

Counsel for the Respondent(s) : Mr Sunil Kumar, Sr. Adv., Mr Devashish Bharuka
Mr. Sudarshan Shrivastava,

JUDGMENT

Per Hon'ble Mr. A.A. Khan, Technical Member

The Appellant, Damodar Valley Corporation (hereinafter referred to as the 'DVC') is a statutory body promoted jointly by the Government of India and two provincial governments namely, Government of West Bengal and Government of Bihar (subsequently replaced by Government of Jharkhand) and was constituted under the provisions of the Central Act, namely Damodar Valley Corporation Act, 1948, ('DVC Act'). The Central Government exercises administrative control over the Appellant.

2. The present Appeal is filed by the Appellant, DVC, against the impugned order dated 27.04.2009 passed by the Jharkhand State Commission (hereinafter to be referred to as 'State Commission' or 'the Commission') in case numbers 11, 12, 14, 18 and 19 of 2007-08 holding that the Appellant shall not be entitled to charge Fuel Cost Surcharge (FCS) from its consumers without that being approved by the State Commission in the distribution tariff. The Appellant, DVC, is aggrieved of the State Commission having assumed jurisdiction to undertake determination and approval of the Fuel Cost Surcharge (FCS) for adjustment of basic fuel cost considered by DVC in the generation while undertaking determination of retail tariff for DVC distribution. The Appellant, DVC, has challenged the conclusion reached in the impugned order that the Fuel Surcharge can be part of both

distribution tariff and generation tariff. This has resulted into the Commission disallowing the recovery of FCS from the consumers by the DVC.

3. The DVC had statutory authority to fix its own tariff under Section 20 of the DVC Act and the last tariff notification issued by it was effective from 01.09.2000 and the said tariff included the direction for implementation of FCS alongwith formulae for its computation. The Commission has disallowed the charging from the consumers the increase in FCS of paise 21.93 per unit for the period from April, 2006 to Sep. 2006 and further adhoc increase of 2 paise (i.e. total increase of 23.03 paise) per unit from Oct. 2006 onwards communicated by DVC vide letter dated 18.01.2007.

BASIC FACTS OF THE CASE

4. In order to appreciate the issues involved it is necessary to narrate the basic facts of the case;
 - (a) DVC is a statutory body created by Central Special Act namely DVC Act, 1948, and is an integrated utility functionally responsible for generation, transmission and distribution of electricity to the consumers located in its area of operation in the territories of the State of West Bengal and Jharkhand.
 - (b) DVC in exercise of its statutory power under Section 20 of the DVC Act has been fixing tariff for generation and retail supply of electricity and last tariff fixed by it was made effective from 01.09.2000. FCS

computed as per the formulae is used for automatic adjustment for the increase or decrease in the fuel cost and is included as a part of the generation-tariff. The adjustment is not recognized by the Act to be revising or modifying the effective tariff notified on 01.09.2000. This has been duly recognized under Section 62(4) of the Act. The FCS formula is applied by the DVC, automatically without there being any need to ask for any revision or notification in the tariff.

- (c) Electricity Act 2003 (“Act”) came into force on 10.06.2003 which recognizes DVC as a deemed licensee and provides that the DVC Act would continue to apply as long as it was consistent with the provisions of the Act. Admittedly, insofar as the present case is concerned, the Central Commission has jurisdiction to determine tariff for generation and transmission system. The determination of the distribution tariff falls within the domain of the State Commission. This Tribunal order dated 23.11.2007 passed in Appeal No. 273 of 2006 filed by the DVC may be referred to.
- (d) The Appellant/Petitioner approached the Central Commission in Petition No. 66 of 2005 for determination of generation and inter-state transmission tariff.
- (e) The Central Commission in the order passed on 21.06.2005 allowed the Appellant to continue to charge the tariff on provisional basis as was prevailing on 31.03.2004, in the following terms:

“The Petitioner shall continue to charge tariff as applicable on 31.03.2004 on provisional basis till further order which shall be subject to tariff that may be finally determined.”

Thus, the tariff which DVC notified to be effective from 01.09.2000 became the provisional tariff till further orders and the same was subject to tariff that may be finally determined.

- (f) The Central Commission by its order dated 03.10.2006 determined the Annual Revenue Requirement and the generation and inter-state transmission tariff to the Appellant for the period from 01.04.2006 to 31.03.2009.
- (g) The Appellant, DVC, herein challenged the order of the Central Commission dated 03.10.2006 through appeal No. 273 of 2006 before this Tribunal. In the meantime, the Tribunal by its interim orders dated 06.12.2006, 15.01.2007 and 26.02.2007 directed the Jharkhand State Electricity Regulatory Commission and the West Bengal Electricity Regulatory Commission not to pass any final order till the disposal of the Appeal No. 273 of 2006. The tariff for generation and supply of electricity originally fixed on 01.09.2000 under Section 20 of DVC Act is, therefore, continuing till date.
- (h) The State Commission in its order passed on 15.03.2007 directed the Appellant to raise invoices on the consumers in accordance with the tariff fixed by the Central Commission as an interim measure.

