

(1998) 06 PAT CK 0018

In the Patna High Court

Case No : C.W.J.C. No's. 1632, 1633, 1634, 2153, 2190, 2494, 2495, 2523, 2574, 2575, 2593, 2594, 2604, 2610, 2639, 2665, 2703, 2704, 2705, 2739, 2740, 2750, 2751, 2816, 2817, 2974, 2975, 2976, 2977, 3069, 3135, 3145, 3169, 3346, 3483, 3715, 3716 and 4321 of 1997

Tata Yodogawa Limited and Others

APPELLANT

Vs

Bihar State Electricity Board and Others

RESPONDENT

Date of Decision : 30-06-1998

Acts Referred:

Electricity (Supply) Act, 1948 — Section 49

Citation : (1998) 3 BLJR 2100

Hon'ble Judges : N.K. Sinha, J;B.P. Singh, J

Bench : Division Bench

Judgement

B.P. Singh, J.—In this batch of writ petitions filed by consumers of electrical energy supplied by the respondent-Bihar State Electricity Board, the Circular No. 60 dated 5-2-1997 issued by the respondent-Board has been challenged. It has been prayed that the respondent-Board be directed not to give effect to the impugned Circular and to collect the fuel surcharge for the period 1994-95 and 1995-96 and onwards after considering the recommendation of the Committee appointed by this Court. By the impugned Circular (Annexure-5) the respondent-Board has provisionally calculated fuel surcharge for the periods 1-4-1994 to 31-3-1995, 1-4-1995 to 31-3-1996 and for the three quarters of the year 1996-97 payable by the consumers at the rate of 43.89 p/kwh, 72.12 p/kwh and 102.00 p/kwh respectively. The field officers have been directed accordingly to raise the bill/additional bills on the consumers liable to pay fuel surcharge. The Circular states that the rates fixed are provisional and subject to the decision/order, if any, passed by the Hon'ble High Court. The real dispute is only as to the method of calculation of fuel surcharge, since validity of the tariff notification published on 23rd June, 1993, relating to fuel surcharge has been upheld by this Court as also by the Supreme Court by its order dated 7-2-1996 in Civil Appeal No. 6320 of 1991 and analogous matters. The facts of the case are taken from

C.W.J.C. No. 1632 of 1997.

2. In exercise of power conferred by Section 49 of the Electricity (Supply) Act the respondent-Electricity Board published in the Bihar Gazette on 23rd June, 1993 a tariff notification dated 21st June, 1993 (Annexure-1). The said tariff was introduced with effect from 1st July, 1993. Under Clauses 16-10-1 of the tariff, the consumers of the categories specified therein are required to pay Operational Surcharge at a rate to be determined every year in accordance with the formula prescribed, in addition to other charges as laid down in the tariff schedule. Clause 16.10.2 clarifies that the Operational Surcharge shall consist of two elements (a) Fuel Surcharge and (b) other operational surcharge. Clause 16.10.3 prescribes the formula for determining fuel surcharge applicable during the financial year in paise per unit. Clause 16.10.4 prescribes the formula for determination of other operational surcharge. Clause 16.10.5 provides that the operational surcharge for a financial year shall be calculated by the Board after the expiry of the financial year. Till actual calculation of the operational surcharge for a financial year is made, an operational surcharge during the financial year will be levied at a rate provisionally calculated on monthly or quarterly or half yearly basis as decided by the Board. In case of short or excess realisation the same shall be adjusted in the next bill to be served on the consumers. Clause 17 of the tariff is significant which provides as follows:

The existing rate of fuel surcharge notified in letter No. A./CS/Costing-44/92-93/397 dated 29-3-1993 amounting to 32 paise per unit has been merged in the tariff. However, any increase in the operational surcharge thereafter only shall be levied.

3. The respondent-Board issued a Circular dated 4-4-1994 which stated that the final calculation to fuel surcharge only on average came to 26.14 paise per Kwh for the period 1992-93. According to the petitioner, the same was taken to be 32 paise, obviously for the reason that the tariff was introduced from 1-7-1993 and the said increased figure was adopted in order to cover the charges till that date. On 5-1-1995 the Board issued another Circular calculating the fuel surcharge for the period July 1993 to March 1994 which was found to be 25.98 paise per Kwh. Other operational charge worked out as per Clause 16.10.4 of the tariff came to 8.78 paise per Kwh. The operational surcharge was made effective from 1-7-1993. The consumers were billed accordingly and this gave rise to filing of a writ petition by the petitioners before this Court, namely, C.W.J.C. No. 2771 of 1995 (R). The writ petition was admitted for hearing and an interim order was passed on 6-11-1995. Subsequently, the matter was referred to the Division Bench for hearing.

