committee but that was with the consent of the Board. Counsel for the Board pointed out in course of his submission that the Board wanted to be assured itself that the stand taken by it in letter dated 28.12.95 to the State G Government suggesting amendments in clauses 16.10.3 and 17 was correct.

18. As the aforesaid pleas were taken for the first time in course of argument, the Board was allowed opportunity to file written submission. In its written submission the Board took the H

stand that T & D losses do not form part of calculation of fuel surcharge and the reason for the difference of 8655.78 MU is the existence of large number of defective meters and meterless supply of electricity to consumers belonging to different categories, particularly, agriculture and domestic categories. The statement in paragraph 3.7 of Chapter III of the CAG report actually represents the T&D losses based on units actually metered and does not include power sold to the consumers having unmetered supply or the consumers having defective or burnt meters. That is why in the accounts, the units sold were worked out by dividing the assessed revenue by the tariff rates including fuel surcharge. It has been stated that in the case of defective meters and meterless consumers, though bills are raised, the corresponding quantum of power sold cannot be determined. Hence the assessed revenue (in accordance with the Board's tariff) is treated as the basis for computation of power sold. The CAG, it has been stated, has approved this procedure and granted its statutory certificate to the effect that the accounts of the Board give a "true and fair view of the state of affairs of the Board".

19. The Board further took the stand that if the rates of fuel surcharge were to be determined only on the basis of metered sales the rates would be considerably higher than already determined by the Board. This would be evident from the following chart:

Sl.	Particulars	July 93 March 94	1994-95	1995-96	1996-97
1.	Amount recoverable as fuel surcharge (Rs.in lakhs)	9536.09	16328.20	28431.10	53385.22
2.	Units on which Fuel surcharge is leviable	2645.76	3437.95	3822.96	3834.04

	(in MKwh)				
3.	Rate of fuel surcharge (in P/Kwh)	36.04	47.49	74.37	139.24
4.	Less (20 P/Kwh) As per the Hon'ble High Court's Order dated 30.6.98 Passed in CWJC No.1632 of 99	20.00	20.00	20.00	20.00
5.	Net rate (P/Kwh) If T&D losses as Per serial No.6 Of table at para 3.7 Of CAG report at page 80 is taken into account (3-4)	16.04	27.49	54.37	119.24
6.	Present rates of fuel Surcharge as per the Impugned notification Dated 31.5.1999	23.38	21.33	48.54	99.34

20. The above calculation has been explained by pointing out that while A1, B1, C1 etc. and A3, B3, C3 etc. components of the Formula indicating the power pumped into the Board's system for transmission or distribution to different points in the State and the incremental rise in the average cost of fuel at the Board's Thermal Power Stations or power purchased from NTPC, DVC etc. are not affected by the T&D losses, A2, B2, C2 etc. component of the Formula representing the quantum of power sold to categories from whom fuel surcharge is leviable would be reduced if power supplied to the consumers having defective meters etc. is excluded from the total quantum of power sold. Thus, while the numerators would remain

unchanged, the denominators would get reduced resulting in higher rates of fuel surcharge. In the above view of the matter, it was stated that keeping in view the meterless and defective meter supply of the electricity the Board has made its own realistic calculation of T&D losses as reflected in the table in para 3.7 of the CAG report which has been accepted by the CAG. The Board has accordingly asserted that the table shown in para 3.7 of the report regarding "percentage of actual loss of energy available for sale" has no nexus with the computation of rates of fuel surcharge under the formula in clause 16.10.3.