- (i) In Appeal No. 38 of 2007 filed by the Appellant, Challenging the State Commission's order dated 15.03.2007, this Tribunal granted interim stay of the order dated 15.03.2007 passed by the State Commission.
- (j) Jharkhand State Electricity Regulatory Commission through its orders dated 16.04.2006, 24.04.2007 and 30.04.2007 directed the Appellant not to revise the Fuel Cost surcharge in its tariff without the formula for Fuel Surcharge being approved by the State Commission.
- (k) The Appellant filed Appeal No. 69 of 2007 before the Tribunal and the same was disposed of based on the statement of Respondent, Jharkhand State Electricity Regulatory Commission in the following terms:

“The learned counsel for the Respondent No. 1 states that the State Commission does not have the jurisdiction to determine the fuel surcharge insofar as the Appellant is concerned. In view of this statement the learned counsel for the Appellant states that he does not press the Appeal. Accordingly, the Appeal is disposed of as not pressed.”
- (l) This Tribunal allowed the Appeal No. 273 of 2006 while disposing of other connected appeals and remanded the matter to the Central Commission for *de novo* determination of the generation and transmission tariff of the Appellant by its order passed on 23.11.2007. With regard to the issue of the fuel surcharge adjustment this Tribunal has held as under:

“L. Fuel Price Adjustment: As regards the applicability of fuel price adjustment, the Government of West Bengal has contended that the same is within the jurisdiction of the State Commission. We find no substance in this argument as the applicable fuel price adjustment is to be decided by the Commission determining the applicable generation tariff.”

- (m) The Central Commission, West Bengal Electricity Regulatory Commission, State of West Bengal and some consumers filed Second Appeal against the Tribunal’s order dated 23.11.2007, under Section 125 of the Act before the Hon’ble Supreme Court. The applications for interim order were rejected by the Hon’ble Supreme Court. In the Appeal filed by M/s Bhasker Sharchi Alloys Ltd. And Ors. (Civil Appeal No. 971 – 973 of 2008), the following prayers were made before the Hon’ble Supreme Court:

(a) Leave be granted to the petitioners to pay the retail tariff in accordance with the Order passed by the Central Commission dated 03.10.2006 on the application already filed by DVC before the State Commissions and to secure the difference between the tariffs, according to the Central commission order and the Tribunal’s order under appeal. To be calculated by such authority as this Hon’ble Court may seem fit and proper by way of deposit in a interest bearing account and to the credit of the appeal;

(b) Ad-interim order in terms of prayer above. “

The Hon’ble Supreme Court vide order dated 11.02.2008 dismissed the above prayer for interim relief.

- (n) This Tribunal in Appeal no, 38 of 2007 in its order passed on 20.12.2007 set aside the order dated 15.03.2007 passed by the State Commission clarifying that the parties shall be governed by the judgment rendered in Appeal No. 273 of 2006 and other connected matters dated 23.11.2007.
- (o) In Interlocutory Application filed by the State Commission seeking clarification in Appeal No. 69 of 2008, this Tribunal passed an order dated 20.12.2007 stating that *“the learned counsel for Respondent No. 1 states that the State Commission does not have the jurisdiction to determine the fuel surcharge in generation insofar as the Appellant is concerned. In view of this statement the learned counsel for the Appellant states that he does not press the Appeal. Accordingly, the Appeal is disposed of as not pressed. The above said correction shall be deemed to have been incorporated in the order with effect from August 9, 2007.”* Despite the aforesaid clarification that, in the instant case, the Central Commission has jurisdiction to determine FCS as part of generation tariff, the State Commission has erroneously interpreted that the FCS is related to generation tariff as well as to distribution tariff.
- (p) On 15.01.2008 the State Commission passed an order holding that the issue of Fuel Surcharge Adjustment of the Appellant was within the jurisdiction of the State Commission and directed the Appellant, DVC,

not to charge Fuel Surcharge Adjustment without the approval of the State Commission and to refund the excess collections made.

- (q) In Appeal No. 12 of 2008 filed by the Appellant this Tribunal passed an order on 12.02.2008 granting ex-parte interim stay of the order dated 15.01.2008 passed by the State Commission. This Tribunal in its order dated 28.01.2009 remanded the matter to State Commission to consider whether there is any Fuel Surcharge Adjustment in distribution apart from the Fuel Charge Adjustment in generation of electricity. The stay of the order dated 15.01.2008 passed by the Commission was also extended till the disposal of the matter.
- (r) The State Commission in its order dated 27.04.2009 reiterated its earlier conclusion regarding its jurisdiction over the Fuel Surcharge Adjustment of the Appellant, DVC.
- (s) The present appeal No. 85 of 2009 is filed by the Appellant against the impugned order of the State Commission dated 27.04.2009 challenging the jurisdiction of the State Commission to determine the fuel surcharge for the Appellant.

5. Having heard the arguments and gone through the basic Appeal document; replies by the Respondents and submissions made by the learned counsel for the Appellant, DVC; the Respondent No. 1, the State Commission and Respondent Nos. 2 & 3, the consumers of the DVC, we would record the contentions of the parties as hereunder:

CONTENTIONS OF THE APPELLANT

6. The Appellant while challenging the jurisdiction of the State Commission has contended that the planning for the availability of fuel for electricity generation being one of the activities in the process of generation only (and not in distribution process), the cost of fuel and any variation thereof reflected in the formulae of FCS for Fuel Cost Adjustment (FCA) are part and parcel of the generation tariff only. It has further submitted that after the Electricity Act 2003 ('the Act') came into effect on 10.06.2003, FCS formula being part of the generation tariff, the central Electricity Regulatory Commission (hereinafter referred to as the 'Central Commission') only has the jurisdiction to decide and it is outside the purview and jurisdiction of the State Commission. In other words the contentions of the Appellant is that the State Commission while approving the distribution tariff has no jurisdiction to re-determine Fuel Cost Surcharge already determined in the generation tariff by the Central Commission and FCS-adjusted-Generation Tariff is to be taken as input cost for determination of distribution tariff.

