

(2008) 08 J&K CK 0002
In the Jammu And Kashmir High Court

Bari Brahmana Industries Asso and Another	APPELLANT
Vs	
Power Development Deptt., and Another	RESPONDENT

Date of Decision : 12-08-2008

Acts Referred:

Jammu and Kashmir State Electricity Regulatory Commission Act, 2000 — Section 17, 22, 36

Citation : (2008) 3 JKJ 464

Hon'ble Judges : Virender Singh, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Virender Singh, J.—In the instant appeals, the appellants are calling in question the validity of the order dated 28-03-2007 on common

questions of law and facts, therefore, are being taken together for disposal.

2. Distribution and fixing of electricity tariff applicable to various categories of consumers of the State of Jammu & Kashmir was earlier the

executive function of Power Development Department of the State Government (for short hereinafter to be referred to as PDD). With the

enactment of Jammu & Kashmir State Electricity Regulatory Commission Act, 2000 (hereinafter referred to as the Act), the power to determine

the electricity tariff has come to be vested with State Regulatory Commission (hereinafter referred to as Regulatory Commission). The Regulatory

Commission under the powers conferred u/s 36 read with Section 17(2) of the Act made regulations called Jammu & Kashmir State Regulatory

Commission (Terms and Conditions for Determination of Distribution Tariff) Regulations, 2005, (hereinafter termed as Tariff Regulations). Under

Clause (4) of these Regulations, a licensee (utility) is required to submit its

Annual Revenue Requirement (ARR) in the prescribed form for determination of the tariff. Respondent, Power Development Department, which is deemed as a licensee in terms of Section 6(a) of Jammu & Kashmir Electricity Act, presented its petition for fixing the tariff in respect of different categories of the consumers in the State of Jammu & Kashmir for financial years 2006-2007 and 2007-2008. The Commission after taking cognizance issued notices for inviting objections from all quarters and after affording opportunity of hearing to all the parties, passed the tariff order on 28.03.2007.

3. It needs to be mentioned here that in the said order, the Commission has determined the tariff for the year 2007-2008 (hereinafter to be referred to as FY 2008) operative from 01.04.2007 till 31.03.2008. So far as determination of tariff for the year 2006-2007 is concerned, it has been declined by the Commission on the ground of delay in filing ARR.

4. The appellants, Bari Brahmana Industries Association (Registered) and Association of Small Scale Industries seek to assail the said tariff order on different grounds.

5. The relevant portion of the tariff order relating to various categories of Industries is provided in Chapter 12 Schedule 7 of the order, which reads thus:

Schedule 7: LT and HT Industry

Schedule 7.1: LT Industry

Applicability

12.11 This schedule shall be applicable to all units registered with the Industries Department, Government of J&K, and covered under the Factories Act.

This shall include: all industries for power, lights, fans, coolers, etc. having a Contract Demand above 100 kW, which shall mean and include all energy consumed in factory, offices, stores, canteen, compound lighting, etc. and residential use therein, excluding power intensive industries.

Character of Services

(a) AC, 50 Hz, 230 Volts, single-phase up to a load of 5 kW.

(b) AC, 50 Hz, three phase, 400 volts supply for load up to 100 kW. Rate of Charge

(a) Metered Consumers

Particulars Approved Tariff

Energy charges

(Rs/kWh 200

Minimum Charges

(Rs./HP or Part thereof) 90

(b) Un-metered Consumers

Particulars Approved Tariff

Flat Rate Charges Rs./HP/month or any part thereof

8 hrs shift 300

8-12 hrs shift 450

Above 12 hrs shift 600

Schedule 7.2: HT

Industry

Applicability

12.12 This schedule shall be applicable to all units registered with the Industries Department, Government of J&K, and covered under the

Factories Act.

This shall include flour mills, hullers, power-loom, rice mills, dal mills, oil mills, ice factories, cold storage plants, masala grinders, other industrial

installations and workshops with manufacturing facilities, where raw material is converted to finished goods. Character of Services

(a) AC, 3 phase; 50 Hz on 11 KV above 100 kW up to 1 MVA

(b) AC, 3 phase; 50 Hz, 33 KV and above for load of 1 MVA and above Rate of Charge

Particulars Approved Tariff

11 kV supply

(Demand Charges 105.00

(Rs./kVA/Month)*

Energy Charge (Rs./kVAh)* 175*

For Connections above 100 HP

supplied on LT, Additional 5%

Surcharge on Demand and Energy

Charges at 11 KV tariff shall be

Chargeable

33 kV and above supply

Demand Charge (Rs./kVA/month) 105.00

Energy Charge (Rs./kVAh) 170

Or part thereof on Billing Demand

12.13 The billing demand for any month shall be taken to be the higher of the actual maximum recorded demand or 75% of the Contract Demand.

Schedule 7.3: HT Industry (Power Intensive Industries)

Applicability

12.14 This schedule shall be applicable to power intensive industries, as per the classification of the Department of Industries and Commerce,

Government of J&K and covered under the Factories Act. This shall mean and include all energy consumed in factory, offices, stores, canteen,

compound lighting, etc. and the consumption for residential use therein.

Character of Services

(a) AC, 3 phase; 50 Hz, 11 KV upto 1 MVA

(b) AC, 3 phase; 50 Hz, 33 KV and above for load of 1 MVA and above Rate of Charge

Particulars Approved Tariff

11 kV Supply

Demand Charge (Rs./kVA/Month)* 140

Energy Charge (Rs./kVAh) 2.00

33 kV and above Supply

Demand Charge (Rs./kVA/Month)* 1.35

Energy Charge (Rs./kVAh) 1.95

Or part thereof on Billing Demand

12.15 The billing demand for any month shall be taken to be the higher of the

actual maximum recorded demand or 75% of the Contract Demand.

6. I have heard Mr. Z.A. Shah, learned Senior Advocate assisted by Mr. Vipin Gandotra, Advocate, appearing for Bari Brahmana Industries

Association (in CIMA No. 65/2007), Mr. K.S. Johal, appearing for Association of Small Scale Industries (in CIMA No. 72/2007), Mr. A.H.

Naik, learned Advocate General appearing for State (respondent No. 1) and Mr. A.V. Gupta, learned senior Advocate assisted by Mrs. Swati

Gupta, Advocate, appearing for Regulatory Commission (respondent No. 2). Entire record of the Commission has also been perused by me

minutely.

7. Mr. Shah contended that the sole object of the enactment of the Act is to achieve the objective of rationalising the electricity tariff and to

promote efficiency in different electricity centres in the State. In this exercise, a transparency has to be maintained by the Commission and an

impartial and fair outcome is expected of it as the tariff fixed by the Commission virtually amounts to a verdict to be followed by the utility.

According to Mr. Shah, it has far reaching effect; on one side on the exchequer of the State and on the other side the consumers of different

categories. According to him, in the present case, it appears as if the Commission had assumed the role more than of a taxing authority rather

acting transparently as if the appellants were assesseees before it. Mr. Shah then submits that no doubt for the purpose of fixing tariff criteria with

respect to the industrial units and the domestic consumers has to be different as both cannot be rationally and logically clubbed together, but at the

same time fixation of tariff for industrial units, may it be Large Scale Industries or Small Scale Industries, Commission cannot be unreasonable and

irrational and, if the Commission ignores certain material/relevant aspects or vital issues, which can be said to be relevant for the purpose of

determining the tariff, it would render its order perverse and bad in law.

8. Mr. Shah, while strengthening his arguments and confining it within the aforesaid zone of consideration, has projected the following flaws in the

impugned order:

(a) The Commission has not maintained the transparency envisaged u/s 22 of the Act and it has, in fact, acted in a mechanical manner and dittoed

the ARR and the tariff proposal put forth by the utility/licensee without assigning

cogent reasons meaning thereby that the order suffers from non-application of mind.

(b) The Commission has not followed the legislative mandate as contained u/s 17 of the Act in as much as interest of the consumers, which is the paramount consideration, has not been safe-guarded. It was required of the Commission to apply prudence check on the expenses claimed by the utility and on the transmission and distribution losses. This all has to be passed on to the consumers. To dissect it further, Mr. Shah submits that the Commission should have reviewed the major elements of costs, viz., power purchase and procurement costs; employees costs and major aspects of inefficiency of operation, high level of transmission and distribution losses, high level collection efficiency and non-recovery of bills from Government Departments and Government Bodies as this has ultimately effect on determining the tariff.

(c) That the Commission has relied upon the repealed provisions of Jammu & Kashmir Electricity (Supply) Act, 1971. Therefore, the tariff order is perverse. In this regard, Mr. Shah has referred to Section 17(2)(a) and (2)(b) of the Act.

(d) The revenue requirement approved by the Commission and the tariff designed for recovery of such revenue requirement are erroneous and contrary to the material available on record. The PDD asked for the revenue requirement of Rs. 22 crores for year 2007-08 based on the proposed sale of 4949.90 million units, whereas the Commission has reduced the sale of power to 4243.30 million units. This reduction of 707 million units should reduce the power purchase cost also as this would mean that PDD will not be required to purchase higher, per unit cost electricity. PDD proposed Rs. 1834 crores as power purchase cost, Whereas the Commission approved only Rs. 1697.6 crores. This all reduction would reduce the amount by Rs. 257 crores. It would again have a major effect upon the determination of tariff.

(e) The Commission has not taken into account the 12% free power, which would be available for the current year from Dul Hasti Hydro General Project 390 MW. This ought to have reduced 20% of the power purchase cost. This amount has to be added with the aforesaid amount of Rs.

257 crores and a considerable reduction would be there from Rs. 1834 crores

proposed by the PDD.

(f) The Commission has also not taken into account the collection efficiency, which includes the outstanding payment from the Government

Departments. This would also have its effect. The arrears from the Government Department in the region is Rs. 1200 crores and if all that amount

is realized and considered with the pre-existing tariff, it would make the difference of more than Rs. 100 crores.