21. The significance of the question as to whether fixing the rate of fuel surcharge is a legislative function or a non-legislative function is that if the function is held to be legislative, in the absence of any provision in that regard the principles of natural justice would not be applicable and the scope of judicial review would also be limited to plea of discrimination i.e. violation of Article 14 of the Constitution of India, 1950 (in short the 'Constitution'). As a general proposition, the law on the point is settled. In *Prag Ice and Oil Mills v. Union of India* (AIR 1978 SC 1296), a Seven-Judge Bench of this Court by majority observed:

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

22. The legal position was reiterated in *Rohtas Industries v. Bihar State Electricity Board,* (AIR 1984 SC 657) and *Kerala State Electricity Board v. M/s S.N. Govind Prabhu & Brothers* (AIR 1986 Supreme Court 1999), wherein it was observed, "Price fixation is neither the forte nor the function of the Court".

23. As regards the nature of the function, in *Saraswati Industrial Syndicate Limited v. Union of India* (AIR 1975 SC

460), the Court had observed that the price fixation is more in the nature of a legislative measure even though it may be based upon objective criteria found in a report or other material. It should not, therefore, give rise to a complaint that rule of natural justice has not been followed in fixing the price. In *Prag Ice and Oil Mills v. Union of India* (supra) the Court observed:

> "We think that unless by the terms of particular statute or order, price fixation is made a quasi judicial function for specified purposes or cases it is really legislative in character .....the legislative measure does not concern itself to the facts of an individual case. It is meant to lay down a general rule applicable to all persons or objects or transactions of a particular kind of class."

24. In *Union of India v. Cynamide India Ltd.* (AIR 1987 SC 1802) this Court held that except in cases where it becomes necessary to fix the price separately in relation to individuals, price fixation is generally a legislative act, the performance of which does not require giving opportunity of hearing. Following passage from the judgment may usefully be noticed:

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

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

26. In a sense, fixing rate of fuel surcharge under clause 16.10 of the Tariff notification is different from fixing the tariff under Section 49 of the Act. Fuel surcharge is undoubtedly a part of tariff. But fixing rates of consumption charges or the guaranteed charges or the fixed charges or the delayed payment surcharge etc. and fixing rates of fuel surcharge do not stand on par. Though rates of consumption charges etc. are based on objective materials, there is enough scope for flexibility in fixing the rates. It also involves policy to fix different fates for different categories of consumers. Such is not the position with the fuel surcharge. Clause 16.10.1 specifies the categories coning in the net of the levy and clause 16.10.3 provides the formula. In simple words, the formula envisages addition of units generated or purchased and increased average cost of fuel and average unit rate of purchase rates and division of the total by the quotient is the average fuel surcharge per unit (expressed in terms of paise) described by denominator S1 in the formula. The whole exercise, it would appear, involves arithmetical accounting. There is no scope for exercise of any discretion or flexibility. This distinction, however, does not help the petitioners. It rather goes against them because if fixing rate of fuel surcharge is just an arithmetical exercise, giving opportunity of hearing would hardly serve any useful purpose. How mathematical in nature is the process of computation is clearly illustrated in a chart which is part of Annexure E series at page 290 of the Paper Book as under:

CALCULATION OF FUEL SURCHARGE RATE FOR THE YEAR 1996-97

FUEL SURCHARGE =

(A1xA3)+(B1xB3)+(C1xC3)+(D1xD3)+(E1xE3)+(F1xF3)+(G1xG3)

A (A2+B2+C2+D2+E2+F2+G2)

1. A1 = Generation of PTPS (MKWH) = 1116.54

A3 = Increase in Average cost of PTPS (Paise/Kwh) = 17.33 = 1934.96

B A1 x A3 (Rs. in lakhs)