7. The Appellant has submitted that prior to the Act coming into effect on 10.06.2003, the tariff terms and conditions of DVC was solely governed by Section 20 of the DVC Act. In exercise of the statutory powers vested in DVC, it determined and notified the terms and conditions for its consumers located in DVC command area with effect from 01.09.2000 and the said tariff notification

contains provisions for FCS to be effected from time to time as per the formula given therein.

8. The Appellant has submitted that insofar as the DVC is concerned FCA and formulae for FCS computation is to be decided by the Central Commission as being done in case of other generating companies and bodies controlled by Central Government such as NTPC, NHPC, etc.

9. The Appellant has averred that the State Commission did not pay any heed to its submission before the Commission that this Tribunal in its judgment dated 23.11.2007 in Appeal No. 273 of 2007 and other connected Appeals taken together, has clearly settled the issue of jurisdiction on the Fuel Costs Surcharge in the following words:

“L. Fuel Price Adjustment: As regards the applicability of fuel price adjustment, the Government of West Bengal has contended that the same is within the jurisdiction of the State Commission. We find no substance in this argument as the applicable fuel price adjustment is to be decided by the Commission determining the applicable generation tariff.”

10. The contentions that Fuel Price Adjustment should be regulated by the West Bengal Electricity Regulations and not by the Central Commission was raised by the Government of West Bengal in Appeal No. 273 of 2006 and was rejected by this Tribunal.

11. In terms of the Section 62(1)(a) of the Electricity Act, 2003, the Appropriate Commission shall determine the tariff for supply of electricity by a generating company to a distribution licensee. The State Commission is admittedly not the Appropriate Commission in regard to the generation and inter-state transmission of electricity. In the instant case, the Central Commission only has jurisdiction to determine tariff for generation and inter-state transmission of electricity.

12. There cannot be any determination of the distribution tariff of the Appellant by the Commission till the time the generation and transmission tariff of the Appellant is determined. The generation and transmission tariff as determined by the Central Commission has to be necessarily adopted as input costs by the State Commission for determination of Distribution tariff. There cannot be re-determination or re-look by the State Commission for validating FCS as it has no separate identity other than the adjustment of the Fuel Cost. This also is in accordance with Rule 8 of Electricity Rules, 2005.

13. While admitting the Appeal No. 273 of 2006 this Tribunal passed orders dated 06.12.2006, 15.01.2007 and 26.02.2007 inter-alia directing the State Commissions of Jharkhand and West Bengal to proceed with the matter of determination of Distribution tariff with the rider that the final order shall not be passed till the disposal of the Appeal No. 273 of 2006.

14. The order of the Central Commission in regard to generation tariff and transmission tariff is binding on the State Commission. This Tribunal by the order dated 06.06.2007 read with the order dated 05.07.2007 passed in Petition No. 1 of 2007-08 by the State Commission held that the order of the Central Commission in determining Annual Revenue Requirement of DVC will not have a binding force in regard to the distribution and retail supply activities by the DVC. The DVC was asked to furnish all details as per the formula of the State Commission. This was appealed against by DVC in Appeal No. 107 of 2007 which was allowed by this Tribunal by its order dated 10.10.2007 setting aside the order of the State Commission holding that annual revenue requirement for the appellant as determined by CERC cannot be interfered with and the Commission's orders demanding a fresh ARR filing by the DVC cannot be sustained.
15. The matter relating to FCS is outside the purview of the jurisdiction of the State Commission and the State Commission is to adopt the generation costs with FCS as decided by the Central Commission as an input cost without going into the issue whether such cost is to be included in the tariff or not. The State Commission's view in the impugned order that Fuel Surcharge can be the part of both the distribution tariff and the generation tariff is erroneous and without any merit.

16. The Fuel Cost Adjustment does not amount to revision or change in tariff. It is only automatic adjustment based on the increase or decrease in the Fuel Cost. Thus the FCS formula is to be applied without there being any need to ask for any revision or modification in the tariff. The Appellant, DVC has consistently applied the above FCS formula for the period effective from 01.09.2000. The formula has been devised to adjust the amount recoverable on account of Fuel Cost on the actual cost. The State Commission itself accepts the contentions of the Appellant, DVC in the impugned order as under:

“We accept the plea of the respondent DVC that the increase in fuel cost surcharge has been charged in accordance with the fuel cost surcharge formula contained in their tariff for the consumers, effective from 1st Sept. 2000 fixed by them and they have not made any change in the tariff and the fuel cost surcharge formula is part of this tariff.”

Section 62(4) of the Electricity Act, 2003 also recognizes the above contentions.

17. FCS formula has been universally applied by all the generating companies in the Central as well State Sector, and the Independent Power Producers, etc. without the same being construed as a revision or modification of the tariff. That being so, the FCS accruing based on the FCS formula notified in the tariff of DVC effective from 01.09.2000 is not to be viewed as amendment or change in the tariff.