(g) That the Commission has also not taken into account the amount of Rs. 1300 crores made available by the Central Government as the grant,

which reduces the entire gap. This all changes the entire complexion and eliminates the scope of any increase in the tariff from the preceding

financial year 2006-2007 existing up to 31 -3-2007. There is increase of more than 25% to 50% in the tariff.

9. According to learned Counsel, all aforesaid material aspects need to be re-examined afresh in the present statutory appeals to arrive at the just

conclusion, as it is continuation of the lis.

10. Primarily on the basis of aforesaid submissions, Mr. Shah submits that the Commission should have, in fact, reduced the tariff for FY 2007-

2008, instead it has increased the same and, therefore, the tariff order impugned herein deserves to be set aside. .

11. Mr. Johal, learned Counsel appearing for Association of Small Scale Industries, raises the following additional contentions/grounds for assailing

the tariff order:

(a) That the commission was not properly constituted as the other two members were not appointed. It was singly headed Commission and that

too by a retired Administrative Officer, who was inclined more towards the utility. He was otherwise not a technical person on the subject and,

therefore, could not examine all the aspects/issues effectively and prudently. This makes the tariff order perverse.

(b) That even the main objections and supplementary objections of the appellant were not considered by the Commission; the parties were-heard

on 13.03.2007 and the impugned order was pronounced on 28.03.2007 within a very short spell of just fifteen days, which was practically not

possible by a singly headed Commission. This also smacks of either non-application of mind or a tilt towards the utility/licensee.

(c) The increase in the electricity tariff in case of Association of Small Scale Industries has caused significant shock to the consumers. The tariff has been fixed without any basis or any supporting document filed by the utility. That it was expected of PDD (utility) to calculate its ARR considering

Terms and Conditions for Determination of Distribution Tariff Regulations, 2005 notified by the Commission on 12.04.2005 and should have

furnished the requisite details following due procedure. Even otherwise, the other provisions of the relevant regulations applicable to the case for

fixing the tariff have not been adhered to.

(d) That PDD filed a petition for approval of its ARR for financial year 2006-2007 on 14.11.2006 and on 30.11.2006 it submitted another

petition for the approval of ARR for determination of tariff for the subsequent financial year 2007-2008. This exercise was done to create a mess

and, therefore, the Commission instead of diving deep into the details, virtually approved the tariff petitions as presented by the utility. This,

according to Mr. Johal, again reflects non-application of mind by the Commission, rendering the tariff order perverse. In this regard attention of the

Court has been drawn to certain details in the tariff petition left blank by the PDD (utility). According to the learned Counsel, the Commission

should have rejected the petition out-rightly and returned it to PDD, whereas it got the nod from it.

(e) That the Commission has not made any modification to the existing tariff for the year 2006-2007, whereas a drastic increase is shown in the

overall tariff for the industrial consumers for FY 2007-2008. There are two categories of industrial units. The First category of Unit holders are

who have sanction loan from 1 to 100 HP; and Second category of Unit holders have the sanction loan of 100 HP to 1000 HP. The manner in

which vide the order and the decision impugned has adopted the assessment/enhancement of the tariff is bound to seriously affect the two

categories of the Units referred to hereinabove. It is categorically and specifically submitted that with the passing of the decision/order impugned

the Industrial Units with sanction load of 1 to 100 HP would be bound to pay tariff 50% more than what it actually has been paying at present.

Similarly the Unit holders of the Second category viz with the sanction load of 100 HP to 1000 HP will have to pay enhanced effective tariff as per

the decision impugned to the total 60% to 100% over and above the tariff being paid by them as on the date of the order impugned.

(f) That the Industrial Policy 2004 has been ignored by the Commission. On one side the State is giving incentives to the industries so that the State

of J&K, which had undergone turmoil of militancy for reasonably long period, should set up maximum units; on the other hand, huge increase in the

tariff is going to adversely affect the said policy and this important factor has altogether been ignored by the Commission while fixing the tariff. The

Commission, in fact, has given to respondent (PDD/utility) more than what was actually asked for and this again indicates sheer non-application of mind.

12. On the basis of the aforesaid submissions, Mr. Johal submits that the impugned tariff order cannot stand on the touchstone of any rationality

much less legality and safely be said to be totally perverse deserving to be set aside.

13. Learned Counsel for both the appellants, in support of their contentions, have relied upon the following judgments:

i) West Bengal Electricity Regulatory Commission Vs. C.E.S.C. Ltd. etc. etc.,

ii) Maharashtra State Electricity Board Vs. Maharashtra Electricity Regulatory Commission,

iii) BSES Ltd. Vs. Tata Power Co. Ltd. and Others,

iv) Gaya Din (D) through LRs. and Ors. v. Hanuman Prasad (D) through LRs. (2001) 1 SCC 501.

14. Per contra, Mr. Naik, learned Advocate General submitted that the tariff order, impugned herein, has been passed by following the procedure

envisaged by the Act, Rules and Regulations. According to him, all relevant factors were kept in view by the Commission while fixing it. He further

submitted that the tariff suggested by the PDD was the lowest in the country.

15. According to Mr. Naik, petition was technically drafted, for which even the financial corporation has been consulted, as is clear from tariff

petition itself and all the relevant aspects have been incorporated in it. According to Mr. Naik, it is not only that the tariff structure which was to be

submitted before the Commission, it was also to be apprised of certain other relevant factors/aspects, which were to be adjudicated upon for the

purpose of determining the tariff, as this was being done for the first time in the

State of J&K. Therefore, the Commission was rendered all assistance by the utility/PDD on all material aspects.

16. Mr. Naik, while repudiating the submissions advanced by learned Counsel for both the appellants on technical aspects, has drawn the attention of this Court to the relevant chapters of the tariff order vis-a-vis tariff petition and contended that the tariff order does not suffer from any illegality or perversity. However, on the aspect of perversity, Mr. Naik also relies upon the judgment rendered in case titled West Bengal Electricity Regulatory Commission v. CESC Ltd., cited by the opposite side and submits that the order impugned rather gets support from the said judgment.

17. Mr. A.V. Gupta, learned senior Advocate, at the very outset, by way of preliminary objections, submits that an alternative remedy of filing a petition for review or revision u/s 72 of the Conduct of Business Rules, 2005, bars the appellants to approach this Court. He has, otherwise defended the impugned order on the similar grounds, as taken by Mr. Naik, and submits that there is no legal or factual error apparent on record, which can vitiate the order. According to him, it was not a regular trial before the Commission, which would call for re-appreciation by this Court afresh on all aspects. Mr. Gupta then submits that the fact that the Commission acted as quasi-judicial authority, may not be ignored by this Court.

18. Mr. Gupta then submits that in the present case, for the purpose of determining the tariff, the Commission consulted different authorities for getting data on all material aspects, which was made available to it. An expert was also appointed to assist the Commission and only then the tariff was determined. This fact is reflected in the introductory part of the tariff order itself. On technical aspects also, Mr. Gupta has assisted this Court and, while taking to the relevant observations made by the Commission, has supported the tariff order.

19. Mr. Gupta, however, fairly states that the judgment rendered by Hon'ble Supreme Court in West Bengal Electricity Regulatory Commissions case will be the guiding factor in deciding the controversy involved herein.

20. Since I have to re-appreciate all the vital aspects of the matter in the light of the contentions raised by the learned Counsel for the either side, in my view, it is necessary if the petition filed by the utility (PDD) and the objections raised by the appellants before the Commission, in brief, are

noticed.

21. The conceded position is that there has been no increase in the electricity tariff since 1999. The utility in its petition for approval and

determination of tariff for the year 2007-08 has tabulated/projected ARR under various heads. The revenue requirement from the year 2004-05 to

year 2007-08 shows a gradual increase in it. Though there was a minimal decline in the requirement from the year 2005-06 to year 2006-07, yet it

escalated ultimately to mounting level of Rs. 2200 crores in the year 2007-08 and eventually exhibited an Unmet Revenue Gap to the tune of Rs.

1695 crores. No doubt, it had a substantial support from Government of India and Planning Commission, still the net financial burden of the State

has been projected to the tune of Rs. 186.89 crores, despite observing the optimum level of economy.

22. The infrastructural activities of the utility are vast, broad based. A glance at the category-wise sale of MUs and percentage of sales from the

year 2004-05 (Actual Sale) to the year 2007-08 (Projected Sale) too shows an increasing trend. There are as many as 11 categories of various

wings, who are the consumers of energy to show an increasing trend. They are Domestic Consumers, Non-Domestic Consumers/Commercial

Consumers, Industrial Consumers and Agricultural Consumers, Central and State Government Undertakings, Public Lighting and PHE and Army

Supply. The charge supplied in the case reveals that the level of consumption of energy is maximum in the Domestic Sector, followed by Industrial

Sector, and Agricultural and then Army Supply. The total consumption which was 3856 MUs (Actual) in the year 2004-05, significantly rose to

4949.79 MUs (Projected) in the year 2007-08. Likewise the connected load of consumers from the year 2004-05 to the year 2007-08 too has

mounted. There were 987096 consumers (Domestic) of energy in the year 2004-05, which rose to 1101918 consumers in the year 2007-08. The

Industrial consumers from 22123 in the year 2004-05 rose to 26160 in the year 2007-08. The Agricultural supply from 10588 consumers in the

year 2004-05 rose to 12191 consumers in the year 2007-08. However, the Army supply from 848 consumers in the year 2004-05, declined to

743 consumers, but the consumption load of Army raised from 84.77 MW to 90.60 MW. The total figure shows escalation. There were 1163285

consumers in the year 2004-05 and the connected load was 1194.67 MW. However, by 2007-08 the number of consumers raised from

1307616 and the connected load was raised to 1396.85 MW. The net generation of power itself by the utility in the year 2004-05 was 15.23

MU, the same declined to 14.85 MU in the year 2007-08.

23. The cost of purchase of power from the Central Power Sector Undertakings and other agencies which was Rs. 2.04 per unit in the year 2004-

05, raised to Rs. 2.20 per unit in the year 2007-08.

