

(2013) 12 AP CK 0134

In the Andhra Pradesh High Court

Case No : Writ Petition No's. 4330, 4340, 4926, 6736, 6837, 6848, 7165, 7184, 7185, 7201, 7443, 7458, 9379, 9465, 9490, 10807, 12575, 17859, 17893, 18270, 19662, 19663, 19678, 19705, 19799, 19855, 19856, 19857, 19858, 19871, 20387, 20403, 20405, 20410, 20968, 2096

M/s. Dhanalakshmi Iron Industries Limited and Others

APPELLANT

Vs

A.P. Electricity Regulatory Commission, The Central Power Distribution Company of A.P. Ltd. and The Senior Accounts Officer, Operation, The Central Power Distribution Company of A.P. Ltd. and Others

RESPONDENT

Date of Decision : 06-12-2013

Acts Referred:

Citation : (2013) 12 AP CK 0134

Hon'ble Judges : Sanjay Kumar, J

Bench : Single Bench

Advocate : D.V. Nagarjuna Babu, for the Appellant; P. Sri Raghu Ram, S.C. for A.P.E.R.C. for Respondent No. 1, Sri O. Manohar Reddy, S.C. for A.P.C.P.D.C.L. for Respondent Nos. 2 to 4 in W.P. Nos. 4330, 4340, 4926, 6736, 6837, 6848, 7165, 7184, 7185, 7201, 7443, 7458, 9379, 9465, 9490, 19662, 19663, 19678, 19705, 20987 of 2012, Sri O. Manohar Reddy, S.C. for APTRANSCO for Respondent Nos. 1 to 4, Sri Srinivasa Rao Putluri for Respondent No. 5 in W.P. No. 10807 of 2012, Sri O. Manohar Reddy, S.C. for A.P.C.P.D.C.L. for Respondent Nos. 1 to 3, Sri P. Sri Raghu Ram, S.C. for A.P.E.R.C. for Respondent No. 4 in W.P. Nos. 12575, 17859, 17893, 18270 of 2012, Sri Srinivas Rao Putluri, S.C. for A.P.E.R.C. for Respondent No. 1, Sri O. Manohar Reddy, S.C. for A.P.C.P.D.C.L. for Respondent Nos. 2 to 4 in W.P. Nos. 19799, 19855, 19856, 19858, 19871, 20387, 20403, 20405, 20969, 20970, 20973, 20986, 20995, 21095, 21096, 22342, 22364, 24660, 24765, 24573, 24814, 25201, 25212, 25216, 25239, 25271, 25272, 25911, 26207, 26209, 26212, 27566, 27571, 27595, 27731, 29067, 29068, 29507, 29508, 30057, 30076, 30170, 30175, 31200, 31206 of 2012, 24603, 24610, 24611, 24612, 24613, 24639, 24664, 25052, 25075, 25076, 25087, 25090, 25138, 25142, 25143, 25170, 25171, 25173, 25194, 25696, 25722, 25736, 25750, 26315, 26328, 26330, 26331, 26344, 26476, 26481, 26483, 26488, 26489, 26499, 26536, 26567, 26589, 26590, 26593, 26627, 26896, 26902, 26965, 27267, 27269, 27275, 27276, 27283, 27313, 27453, 27486, 27496, 27524 of 2013, Sri O. Manohar Reddy, S.C. for A.P.C.P.D.C.L. for Respondent Nos. 1 to 3, Sri Srinivas Rao Putluri, S.C. for A.P.E.R.C. for Respondent No. 4 in W.P. Nos. 19857, 20410, 20968 of 2012, Sri.

Srinivas Rao Putluri, S.C. for A.P.E.R.C. for Respondent No. 1, Smt. G. Jyothi Eswar, S.C. for A.P.E.P.D.C.L. for Respondent Nos. 2 to 4 in W.P. No. 27943 of 2012, Sri. Srinivas Rao Putluri, S.C. for A.P.E.R.C. for Respondent No. 1 and Sri O. Manohar Reddy, S.C. for A.P.C.P.D.C.L. for Respondent Nos. 2 to 6 in W.P. Nos. 29952, 29953 and 29954 of 2013, for the Respondent

Final Decision : Allowed

Judgement

Sanjay Kumar, J.—The petitioners in this batch of cases are consumers of High Tension (HT) electricity, availing power supply from the Central Power Distribution Company of Andhra Pradesh Limited (APCPDCL) and in one case, Eastern Power Distribution Company of Andhra Pradesh Limited (APEPDCL). They are aggrieved by the Tariff Orders issued by the Andhra Pradesh Electricity Regulatory Commission (APERC) for 2011-12, 2012-13 and 2013-14, u/s 64 of the Electricity Act, 2003 (for brevity, "the Act of 2003" in so far as they provide for billing of energy by the Distributing Companies (DISCOMs) on the basis of kilo volt amperes per hour (kVAh) instead of kilo watts per hour (kWh). According to the petitioners, earlier, HT consumers were subjected to a twin tariff system, viz., maximum demand charges and energy charges. The tri-vector HT Meters recorded the above two factors - maximum demand in kilo volt amperes and the energy consumed in kilo watts. The petitioners claimed that they were also subjected to this twin tariff levy as per the meter readings of maximum demand (kVA) and energy (kWh).