2. B1 = Generation of BTPS (MKWH) = 387.37

C B3 = Increase in Average cost of BTPS (Paise/kwh) = 69.17

B1xB3 (Rs. In lakhs) = 2679.44

3. C1 = Generation of MTPS (MKWH) = 213.52

D C3 = Increase in Average cost of MTPS Paise/Kwh) = 53.05

C1xC3 = 1132.72

E 4. D1 = Power purchase from DVC (MKWH) = 2153.00

D3 = Increase in Average rate of DVC (Paise/Kwh) = 57.87

D1xD3 = 12459.41

F 5. E1 = Power purchase from NTPC(MKwh) = 4047.70

E3 = Increase in Average rate of NTPC (paise/kwh) = 69.50

G E1xE3 (Rs. In lakhs) = 28131.52

6. F1 = Power purchase from PGCIL(MKwh) = 507.22

F3 = Increase in Average rate of PGCIL (Paise/kwh) = 18.12

H

F1xF3 (Rs.in lakhs) = 919.08

7. G1 = Power purchase from others(MKwh) = 737.82

G3 = Increase in Average rate of others (Paise/kwh) = 60.57

G1xG3 (Rs. In lakhs) = 4468.98

Excluding prior period expenditure

8. Admissible prior period expenditures. Rs. In lakhs) = 1659.11
(This is on the basis of recommendation made by the Committee constituted by the Hon'ble High Court)
(I) Incremental cost of the year (A1xA3)+(B1xB3)+..... (G1xG3)(Rs.in Lakhs) = 53 385.22

9. Mer. A2 = B2+..... G2(MKwh) = 4473.47
Hence, Rate of fuel surcharge for the year (paise/Kwh) = 119.34
Less 20.00
Net rate of fuel surcharge for the year (Paise/Kwh) = 99.34

27. Where the fixation of rate or determination of the amount is made individually, depending on the context in which this is to be done, there may be justification or necessity to give opportunity of hearing to the person or persons concerned. But where the rate is fixed for persons at large the only way by which such opportunity can be given is to notify the rates and then invite objections. There is no such provision. In the absence of any mechanism provided in the Tariff notification, it would not be feasible at all. Whenever the statute contemplates giving such an opportunity a mechanism, such as, for fixing rates of

A municipal Taxes, while it is not so in the case of Income tax or other taxes.

28. On behalf of the writ petitioners endeavour was made to question the very basis of fixation of fuel surcharge. It was B submitted that though it is open to the Board to levy fuel surcharge on certain specified categories of consumers alone or even supply electricity free to certain categories of consumers the unit rate should be worked out taking into account the entire units sold as is being done by the U.P. State Electricity Board, Damodar Valley Corporation or even in Delhi. C Fixing the rates of fuel surcharge on the basis of units sold to only specified categories of consumers, it was submitted, is arbitrary and discriminatory. The High Court noted that the submission was in the teeth of formula contained in Clause 16.10. Relevant part of the formula was re-stated:

D

A2,B2,C2-Units sold, out of sent out from PTPS, BTPS and MTPS on which fuel surcharge is leviable.

D2 to H2- Units sold, out of purchased from DVC, E UPSEB, OSEB, NTPC, PGCL and any other source during the year on which fuel surcharge is leviable.

29. The High Court that A2,B2,C2,D2 etc. component of the Formula represents the extent of units generated i.e. sent F out from the three generating stations or purchased from the external sources. Counsel for the writ petitioners referred to 'comma' occurring prior to the words "out of". Though sometimes presence or absence of comma has been taken aid of in interpreting the particular provision, the ordinary rule G is that punctuation mark is a minor element in the interpretation of Statute (See *Aswini Kumar Ghose v. Arbinda Bose,* AIR 1952 Supreme Court 369). More so, in the case of subordinate legislation. The words "out of" according to the High Court have to be understood in the sense of "to the extent of", and so read; H the formula postulates that so much of units out of, the units

generated or purchased on which fuel surcharge is leviable only is to be taken into account for determining the value of A2 to C2 or D2 to H2. Omitting the part "out of...." the formula would read as follows, "units sold .... on which fuel surcharge is leviable". In terms of clause 16.10.1, fuel surcharge is leviable only on consumers in CS II and III, L.T. Industrial Service, High Tension Service, Extra High Tension (EHT) arid Railways Traction Service categories, the units sold to other categories, of consumers cannot, therefore, be taken into account for determining the value of either A2 to C2 or D2 to H2. The validity of the formula had been upheld earlier. High Court noted that though by the impugned circular dated 31.5.1999 the rates of fuel surcharge have been fixed for the years 1993-94 (July 1993 to March 1994) to 1997-98, the correctness of the rates fixed for the years 1993-94 (July 1994 to March 1994) to 1995-96 were not challenged. The correctness of the rates for the subsequent years only was under challenge.