24. Thus, the data finally shows that the net energy available for sale in year 2004-05 was 2856.29 MUs while in the year 2007-08, it was

4949.79 MUs.

25. The utility has further to bear out the Electricity Generation expenses of its own stations which as per its own saying has a small hydel project

of 4 MW, and very few small diesel based stations totalling 14.6 MW in Ladakh Region.

26. The utility is suffering and not immune from Transmission and Distribution Losses owing to the fact that metering is there on majority of

consumers and conventional meters wherever installed are mainly not functional. The utility has a plan to provide meters on all feeders and

unmetered consumers in order to initiate billing on the basis of energy actually consumed. Due to its endeavour, the utility has been able to control

the losses from the year 2004-05 which was 48% to 43% in the year 2007-08.

27. The total income of the utility, which stood at Rs. 1443.42 crores in the year 2004-05, is projected at Rs. 1834 crores in the year 2007-08.

28. The average cost of supply and average Revenue demand as projected in the year 2007-08 is Rs. 4.42 per unit and Rs. 1.35 per unit

respectively. The gap between the average cost per unit and average tariff per unit shows a negative assessment, for all the categories of the

consumers. It is as under:

(i) For Domestic Consumers, the gap is -3.74 per unit;

(ii) For commercial consumer, the gap is -2.85 per unit;

(iii) For Industrial consumers, the gap is -3.70 per unit;

(iv) For Agricultural consumers, the gap is -4.06 per unit;

(v) For Army supply, the gap is -1.98 per unit;

(vi) For temporary supply, the gap is -3.70 per unit;

29. The aforesaid situation is largely due to the fact that there has been no tariff increase since 1999. Thus, the gap is proposed to be reduced by the tariff increase.

30. Another factor which is worth mentioning is that for evaluating the tariff structure one of the principles adopted by the utility (PDD) is the rationalization of the categories of the consumers still the slab under different categories particularly for domestic and commercial is being

maintained to minimize the tariff shock. The tariff has been proposed up to 33 KV supply. The tariff of 33 KV supply are around 2.5% below that

is prescribed for 11 KV supply. Resultantly, if prospective consumer applies for a connection of 66 KV, or 132 KV, the tariff for supply at these

voltages shall also be kept at 2.5% below that of 33 KV respectively. For consumption of power by continuous process, the industries during

peak hours have to pay 25% additional charges over and above the existing tariff. Should a consumer be found using load in excess of the

sanctioned connected load, the minimum demand charges for the excess load shall be 1.5 times of the normal rate. For LT consumer, this extra

billing shall be done for the last 6 months and would continue until the excess load is removed or regularized. On the persistent default the

connected load could be removed as well.

31. No new connection would be provided without a meter. Concept of power factor control has been introduced, through which it would be

mandatory for the consumers of aggregate load of 5 KVP or above to pay surcharge of 10% on the energy charge (metered or flat).

32. I now advert to the objections filed by the appellants before the Commission. It has been asserted that PDD has not furnished requisite details,

information, particulars and justification qua the factual aspect of its petition which would create an impediment before the Commission to apply the

necessary prudence check for determining the tariff in a transparent manner as envisaged u/s 22 of the Act. It was then objected that there was no

detail with regard to cost of purchase of power; with regard to employees cost. The other objection was that there cannot be retrospective

enforcement of tariff by the utility and the revenue gap for the past period is the sole obligatory responsibility of the State Government, which

cannot be allowed to be filled at the cost of the consumers. In addition to this, the figure narrated by the utility in its petition, too has been controverted, and in turn, it has been asserted that per unit cost of Rs. 1.40 for power purchased from JKPDCL hydro-station, as claimed by the utility is excessive, unjustified and without there being any basis. The benefit of 12% free power which is available free of cost to the utility should also be taken into account. Further the PDD has not substantiated, as to how the amount of Rs. 2.20 per unit power purchase cost, for power available from CPUs Central Power Sector Generating Units has been worked out and absence of all these details would make the Commission totally handicapped for approving ARR and determine the tariff for the year 2007-08. The power purchase cost projected by utility to the tune of Rs. 1834 crores in the total ARR of Rs. 2200 crores is excessive. Similarly the grant of Rs. 1300 crores from the Central Government, if adjusted by the utility, it would set off the net revenue gap and even after accounting for 43% of T&D Loss, the existing tariff would still provide the utility a revenue to the tune of Rs. 503 crores.

33. Another objection is to the effect that the utility has not disclosed the huge arrears to be realized from various Government Departments and Organizations which should be to the tune of Rs. 1200 crores and this would be a sizeable revenue receipt of the utility, if realized.

34. On the pretext of collection efficiency, which was projected by the utility to be 75%, the appellants asserted that utility has not taken any concrete steps either to realize the amount, or to disconnect the connection of defaulted consumer, in accordance with the law. There has been no details submitted about the quantum of unrealized revenue resulting due to supply of either free supply of electricity, or supply at a concessional rate to specialized categories, like Border Migrants, Secretariat Employees. It has been urged that burden resulting therefrom should be set off through budgetary support.

35. The appellants further asserted that even otherwise estimated loss of 43% on account of Transmission and Distribution as claimed by PDD, is totally unjustified, in view of the fact that 96% of the registered consumers in the Kashmir Region are unmetered, and 53% of the consumers registered in the Jammu Region are unmetered. Above all, even 7 lac consumers

in the State are not even registered. Resultantly, only 75% of the metered and assessed electricity charges are actually recovered. The assertion regarding e-metering as claimed by the utility is still at its infancy. If the claim of the utility in this regard is otherwise correct, it would reduce the power load by 25-30%, then simultaneously the power purchase requirement too would proportionately be reduced by 25-30%. Recovery from the Kashmir Region in the State, which consumes 63% of the total available power, is poor at 30% and that too mainly from the Government Departments and Security Forces. Contrary thereto from the power available is only 37% against the revenue contribution of 70%.

36. On the basis of the aforesaid figures, it was asserted by the appellants that the situation before the Commission was totally unbalanced for determining the tariff.

37. If the comparative stand of the rival parties are prospectively analysed, the following broad issues are required to be discussed, which call for subjective answer:

1. Whether the impugned order dated 28-03-2007 passed by the Commission (second respondent) suffers from perversity or illegality apparent on record so as to declare it as nonest or inoperative upon the consumers.
2. Whether the Commission was not properly constituted being singly headed.
3. Whether the Commission has acted within an illegality and has not observed transparency u/s 22 of the Act.
4. Whether the Commission has not adhered to the legislative mandate as contained in Section 17 of the Act in as much as interest of the consumers has not been safeguarded.
5. Whether certain technical aspects viz., power purchase and procurement costs; employees costs, and major aspects of inefficiency of operation, high level transmission and distribution losses, high level collection efficiency and non recovery of the bills from the Government Departments and Government Bodies and other such like matters could become the subject matter of deep appreciation for this court while sitting in appeal. In other words will it be permissible or appropriate for the court to sit in appeal over the entirely technical view of the experts with regard to the factual aspect detailed in the tariff order.

6. Whether the objections filed by the one of the appellants (Association of Small Scale Industries) have been considered by the Commission and

the principles of natural justice, i.e., Audi Alteram Partem have been observed.

7. Whether an alternative remedy of not filing a petition for review or revision with regard to the tariff order u/s 72 of the Conduct of Business

Regulation 2003 bars the appellant to approach this court.

38. Before entering into a detailed discussion, it would be beneficial to note the scheme of the Act and its relevant Sections/provisions at the very

outset.

39. The aims and objects to be achieved by the Act as per preamble are as under:

An Act to provide for the establishment of a State Electricity Regulatory Commission, rationalization of electricity tariff, transparent policies

regarding subsidies, promotion of efficient and environmentally benign policies and matters connected therewith or incidental thereto.

40. Section 3 of the Act mandates the Government to establish a Commission known as the State Electricity Regulatory Commission by a

notification in the Government Gazette to be a body corporate of not more than three members including the Chair-person who are to be the

persons of ability, integrity and standing having adequate knowledge and capacity in dealing with problems relating to engineering finance,

commerce, economics, environment law and management, to be appointed on the recommendations of the Selection Committee constituted u/s 4

of the Act consisting of:

(a) Chief Minister...Chairperson

(b) Chief Secretary...Member

(c) Chairperson or a Member of Central Electricity Regulatory Authority as may be nominated by Government...Member

41. Section 8 of the Act enumerates the functions of the Commission which includes determination of the tariff payable for use of transmission

facility in the manner prescribed by Section 17.

42. In terms of Section 12 of the Act the Commission enjoys the powers of civil court in respect of the specified matters.

43. u/s 13, the Commission can establish State Advisory Committee for the

objects detailed in Section 14 which includes protection for consumers interest.

44. Section 16 confers the right of appeal before the High Court upon the person who feels aggrieved of the order or decision of the Commission.

45. Section 17 provides the manner in which the tariff is to be determined by the Commission.

46. Section 18 of the Act enjoins upon the Commission to record reasons in case it chooses to depart from factors specified in Clauses (a) to (f)

of Section 17 (2).

47. Section 22 requires the Commission to ensure transparency while exercising its powers and discharging its functions.

48. In terms of Section 25 of the Act the proceedings before the Commission are to be deemed judicial proceedings.

49. Under Sections 27 and 28, violation of the orders of the Commission have been made penal.

50. Section 36 empowers the Commission to frame regulations on the specified matters which includes the manner in which charges for

energy/electricity may be determined u/s 17 (2) of the Act.

51. In order to carry out the purposes of the Act the Commission framed the following regulations:

(i) J&K Electricity Regulatory Commission (Conduct of Business) Regulations.

(ii) J&K State Electricity Regulatory Commission (Terms and conditions for the determination and distribution of Tariff) Regulations.

(iii) J&K State Electricity Regulatory Commission (Appointment of Consultants) Regulations.

(iv) J&K State Electricity Regulatory Commission (Power Purchase and Procurement) Regulations.

(v) J&K State Electricity Regulatory Commission (terms and conditions for the determination of Hydro Generation Tariff) Regulations, 2006.

(vi) J&K State Electricity Regulatory Commission (Open Access in Intra State Transmission and Distribution) Regulations, 2006

(vii) J&K State Electricity Regulatory Commission (Distribution Performances Standard) Regulations.