18. The Electricity Act 2003 on coming into effect repealed the provision of Section 20 of the DVC Act which empowered DVC to determine tariff. In terms of Section 6 of the General Clause Act 1894 read with principles contained in Section 185 of the Electricity Act, 2003, it is provide that all orders passed by DVC under the statutory powers of the DVC Act would continue to be valid and enforceable until they are modified or changed under Electricity Act, 2003. This is also in terms of the Tribunal's judgment passed on 20.05.2009 in Appeal No. 139 and 140 of 2007 (**Jindal Steel and Power Ltd. Vs. Chhattisgarh State Power Distribution Company Ltd.**) emphasizing the applicability of Section 6 of the General Clauses Act, 1894 read with Section 185 of the Electricity Act. 2003, in the transition phase of the tariff-regime.
19. The tariff notification of DVC effective from 01.09.2000 will continue to be valid till it is varied by the appropriate authority under Electricity Act, 2003. The Central Commission in its order dated 03.10.2006 has inter-alia come to the conclusion that the tariff for the entire generation and the entire transmission put together constituting 96% of the DVC tariff are to be determined by the Central Commission. It is for this reason that this Tribunal passed the orders restraining the State Commission to determine the distribution tariff and retail supply tariff till determination of the generation and transmission tariff by the Central Commission.

20. The Central Commission by its order dated 21.06.2005 had decided that the provisional tariff will continue to be applied till final tariff is determined. This is not a case of interim stay order but a decision to the effect that the provisional tariff determination by the Central Commission will continue till final tariff is determined. This would mean that the existing generation tariff alongwith FCS formula will continue.

21. The provisional tariff determined by the Central Commission on 21.06.2005 continued till 03.10.2006 when the final order was passed by the Central Commission and the same continued firstly, because of the proceedings before this Tribunal leading to order dated 23.11.2007 and thereafter due to denovo proceedings by the Central Commission to determine new tariff.

22. It is accepted that Section 86(b) of the Act empowers the State Commission to exercise regulatory control in regard to power purchase cost of the distribution licensee. This would, however, not apply to a pre-existing PPA as on the date of coming into force of the Electricity Act, 2003. The jurisdiction of the State Commission is limited to either approving or disapproving the purchase of quantum of power and not dictating the tariff terms and conditions to the generating companies. Also for the generating companies whose tariff is determined by the Central Commission, Rule 8 of the Electricity Rule 2005 imposes a complete bar for the State Commission to interfere with the price.

CONTENTIONS OF THE RESPONDENTS

23. The learned counsel for the Respondent Nos. 2 and 3 has made the submission as recorded hereunder.

24. The reliance placed by the Appellant in paragraph – L of this Appellant's judgment dated 23.01.2007 in appeal No. 273 of 2006 is misplaced and not applicable in the instant case as the said decision relates to generation and transmission tariff of DVC in the capacity of generating company and transmission licensee and not distribution tariff whereas the present case relates to distribution tariff of DVC in its capacity as distribution licensee. Further the issue of FCS viz a viz distribution tariff was never raised in aforesaid Appeal 273 of 2006.

25. The issue is whether DVC under the provisions of the Electricity Act and the regulations framed there under is entitled to charge from its consumers within the State of Jharkhand FCS adjustment without having sought approval from the State Commission by way of determination of the Distribution Tariff.

26. Unless the recovery of FCS is a part of distribution tariff and in turn approved by the State Commission, DVC in the present case cannot be permitted to recover such FCS from the consumers like Respondent Nos. 2 and 3.

27. By virtue of this Tribunal's judgment dated 23.11.2007 in Appeal No. 273 of 2006 which held that DVC's tariff fixing power under Section 20 of the DVC Act is inconsistent with the provisions of the Electricity Act 2003 and hence stands repealed. Once Section 20 of the DVC Act is rendered invalid any delegated legislation (like tariff) automatically stands invalidated. The DVC is implementing its *non-est* tariff of the year 2000 in violation of the judgment of this Tribunal dated 23.11.2007. DVC as a generating company can recover the generation tariff or components thereof only from the transmission licensee and not from consumers directly. It is only distribution licensee that can recover any thing from consumers with the approval of the distribution tariff from the State Commission.
28. Unless the distribution tariff is fixed by the State Commission, the DVC, distribution licensee is bound to comply with interim measures contained in the order of State Commission dated 27.04.2007. DVC under the guise of its own distribution tariff of 2000 notified under Section 20 of the DVC Act is consciously and deliberately charging FCS thus violating the interim order of the State Commission dated 27.04.2007 which has attained finality.
29. With reference to applicability of Rule 8 of the Electricity Act Rule 2003 it is submitted that the generation tariff fixed by the Central Commission is debarred from interference from the State Commission and subject to this the Commission is free to decide on the power procurement process. If the Appellant's claim that

the FCS claimed by it relates to only the generating tariff is taken as correct then DVC generating company cannot recover fuel surcharge from the consumers directly. It can, at the most, pass on this burden to DVC distribution licensee which in turn would be governed by the distribution tariff determined by the State Commission. This action of DVC is prima-facie illegal and unsupported by law.