30. In *Maharashtra State Electricity Board v. Kalyan Borough Municipality,* (AIR 1968 SC 991), this Court upheld the constitutional validity of Section 49(3) of the Act. In M/s *Robtas Industries Limited v. Chairman, Bihar State Electricity Board*, (AIR 1984.SC 657), this Court held that Section 49(3) expressly authorises the Board to fix different tariffs for the supply of electricity classifying the consumers into different categories and fixing different tariffs. Thus, the Electricity Board is entitled to levy fuel surcharge on the consumers receiving high tension supply leaving out the consumers coming in other categories. While considering the validity of similar provisions of the 1979 Tariff of the Bihar State Electricity Board relating to Fuel surcharge, the Court observed,

> "Though the nomenclature given to the surcharge is "fuel surcharge" it is really a surcharge levied to meet the increased cost of generation and purchase of electricity.... We see no force in the contention that the words "increase in the average unit rate of purchase of energy" used in C1

A below paragraph 16.7.2 should be interpreted as taking their colour from the contents of paragraph 16.7.3. From a reading of these provisions it is abundantly clear that the entire increase in cost incurred in the purchase of energy from DVC and UPSEB has to go into the .compensation
B of the surcharge leviable under paragraph 16.7"

31. In *Kerala State Electricity Board v. S.N.Govind Prabhu & Brothers*, (AIR 1986 SC 1999), the Court noticed the amendments in section 59 of the Act and held that a plain reading of section 59, as amended, plainly indicates that it is
C the mandate of Parliament that the Board should adjust its tariff so that after meeting the various expenses properly required to be met, a surplus is left. It will not be out of place to mention here that in terms of section 59, as it stood prior to 1978, the Board was supposed to adjust its tariff in such a way as not to
D incur loss. By amendment made in 1978, the Board was supposed to adjust its tariff so as to ensure that the total revenues in any year of account should after meeting expenses "leave such surplus as State Government may, from time to time, specify". The section was amended again in 1983 and
E as per the 1983 amendment the Board is supposed to adjust its tariff in a manner so as to ensure that the total revenues in any year of account after meeting all expenses shall leave such surplus as is "not less than three per cent or such higher percentage as State Government may by notification specify".
F After noticing the said amendments this Court observed:

"The original negative approach of functioning so as not to suffer a loss is replaced by the positive approach of requiring a surplus to be created. The quantum of surplus
G is to be specified by the State Government. What the State Government is to specify is the minimum surplus. This is made clear by the 1983 amendment which stipulates a minimum of 3 per cent surplus in the absence of specification by the State Government which has the liberty "to specify a higher percentage than three. The failure of
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the government to specify the surplus which may be generated by the Board cannot prevent the Board from generating a surplus after meeting the expenses required to be met. Perhaps, the quantum of surplus may not exceed what a prudent public service undertaking may be expected to generate without sacrificing the interests it is expected to serve and without being obsessed by the pure profit motive of the private entrepreneur. When that happens the court may strike down the revision of tariffs as plainly arbitrary. But not until then. Not merely because surplus has been generated, a supply which can by no means to be said to be extravagant."

32. High Court noted that the purchase of electricity from Tenughat Vidyut Nigam Limited (TVNL) has been treated as a component of H3 i.e. "any other source", but as the TVNL came into existence only in the year 1996-97 it could. not be treated as a relevant factor having regard to the fact that in computing the fuel surcharge, increase in the average unit rate of purchase of electricity has to be calculated treating 1991-92 as the base year. Secondly, it was contended that the Board has treated the supply of electricity by the DVC to the TISCO as "deemed supply" by the Board to TISCO at a different rate which is not in accordance with the formula. As noted above the High Court found the objections to be well founded.