(viii) J&K State Electricity Regulatory Commission (Notification Guidelines for Revenue & Tariff filing) Regulations.

(ix) J&K State Electricity Regulatory Commission (terms and conditions for determining Hydro Tariff) Regulations.

52. Thus, one of the principle functions of the Commission is to determine the tariff for use of energy/electricity, which is required to be determined

in accordance with the relevant regulations framed u/s 36 while being guided by the factors enumerated in Section 17(2).

53. For appreciating the controversy, the following provisions need to be taken note of in detail.

Section 17 reads thus:

Tariff by the Commission

1. Notwithstanding anything contained in any other law, the tariff for inter-State transmission of electricity and the tariff for supply of electricity,

grid, wholesale, bulk or retail, as the case may be, in the State (hereinafter referred to as the tariff), shall be subject to the provisions of this Act

and the tariff shall be determined by the Commission in accordance with the provisions of this Act.

(2) The Commission shall determine by regulations the terms and conditions for the fixation of tariff, and in doing so, shall be guided by the

following, namely:

(a) the principles and their applications provided in Sections 41, 52 and 53 of the Jammu and Kashmir Electricity (Supply) Act, 1971 and the Sixth

Schedule thereto;

(b) in the case of the Board or its successor entities, the principles u/s 56 of the Jammu and Kashmir Electricity (Supply) Act, 1971;

(c) that the tariff progressively reflects the cost of supply of electricity at an adequate and improving level of efficiency;

(d) the factors which would encourage efficiency, economical use of the resources, good performance, optimum investments and other matters

which the Commission considers appropriate for the purposes of this Act;

(e) the interests of the consumers are safeguarded and at the same time, the consumers pay for the use of electricity in a reasonable manner based

on the average cost of supply of energy;

(f) the electricity generation, transmission, distribution and supply are conducted on commercial principles.

(3) if the Government requires the grant of any subsidy to any consumer or class of consumers in the tariff determined by the Commission under

this section, the Government shall pay the amount to compensate the person affected by the grant of subsidy in the manner the Commission may

direct, as a condition for the licensee or any other person concerned to implement the subsidy provided for by the Government.

(4) The Commission, while determining the tariff under this Act, shall not show undue preference to any consumer of electricity, but may

differentiate according to the consumers load factor, power factor, total consumption of energy during any specified period or the time at which the

supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required.

(5) The holder of each licence and other persons including the Board or its successor body authorized to transmit, sell, distribute or supply

electricity, wholesale, bulk or retail in the State shall observe the methodologies and procedures specified by the Commission from time to time in

calculating the expected revenue from charges which he is permitted to recover and in determining tariffs to collect those revenues.

54. Regulation 20 of the J&K State Electricity Regulatory Commission (Terms and Conditions for the Determination and Distribution of Tariff)

Regulations reads as under:

Cost standard.- The tariffs for various categories/voltages shall be benchmarked with and shall progressively reflect the cost of supply based on

costs that are prudently incurred by the distribution licensee/utility in its operations. Pending the availability of information that reasonably

establishes the category-wise/voltage-wise cost to supply, average cost of supply shall be used as the benchmark for determining tariffs. The

category-wise/voltage-wise cost to supply may factor in such characteristics as the load factor, voltage, extent of technical and commercial losses

etc.

Sub-clause (6) of Regulation 7 also reads as under:

The Commission may fix targets, both long term and short term for loss reduction to bring down the distribution loss levels (both technical and

commercial) gradually to acceptable norms of efficiency.

Relevant portion of Regulation 11 reads as under:

Employee Costs, Administration and General (A&G) Expenses and Repair and Maintenance (R&M) Expenses.- (1) Employee Costs, A&G

Expenses and R&M Expenses for the tariff x x x x x

x x x x (2) the norms of Employee Costs, A&G Expenses and R&M Expenses shall be brought up to an efficient level within such span of time as

may be determined by the Commission.

55. Regulation 48 of the J&K Electricity Regulatory Commission (Conduct of Business) Regulations 2005 also reads as under:

48. Publication of tariff petitions and hearing on objections.- (1) The Commission shall invite objections/suggestion on the tariff petition from the

interested stake holders and this shall be followed by grant of public hearings as may be deemed fit.

56. Further Regulation 54 of the J&K Electricity Regulatory Commission (Conduct of Business) Regulations, 2005 also reads as under:

54. Subsidy from Government.- (1) The Government may, at any time as it considers to be appropriate, propose grant of any subsidy to any

consumer or class of consumers in the tariff determined by the Commission and upon receiving such proposal, the Commission shall determine the

amount to be paid as subsidy and the terms and conditions of such payment including the manner of payment of subsidy amounts by the

Government to the persons affected by the decision of the subsidy.

(2) While determining the tariff, the Commission shall take into account any subsidies, which the Government had agreed to give to any class or

classes of consumers.

(3) Notwithstanding anything contained above, no direction of the Government shall be operative if the advance payment of the subsidy is not

made by Government and the tariff fixed by the Commission shall be applicable from the date of issue of orders by the Commission in this regard.

(4) The distribution licensee shall be required to furnish documents to the satisfaction of the Commission that the subsidy amount received by the

distribution licensee from the Government is duly accounted for and utilized for the purpose for which the subsidy is given.

57. A glance on the above quoted provision by itself projects that in order to achieve the object set forth in the Act itself, the Commission would

be guided by all the factors, which would encourage efficiency, economical use of

resources, good performance, optimum investments. By and large Section 17 embodies the guidelines, which the Commission would bear in mind while working out the tariff.

58. So the legal validity of the tariff order, which is the subject matter of debate before this court, has to be tested on the touchstone of the relevant regulations concerning the subject and the relevant factors specified in Section 17 of the Act.

59. Admitted position is that the Commission has passed the tariff order for FY 2008 and expressed its reluctance not to divulge itself for

determining the tariff for the year 2006-07 considering delay in filing the petition by the utility. I, may observe here that although Mr. Johal has

made an attempt to assail the impugned order contending that it was all mess created by the utility as there was a gap of just two weeks in filing the

tariff petition for two financial years, but in my considered view, the said contention deserves to be repelled out rightly for a very simple reason that

the tariff petition for the year 2006-07 was rejected by the Commission at the very instance and there being no grievance projected by the utility

itself, can not be now made the subject matter of debate or dispute before me.

60. At the same time, I would like to comment upon the other two objections raised by Mr. Johal with regard to Commissions not adhering to the

principles of natural justice in not hearing the representative of Association of Small Scale Industries (appellant in CIMA No. 72/2007) and the

defect in constitution of the Commission being singly headed Commission.

61. In my view, both the aforesaid objections are without any substance. If one adverts to page 25 of the impugned tariff order, Chapter 3 (a)

deals with the objections raised during the public hearing process. One Mr. Ganyal, President Association of Small Scale Industries was also

present, besides other persons representing 13 Associations/Organizations, as is evident from the tariff order. This also included one Shri

Vikramjeet Gaur, Member Jammu & Kashmir State Consumers Protection Council. From this all, I do not feel any difficulty in holding that the

Commission had afforded reasonable opportunity to Association of Small Scale Industries, appellant herein, to project its cause.

62. The other argument with regard to defect, if any, in the constitution of Commission is equally unfounded. Once the Association of Small Scale

Scales Industries (appellant herein) has submitted to the jurisdiction of the Commission, may be singly chaired, filed objections, raised various pleas

during the public hearing process, this plea, in my view, shall not at all be available to Mr. Johal in order to find fault with the tariff order and I,

reject the same being not sustainable.

63. Similarly, on the other hand, preliminary objection raised by Mr. Gupta, learned Sr. Advocate appearing for the Commission (respondent No.

2), with regard to non-maintainability of the instant two appeals on the pretext that there is an alternative remedy of filing a review/revision u/s 72 of

the Conduct of Business Regulations, 2005, in my view, has also no merit in it. The appellants have knocked at the door of this court u/s 16 of the

Act having statutory right of filing the appeal agitating the entire case afresh. The scope of interference in review or revision is very limited.

Therefore, the said provision does not debar the appellants to approach this court u/s 16 of the Act. Thus, the preliminary objection, raised by Mr.

Gupta on this count, is hereby rejected.

64. Let me now deliberate upon the vital issues calling for the answer from this Court on the point of perversity if any in the impugned tariff order

dated 28.03.2007.

65. In my considered view, it needs to be examined to ascertain whether there exists an element of subjective satisfaction considering all the

material and relevant factors before handing down the said order and that a reasoned order is passed reflecting appreciation of mind and after

affording reasonable opportunity of being heard by all concerned.

66. One important factor, which is to be kept in mind while considering the case on hand afresh on all important factors, is that this is an order

passed by a quasi-judicial authority. No doubt, every action of public authority is subject to rule of law and if any particular action fails to satisfy

the test of reasonableness, it would be arbitrary. There should not be any element of arbitrariness in any action of the State or its instrumentality. In

case, the order passed by quasi-judicial authority is not suffering from such like flaws, then obviously the judicial review of the any action by the

courts of law is minimized. When any authority exercising quasi-judicial power passes an order, the law presumes that it would act bona fide.

Presumption exists that a statutory functionary would act honestly and bona fide.

Obviously, when there is a departure of rule by an authority, administrative or quasi-judicial, then judicial review is permissible.

67. Hon'ble Supreme Court in case Union of India (UOI) and Others Vs. Flight Cadet Ashish Rai, , held that there should be judicial restraint

while making judicial review in the administrative matters. Where irrelevant aspects have been eschewed from consideration and no relevant aspect

has been ignored and the administrative decisions have nexus with the facts on records, there is no scope of interference. The duty of the Court is

to confine itself to the question of legality; to decide whether the decision-making authority exceeded its power; committed an error of law;

committed breach of the rules of natural justice and reached a decision which no reasonable authority would have reached or there is abuse of

power.