30. Regulations 2005 notified by the State Commission has placed FCS as part of the distribution tariff. As long as the said Regulation provides FCS as a part of the distribution tariff, DVC, the distribution licensee, has no authority whatsoever under the law to bypass the State Commission and recover FCS directly from the consumers.
31. Respondent No. 1 the State Commission in its written submission has urged the following.
 - (a) As the appellant, DVC has not challenged the interim order dated 27.04.2007 passed by the Respondent commission in case No. 01 of 2007-08 it is bound to implement it and can only charge the tariff including the Fuel Surcharge applicable as on 31.03.2006 till final determination of distribution tariff by the Commission
 - (b) With the Electricity Act, 2003 coming into effect, Section 20 of the DVC Act 1948 stands repealed as ruled by this Tribunal in its order dated 23.11.2007 in Appeal No. 273 of 2007 stating that “4. According to the above said provision it is the appropriate Commission which is required to determine tariff.

Section 20 of the DVC Act providing for determination of tariff by the DVC being incompatible with Section 62 of the Act of 2003 cannot apply.” As such continuing to apply the tariff fixed by the Appellant, DVC notified in September, 2000 under the provision of Section 20 of the DVC Act 1948 is incorrect and not sustainable in law. The Appellant DVC justifying its continuance by taking recourse to Section 185 of the Act or section 6 of the General Clauses Act or grounds continuing to fill the vacuum in tariff till final determination of distribution tariff is irrelevant and inapplicable. Section 185 of the Act does not provide any exemption for the DVC Act, 1948. Section 6 of the General Clause Act is only applicable when the Central Government *“repeals any enactment.....unless a different intention appears”*. Also there is no question of vacuum in tariff as the Commission has only disallowed the distribution licensee, the DVC to levy additional FCS till determination of the final tariff as per the provisions of the Act. The judgment of the Supreme Court referred to by the Appellant DVC to justify the continuity of the tariff fixed under the provision of the DVC Act is also irrelevant, out of context and not applicable.

- (c) The Central Commission in Petition no. 66 of 2005 filed by the Appellant, DVC in its interim order dated 21.06.2005 had directed the DVC to continue to charge provisional tariff that it was charging on 31.03.2004 till further orders and such tariff that may be determined by the Central Commission. In the instant case, in terms of Section 79(1)(b),(c) and (d) of the Act the Central

Commission has only jurisdiction to determine tariff for generation and transmission but not the determination of the distribution tariff.

- (d) The jurisdiction to determine the 'tariff for retail sale' or 'distribution tariff' for supply to the consumers is that of State Commission. Admittedly, the central Commission has jurisdiction to determine the generation tariff of the DVC being a generating company controlled by the Central Commission in terms of Section 62(1)(a) of the Act for supply to the distribution licensee like West Bengal State Electricity Board, Jharkhand State Electricity Board and distribution licensee DVC for onward sale to its consumers and transmission tariff of the DVC being transmission licensee having inter-state transmission system in terms of Section 62(1)(b) of the Act. Therefore, the interim order dated 21.06.2005 is passed by the Central Commission is only confined to generation and inter-state transmission tariff of the DVC chargeable to distribution licensee like West Bengal State Electricity Board, Jharkhand State Electricity Board and distribution licensee DVC. It did not relate to the distribution tariff of the DVC. Accordingly, the restrictions imposed by Rule 8 of the Electricity Rules, 2005 also pertain to generation tariff and charges for inter-state transmission system. The said interim order dated 21.06.2005 of the Central Commission stood merged with the final order dated 31.10.2006 passed by the Central Commission and is no more in existence. Moreover the order dated 31.10.2006 passed by the Central Commission was challenged before this Tribunal in Appeal No. 273 of 2006 and other connected appeals. This Tribunal has set aside the order dated 03.10.2006 and

remanded the matter to Central Commission for denovo determination of tariff of the Appellant, DVC and the matter is still pending before the Central Commission and no interim order has been passed after the remand to the Central Commission.

- (e) The claim of the Appellant, DVC that FCS is only related to generation tariff and the Central Commission only has the jurisdiction to decide and the same is not in the purview and jurisdiction of the State Commission is fallacious and not sustainable under law. The Commission has submitted that FCS or for that matter any surcharge is part of the particular tariff and is not independent of that tariff. The FCS under question is a part of the distribution tariff chargeable for supply of electricity to the consumers in the State of Jharkhand by the distribution licensee DVC. The aforesaid component of the Fuel Cost Surcharge being part of the distribution tariff is, therefore, well within the jurisdiction of the State Commission and needs to be determined by it under Section 86(1)(a) read with Section 62(1)(d) of the Act . Section 62(4) of the Act has explicit provision that any tariff may have its FCS formula for permissible variation in tariff specified by the appropriate Commission which clearly means that the FCS formula has to be specified by the Commission which has determined the tariff. Like all other State Commissions the Jharkhand State Electricity Regulatory Commission has also specified the formula for FCS distribution tariff chargeable to the consumers. The reliance is misplace on paragraph 'L' of this Tribunal's judgment dated 23.11.2007 in appeal No. 273 of 2007 which inter-alia states that "***L. Fuel Price Adjustment***

..... *Applicable Fuel Price Adjustment is to be decided by the Commission determining the applicable generation tariff is misconceived and not applicable not applicable in the present context.*” The Appeal No. 273 of 2007 is against the order of the Central Commission dated 03.10.2006 which is in the matter relating to determination of generation tariff of the DVC. Thus paragraph L of the judgment dated 23.11.2007 is with respect to the Fuel Surcharge in generation tariff of the DVC Chargeable to the distribution licensee like Boards of West Bengal and Jharkhand. The said judgment has no applicability to the Fuel Surcharge chargeable to the consumers by the DVC being distribution licensee as this matter was never before the Tribunal in the said Appeal No. 273 of 2007.