2. While so, per the petitioners, in its Tariff Orders of 2011-12, 2012-13 and 2013-14, the APERC provided that Reactive Energy measured in kVAh should be taken as the basis for billing. They contend that the same is illegal on grounds more than one.

3. It is their case that readings of active energy and reactive energy would always be at variance and the recorded reactive energy would be higher than the recorded active energy. The difference in this regard was stated to be about 20%. The petitioners stated that billing is done universally as per consumption of active energy in terms of kWh and not in terms of reactive energy in kVAh. They asserted that all other State Electricity Boards in the country are billing their consumers in terms of kWh and contended that the APERC alone adopted the peculiar system of permitting billing on reactive energy basis so as to generate extra revenue for the DISCOMs. They alleged that owing to this new system, consumers would have to shell out extra though their actual consumption, in terms of the recorded active energy in kWh, was lesser. They therefore assailed this billing methodology and challenged the APERC's Tariff Orders of 2011-12, 2012-13 and 2013-14 in this context.

4. The petitioners further asserted; that though Section 111 of the Act of 2003 provided for an appeal against the APERC's Tariff Orders, the same would not

bar the maintainability of these writ petitions. They contended that as the APERC exercises quasi-legislative power while determining the tariff and as the impugned Tariff Orders are conflicting with existing statutory provisions, they would be entitled to invoke the jurisdiction of this Court under Article 226 of the Constitution.

5. Be it noted that the petitioners in W.P. Nos. 9379, 9465, 10807, 24660, 24765 and 24814 of 2012 only assailed the billing methodology adopted pursuant to the APERC's Tariff Orders but did not independently challenge the same. However, the petitioners in W.P. Nos. 6837, 6848, 7165, 7185, 7201, 7458 and 24573 of 2012, who initially challenged only the billing methodology adopted by the DISCOM concerned, thereafter amended their prayer in the writ petitions and included a challenge to the Tariff Order for the year in question in the context of the changed billing methodology.

6. Similar amendment of prayer was sought in WPMP No. 25612 of 2012 in W.P. No. 4330 of 2012, WPMP No. 22303 of 2012 in W.P. No. 7184 of 2012 and WPMP No. 21706 of 2012 in W.P. No. 7443 of 2012, which are still pending. These amendment petitions are not opposed and are accordingly ordered.

7. The APCPDCL filed counter affidavits in some of the cases. It would be sufficient to summarize the contents of one to the extent relevant. The stand of the APCPDCL is as under:

The DISCOM.S, including the APCPDCL, are bound to follow the APERC's Tariff Orders for billing of energy. During the tariff year 2010-11, the APEPDCL proposed fixing reactive power tariff. The APERC discussed this issue in Paras 222 to 229 of the Tariff Order of 2010-11. The APERC observed that billing of energy consumption was being done for active power while the effect of reactive power was considered in the form of power factor penalty and opined that time had come to dispense with such penalty through change of the billing procedure, viz., from kWh based billing to kVAh based billing, which was the correct way of billing and had already been implemented in Delhi and Uttaranchal.

8. Pursuant thereto, the DISCOMs submitted proposals for 2011-12 and the same were approved by the APERC. Before doing so, the APERC considered the objections and suggestions of consumers and thereafter passed the Tariff Order of 2011-12. The extract of the Tariff Order, wherein this discussion is found, was appended to the counter affidavit. It was also pointed out that the petitioners had a right of appeal against the Tariff Orders u/s 111 of the Act of 2003. The APCPDCL contended that as the petitioners had an alternative and efficacious remedy by way of an appeal, these writ petitions were not maintainable.

9. Reference was made to U.P. Power Corporation Ltd. Vs. National Thermal Power Corporation Ltd. and Others, wherein the Supreme Court observed that the Commission constituted under the Act of 2003 is an expert body entrusted with the task of determination of tariff, involving a highly technical procedure requiring not only working knowledge of law but also of engineering, finance,

commerce, economics and management. The Supreme Court therefore opined that issues regarding such determination should be left to the expert body and ordinarily, the High Courts and even the Supreme Court should not interfere with determination of the tariff.

10. Reference was also made to the judgment of the Supreme Court in PTC India Ltd. Vs. Central Electricity Regulatory Commission thr. Secy., and more particularly, para 26 thereof:

26. The term "tariff" is not defined in the 2003 Act. The term "tariff includes within its ambit not only the fixation of rates but also the rules and regulations relating to it. If one reads Section 61 with Section 62 of the 2003 Act, it becomes clear that the appropriate Commission shall determine the actual tariff in accordance with the provisions of the Act, including the terms and conditions which may be specified by the appropriate Commission u/s 61 of the said Act. Under the 2003 Act, if one reads Section 62 with Section 64, it becomes clear that although tariff fixation like price fixation is legislative in character, the same under the Act is made appealable vide Section 111. These provisions, namely, Sections 61, 62 and 64 indicate the dual nature of functions performed by the Regulatory Commissions viz. decision-making and specifying terms and conditions for tariff determination.