68. No doubt, the above said case relates to a different subject, but, in my view, while deciding the present appeals, the same test shall be made

applicable to a great extent, as the impugned tariff order is passed by a quasi-judicial authority, which is an instrumentality of the State. Perversity,

if any, would also fall in the same zone of consideration.

69. The provisions enacted in the Jammu and Kashmir State Regulatory Commission Act, 2000, are pari materia with the provisions made by

West Bengal Electricity Regulatory Commission Act.

70. Learned Counsel for both the sides have heavily rested upon the judgment rendered by Apex Court in case West Bengal Electricity Regulatory

Commission Vs. C.E.S.C. Ltd. etc. etc., in support of their respective contentions. In this case, their Lordships in para 40 have observed:

40. While considering this question, it is relevant to notice that so far as the 1948 Act is concerned, the consumers had no such specific right. But

we notice that the 1998 Act brought about a substantial change in the manner in which the determination of tariff has to be made. It not only took

away the right of the licensee or a utility to determine the tariff, but also conferred the said power on the Commission. This was done because one

of the primary objects of the 1998 Act was to create an independent regulatory authority with the power of determining the tariff, bearing in mind

the interests of the consumers whose rights were till then totally neglected. The fact that the Commission was obligated to bear in mind the interests

of the consumers is also indicative of the fact that the Commission had to hear the consumers in regard to fixation of tariff. This right of the

consumers is further supported by the language of Section 26 of the Act, which specifically mandates the Commission to authorise any person as it

deems fit to represent the interest of the consumers in all proceedings before it. If the above provision of the Act is read in conjunction with

Sections 22 and 29 read with Section 58(2)(d) of the 1998 Act, it is clear that the Commission while framing the Regulations must keep in mind

the interests of the consumers for the purpose of determining the tariff. At this stage, it may be worthwhile to notice the mandate of Parliament in

Section 37 of the 1998 Act to the Commission that the Commission should ensure transparency while exercising its powers and discharging its

functions which also indicates that the proceedings of the Commission should be public which, in itself, shows participation by interested persons.

That apart, the State of West Bengal in exercise of its power u/s 57 of the Act has enacted the West Bengal Electricity Regulatory Commission

(Appointment of Chairperson and Members Functions, Budget and Annual Report) Rules, 1999. In the said Rules under Rules 4(1)(c) the State

Government has provided that the Commission before taking any decision on the rates of tariff must notify its intention in this behalf, in leading

newspapers of West Bengal and hold public hearing for the said purpose, (emphasis supplied) Even the Commission under the power conferred

on it in Section 58 of the Act, has framed the West Bengal Electricity Regulatory Commission (conduct of Business) Regulations, 2000 as

amended by the Regulations dated 3-2-2000, wherein, under Regulation 18 the Commission, can permit an association or other body corporate

or any group of consumers to participate in any proceedings before the Commission on such terms and conditions, including, in regard to the

nature and extent of participation as the Commission may consider appropriate. The Commission under Regulation 19 is also empowered to notify

a procedure to associations, groups, forums or body corporates or registered consumer associations, for the purpose of representation before the

Commission. These Regulations also provide for the procedure for the filing of affidavits, pleadings, service of notice and the right of participation.

Under Regulation 32 the manner of hearing before the Commission is also provided for. These Rules and Regulations framed by the State

Government and the Commission will have to be placed before the State Legislature u/s 59 of the 1998 Act. Thus, these Rules and Regulations have the necessary statutory force. A combined reading of these provisions of the Act, Rules and Regulations, clearly shows that the statute has unequivocally provided a right of hearing/representation to the consumers, though the manner of exercise of such right is to be regulated by the Commission. This right of the consumers is neither indiscriminate nor unregulated as erroneously held by the High Court. It is true that in Calcutta the respondent Company supplies energy to nearly 17 lakh consumers, but the statute does not give individual rights to every one of these consumers. The same is controlled by the Regulations. Therefore, the question of indiscriminate hearing as held by the High Court will not arise.

That apart, when a statute confers a right which is in conformity with the principles of natural justice, in our opinion, the same cannot be negated by a court on any imaginary ground that there is a likelihood of an unmanageable hearing before the forum concerned. As noticed above, though normally price fixation is in the nature of a legislative function and the principles of natural justice are not normally applicable, in cases where such right is conferred under a statute, it becomes a vested right, compliance of which becomes mandatory. While the requirement of the principles of natural justice can be taken away by a statute, such a right when given under the statute cannot be taken away by courts on the ground of practical inconvenience, even if such inconvenience does in fact exist. In our opinion, the statute having conferred a right on the consumer to be heard in the matter pertaining to determination of the tariff, the High Court was in error in denying that right to the consumers. Consequently, the right of the consumers to prefer an appeal u/s 27 of the 1998 Act to the High Court is similar, if they are in any manner aggrieved by any order made by the Commission. Alternatively, if the Company is an aggrieved party and if it prefers an appeal, then it has to make such of those consumers who have been heard by the Commission, as party-respondent, and such consumers will have the right of audience before the appellate court. In the instant case, none of the consumers/consumer organisations who were allowed to participate in the proceedings by the Commission have been made parties to the appeal. Therefore, the High Court ought to have impleaded and heard the appellant consumers herein. It has been further held by

their Lordships: Tariff determination

51. The next question which arises for our consideration is, under the 1998 Act who determines the tariff? The Commission proceeded on the

basis that under the 1998 Act i.e. u/s 22 read with Section 29, it was the Commission which had the authority to determine the tariff. As per this

understanding, the Commission had also laid down the terms and conditions under which it had to determine the tariff. However, the High Court

proceeded on the basis that in spite of the said sections viz. Sections 22 and 29, it is the licensee which in the first instance had to determine the

tariff which subsequently had to be scrutinised and approved by the Commission. The High Court was thereby of the opinion that the role of the

Commission in determining the tariff was only supervisory. In these appeals learned Counsel appearing for the appellants contended that the above

view of the High Court is wholly erroneous and contrary to the statute. They also argued that if the view of the High Court in regard to

determination of tariff is to be accepted, then the primary object viz., creation of the Commission under the 1998 Act itself would become

nugatory. Learned Counsel strongly relied upon the provisions of Sections 22, 27, 29, 30, 49, 50 and 58 of the Act in support of their contention.

Per contra, the learned Counsel appearing for the respondent Company supported the judgment of the High Court and contended that the primary

duty of the determination of tariff is that of the licensee and the Commission u/s 29 had only to frame the necessary regulation in this regard and

thereafter it only had the power of supervising the tariff determined by the licensee.

54. This view of the High Court is strongly supported by learned Counsel for the respondent Company. It is submitted by them that Section 22 of

the 1998 Act enumerates only the functions of the State Commission and the actual power to determine the tariff under the 1998 Act is traceable

to Section 29 of the said Act. Learned Counsel for the respondent Company further contend that even the exercise of power of determining the

tariff under Sections 22 and 29 is subject to Section 29(2) of the 1998 Act, which mandates that the determination of the tariff shall be made by

framing the Regulations, which according to learned Counsel, will have to be in conformity with Sections 46, 57 and 57-A as well as Schedule VI

to the 1948 Act. If that be so, they contend it is evident that the above provisions of the 1948 Act especially the Sixth Schedule empower only the

licensee to determine the tariff and that the Schedule having been retained in the 1998 Act, none else than the licensee can determine the tariff.

They also contend that Clauses (b) to (g) of Sub-section (2) of Section 29 only reiterate the principles already found in Schedule VI and,

therefore, do not have any specific significance in the context of the framing of the Regulations. Learned Counsel also relied upon Sub-section (4)

of Section 29 which, in their opinion, clearly states that the determination of tariff is to be made by the holder of each licence, though in a manner

specified by the State Commission.

56. First of all the non obstante clause in Schedule VI to the 1948 Act refers only to the provisions of the Indian Electricity Act, 1910. Schedule

VI which is found in the Act of 1948, the legislature could not have contemplated a subsequent enactment containing a non obstante clause coming

into force, nor does it say that this non obstante clause applies to or is in preference to all other enactments including future enactments. Therefore

this ground itself is sufficient to reject the argument of the learned Counsel for the respondents as to the prevailing effect of the non obstante clause

in Schedule VI to the 1948 Act. That apart, on a reading of the 1998 Act vis-a-vis the 1948 Act with reference to Schedule VI, or with special

reference to Sections 57 and 57-A of the 1948 Act, it is seen that Sections 22 and 29 of the 1998 Act are special laws and the 1948 Act is only a

general law in regard to determination of tariff. Consequently, because of the accepted principle in law that a general law yields to a special law,

the provisions of the 1998 Act must prevail. As a matter of fact this is the view taken by another Division Bench of the Calcutta High Court in

regard to this principle in law, as could be seen from the impugned judgment itself, but surprisingly after noticing the same, the impugned judgment

proceeds to take a contrary view without either distinguishing the previous judgment of a coordinate Bench or referring the matter to a larger

Bench. Be that as it may, this question is no more res integra. This Court in the case of Allahabad Bank v. Canara Bank after following an earlier

judgment of this Court held: (SCC p. 427, para 40)

40. Alternatively, the Companies Act, 1956 and the RDB Act can both be treated

as special laws, and the principle that when there are two special laws, the latter will normally prevail over the former if there is a provision in the latter special Act giving it overriding effect, can also be supplied. Such a provision is there in the RDB Act, namely, Section 34. A similar situation arose in *Maharashtra Tubes Ltd. v. State Industrial and Investment Corpn. of Maharashtra Ltd.* where there was inconsistency between two special laws, the Finance Corporation Act, 1951 and the Sick Industrial Companies (Special Provisions) Act, 1985. The latter contained Section 32 which gave overriding effect to its provisions and was held to prevail over the former. It was pointed out by Ahmadi, J. that both special statutes contained non obstante clauses but that the 1985 Act being a subsequent enactment, the non obstante clause therein would ordinarily prevail over the non obstante clause in Section 46-B of the 1951 Act unless it is found that the 1985 Act is a general statute and the 1951 Act is a special one. (SCC p. 157, para 9)

Therefore, in view of Section 34 of the RDB Act, the said Act overrides the Companies Act, to the extent there is anything inconsistent between the Act.