- (f) The State Commission under provisions of Section 86(1)(b) regulates the Power Purchase Cost of the distribution licensee while determining its distribution tariff.
- (g) The claim of the Appellant, DVC that the determination of its distribution tariff by the State Commission could only be determined after the determination of the generation and transmission tariff of the Appellant by the Central Commission, is entirely misconceived, baseless and misleading and is a pretext of the Appellant DVC to continue its monopoly of charging the consumers in accordance with tariff fixed by itself in contravention to the provisions of the Act. The provisions of the Act show that the Commission has exclusive power for the determination of distribution tariff. The tariff approved by the Commission is final and binding and it is not permissible for

a licensee, utility or any one else to charge the different tariff. It was for these reasons the Appellant's circular charging a sum of Rs. 23.93 per unit additionally from the consumers on account of FCS without approval or determination of their retail tariff by the Commission was disapproved by the Commission.

ISSUES INVOLVED:

32. The dispute has raised the following issues for adjudication:
- A. Does state Commission has no jurisdiction in regard to generation companies owned and controlled by the Central Government?
 - B. Does Section 86(1)(a) and (b) of the Electricity Act 2003 empowers the State Commission to adjudicate or enforce or give effect in order against the generation entity which is under the jurisdiction of the Central Commission?
 - C. Whether FCS charges relate to generation tariff or the distribution tariff?
 - D. Whether the State Commission has jurisdiction to interfere with the recovery of FCS based on FCS formula contained in the tariff order notified by the Appellant effective from 01.09.2000 and valid consistently thereafter?

DISCUSSION

33. Keeping in view the background of the contentions of the appellant and respondents and the submission made by them, we would now take-up these issues for our analysis.

34. We will consider issues **A & B** together. The Appellant DVC is statutory body constituted under the provisions of the DVC Act, 1948 and promoted by the Central Government and the State Governments of West Bengal and Jharkahad. The corporation is controlled by the Central Government and is an integrated utility which in its electricity business, is inter-alia, being engaged in the generation, transmission and bulk and retail sale of electricity to the consumers in the Damodar Valley.
35. Admittedly the Appellant being a generation company controlled by the Central Government and also owning state Government transmission system is regulated by the Central Commission in terms of the provisions of Section 79(1)(a), (c), and (d) of the Act. The scheme provides that the Electricity Generated by the Power Generation Division of the DVC at the bulk tariff determined by the appropriate commission (i.e. Central Commission in the instant case) is sold and transmitted to its Distribution Division in terms of provisions of Section 62(1)(a) of the Act. The tariff for retail sale of electricity by the Distribution licensee (i.e. DVC's Distribution Division) provided by Section 62(1)(d) being distinctly different is determined by the appropriate Commission regulating the licensed area of the distribution licensee which, in the instant case, is undoubtedly the Jharkhand Electricity Regulatory Commission (JSERC).

36. The transmission and wheeling charges for the power from Power Generation Division of DVC to the DVC's Distribution Division and to other licensee such as WBSEB and JSEB are paid as per tariff determined by the Central Commission.
37. This Tribunal in the order dated 23.11.2007 passed in Appeal No. 273 of 2007 has settled the jurisdiction to regulate the tariff of the DVC relating to transmission of electricity and has held thus:

“ 48. Thus, there is no doubt that the DVC, which is a generating company, was established by the Central Government and it is the Central Government which has pervasive control over the DVC. This being so, under Section 79, the Central Commission is required to regulate tariff of the DVC as it is controlled by the Central Government. The mere fact that it is also a transmission licensee does not detract from the fact that it is basically a generating company controlled by the Central Government. Thus, neither the West Bengal State Electricity Regulatory Commission nor the Jharkhand State Electricity Regulatory Commission has the power to regulate tariff of the DVC. My learned brother has also held that it is only the Central Electricity Regulatory Commission which has the jurisdiction to regulate tariff of the DVC as a generating company. I also endorse the reasoning of my learned brother whereby he has concluded that it is the Central Electricity Regulatory Commission which has the jurisdiction to regulate the tariff of the DVC relating to transmission of electricity.”

38. It is also observed that the State Commission by its order dated 06.06.2007 read with the Order dated 05.07.2007 passed in Petition No. 1 of 2007-2008 filed by the DVC had decided that the Central Commission's approval of the Annual Revenue Requirements of DVC will not have a binding force in regard to the distribution and retail supply activities by the DVC and that the DVC cannot furnish all details once again as per the format of the State Commission.
39. The DVC challenged the aforesaid orders in Appeal No. 107 of 2007 and this Tribunal by order passed on 10.10.2007 allowed the Appeal and by setting aside the order of the State Commission has held as under:

“6. On hearing the counsel for the parties we find that the facts themselves lead to the conclusion that the demand made by the respondent Commission cannot be sustained in law. It is not disputed by the respondent that the annual revenue requirement for the appellant as determined by CERC cannot be interfered with. The Commission, however, requires bifurcation of all figures relating to capital costs etc. between the appellant's business in West Bengal and its business in Jharkhand. Mr. M.G. Ramachandran submitted that the activity and infrastructure of generation, transmission and distribution of the appellant is such that the cost cannot be bifurcated between its business in the two States. It is submitted that even the distribution assets of the appellant is common for the two States except, however, for the transmission lines which can be measured in terms of their length. The position is not disputed by Mr. Sudarshan Srivastava, counsel appearing for the Respondent. We appreciate the concern of the Commission which lies behind seeking bifurcation of the 13% of the capital cost which has gone into the distribution business in the two States. The

Commission is genuinely interested in keeping the distribution tariff for its industrial consumers at lowest possible level. However, the demand for filing a fresh ARR petition altogether and further showing therein the part of the cost incurred in business in Jharkhand is not possible to comply with. The consumers located in Jharkhand are required to meet only that part of the revenue requirement which arises out of the electricity supplied in Jharkhand. However, what proportion of the cost of supply of the appellant is attributable to business in Jharkhand has to be determined on some rational criteria other than segregated ARR in the prescribed format as mentioned above. At the time of hearing it was suggested that the bifurcation of 13% of the capital cost etc may be done in the ratio of the units of electricity consumed between the two States. The Commission may adopt this criteria or may evolve some other criterion suitable for the purpose as it may be advised. We refrain from giving any advice on this issue. The Commission's demand for a fresh ARR filing as made in the two impugned orders cannot be sustained and the appeal to this extent requires to be allowed.” (Emphasis supplied)

40. The tariff for generation and inter-state transmission being within the jurisdiction of the Central Commission, the cost of purchase of power by the DVC's Distribution Division may only be regulated by varying the quantum of purchase of power by the State commission in terms of Section 86(1)(b) and not by altering the tariff rates already determined by the Central Commission. This, however, is subject to the availability of power at merit order and competitive rates. Thus, during determination of distribution of tariff of the DVC's Distribution Division by the State Commission the cost of power purchase subject to approved quantum of power is to be taken as conclusive input costs alongwith with other costs incurred in the distribution infrastructure. In this context the

Commission's contention that in order to optimize the power purchase cost under Section (86)(1)(b) of the Act it may have to also vary the rates of tariff already determined for generation by the Central Commission is erroneous and is not consistent with the law. Rule 8 of the Electricity Rules 2005 specifically debars the aforesaid conduct of the State Commission.

41. The generation and transmission tariff in the instant case have to be necessarily adopted by the State Commission. Rule 8 of the Electricity Rule 2005 also specifically provide that

“8. Tariffs of generating companies under section 79: - The tariff determined by the Central commission of generating companies under clause (a) or (b) of sub- section (1) of Section 79 of the Act shall not be subject to re-determination by the state Commission in exercise of functions under clause (a) or (b) of sub-section (1) of Section 86 of the Act and subject to the above the State Commission may determine whether a Distribution Licensee in the State should enter into power purchase agreement or procurement process with such generating companies based on the tariff determined by the Central Commission.”

42. The State Commission has not complied with the provision of the above quoted Rule 8 which inter-alia states that when the generation tariff is determined by the Central commission in exercise of its jurisdiction, the State Commission cannot

- go into the same issue again in exercise of its powers under 86(1)(a) and (b) of the Act.
43. In view of the above, the State Commission constituted under Section 82 in exercising powers and function under Section 86 of the Act does not have jurisdiction for determination of tariff and regulations of generation and inter-state transmission system of the appellant DVC. Issues **A and B** have been answered in favour of the Appellant.
44. We shall now deal with issue '**C**' and '**D**' which inter-ala require resolution of the point as to whether FCS and its adjustment relates to generation tariff or to distribution tariff and further the validity of recovery of FCS based on FCS formula contained in the DVC's tariff order notified effective from 01.09.2000.
45. We need to clarify that in the entire electricity chain of generation, transmission and distribution of electricity, fuel is consumed only in generation process, wherein the fuel energy is converted into electricity. Thus, the cost of fuel considered as variable cost is one of the major costs in determination of generation tariff. It is not appropriate to argue that the cost of power generated and transmitted to the distribution licensee shall be paid by the transmission utility. It is totally incorrect as in the terms of the provision Section 62(1)(a) of the Act, the Appropriate commission shall determine the tariff when the supply is effected by a generating company. The transmission utility does not pay the cost

- of power but only levy the transmission and wheeling charges as determined by the appropriate commission. The Cost of the power alongwith transmission charges are required to be paid by the Distribution agency which in turn recovers it from the ultimate consumers. It needs to be appreciated that in the electricity chain of generation, transmission and distribution, the costs of generation, transmission and distribution of electricity are serviced by the ultimate consumers of electricity.
46. As there is no activity of fuel involved in transmission and distribution of electricity there cannot be any recovery of Fuel Cost or variation thereof in the tariffs for transmission and distribution segments. The actual cost incurred in the activities forming part of respective segment of the generation, transmission and distribution are only considered in the tariff determination of the respective segments. The activities pertaining to the purchase of fuel, its transportation to generator-site, processing etc., falling in the domain of generation segment, the fuel cost and variation thereof is to be recovered from the generation tariff only.
47. The determination of tariff for the generating plant comprise of computation of fixed and variable costs incurred in the process of generation of electricity. The fixed (capacity) cost is primarily derived from various costs such as capital costs; interest or loans; interest on working capital; O&M cost, return on equity; depreciation; income tax, etc, whereas the variable cost is primarily determined

by the approved basic fuel (Coal, Lignite, Natural Gas, etc.) used in the generation plant.