11. The APCPDCL stated that HT consumers were subjected to a three-part tariff structure - energy charges in kWh, demand charges in kVA and low power factor surcharge for reactive power drawal. The petitioners' averment that they were only subjected to a two-part billing was denied. Technical details were set out in support and justification of the new system of billing. Till the year 2010-11, the effect of the reactive power was not considered in the billing but was considered in the form of the power factor penalty. However, from 2011-12, the APERC introduced a two-part tariff structure for HT consumers, whereby the energy charges and low power factor surcharge were merged into the energy charges in kVAh and demand charges were based on kVA.

12. The APCPDCL stated that it had been permitted by the APERC to levy energy charges basing on kVAh (integral of active power and reactive power) and not on kVArh i.e., reactive energy reading basis, as contended by the petitioners. The APCPDCL denied that the new system of billing was contrary to extant statutory provisions or that it had been introduced only to favour the DISCOMs and contended that it was perfectly legal and valid.

13. Smt. Jyothi Eswar Gogineni, learned standing counsel for the APEPDCL, basing on the counter affidavit filed by her client, reiterated the issue of maintainability on the same grounds urged by the APCPDCL. On merits, the APEPDCL stated in its counter that the proposal to switch over to kVAh based billing originated with the motive of reducing reactive power drawl from the system as it was not desirable for proper system management. The APEPDCL therefore proposed kVAh billing in the tariff proposals submitted for 2010-11.

Thereupon, a directive was given by the APERC to the DISCOMs in the Tariff Order of 2010-11 to file suitable proposals for 2011-12. Accordingly, the DISCOMs proposed kVAh based billing and details thereof were published on the APERC's web site, inviting public response. The proposals were therefore placed in the public domain for quite some time before implementation. Various averments were made in support of the new billing system which would lead to a win-win situation for all the parties concerned.

14. The APERC accordingly approved kVAh based billing instead of kWh based billing for 2011-12. Suitable changes were made to the tariff schedule for that year. The Central Electricity Authority (Installation and Operation of Meters) Regulation, 2006, was amended on 04.06.2010 whereby in Part III, in sub-para (b) of paragraph (1), after item (vi) the following was inserted:

(vii) Cumulative apparent energy (kVAh)

(viii) Any other parameter required for tariff application or analysis.

In Part IV, paragraph (2) after item (j), the following was inserted:

(k) Cumulative apparent energy (kVAh)

(l) Any other parameter required for tariff application or analysis.

15. The APEPDCL therefore stated that kVAh based meter reading for tariff application/analysis had been duly approved. This system of billing was implemented in Delhi, Gujarat and Uttaranchal. The APEPDCL contended that no statutory provisions were contravened by this new billing methodology.

16. In a separate counter, while reiterating the contentions urged by the DISCOMs as to the maintainability of these writ petitions, the APERC stated that its Tariff Order dated 30.03.2012 set out the reasons for adopting the new billing methodology and that it was clear therefrom that the same was brought into effect after elaborate discussions and upon considering all the objections raised during the course of determination of the tariff. Referring to the statutory provisions relied upon by the petitioners, the APERC asserted that none of the regulations provided that energy supplied to a consumer should be measured only in a particular mode. The APERC therefore justified the new billing methodology as being beneficial to the DISCOMs as well as the consumers.

17. Much was stated in defence of the new billing methodology on merits. Referring to the Andhra Pradesh Electricity Duty Act, 1939 [for brevity, "the Act of 1939", the APERC stated that it related to levy of duty by the State and had nothing to do with the billing of energy by the DISCOMs. Similar contentions were advanced vis-à-vis the security deposit regulations and it was contended that the same did not mention that the calculation of power drawn should only be on the basis of kWh readings.

18. It may be noted that suspension of the Tariff Order impugned in W.P. No. 19663 of 2012, in so far as it pertained to billing of energy based on kVAh

readings instead of kWh readings, was sought in WPMP. No. 25211 of 2012 filed therein. By order dated 21.08.2012, this Court opined that unless the petitioner succeeded in getting the Tariff Order set aside, it would not be entitled to such interim relief and dismissed the WPMP, making it clear that implementation of the Tariff Order would however be subject to the result of the writ petition. This writ petition pertained to the Tariff Order of 2011-12.

19. A novel argument was advanced by Sri Duba Nagarjuna Babu, learned counsel for the petitioners. He contended that determination of the tariff regulations and the tariff by the APERC under the Act of 2003 was itself illegal. He pointed out that u/s 26 of the Andhra Pradesh Electricity Reform Act, 1998 (for brevity, "the Act of 1998"), the APERC was empowered to determine the tariff. It is his case that the Act of 1998, which received the assent of the President of India on 21.10.1998, would prevail over the Act of 2003 in so far as this aspect is concerned. He would therefore contend that tariff determination by the APERC under the Act of 2003, instead of the Act of 1998, is ultra vires and illegal.