4. After the writ petition was admitted for hearing and an interim order passed, the Secretary of the respondent-Board wrote to the Secretary of the Department of Energy of the Government of Bihar vide letter No. 135 dated 28-12-1995. In the said letter reference was made to the tariff effective from 1-7-1993 which provided for realisation of operational surcharge from specified categories. It was

further stated that an in depth study of the formula and other provisions of the base values given in the tariff for calculation of operational surcharge was made and it has been found that certain amendment in the tariff provision are necessary. The Board had already, taken a decision in this regard. The Board's approved agenda along with a short note prepared in this regard by the Commercial Department, which also formed part of the Board's agenda, was annexed with the letter which clarified the position, and the reasons which necessitated the proposed amendment in the tariff. As would appear from the letter, Clauses 16.10.3, 16.10.3.1 and 17 of the tariff were sought to be amended. So far as Clause 16.10.3 is concerned, it was proposed that instead of calculating the increase with respect to the year 1992-93, the same should be calculated with respect to the year 1991-92. Similarly in Clause 16.10.3.1 an amendment was proposed that the increase in average cost of fuel in respect of energy generated from Board's own generating stations be computed on the base rate of 1991-92 and not 1992-93. Clause 17 was also proposed to be amended by providing that in accordance with the instruction issued by the Government of Bihar to the Electricity Board the rise in the rate of fuel surcharge between January '92 and June '93 which comes to 20 paise (32 paise as in June '93, 12 paise as in Jan. '92) has been merged in the tariff. However, any increase in the fuel surcharge hereafter shall be levied after accounting for the increase already merged in the tariff. The letter also indicated that according to the revised calculation for operational surcharge for the period 1-7-1993 to 31-3-1994, the rate comes to 21.51 paise per unit. The earlier calculation for this rate on the basis of existing tariff was 34.67 paise per Kwh. The revised rate for 1994-95 and 1995-96 on the basis of proposed amendment in the formula was being worked out. In these circumstances, the Board sought the approval of the State Government for the proposed amendments in the existing tariff notified in June 1993. Reference was also made to the pending writ petitions before the High Court in which a counter-affidavit had to be filed by the Board.

5. The approved agenda appended to the letter discloses that it was found that there has been some inherent defect in calculating the amount of fuel surcharge in terms of the formula, as provided in 1993 tariff. Clause 16.10.3 of the 1993 tariff was procured to replace the base year from 1992-93 to 1991-92, because the base year 1992-93 was mentioned inadvertently and by mistake. Similarly, amendment to Clause 16.10.3.1 was necessary to clarify the base. Amendment to Clause 17 was necessary with a view to clarify that increase of 20 paise in fuel surcharge, which is increase over January '92 up to June '93, has only been merged and not 32 paise. The short note prepared by the Commercial-Department of the respondent-Board discloses the reasons why an amendment to the tariff was necessary. The letter of the Secretary of the Board along with the annexures has been annexed as Annexure-6 to the writ petition. It is also the case of the petitioner that by Circular dated 8-2-1995 the earlier Circular dated 5-1-1995 was not implemented and was kept pending. Further Circulars were issued on 8th March, 1995 and 17th April, 1995 directing payment at the rate of

15 paise per Kwh from 1-7-1993 to 31-3-1995 instead of 25.98 paise per Kwh by way of fuel surcharge. However, by Circular dated September 20, 1995 the Circulars dated 8-3-1995 and 17-4-1995 were withdrawn and the earlier Circular dated 5-1-1995 imposing fuel surcharge at the rate of 25.98 paise per Kwh was restored.

6. The writ petitions filed before this Court were heard by a Division Bench on 10-10-1996 and the respondent-Board took time to consult the Board with regard to constitution of a Committee proposed by the High Court to work out the rate of fuel surcharge payable by the petitioners. Ultimately, on 17-10-1996 this Court constituted a high level committee consisting of six members of whom two were independent members, one from the Central Electricity Authority and another an independent Chartered Accountant whose name was suggested by the respondent Board. Apart from them, two members representing the consumers and two members representing the respondent-Board were also nominated on the Committee. The Committee was directed to calculate the amendment of fuel surcharge in terms of 1993 tariff, particularly taking into account Clause 17 thereof. The Committee was directed to submit its detailed report relating to calculation of fuel surcharge by 31st January, 1997 to the Chairman of Bihar State Electricity Board. It was further directed that after submission of such report, if any party feels aggrieved, it will be open for them to move the appropriate forum or Court of law. Till the final submission of the report the interim order was made operational. The writ petitions stood disposed of in the above terms.

7. It appears that the Committee was not in a position to submit its report by 31st January, 1997 on account of various reasons. According to the petitioner, the documents called for by the Committee were not supplied to the Committee and, therefore, an interlocutory application was filed before the High Court, which was disposed of by order dated 21-9-1997. This Court recorded the statement of Counsel for the Board that he had no objection to the production of all the documents. Time was extended till 31st March, 1997 for submission of the report. Later by order passed in the instant writ petition on 12-3-1997 this Court directed the Committee to submit its recommendation/report to this Court on 17th March, 1997. Pursuant to the order of this Court the report of the Committee has been submitted to this Court. From the aforesaid report it appears that the Committee has submitted before this Court the recommendations of different members of the Committee who have differently computed the fuel surcharge payable. There is no such recommendation on behalf of the Committee as a whole. Counsel for the petitioner submits that in these circumstances, the report of the majority should be accepted by this Court.