33. It is not in dispute that TVNL came into existence in 1996-97 whereas while calculating the electricity 1991-92 is to be treated as the base year. As a matter of fact, as seen above, it was on that ground, namely, that a different base year i.e. 1992-93 was provided for computing the increase in the average unit rate of purchase of electricity from external sources, that the High Court directed the Board to consider amending clause 16.10.3 so as to provide for the same base year i.e. 1991-92 with respect to both the increase in the average cost of generation and increase in the rates of purchase, and accepting the verdict of the High Court the Board

A amended the last part of clause 16.10.3. Purchase of electricity from TVNL which admittedly came into existence in the year 1996-97, therefore, cannot be treated as component of H3 i.e. increase in the average unit rate of purchase of electricity from "any other source". As a matter of fact, the case of writ B petitioners was that the TVNL is nothing but a unit of the Board in disguise of a subsidiary company and, therefore, could not be treated as a component of 113. It may not be necessary to go behind the veil of the separate legal character of the TVNL. The fact that TVNL did not exist in the year 1991-92 and came C into existence only in the year 1996-97 is sufficient to justify its deletion as component of H3. Counsel for the Board accepted that if TVNL is to be treated as a source, some mechanism has to be worked out, and the Court has then to see whether it is rational. The Board submitted that if the High Court comes to the conclusion that the supply from TVNL, cannot be D included, the consequence will be that the units purchased from TVNL would have to be kept out, which is not the intention underlying levy of fuel surcharge. It is like 'escalation' clause, and the additional cost has to be reimbursed. The High Court did not accept the same submissions as it will result in creating E a different base year. The relevant clause of the formula, after amendment, reads, "the said increase to be calculated with respect to the year 1991-92" (vide last para of clause 16.10.3). The amendment has been made in the light of the decision of the High Court. In the rejoinder affidavit the Board had taken F the stand that the incremental rise in 1996-97 over the 1991-92 base year from other sources including TVNL was less compared to DVC or NTPC. High Court did not appreciate this logic. Increase in the unit rate has been similarly worked out in the case of TVNL, but the relevant Base year column has been G shown as blank though in the counter affidavit, para 37, it had been stated that the same base year i.e. 1991-92 has been applied, even when TVNL admittedly did not exist prior to 1996-97. High Court held that it is not possible to allow the Board to include purchase of electricity as a component of H3 without

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suitably" amending the formula in accordance with law.

34. As regards "deemed supply" by the Board to TISCO High Court noticed that under a tripartite agreement between the Board, the DVC and the TISCO, with the consent of the State Government, the electricity is being supplied directly by the DVC to the TISCO but such supply is treated as made-by the Board to the TISCO. It seems to be an admitted position that the tariff rates of the Board are higher than the tariff rates of the DVC. But since legally the TISCO cannot directly but electricity from the DVC it has entered into agreement with the Board to buy electricity directly from DVC but pay the amount at the Board's rates. Though the amount is paid to DVC, such payment is adjusted against the amount due from the Board to it i.e. DVC. As seen above, DVC is one of the external sources, represented by D1. The Board buys the electricity from DVC, amongst others, and pays to it for the same. The increase in the average unit rate of purchase from it is reflected by D3. However, so far as the supply made by DVC to TISCO is concerned, it is treated as a "deemed supply" by the Board. While it may be permissible to charge the TISCO at the rates prescribed by the Board, i.e, at rates higher than the DVC rates, and it may also be permissible to treat sale of such electricity sold by DVC to TISCO as deemed supply/sale by the Board to TISCO. High Court held that two rates of supply/sale cannot be permitted for the purpose of computing D3 in the ordinary course, in the absence of any tripartite agreement referred to above, the Board would have supplied/sold electricity to TISCO and charged at its rates. Such supply would have been made from the electricity either generated by it at its own generating station or purchased from external sources including DVC. Clause 16.10.3.1 provides for computation of the cost of generation at the Board's own generating station; as regards purchase of energy from other sources, the said clause lays down that the actual increase in average unit rate of purchase will apply. If the Board is purchasing electricity from different