20. Elaborating further, learned counsel pointed out that Section 185(3) of the Act of 2003 provides that the enactments specified in the Schedule thereto, which also includes the Act of 1998, would continue to apply to the extent they are not inconsistent with the Act of 2003. He pointed out that "Electricity" falls in Entry 38 of the Concurrent List in the Seventh Schedule to the Constitution, whereby the State as well as the Centre would have authority to legislate on the subject, and contended that as the Act of 1998 had already received the assent of the President of India, it would take precedence over the Act of 2003. Reference was made to repugnancy between Central and State enactments in the context of Article 254(2) of the Constitution, which reads thus:

254(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provisions repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State.

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State.

21. Learned counsel placed reliance on The Bar Council of Uttar Pradesh Vs. The State of U.P. and Another, Therein, the Supreme Court found on facts that Article 254(2) of the Constitution had been duly complied with as the assent of the President had been obtained vis-?-vis the impugned conflicting State Act.

22. Reliance was also placed on M. Karunanidhi Vs. Union of India and Another, and more particularly, paragraph 24 thereof. The Supreme Court observed therein that before repugnancy can arise, the following conditions must be

satisfied:

1. That there is a clear and direct inconsistency between the Central and the State enactments.
2. That such an inconsistency was absolutely irreconcilable.

That the inconsistency between the provisions of the two Acts is of such a nature as to bring the two Acts into direct collision with each other and a situation is reached where it is impossible to obey the one without disobeying the other.

23. However, the observations in para 37 of the said judgment are more relevant. It was observed therein that an important test to determine whether or not there is repugnancy is to ascertain the intention of the legislature regarding the fact that the dominant legislature allowed the subordinate legislature to operate in the same field *pari passu* the State Act. It was found that the State Amendment Act, which received the assent of the President, itself clarified that there would be no question of it colliding with the Central Act and therefore, there was no room for the argument that the State Act was in any way repugnant to the earlier Central Act.

24. Relying on the above decisions, Sri Duba Nagarjuna Babu, learned counsel, would contend that in so far as the State of Andhra Pradesh is concerned, Sections 61, 62 and 64 of the Act of 2003 would have no application and that the APERC is bound to follow the procedure in Section 26 of the Act of 1998.

25. This Court however finds no merit in this contention.

26. Contrary to the facts in the decisions above cited, in the present case, the State Act, being the Act of 1998, received the assent of the President long before the enactment of the Central Act of 2003. Section 185(3) of the Act of 2003 also made it clear that the provisions of the Act of 1998 were saved only to the extent they were not inconsistent with the provisions of the Act of 2003. Therefore, any inconsistency between the State and the Central Acts as to the procedure to be followed by the APERC in tariff determination and fixation would mean that the Central Act alone would prevail. The procedure prescribed u/s 26 of the Act of 1998 would necessarily have to give way to that extent.

27. Further, it may be noticed that Article 254(2) of the Constitution posits that a State legislation would prevail over a Central legislation on the same subject if it receives the assent of the President. The obvious implication is that the Central legislation is earlier in point of time and already in existence at the time the State legislation came into being and received the assent of the President. However, this provision has no application to a Central legislation which comes into existence after the State legislation received the assent of the President. All the more so, when the later Central legislation makes it clear, as in the present case, that it would prevail over the State legislation in the event of any inconsistency. The instant case would therefore fall within the ambit of the proviso to Article 254(2) of the Constitution and not Article 254(2) itself. Thus,

Article 254(2) of the Constitution is of no avail to the petitioners in their attack against exercise of powers by the APERC under Sections 61 and 62 of the Act of 2003. The contention of Sri Duba Nagarjuna Babu, learned counsel, in this regard must therefore fail and is accordingly rejected.

28. In this context, reliance was placed on several judgments of the Supreme Court. However, as this Court finds that the said provision has no application whatsoever to the cases on hand, the judgments do not warrant further elucidation.

29. Alternatively, Sri Duba Nagarjuna Babu, learned counsel, contended that even if the APERC had power under Sections 61 and 62 of the Act of 2003 to alter the billing norm, implementation of the same under the impugned Tariff Orders is illegal as it was inconsistent with the following statutory provisions/regulations.

30. The Andhra Pradesh Electricity Regulatory Commission (Electricity Supply Code) Regulation, 2004 (for brevity, "Regulation No. 5 of 2004"), was framed by the APERC in exercise of powers conferred by Sections 181(2)(x) and 50 and of the Act of 2003. Regulation 2(c) defines consumption charges thus:

2 (c) "consumption charges" means charges payable for the consumption of electrical energy in Kwhrs multiplied by appropriate tariff rates and also includes Demand/Fixed charges, Fuel Surcharge Adjustment (FSA) and customer charges etc., wherever applicable.

31. It may be noted that Sri O. Manohar Reddy, learned standing counsel for the APCPDCL, contended that this definition was amended by the APERC to read as under:

2 (c) "Consumption Charges" means energy charges for consumption of electrical energy (calculated on the basis of kWh or kVAh rate as applicable), and includes Demand/Fixed charges, Fuel Surcharge Adjustment (FSA) charges, customer charges, wherever applicable.

32. Sri Duba Nagarjuna Babu, learned counsel, however countered this by contending that this amendment was not published in the Gazette and would therefore not take effect. This aspect will be dealt with hereinafter.