57. We are, therefore, of the considered opinion that we cannot accept the view of the High Court as well as the arguments advanced by learned Counsel for the respondents in this regard.

71. The scope of appellate power of the High Court has been explained as follows:

69. We have perused the above judgments as also the arguments of learned Counsel, and we have no hesitation in holding that the appellate power

of the High Court statutorily is not hedged in by any restriction, but in our opinion, the High Court merely because it has unrestricted appellate

power, should not interfere with the considered order of the Commission unless it is satisfied that the order of the Commission is perverse, not

based on evidence or on misreading of evidence, keeping in mind the fact that the Commission is an expert body. In the case of *U.P. Coop.*

Federation Ltd. v. Sunder Bros, while considering the appellate power of the Court u/s 34 of the Indian Arbitration Act, this Court held thus:

(SCC pp. 222 F-223 A)

It is well established that where the discretion vested in the Court u/s 34 of the Indian Arbitration Act has been exercised by the lower court the

appellate court should be slow to interfere with the exercise of that discretion. In dealing with the matter raised before it at the appellate stage the

appellate court would normally not be justified in interfering with the exercise of the discretion under appeal solely on the ground that if it had

considered the matter at the trial stage it may have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably

and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial courts exercise

of discretion. As is often said, it is ordinarily not open to the appellate court to substitute its own exercise of discretion for that of the trial Judge;

but if it appears to the appellate court that in exercising its discretion the trial court has acted unreasonably or capriciously or has ignored relevant

facts then it would certainly be open to the appellate court to interfere with the trial courts exercise of discretion. This principle is well established;

but, as has been observed by Viscount Simon, L.C., in *Charles Osenton & Co. v. Johnston*:

The law as to the reversal by a court of appeal of an order made by a Judge below in the exercise of his discretion is well established, and any

difficulty that arises is due only to the application of well-settled principles in an individual case.

71. Similar is the view taken by this Court in the case of *Reliance Silicon (I) (P) Ltd.* which was in regard to the appellate power of the Supreme

Court u/s 35-L of the Central Excises and Salt Act, 1944. We have also noticed carefully the decisions relied upon by learned Counsel for the

respondent Company, which have held that an appellate court whose powers are not hedged in by any limitation, is free to independently consider

the evidence and satisfy itself whether the findings and conclusions arrived at by the court of the first instance are proper or not. These judgments

cited by the learned Counsel for the Company also hold that the appellate court is competent to adjudicate all questions of fact and law and record

its own findings and that it can reappreciate and re-evaluate the evidence and arrive at its own finding and conclusions. These enunciations of law

found in the judgments cited by the learned Counsel for the respondent Company, in our opinion, in no way conflict with the decisions on which we

have placed reliance herein-above. It cannot be disputed that when the appellate power is not hedged in by any restriction, the appellate court can

independently reconsider the evidence, but the line of decisions relied on by us show that the rule of prudence in law is that such appellate power is

not to be exercised for the purpose of substituting one subjective satisfaction with another, without there being any specific reason for such

substitution. Further, in regard to the exercise of appellate power against the orders of expert tribunals, on facts, the appellate court which is not an

expert forum should be doubly careful while interfering with such expert forums findings on facts. That is a principle accepted by this Court with

which we respectfully agree. [See *Reliance Silicon (I) (P) Ltd. as also Collector of Customs, Bombay.*]

101. The right of audi alteram partem is a valuable right recognised even under the Indian Constitution (see *Maneka Gandhi v. Union of India*)

wherein it is held, the principle of the maxim which mandates that no one should be condemned unheard, is a part of the rule of natural justice. We

have already held that such right of hearing conferred by a statute cannot be taken away even by courts. While reckless and motivated allegations

against the court should be severely dealt with by appropriate proceedings, in our opinion, imposition of the punishment of denying a right of

hearing would amount to a violation of the principles of natural justice and, hence, should not be resorted to. However, in the instant case since we

have heard these appellants on the merits of the case, the said prejudice, if any, caused to them stands obliterated and requires no further

consideration.

72. While considering various factors manifest for fixing the tariff by the Commission, their Lordships with regard to the scope of powers of the

High Court, held that though the appellate power of High Court is not hedged in by restriction, but the High Court merely because it has

unrestricted power, should not interfere with the considered order of the Commission unless it is satisfied that order of Commission is perverse not

based on evidence or on misreading of evidence, keeping in mind that Commission is an expert body. The appellate Court which is not an expert

forum should be doubly careful while interfering with such expert forums finding on facts. The fixation of tariff, as observed by the Apex Court,

involves a highly technical procedure, giving rise to numerous technical and factual questions. Such matters cannot be effectively dealt with by the

Courts being not expert in the field, so it would have been better if there has been State Commission or Central Electricity Regulatory Commission

or other like body. But the fact remains that under the Act, Appellate Authority can sit over the order of the Commission, which has been vested

with the powers of fixation of tariff.

73. At this stage only, I would like to refer to the other judgments cited by learned Counsel for the appellants on the point.

74. In case BSES Ltd. Vs. Tata Power Co. Ltd. and Others, relied by learned Counsel for the appellants, is not applicable to the facts of the case

on hand. In the said judgment, their Lordships had examined the scope and ambit of the Maharashtra Electricity Regulatory Commission Act and

its Regulations on different aspects including the procedure adopted by the Chairman and its Members. Their Lordships, in that context, while

commenting upon Regulation 21 of Conduct of Business Regulations, 1998 (Maharashtra State), held that the High Court was justified in remitting

the matter. That is not the fact situation in the present case. In particular facts of that very case, their Lordships have also exhaustively examined

Sections 22(1) and 29 of the Regulatory Commission Act of that State with regard to the power of tariff determination by the Commission.

75. Dispute qua fixation of tariff also came up for the adjudication of Division Bench of Bombay High Court in case of Maharashtra State

Electricity Board, Mumbai v. Maharashtra Electricity Regulatory Commission, Mumbai, AIR 2003 Bombay 398, the other judgment cited by

learned Counsel for the appellants, and it was held that while fixing the tariff for electricity, the Commission has to necessarily take into

consideration terms and conditions for supply of electricity in so far as they add to cost of electricity. In that case, the Maharashtra State Electricity

Regulatory Commission had not accepted the claim of Maharashtra State electricity Board, regarding Transit Loss of Coal, while fixing tariff. The

Hon'ble High Court, in view of law laid down in the case of West Bengal Electricity Regulatory Commission (supra), held that loss being beyond

the control of Electricity Board should be considered while framing the tariff. In the present case, the Commission has considered the loss resulting

from Transmission and Distribution while analysing the tariff for the year 2007-08. This seems to be quite a reasonable approach of the

Commission.

76. The observations made by their Lordships in para 69 of case West Bengal Electrical Regulatory Commission (supra) show that although this

Court while sitting in appeal over the order passed by the Commission, possesses untrammelled powers, yet the opinion of the expert body like

that of Commission has to be respected and interference thereof would be warranted only if the order is based on no evidence or misreading of the

evidence that is to say perverse.

77. Perversity, in legal parlance, means a finding which is not supported by the evidence available on record or the evidence available does not

lead to the conclusion arrived at.

78. The dictionary meaning of the term perverse as given in Oxford Dictionary 10th Edition is:

Showing a deliberate and obstinate desire to behave unacceptably; contrary to that is expected and accepted; against the weight of evidence or the

direction of the Judge.

79. In Vekata Ramaiyas Law Lexicon 2nd Edition, the term perverse finding has been shown to mean as under:

A perverse finding is not only against the weight of evidence, but is altogether against the evidence itself. A wrong finding is not necessarily a

perverse finding; but the finding cannot be perverse merely because it is possible to take a different view on the evidence.

80. In case Gaya Din (D) through LRs. and Ors. v. Hanunab Orasad (D) through LRs. (2001) 1 SCC 501, the judgment relied upon by learned

Counsel for the appellants, their Lordships, while dealing with a case of Tenancy and Land Laws on the point of perversity, held that where the

findings of the subordinate authority are perverse in the sense that they are not supported by the evidence brought on record or they are against the

law or where they suffer from the vice of procedural irregularity, interference is permitted. Otherwise on facts, this judgment does not put the

appellants on any advantageous position.

81. From the aforesaid, it can be comfortably said that the order would suffer from the vice of perversity if it has been passed due to non-

appreciation of evidence; it is without evidence or improper appreciation of evidence or of relevant material on record. This would be the scope,

area and the extent to which this Court is required to venture into. However, at the same time while hearing the present appeals, one important

factor of which this Court can not lose sight of, is that the tariff order has been passed by a statutory body constituted not only to decide the

technical matter, but vested with the powers to frame regulations for its own efficient working. In the present case, the entire discussion shall be

within the four corners of Sections 17 and 22 of the Act. Primarily, it would be Section 17 of the Act read with certain relevant provisions of J&K

State Electricity Regulatory (Terms and Conditions for Determination of Distribution of Tariff) Regulations 2005 and of J&K State Electricity

Regulatory (Conduct of Business) Regulations, 2005 (as quoted above).

82. The foremost attack launched by learned Counsel for both the appellants, on the impugned tariff order is that the Commission has not

maintained the transparency envisaged u/s 22 of the Act and it has just dittoed Annual Revenue Requirement and Tariff proposal put forth by the

utility (PDD), which has inflated the cost.