A sources for the purpose of D3, E3, F3 etc. the actual increase in the average unit rate of purchase so far as the particular source is concerned, is to be taken into consideration. DVC has thus to be treated as one source. The source being one there cannot be two rates of purchase or increase in the B average unit rate of purchase. It may be mentioned here that NTPC sells electricity generated different power stations, namely, Farakka, Kahalgaon Talchar or Anta and though the increase in the average unit rate is not the same, it charges the Board at a uniform rate. It is an admitted position that C though the DVC has revised its tariff from year to year the Board so far has not recognised the revision and has been paying it at the rates applicable in the year 1991-92. In the agenda note dated 26.11.98 it has been clearly mentioned "that during the 1996-97 the DVC rates for the purchase remained D unchanged but the rates applicable to deemed supply to TISCO rose upto 13P/kwh. High Court held that the Board cannot treat the sale of electricity by the DVC to the TISCO as a separate class or category for the purpose of computing D3. The computation of D3 to this extent, was held to be not correct.

E 35. The computation of the rates of fuel surcharge by the impugned circular for the years 1996-97 and onwards so far as it relates to the purchase of electricity from TVNL and "deemed supply" by the Board to TISCO thus does not appear to be in accordance with the formula. Fuel surcharge has to be F calculated strictly within the framework of the formula. If any extraneous element has crept in the computation to that extent must be held to be not in accordance with law and accordingly modified.

G 36. The computation of fuel surcharge was also assailed before the High Court on the ground of non-disclosure of details to A2, B2 etc. It was submitted that as the incremental rise in the cost of generation at the Board's own generating stations and the average unit rate of purchase of electricity from external H sources represented by different denominators in the formula

is not the same, the Board ought to have given the details of the quantum of units sold respectively out of the units generated and purchased from the external sources. The High Court considered the plea to be of academic value. It is true that in the matter of calculation of Fuel surcharge the units sold from out of units generated at the Board's power stations and units purchased from external sources are shown by separate denominators i.e. A2, B2, C2 and D2, E2, F2 etc. respectively, but it would appear that after the electricity generated at the Board's stations or purchased from external sources are fed into transmission lines, they lose their separate identity as electricity generated at the Board's own power stations or purchased from other sources. It is difficult thereafter to find out as to how much of electricity fed in the transmission lines came from the Board's own power stations and how much of it from external sources.

37. Board's stand was that it pays large amounts as delayed payment surcharge (DPS) to the DVC, NTPC etc. contributing to further increase in the average unit rate of purchase of electricity resulting in higher fuel surcharge and causing thus additional burden on the consumers. The fact that the Board has had to pay large amounts as DPS to the external agencies from which it has been purchasing electricity is more or less an admitted position. The case of the Board, however, is that the default in payment was mainly on account of defaults committed by the consumers themselves. It is said that as much as 3,200 crores of rupees are due from the consumers as a result of which the Board is not in a position to pay to the agencies resulting in additional burden by way of DPS. High Court found substance in the stand of the Board. The fact that the consumers at large have not been paying the dues on time and many of them have been making only part payment on the strength of interim orders of Courts are facts which are not disputed. If the consumers do not pay the dues to the Board, they cannot be heard to make any complaint against payment of DPS by the Board to the external agencies.