33. The Central Electricity Authority (Installation and Operation of Meters) Regulations, 2006, was promulgated by the Central Electricity Authority in exercise of powers conferred by Sections 55(1), 73(e) and 177(2) of the Act of 2003. Regulation 2(c) thereof defines "Active Energy" to mean electricity supplied or consumed during a time interval, being the integral of Active Power with respect to time, measured in the units of Watts-hours" or standard multiples thereof, a "Kilowatt-hour" (kWh) being one unit. "Reactive Energy" is defined by Regulation 2(s) to mean the integral of Reactive Power with respect to time and is measured in Volt-Ampere hours reactive (V ARh) or in standard multiples thereof.

34. Condition No. 2.2.54 of the APERC's "General Terms and Conditions of Supply of Distribution and Retail Supply Licensees" defines "units" to mean kilo Watt hours (kWh) indicated by the energy meter meant for billing.

35. Section 3 of the Act of 1939 provides that the licensee shall pay electricity duty at six paise per "unit" of electrical energy sold.

36. The Andhra Pradesh Electricity Regulatory Commission (Security Deposit) Regulation, 2004" was formulated by the APERC in exercise of powers conferred by Sections 47(1) & (4) and 181 of the Act of 2003. Regulation 4(2) thereof provides that HT consumers shall maintain with the licensee a security deposit of two months consumption charges. Regulation 2(c) defines consumption charges to include, amongst others, consumption of electrical energy in Kwhrs multiplied by the appropriate tariff rates.

37. It is the contention of Sri Duba Nagarjuna Babu, learned counsel, that the changed billing methodology introduced by the impugned Tariff Orders is contrary to the unaltered norms in the aforesaid statutory provisions and regulations, which provide that measurement in "kilo watts per hour (kWh)" shall be the basis for billing of energy consumed by a consumer. He therefore argued that the same is liable to be invalidated on this ground.

38. At the outset, it may be noted that the petitioners, the APERC and the DISCOMs raised various issues on merits apropos the new billing methodology. However, as pointed out by the Supreme Court in Uttar Pradesh Power Corporation Limited, determination of the tariff is a matter involving highly technical aspects which should ordinarily be left to the expert body, the APERC. It is not for this Court to sit in appeal over the decision of the APERC as to which of the two billing methodologies is better suited to serve the interests of the consumers and the DISCOMs. Section 61(d) of the Act of 2003 requires the APERC to balance the interests of the consumers and the DISCOMs in this regard. This Court would therefore presume that the APERC has determined the billing methodology to be adopted in keeping with this statutory mandate. Ergo, this Court does not intend to enter into or adjudicate upon the comparative merits of the two billing methodologies or as to which was the better one to be adopted.

39. That being said, the failure, if any, on the part of the APERC in complying with the due procedure while introducing and implementing the new billing methodology would entitle this Court to interfere in the matter, notwithstanding the availability of an appellate remedy u/s 111 of the Act of 2003. Trite to state, availability of an alternative remedy would not by itself be a bar to a writ petition under Article 226 of the Constitution. Violation of statutory provisions would be reason enough for this Court to entertain a writ petition notwithstanding the availability of an alternative/appellate remedy. Reference was made by the learned standing counsel to PTC India Limited in support of their argument as to the maintainability of these writ petitions. Therein, the Supreme Court held that

tariff fixation under the Act of 2003 is appealable u/s 111 of the Act of 2003. However, the Supreme Court also pointed out therein that tariff fixation was relatable to Section 62 of the Act of 2003 while the prescription of the terms and conditions of the tariff, a totally different aspect, was relatable to Section 61 of the Act of 2003. In the present case, the challenge is not to the actual tariff rate but to the basis for determination of such tariff. Further, the challenge is also on the ground that the new billing methodology is inconsistent with existing statutory regulations/provisions. This ground is enough to justify examination and interference, if warranted, by this Court in exercise of its extraordinary jurisdiction despite the statutory appeal provided under the Act of 2003. The writ petitions are therefore held to be maintainable.

40. Sri O. Manohar Reddy, learned standing counsel, filed written submissions. Therein, he pointed out that Regulation 3.1 of Regulation No. 5 of 2004 provides that the DISCOM shall recover electricity charges for the electricity supplied as per the tariff determined by the APERC from time to time in accordance with the provisions of the Act of 2003. He would assert that Regulation 2(c), no doubt, defined consumption charges to mean charges payable for the consumption of electrical energy in Kwhrs, but as the term "consumption charges" was not utilized in Regulation 3.1, the definition thereof in Regulation 2(c) has no effect upon the right of the DISCOM to recover electricity charges as per the tariff determined by the APERC. He argued that the contention, based on Regulation 2(c), that the billing must necessarily be done on the basis of kWh and not kVAh, is not tenable. He therefore submitted that failure to notify the amendment of Regulation 2(c) in the Gazette is wholly irrelevant for the purposes of this case.