48. We would however, analyze the meaning of Fuel Cost Surcharge (FCS) and its adjustment i.e. Fuel Cost Adjustment (FCA). The dictionary meaning of 'surcharge' is 'additional charge or payment.' Therefore the FCS explicitly indicates variation in the base-cost of the fuel considered at the time of determination of generation tariff, which is allowed for periodic tariff adjustment during the tariff year as per formula authorized by the appropriate Commission determining the generation tariff. The variation in the cost of fuel may be positive or negative effecting the increase or decrease in the base-cost of the fuel. FCS which represents the quantum of variation in fuel cost is therefore integral to the base cost of the fuel used in generation and can only be considered by the Commission determining the generation tariff. The Fuel cost variation because of the price changes till next tariff determination will be the sum of the basic fuel cost taken in the previous tariff fixation and adjustment of FCS incurred during the tariff year. The resulting fuel cost will decide variable cost to be taken as base cost for fixing the variable charges of the tariff for the ensuing year. If FCS are determined by the Commission which has not determined the generation tariff the Commission determining the next generation tariff is likely to loose traceability of the FCS.

49. The adjustment of base cost of the fuel using FCS is authorized also by the provisions of Section 62(4) of the Act which reads as under:

“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 change expressly permitted under the terms of any fuel surcharge formula as may be specified.’

50. The FCS formulae which is a part of generation tariff is provided in regulations notified by the appropriate Commission determining the Generation Tariff and is an automatic pass through to the tariff dispensing with the requirement of approaching the Commission from time to time for computation of FCS. FCS is calculated by the generation utility and billed to the purchasers of electricity without the need to approach the appropriate commission. Periodic notification of FCS for correcting the Fuel Cost taken in the tariff may alter the generation tariff and the Act does not recognize it to be a revision or notification in tariff. In case of dispute in computation of FCS the appropriate commission having jurisdiction for determination of generation tariff will adjudicate the dispute. Hence, the applicable fuel price adjustment is to be decided by the Commission determining the generation tariff. The insistence of the Respondent to consider FCS in the process of the determination of tariff for distribution for approval is totally wrong as firstly this cost is not on account of activities involved in the distribution and secondly it being associated with the generation activities, the FCS is already

determined by the appropriate Commission approving the tariff for generation (Central Commission in the present case) for correction in the fuel cost.

51. In this context we would like to clarify that the Central Commission and the Jharkhand State Electricity Regulatory Commission both have exclusive domain of operation without any overlap. The Central Commission regulating the central generation plant as defined in the Act have specified the formulae applicable for computation of FCS. Also Jharkhand State Electricity Regulatory Commission has the regulations specifying similar formulae for FCS but applicable only to generating plants located in its domain of operation. The generation tariff of the plant located in the state of Jharkhand being determined by the State Commission will be subject to formula specified by the State Commission through regulations. The cost of fuel inter-alia means the FCS-adjusted-Cost and is to be taken as given alongwith other cost stream for determining the distribution tariff. Distribution tariff being fixed by the State Commission for the distribution licensee like Board will consider this cost while considering power purchase cost. We have seen above that the Commission can alter the Power Purchase Cost by changing the quantum of the power to be purchased by the licensee and not by changing the generation tariff inclusive of FCS already determined by the Appropriate Commission.
52. Considering the above, we inevitably reach to the conclusion that the cost of Fuel Surcharge is to be calculated in accordance with the approved formulae in

generation tariff so as to adjust the cost of fuel used in generation of electricity to bring it to the level of its true market price. The FCS, therefore, is to be regulated by the authority regulating the generation tariff and no one else. The impugned order dated 27.04.2009 has failed to establish fictional distinction to the effect that *“the distribution tariff may have its own fuel surcharge formulae and generation tariff may have its own.”* However, in the interest of smooth and orderly transition of DVC generation tariff from the regime of DVC Act, 1948 to Electricity Act 2003, it is unavoidably essential that the provisional tariff determined under Section 20 of the DVC Act effective from 01.09.2000 continues till the fixation of the final tariff for generation and transmission by the Central Commission. The purpose of Section 6 of the General Clause Act, 1894 read with principles contained in Section 185 of the Electricity Act, 2003, is exactly to avoid abrupt transition. Consequently the Issues ‘C’ and ‘D’ are also decided in favour of the Appellant.

CONCLUSION

53. In view of the above, we conclude that the State Commission has usurped the jurisdiction by creating unsustainable legal fiction and has also acted contrary to the orders passed by this Tribunal. We, therefore, allow the Appeal and set aside the impugned order by the Jharkhand State Electricity Regulatory Commission passed on 27.04.2009 in Case Nos. 11, 12, 14, 18 and 19 of 2007-08. The arrears on account of FCS formulae based on DVC’s tariff order dated 01.09.2000 is to be liquidated with delayed payment charge at the rate applicable

to the defaulting consumers of the State of Jharkhand within a period of six months from the date of this judgment.

54. This disposes of Appeal No. 85 of 2009, with no orders as to cost.

(A. A. Khan)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 22nd July, 2009.

Reportable/Non-reportable.