38. We have referred in extenso reasonings of the High Court.

39. It is stand of Board that while arriving at the average cost of purchase where the purchase prices vary weighted average is taken into account. This can be explained by illustration of electricity purchased from different units of NTPC. The Board purchases electricity normally from generating units of NTPC at Farakka, Kahalgaon and Talcher at different rates. During 1996-97 the Board purchased electricity from Farakka unit at the rate of 147.28 paise/Kwh (inclusive of trans. Ch.) from Kahalgaon at the rate of 179.20 paise/Kwh and Talcher at the rate of 70.33 paise/Kwh. The total power purchased from NTPC during the said year was 4047.70 Mkwh for Rs.61,989.32 lacs. For the purposes of calculating per unit rate during the said year weighted average of the different rates was taken which comes to 153.15 paise/Kwh. The difference in cost of purchase of electricity from NTPC during 1996-97 with reference to the base year 1991-92 comes to 153.15 minus 83.65 = 69.50 paise/Kwh (the average rate during 1991-92 was 83.65 paise/Kwh). Similarly, in the case of purchase of power from 'other source', there is more than one source for such purchase and the rates of supply also vary. In such cases average incremental cost is arrived at by the method of weighted average.

40. There is no dispute with regard to levy of fuel surcharge in respect of power generated by the generating stations of the Board. The dispute in the writ petitions was with regard to only the method of calculation of fuel surcharge in respect of power purchased by the Board, i.e. the rates of fuel surcharge in respect of the years 1996-97 and 1997-98.

41. The Board by its Circular dated 31.5.1999 fixed the rate of fuel surcharge by applying formula for the years 1993-94 to 1996-97. During the year 1996-97 the Board started purchasing electricity from generating unit of TVNL established in 1996. By treating TVNL as a source falling under the

category of other source, the Board calculated weighted average cost of power as Rs.60.57 paise/Kwh.

42. Stand of the writ petitioners was that since TVNL came into existence in the year 1996-97 there cannot be any incremental cost in respect of electricity purchased from TVNL inasmuch increase in the average unit rate of purchase of electricity has to be calculated treating 1991-92 as the base year. The other stand of the writ petitioners was that the Board has treated the supply of electricity by DVC to TISCO as deemed supply by the Board to TISCO at a differeht rate which is not in accordance with the formula. The stand of the writ petitioners was accepted by the High Court. So far as TVNL and deemed supply to TISCO are concerned, the High Court held that there is no infirmity in the fixing of rates of fuel surcharge except on the aforesaid two grounds. All other stands taken in the writ petition was rejected.

43. Judgment of the High Court is under challenge in these appeals by the Board. An appeal has been filed by the private companies so far as the conclusions of the High Court relating to non accounting of Rupees 100 crores paid by the private companies to the Board. According to the appellant-Board, the High Court was not right in directing to re-work out the rates of fuel surcharge for the years 1996-97 onwards after deleting the purchase of electricity from TVNL as a component of H3 in the formula. It is also submitted that the direction of the High Court to re-work out the rates of fuel for the year 1996-97 onwards after treating the deemed supply i.e. supply of electricity by DVC to TISCO as supplied by DVS to the Board as an element of D3 in the formula was erroneous.

44. Though learned counsel for the appellant Board questioned correctness of High Court's conclusions, nothing material could be highlighted as to how the reasonings suffer from any infirmity. We are in agreement with the conclusions of the High Court. The appeals filed by the Board are accordingly dismissed.

A 45. In the other appeals challenge is to non-accounting of Rs.100 crores paid by the Coal Companies to the Board. According to the writ petitioners, if the said amount has been shown in the accounts the rate of fuel surcharge would have been different. The High Court noticed that this aspect of the B matter has been dealt with by the Board in its rejoinder affidavit wherein it has been stated that as against the total claim of Rs.356.20 crores on account of loss due to grade slippage, short supply of coal, supply of stones etc. the Coal Companies have agreed to pay Rs.100 crores in full and final settlement of C the claim. But though such decision was taken on 30.8.1998 actual payment has not been made till date. High Court observed that payment of the amount would be relevant consideration while calculating the rate of fuel surcharge for the year 1998-99 and not 1997-98.

D 46. We direct that the actuals be worked out within three months from today. The adjustment of Rs.100 crores be worked out accordingly. The appeals are accordingly disposed of.

R.P. Appeal disposed of.