41. As regards the contention urged by the petitioners that the changed methodology of billing would also conflict with the Central Electricity Authority (Installation and Operation of Meters) Regulations, 2006, learned standing counsel pointed out that Part-III of these regulations, dealing with standards for consumer meters, provides for measuring parameters. Under Regulation 1(b) thereof, consumer meters shall measure, record and display the parameters, depending upon the tariff requirement for various categories of consumers, and one such parameter is cumulative apparent energy (kVAh). He therefore stated that these meters were designed to measure the said parameter in kVAh and the definition of active energy in Regulation 2(c), in terms of kilowatt-hours being the unit for measurement of electricity supplied or consumed, had no bearing and contended that the impugned billing methodology did not violate these regulations. Learned standing counsel further pointed out that full opportunity was given to the consumers to object to the proposed methodology of billing pursuant to the suggestions given by the APEPDCL, referred to in the Tariff Order of 2010-11. He therefore asserted that there was no violation of any procedural aspect and sought dismissal of the writ petitions.

42. Sri Putluri Srinivasa Rao, learned standing counsel for the APERC, also filed written submissions to the following effect:

The contentions of the APCPDCL were reiterated as regards Regulation 2(c) read with Regulation 3.1 of Regulation No. 5 of 2004. Learned standing counsel also adopted the arguments of the APCPDCL with regard to the Central Electricity Authority's regulations. Reference was made to Condition No. 5.3.5.2 of the General Terms and Conditions of Supply, which states that the tariff and other charges for supply shall be specified by the APERC in the Tariff Order. Learned standing counsel contended that the definition under Regulation 2.2.54 has to be read in conjunction with the other conditions, and therefore, the mode of billing approved by the APERC would be valid. Reference was also made to Regulation 55(2) of the A.P. Electricity Regulatory Commission (Conduct of Business) Regulations, 1999, which deals with saving of the inherent powers of the APERC and empowers the APERC to adopt a procedure at variance with any of the provisions of the said regulations. He pointed out that the APERC, while determining the tariff, would exercise power comprehensively, balancing the interests of the DISCOMs and the consumers.

43. Reliance was placed on the judgment of a Division Bench of this Court in *S. Bharat Kumar and others Vs. Government of Andhra Pradesh and others*, Therein, this Court held that the process of determination of the tariff would involve aspects on which the Court could not place itself as an appellate authority and embark upon a fresh appraisal of the material and test the decision of an expert body from the standpoint of its own appraisal, especially in the matter of price-fixation. As this Court has no intention of undertaking such an exercise, this judgment has no bearing. Similarly, the judgment of the Supreme Court in *Bihar State Electricity Board and another Vs. M/s. Usha Martin Industries and another*, dealing with price-fixation and the limited scope of interference by a Court of law in such a matter, is also irrelevant.

44. This Court finds that Regulation 5 of 2004, being the electricity supply code promulgated by the APERC, is crucial to the relations between the DISCOMs and the consumers and more particularly, the issue of recovery of electricity charges from them. Perusal of Regulation 1(iii) thereof indicates that Regulation No. 5 of 2004 was to come into force three months after the date of its publication in the Andhra Pradesh Gazette. It is not in dispute that Regulation 2(c) thereof defines consumption charges to mean charges payable for consumption of electrical energy in Kwhrs multiplied by the tariff rates. Regulation 3 deals with recovery of electricity charges from consumers and under Regulation 3.1, it is provided that the DISCOM shall recover electricity charges for the electricity supplied to the consumer as per the tariff determined by the APERC from time to time in accordance with the provisions of the Act of 2003. As pointed out by the learned standing counsel, these regulations would have to be read cumulatively. However, upon doing so this Court does not find that Regulation 3.1 overrides the definition of "consumption charges" in Regulation 2(c) or derogates against it. Consumption charges are defined in terms of multiplication of electrical energy consumption in Kwhrs by the appropriate tariff. These tariff rates are referred to in Regulation 3.1. Therefore, the multiplication factor, being the tariff rate

determined by the APERC under Regulation 3.1, has no impact on the other component - the actual consumption of electrical energy, which is to be measured in Kwhrs as per the definition clause.

45. Further, Regulation 4.2 details the information that should be included in the bill. Under Clause (1) thereof, it is provided that the number of units consumed during the billing period should be indicated. "Unit" has not been defined separately in these regulations. However, as Regulation 2(c) defines "consumption charges" to mean the charges payable for energy consumed in Kwhrs, a "unit" would obviously have to be computed in Kwhrs.

46. Though it is urged that the existing Regulation 2(c) is not at odds with the changed methodology, it may be noted that the APERC itself, by way of Regulation No. 7 of 2013, sought to amend Regulation 2(c) so as to enable computation of the consumed energy in kVAh also. If there was no inconsistency between the changed methodology and the existing definition of "consumption charges", there would have been no necessity for the APERC to undertake such amendment. Unfortunately, this aspect of the matter seems to have dawned on the APERC belatedly. The amendment of Regulation No. 5 of 2004 at this late stage would invariably have an impact on the implementation of this billing methodology long before the fact.

47. Further, this amendment has not even come into effect as yet. Regulation 1(3) of Regulation No. 7 of 2013 specifically provides that Regulation No. 7 of 2013 would come into force with effect from the date of its publication in the Andhra Pradesh Gazette. Admittedly, this has not yet taken place. Though the learned standing counsel would gloss over the necessity of such publication, this Court finds that the scheme of the Act of 2003 and the regulations framed thereunder indicate to the contrary.