83. After perusing the impugned tariff order and the record of the Commission made available by Mr. Gupta, learned Sr. Advocate, I am of the

view that the appellants cannot be put to any advantageous position on this count. Undoubtedly, Section 17 of the Act gives the guidelines, which

the Commission has to keep in its mind while determining the tariff and requires a comprehensive subjective finding by this Court. But, so far as

transparency is concerned, it is worth noticing that not only the appellants herein, who had submitted their objections and rather responded to the

petition comprehensively were afforded opportunity of being heard by the Commission, the Managers & General Managers of Industrial Units,

private individuals, Chamber of Commerce and Industries, Jammu Tawi; President Consumer Protection Society Jammu, Apna Vihar Residents

Welfare Association Jammu, Chenab Textile Mill and Political Organizations, were also heard in the matter. As already said in the preceding paras,

one Sh. Vikramjit Gaur, Member, J&K State Consumer Protection Council was also present. Perusal of the tariff order reflects that one Sh. Sofi

Yousaf, President, Bharatiya Janta Party, was also heard. In my view, the Commission was performing an important and arduous task evaluating

the tariff for the first time after its constitution and it kept all the transparency

leaving no doubt in the minds of the consumers of any category. At the same time, the Commission being conscious of the fact, took a note of insufficiency of the data in the petition, but instead of drawing an adverse inference to these irregularities may be on the premise that the petition submitted by the utility/PDD was first of its kind, collected the data from its own sources for the purpose of determining the tariff and expected the quality and the contents of the petition to improve subsequently. Thus, in my view, the Commission had streamlined all the material aspects relevant for the purposes of determining the tariff and exhibited a complete transparency. Another fact, which is worth noticing, is that the utility had also furnished certain additional information to the Commission to the knowledge of the appellants to facilitate the preparation of tariff order. Therefore, the objections raised on this count by the learned Counsel for the appellants are without any basis.

84. Let me now advert to the other flaws pointed out by learned Counsel for the appellants and referred to hereinabove, while formulating the various points for consideration. They are clubbed together for discussion being interlinked with each other and to be decided within the parameters of Section 17 of the Act and the relevant regulations.

85. Admittedly, in the State of J&K, there is no separate Electricity Board. At the same time, there is no system of distribution of electricity to the consumers on private basis. In this eventuality, Power Development Department (PDD) of the State is performing dual role i.e., as administrative department as also the utility within the meaning of the Act for the purpose of distribution of electricity to the consumers. At the same time, the Commission has been given onerous responsibility of not only bringing reforms in the Electricity Generation and Distribution System in the State, but also of fixation of tariff in such a manner that it is done on commercial basis and that it has direct reference to the cost of supplies.

86. In the present case, the Commission has kept the rational nexus between the various categories of consumers of electricity and the object of the Act to be achieved. This major factor by itself speaks volumes of the application of mind by the Commission.

87. One important factor, which is worth noticing here and agitated also by learned Counsel for the appellants, is that the tariff has been fixed

without any basis or without any supporting document filed by the utility. It was expected of the utility to calculate its ARR considering the Terms

and Conditions for Determination and Distribution of Tariff notified by the Commission on 12-04-2005 and should have furnished the requisite

details followed by the procedure. It is true that due to lack of data, category-wise cost of supplies could not be determined and, therefore,

average figure was taken by the Commission as cost supplies for all categories. In these circumstances, the following options were open before the

Commission:

(a) To rely on the Regulations;

(b) To collect its own information; and

(c) To get appropriate information from the Consultants.

88. In the present case, the Commission decided to rely on Regulation 20 of the Tariff Regulations, 2005, which reads as under:

Regulation 20

Cost standard.- The tariffs for various categories/voltages shall be benchmarked with and shall progressively reflect the cost of supply based on

costs that are prudently incurred by the distribution licensee/utility in its operations. Pending the availability of information that reasonably

establishes the category-wise/voltage-wise cost to supply, average cost of supply shall be used as the benchmark for determining tariffs. The

category-wise/voltage-wise cost to supply may factor in such characteristics as the load factor, voltage, extent of technical and commercial losses

etc.

89. A perusal of the aforesaid Regulation 20 shows that pending availability of the information that reasonably establishes category- wise/voltage-

wise cost to supply, average cost of supply shall be used as bench-mark for determining tariff.

90. In the tariff petition, the average cost of supply has been worked out by the utility itself. The Commission relied upon the report of the

Consultants appointed in accordance with the Regulations. Perusal of the record reveals that the Commission had appointed M/s Price

Waterhouse Cooper Private Limited. Undoubtedly, the appellants have not disputed the expertise of these Consultants or their commitment to the

job. The report of the Consultants is a very important part of record, which was relied upon by the Commission while fixing the tariff.

91. Learned Counsel for the appellants for submitting that the impugned tariff order is perverse, referred to Section 17 of the Act, particularly its

Sub-section (2)(a). It was submitted that this Section provides that Commission shall inter alia be guided by Sections 41, 52 and 53 of Jammu and

Kashmir Electricity Supply Act, 1971 and VI Schedule thereto. A reference was also made in this regard to Section 17(2)(b). It was contended

that aforesaid Jammu and Kashmir Electricity Supply Act has since been repealed and, therefore, any reliance made on these provisions by the

Regulatory Commission would make the tariff order perverse.

92. In my view, this argument is without any substance. A perusal of the tariff order (internal page 67) would show that the tariff philosophy is

adopted by the Commission. For reference, paragraphs 8.1, 8.2 and 8.3 of the tariff order are reproduced as under:

8.1 The Commission is mandated to work within the framework of the SERC Act, which requires it to be guided by the following aspects during

the fixation of tariff.

(a) That the tariff progressively reflects the cost of supply of electricity at an adequate and improving level of efficiency;

(b) The factors which would encourage efficiency, economical use of resources, good performance and optimum investments;

(c) The interests of the consumers are safeguarded and at the same time, the consumers pay for the use of electricity in a reasonable manner based

on the average cost of supply;

(d) The electricity generation, transmission, distribution and supply are conducted on commercial principles.

8.2 The Commission had framed the Terms and Conditions for Determination of Distribution Tariff Regulations, 2005 which laid the principles to

be followed during the tariff setting process.

8.3 It has deliberated on the adoption of rate-of-return approach against the performance based regulations for tariff setting in Discussion Paper on

Tariff Determination issued by the Commission in October, 2006. This paper, among other things, discusses the objectives of tariff setting, tariff

principles, methodologies and key issues involved in determining the retail

electricity tariff for the State of Jammu & Kashmir.

93. In view of the above, it can comfortably be observed that the Commission has taken into consideration all factors mentioned in Section 17

except Section 17(2)(a) and (2)(b), as they do not find mention in the tariff philosophy. No part of the impugned tariff order reflects that the

Commission has referred to Jammu and Kashmir Electricity Supply Act, 1971. That means the repealed provisions were not taken into account at

all. However, assuming considerations of Supply Act in terms of Section 17(2)(a) and (2)(b) of the Regulatory Commission Act have been kept in

view by the Commission despite the repeal of the Supply Act, in my considered view, it would be of no consequence. By the doctrine of

incorporation, the provisions of Supply Act have become part and parcel of Regulatory Commission Act. So mere repeal of Supply Act would not

affect its applicability under Regulatory Commission Act.

94. In the context of Transmission and Distribution Losses, the Commission after noticing rival contentions, specially with regard to the assertion

that Transmission and Distribution Losses in the State were 47% in 2005-06 and were expected to be reduced to 43% in year 2007-08 and being

conscious of the fact that the utility had sought for the services of M/s S.R. Baltiboi and Associates, independent auditors for assessing the status of

Transmission and Distribution in the State, has expressed a realistic hope that there exists scope for reduction of these losses and consequently

refrained itself from issuing any directions.

95. The issue of power purchase cost, in my view, has also been properly analysed by the Commission in the light of material placed before it. No

doubt, the complete details relating to the power purchase cost by the utility were not furnished before the Commission, yet the Commission has

properly assessed power purchase cost of the utility.

96. In the area of expenses on employees, the Commission appears to be conscious of the fact that the employees needed to be equipped with

latest technical know-how infrastructure, which has become need of hours.

97. On the aspect of recovery from Government Departments and Undertakings, the Commission, in fact, accepted the contention of the

appellants that any projected inefficiency in the matter of collection should not be passed on to the consumers in the current tariff order. In fact, a

mandate has been issued to the utility to submit details of existing dues and expected collection efficiency to be 100% from such consumers for

realising the payment of bills.

98. On the Tariff related issues, the Commission after considering the comments of various categories of consumers has determined the slabs that

reflect the cost of supply in a progressive manner and at the same time ensuring that the marginal consumers are always protected. On this analogy,

the Commission has specifically observed that Tariff has not been increased for the last 9 years, and as such the determination of Tariff is a

necessity to promote the financial viability of the utility. As a step in this direction, the Commission has decided to introduce the Time of Day Tariff

concept and levy different tariff for peak and non-peak hours. Still further, while dealing with the issue of imposing minimum charges, the

Commission has a reason to believe that the same is disincentive for the energy conservation. It has consequently removed the minimum charges

from the purview of the HT Industry, HT General purpose bulk supply and HT Waterworks category and replaced the same by demand charges.

It has also comprehensively rationalized the minimum charges for LT domestic consumers and expressed its intention to completely do away with

the same in future tariffs.

99. Because the metering programme undertaken by the utility is financed through the grant received by it, hence the Commission has not levied

meter rental, for recovery of cost not incurred. The Commission has justifiably declined to observe any thing on the issue of Electricity Duty, which

is a tax levied in accordance with the Electricity Duty Act, 1963 (State Act) and the levy of this duty being beyond the purview of the Commission.

100. The Commission has taken a serious note of the unsatisfactory quality of supply of electricity and called for a realistic improvement in this

direction. Rightly so. Increase in tariff for its validity must co-relate to the quality and regularity of supply of electricity by the utility.

101. While reviewing the Sales Projection, the Commission after considering the data made available to it, has observed that there has been a

uniform growth rate at the rate of 6.77% for the period of 2006-07 and has ultimately projected a uniform growth at the rate of 8.58% for all

consumers in any of the category. On the front of Domestic supply of energy, the

Commission has observed a steep increase at the rate of 12.5%, simultaneously also observing that only 14.20% of the domestic consumers have been metered. Yet on the core issue of Transmission of Distribution Losses, the Commission on the analysis of the evidence made available to it, particularly on giving its thoughtful consideration to the recommendation of the Abraham Committee report, expressed a belief that utility would be able to reduce its losses by 4% in the year 2007-08. It has commanded upon the utility to segregate the losses into Technical Losses and Commercial Losses, specify and devise a detailed plan for achieving the loss reduction.