48. Regulation No. 7 of 2013 manifests that the amendment effected thereunder was in exercise of the powers conferred by Section 181(2)(x) read with Section 50 of the Act of 2003. The power of the APERC to make regulations is dealt with u/s 181 of the Act of 2003. Section 181(2)(x) provides that the APERC is empowered to make the electricity supply code provided for u/s 50 of the Act of 2003. Crucial to note, Section 181(1) of the Act of 2003 provides that the State Commissions may, by notification, make regulations thereunder. "Notification" is defined u/s 2(46) of the Act of 2003 to mean a notification published in the Official Gazette. Section 181(3) of the Act of 2003 makes it explicit that all regulations made by the Commissions under the Act of 2003 shall be subject to the condition of previous publication. Though the phrase "previous publication" has not been defined in the Act of 2003 or Regulation No. 5 of 2004, the Central Government, in exercise of the powers conferred by Section 176(1) read with Section 176(2)(z) of the Act of 2003, promulgated The Electricity (Procedure for Previous Publication) Rules, 2005". Rule 3 thereof deals with the procedure for previous publication and Rule 4, with the publication in, the Official Gazette. These Rules read as under:

3. Procedure of Previous Publication - For the purpose of previous publication of regulations under sub-section (3) of Section 177, sub-section (3) of section 178 and the sub-section (3) of Section 181 of the Act, the following procedure shall apply:--

(1) the Authority or the Appropriate Commission shall, before making regulations, publish a draft of the regulations for the information of persons likely to be affected thereby:

(2) the publication shall be made in such manner as the Authority or the Appropriate Commission deems to be sufficient;

(3) there shall be published with the draft regulations, a notice specifying a date on or after which the draft regulations will be taken into consideration;

(4) the Authority or the Appropriate Commission having powers to make regulations shall consider any objection or suggestion which may be received by the Authority or the Appropriate Commission from any person with respect to the draft before the date so specified.

4. The publication in the Official Gazette of the regulations made in exercise of a power to make regulations after previous publication shall be conclusive proof that the regulations have been duly made.

49. In the context of the aforesaid statutory scheme, it is manifest that for a regulation to come into effect, there must necessarily be compliance with the requirement of "previous publication" and thereafter, "notification".

50. Presently, though there is compliance with the norm relating to "previous publication" in terms of the APERC hosting the draft of Regulation No. 7 of 2013 in its web-site, inviting objections and conducting a public hearing on 17.06.2013, there is admittedly no compliance with the "notification" requirement under Rule 4 above read with Sections 2(46) and 181(1) and of the Act of 2003.

51. In this regard, it would be useful to refer to the observations of the Supreme Court in Subhash Ramkumar Bind @ Vakil and Another Vs. State of Maharashtra,

20. ...Notification in common English acceptation means and implies a formal announcement of a legally relevant fact and in the event of a statute speaking of a notification being published in the Official Gazette, the same cannot but mean a notification published by the authority of law in the Official Gazette. It is on formal declaration and publication of an order and shall have to be in accordance with the declared policies or in the event the requirement of the statute then in that event in accordance therewith.

52. Needless to state, if the statute requires a particular thing to be done in a particular manner, then it shall be done either in that manner or not at all (The State of Maharashtra and Another Vs. The Jalgaon Municipal Council and Others,

53. Though the learned standing counsel strived to water down this statutory requirement, it is not a matter of choice or prerogative. The observations of the Supreme Court in *Centre for Public Interest Litigation v. Union of India*, (2012) 3 SCC 117 are apposite to the obtaining fact situation. They read as under:

14. We are of the view that the expression "prerogative" cannot be used in the context of a statutory provision. Under our constitutional and statutory framework, there is nothing known as prerogative. In this connection, we may usefully recall what was said by the eminent jurist N.A. Palkhivala in his treatise *Our Constitution: Defaced and Defiled* (Macmillan: December 1974). The relevant portion reads as follows:

Our Constitution recognises no prerogative whatsoever; it recognises merely rights, duties and discretions. The difference between "prerogative" and "discretion" is clear. A person who has a prerogative can act arbitrarily or irrationally and yet his decision must be treated as legal and valid. On the other hand, if a person has the discretion, and not the prerogative, to make a decision, the discretion can only be exercised fairly and reasonably; otherwise his act is void on the ground that there was no valid exercise of discretion in the eye of the law.

54. The importance of due "notification" as posited by law therefore cannot be undermined. It may be noticed that in keeping with the statutory requirement, Regulation No. 7 of 2013 itself stated that it would come into effect only from the date of its publication in the Andhra Pradesh Gazette. As this event is still to take place, this Regulation has, as yet, not come into force.

55. Thus, as matters stand, the definition of consumption charges under Regulation 2(c) of Regulation No. 5 of 2004 remains unaltered. Read with this, the definition of active energy under Regulation 2(c) of the Central Electricity Authority (Installation and Operation of Meters) Regulations, 2006 assumes importance. Thereunder, electricity supplied or consumed during a time interval is to be measured in units of Watts-hours" and a "Kilowatt-hour" (kWh) is treated as one "unit". Active power is defined under Rule 2(d) to mean electrical power and is measured in units of Watt (W) or in standard multiples thereof. Though reference was made by the learned standing counsel to Part-III of these regulations which deals with standards for consumer meters, wherein one of the parameters which can be measured by such a meter relates to cumulative apparent energy in kVAh, it would be relevant to refer to some of the other aspects covered by these regulations. As stated supra, active energy is to be measured in terms of "kilowatt-hours" and Part-I under the Schedule to these regulations sets out the specifications of meters, wherein power consumption is again related to "watt-hours". Similarly, Part-II dealing with "Standards for Interface Meters" also sets out that meters should have a non-volatile memory for storage of net Wh (watt-hour) transmittal during each successive 15-minute block and for cumulative Wh transmittal at midnight. Clause 1(g) of Part-II in the Schedule to these regulations sets out that the meters shall also display the

stipulated parameters, one of which is cumulative Wh register reading as well as the net Wh transmittal.

56. The APERC's "General Terms and Conditions of Supply" were approved by the APERC on 06.01.2006 u/s 16 of the Act of 2003. Condition No. 2.2.54 thereof defines "units" to mean "kilowatt-hours" indicated by the energy meter meant for billing. "Consumption charges" are not separately defined but Condition No. 2.2.6 defines "CC to mean current consumption generally used in the context of electricity bills/charges. Condition No. 5.3.1 deals with the security deposit payable by a consumer and reads to the effect that the same shall be in accordance with the APERC (Security Deposit) Regulation, 2004, wherein Regulation 2(c) defines "consumption charges" to mean consumption of electrical energy in "kilowatt-hours" multiplied by appropriate tariff rates. These statutory provisions have also not been amended to bring them in line with the changed methodology of billing and in keeping with the amendment proposed under Regulation No. 7 of 2013. Though Condition No. 5.3.5.2 states that the tariff and other charges for supply of electricity shall be as specified by the APERC in the Tariff Orders issued from time to time, this condition is obviously relatable to tariff rate fixation and has no relation to the terms and conditions of the tariff. Clause 5.3.2 therefore does not override the prevalent norm in the existing regulations that the unit for measuring consumption of electricity is "kilowatt-hours".

57. Further, perusal of the "General Terms and Conditions of Supply" relating to billing of defective meters reflects that it is also done on the basis of the number of units; a unit again being measured in "kilowatt-hours". Even in terms of the Act of 1939, which provides for levy of a duty on sale and consumption of electrical energy by the licensees in the State of Andhra Pradesh, the duty payable thereunder as provided in Section 3 is to be calculated on the basis of the consumption in units, which as per the existing norms are based on "kilowatt-hours".

58. It is therefore clear that under the obtaining regulations and the General Terms and Conditions of Supply, billing of the consumers is provided for on the basis of "kilowatt-hours". Without effecting corresponding amendments in all the regulations and the General Terms and Conditions of Supply, the APERC could not have adopted a new system of billing in its Tariff Orders which is at variance with them. Though it is for the APERC to decide in its wisdom as to which is the better methodology for billing consumption of electricity, it necessarily has to follow the due procedure for effecting such a change in methodology so that there is consistency and uniformity in this regard in all the applicable statutory regulations and provisions.

59. Reliance on the inherent powers of the APERC under the A.P. Electricity Regulatory Commission (Conduct of Business) Regulations, 1999, is of no avail as it empowers the APERC to adopt a procedure at variance only with the provisions of the said regulations. Such power would not extend to other

independent statutory regulations and provisions.

60. Notably, except for placing the proposed change of methodology in the public domain and called for objections, the APERC did not choose to amend the other regulations or provisions, framed or approved, which spoke to the contrary in so far as the base component for billing, expressed in terms of kilowatt-hours, was concerned. As Section 61(d) of the Act of 2003 requires the APERC to consider consumers' interest also, it is expected to project a uniform and consistent signal to them as to the billing methodology. As the existing regulations conflict with the impugned Tariff Orders in this regard, this Court necessarily has to hold that the new billing methodology adopted by the APERC, which is inconsistent with the existing statutory regulations, is invalid. The APERC went about effecting and implementing a change in the billing methodology losing sight of the fact that the same was inconsistent with the regulations already put in place, be it by itself or by the Central Regulatory Commission. Wisdom having dawned of late, the APERC set in motion Regulation No. 7 of 2013, but the same has not been notified as yet and would therefore not come into effect. In the absence of an amendment to Regulation No. 5 of 2004 and without effecting similar amendments in the other regulations and the General Terms and Conditions of Supply, it is not open to the APERC to give effect to the changed methodology of billing.

61. The Tariff Orders of 2011-12, 2012-13 and 2013-14 in so far as they provide for implementing this change in the billing methodology are therefore held to be invalid and are accordingly set aside to that extent. The writ petitions are allowed in part. Pending miscellaneous petitions in all the writ petitions shall stand closed in the light of this final order. No order as to costs.