102. The Commission, while analysing the level of energy available to the utility, has dealt with the issue segment-wise. It has considered the data

at its disposal. In this regard, it is worth mentioning that energy available from the State owned stations during the period 2004-05 was 748.3 MUs

(Million Units) and the availability for the year 2007-08 has been projected at 891.6 MUs. The energy and the availability for the year 2007-08

has been projected at 891.6 MUs. The energy is also available from NTPC stations and total generation is 69366 MUs corresponding to the

installed capacity of 11784 MWs. Availability is also available from NTPC stations and total generation is 69366 MUs corresponding to the

installed capacity of 11784 MWs. Availability of the energy from NHPC is 11784 MUs Annual and the availability from the other sources is 770.6

MUs. This apart, there is also self-generation of energy from the diesel generation units of the capacity of 14.60 MW primarily to provide

electricity to Ladakh Region. The utility has also one Stakna Hydro-electric Station with the installed capacity of 4 MW, for self-generation. For

the year 2007-08, the utility has projected annual generation of 12.5 MUs from its Diesel Generation Stations and generation of 5 MUs from

Stakna Hydro-electric Station. The Commission has also examined the cost incurred by it, from the self-generation of energy and for procurement

of the same from various avenues.

103. The Commission has considered the data made available regarding relative cost incurred for procurement of energy from each and every

NTPC station, NHPC stations and other stations. While the assessment vis-a-vis NTPC stations, NHPC stations and other stations regarding

variable cost incurred has been considered at per unit level. Thus the energy balance of the utility towards its power purchase requirement for the year 2007-08 has been worked out at 7949.1 MUs. Also the power purchase cost from the State owned Generating Stations has been taken note of to the tune of Rs. 90.2 crores, against 891.6 MUs. On the examination of its data, the Commission has eventually approved the power purchase cost of the utility from the Central Generating Stations and the average cost of one unit of energy for the utility, based on approved power purchase quantum and cost for 2007-08 is Rs. 2.14 per unit as held by the Commission.

104. The Commission comprehensively reviewed various aspects of cost, which comprises of the Annual Revenue Requirement (ARR). In the arena of Establishment Expenses, the Commission has drawn a comparison vis-a-vis HPSEB (Himachal Pradesh State Electricity Board) and approved the employees expenses for 2007-08, noticing that utility serves same geographical area as that of HPSEB. However, the Commission suggested for revolutionary measures to be adopted by the utility for optimum utilisation of its staff. Cost towards operation and maintenance expenses which the utility has projected at 56.50 crores for the year 2007-08 has been approved by the Commission to the extent of Rs. 36.61 crores by considering the Annual Inflationary increase at the rate of 6%. Though no specific details regarding the value of Assets were available with the Commission, yet the depreciation rate based on a useful life of 25 years, and a residual value of 10% has been approved by Commission at 3.60% and thus approved depreciation of the utility in the year 2006-07 and year 2007-08 shall be Rs. 69.7 crores and Rs. 73.6 crores respectively.

105. In reference to interest and finance charges, the Commission was deprived of any substantive evidence regarding loan repayment, thus the Commission chose the basis of Opening Balance, Closing Balance and amount payable as interest for ascertaining the interest rates applicable for Market Borrowings, Loan from LIC and Loans from REC, which has been worked out at 11.98%, 14.16% and 11.45% respectively. It has worked out the specific calculation in this regard from year 2003-04 up till year 2007-08 and accordingly approved the interest expenses at Rs. 21.81 crores for the year 2006-07 and Rs. 17.95 crores for the year 2007-08.

Thus collectively against the proposed Revenue Requirement to the tune of Rs. 2200 crores for the year 2007-08, the Commission has eventually approved Rs. 2075 crores. Based upon the approved value of energy sales and ARR of the utility, the average cost of supply of the utility in the year 2007-08 is Rs. 4.891 per unit.

106. The Commission has also considered the aspect of Generation of Revenue from the Sale of Power. It has computed the Revenue of each

category of Commission on the basis of projected sales and approved tariff for different slabs within a particular category. In this regard, the total

approved sale of power for the year 2007-08 has been worked out at 4243.4 MUs. The Revenue at the existing tariff was Rs. 6295.5 crores,

while at the approved tariff, it went up at the level of Rs. 1042.1 crores. The average tariff, considering all the categories of consumers, comes to

Rs. 2.46 per unit. Specifically to the case of the appellants, it comes to Rs. 2/- per unit in case of LT Industrial, Rs. 2.72 per unit in case of HT

Industrial and Rs. 3.49 per unit in case of HT Industrial for Power Intensive Industries.

107. The Commission did consider the aspect of subsidy being granted to the different categories of consumers. The total subsidy at the average

cost per unit of Rs. 4.89 has been worked out at 49.7%. Specifically to the case of appellants, the subsidy in case of LT Industrial is 59.1%, in

case of HT Industrial, it is 44.3% and in case of HT Industrial for Power Intensive Industries is 28.6% (All have been worked out at the average

cost of supply at Rs. 4.89 per unit).

108. The Commission has also set the target regarding collection efficiency for the year 2007-08 to be 77%, which would account for towards

generation of Revenue for the utility. Thus the total Revenue Realisation on the basis of approved sales and tariffs and target collection efficiency

has been worked out at Rs. 802.4 crores and the Non-Tariff Income for the year 2007-08 has been worked out at 2 crores.

109. For the purposes of fixing the tariff, the Commission was required to work within the framework of State Electricity Regulatory Commission

Act and was guided by the following aspects:

a) The tariff progressively reflects the cost of supply of electricity at an adequate and improving level of efficiency;

- b) All factors which would encourage efficiency, economical use of resources, good performance and optimum investment;
- c) The interests of the consumers are safeguarded and at the same time, the consumers pay for the use of electricity in a reasonable manner, based on the average cost of supply;
- d) The electricity generation, transmission, distribution and supply are conducted on commercial principles.

110. The Commission seems to have determined the tariff on the basis of average cost of supply and intended to shift from the existing tariff

structure, which was not based on the principle of cost of supply. Therefore, the Commission has noticed that existing tariff for various categories

of consumers is much lower than the average cost of supply. Consequently, the Commission has raised the tariff for connections to State

Government, Central Government and Defence Installations to the level of average cost of supply forthwith and opined that the tariff for the other

categories shall be raised to the level of cost of services.

111. The Commission has relieved the utility from the burden of meeting the subsidy by observing that all the departments to whom the energy is

being supplied at a subsidized rate shall themselves bear the burden of receiving energy at a subsidized rate.

112. The Commission has adopted the cost plus approach for determination of tariff and intended to shift to the performance based regulation

approach in times to come and expressed in plain terms that no cost would be approved, which is the outcome of non-achievement of approved

performance targets, such as reduction in T&D Losses, improvement in collection efficiency.

113. The concept of time of day tariff was evolved by the Commission and it strongly felt that it would give signal to the consumers to manage their

respective power purchase system keeping in view the higher cost of supply during peak hours. Consequently, the Commission observed that the

consumer must pay higher than the normal during the peak hours and lower for the consumption during lean hours, when the cost of power

purchase is low.

114. The Commission has also decided to introduce the concept of Two Power Tariffs for all metered categories of consumers, as this system has

successfully worked out in most parts of the country. The reasons for this adoption given by the Commission are as follows:

- a) The utility can recover its fixed expenses incurred even when the consumer is not consuming electricity;
- b) Consumers are charged for each unit of electricity consumer, thus providing a direct incentive to save electricity;
- c) The utility is encouraged to improve its billing and metering system, as the removal of minimum charges ensures recovery only on billed amount;
- d) The consumer is encouraged to declare his connected load correctly;

115. While rationalizing tariff structure, Commission has also introduced fixed charges for HT and bulk consumers in the form of demand charges.

The Commission has expressed a belief that KVAH (Kilowatt Ampers hours) based tariff is a better approach due to reasons of greater

transparency, reduced likelihood of occurrence of errors and above all, reduced administrative burden on the utility. Thus, it introduced KVAH

tariff at the initial stage for all the consumers connected at the load of 11 KV and above. It is further said that all the consumers having a connected

load above 5 KW shall be charged KVAH tariffs, when the facility by installation of tri-vector meters is provided for by the utility. Thus eventually,

the Commission has determined the Tariff design for various categories of consumers and accordingly proposed the Tariff so determined by it, and

approved the same. Separate Tariff has been approved for Domestic Supply/Non-Domestic and Commercial Supply, Supply to State and Central

Government Departments and Industrial Supply etc. In this regard, the Commission has kept in mind the character of service provided to each and

every one by the utility, in terms of supply of power.

116. Thus, taking into consideration all the aforesaid relevant factors and after appreciating the controversies raised at the Bar, in my considered

view, the tariff order impugned herein, has been passed by the Commission after adequate consideration of different aspects of the matter vis-a-vis

consumers of different categories on the basis of the material available before it. In fact, it has been passed with the object of rationalizing the

already creeping financial structure of the utility and to secure the optimum utilization of various energy generating resources of the utility. It carries

wide scale ramification towards cost related factors for securing effective energy

output. All the available data has been adequately and deeply considered by the Commission in the light of the contentions of the utility, as projected in the petition, and objections raised by the appellants.

Before handing down the order, the Commission had the assistance of the expertise in the field. Technical know-how and assistance was also rendered to it. On certain issues, the Commission even expressed its disturbing concern emanating from non-availability of the data and, thus, observed against the utility. The approval of tariff vis-a-vis various categories of consumers in the manner of consumption of energy up to a particular level, shows an in-depth approach of the Commission qua the task in hand. Therefore, it cannot be said that it is passed without application of mind or it is not based on evidence. Examining the entire controversy from the factual matrix and from the legal point of view, I am of the considered view that the impugned tariff order does not suffer from any legal invalidity so as to call it perverse.

117. Resultantly, finding no merit in both the appeals, {CIMA Nos./65/2007 and 72/2007}, they are hereby dismissed.

118. Record of the Commission be returned to Mr. A.V. Gupta, learned senior Advocate, and counsel for the Commission.