8. The respondent-Board, however, issued the impugned Circular dated 5-2-1997 even before the submission of the report of the Committee appointed by this Court and levied provisional fuel surcharge for the periods and at the rates earlier noticed. The said Circular dated 5-2-1997 is the subject matter of

challenge in this batch of writ petitions.

9. The petitioners really have only two serious objections. Firstly it is submitted that though no objection can be taken to the formula for determining fuel surcharge as contained in Clauses 16.10.3, in working out the fuel surcharge the Board has not followed the formula laid down in the tariff and the deviation made by the Board makes the determination of fuel surcharge arbitrary. Secondly, it is submitted that the Board has failed to give effect to Clauses 17 of the tariff which provides for merger of fuel surcharge of 32 paise as on 1st July, 1993 in the tariff, and further provides that the consumers shall be liable only to pay the operational surcharge fuel surcharge having regard to the increase in the operational surcharge thereafter. It is, therefore, submitted that the amount already realised from the consumers by way of fuel surcharge should not be doubly charged in view of the clear stipulation in Clauses 17. It is, therefore, contended that the consumer is entitled to adjustment in subsequent years to the extent of amount of fuel surcharge merged in the basic tariff. In other words after calculating the gross fuel surcharge the extent of fuel surcharge merged in the basic tariff ought to be deducted from the gross fuel surcharge while making demand from the consumers.

In one sense the petitioners have really reiterated the stand of the Board itself as contained in Annexure-5, the letter written by the Secretary of the Electricity Board to the Secretary, Department of Energy dated 28-12-1995 seeking the Governments' approval for modification of 1993 tariff.

10. It would, therefore, be necessary first to advert to 1993 tariff, the validity of which has been upheld by this Court as well as the Supreme Court so far as it relates to levy of fuel surcharge.

11. It is not in dispute that the tariff notification was published in the Bihar Gazette on June 23, 1993 and the revised tariff takes effect from 1st July, 1993. The terms and conditions for supply of electricity as also the rate of tariff, as contained in the tariff schedule has the effect of amending, adding and/or replacing the corresponding part of the previous tariff of the year 1991. The tariff has been framed by the Bihar State Electricity Board with the approval of the State Government by virtue of powers conferred upon it u/s 49 of the Electricity (Supply) Act, 1948. The tariff schedule prescribes the rates at which the consumers of all categories served or to be served by the Board are to pay for the services rendered. The basic tariff is contained in tariff schedule, but Clauses 16 of the tariff contains the rate modifying provisions of the tariff. These provisions are part of the tariff schedule and is leviable wherever applicable in addition to the rates indicated against each category of service. Clauses 16.10 provides for operational surcharge which consists of two elements, namely, fuel surcharge and other operational surcharge. The provisions with regard to other operational surcharge have been struck down by this Court and affirmed by the Supreme Court, but the levy of fuel surcharge has been upheld. We are really concerned in this batch of writ petitions with the levy of fuel surcharge. Clauses

16.10.1 provides that all consumers of the categories enumerated therein shall be required to pay operational surcharge at a rate to be determined every year in accordance with the formula given below in addition to the other charges as laid down in the tariff schedule.

Clause 16.10.3 lays down the formula for determining fuel surcharge in paise per unit. The formula is as follows:

$$S1 = \frac{A1 \times A3 + B1 \times B3 + C1 \times C3 + D1 \times D3 + E1 \times E3 + F1 \times F3 + G1 \times G3 + H1 \times H3 + (A2 + B2 + C2 + D2 + E2 + F2 + G2 + H2 \dots)}{A1 + B1 + C1 + D1 + E1 + F1 + G1 + H1 + A2 + B2 + C2 + D2 + E2 + F2 + G2 + H2 \dots}$$

S1 in the formula represents the average fuel surcharge per unit. A1, B1 and C1 represent the units generated from three thermal stations of the respondent-Board, namely, Patratu, Barauni and Muzaffarpur, and D1 to H1 refer to the units purchased from other sources such as Damodar Valley Corporation, Uttar Pradesh Electricity Board, National Thermal Power Corporation etc. A2, B2 and C2 represent the units sold out or sent out from three generating units of the Board on which fuel surcharge is leviable. D2 to H2 represent the units sold out of the units purchased from other sources on which fuel surcharge is leviable. A3 to C3 represent the increase in average cost of fuel surcharge in paise per unit computed for three Generation units owned by the Board. Lastly, D3 to H3 represent the increase in the average unit rate of purchase of energy from other sources, such as DVC, NTPC etc. during the year for which the surcharge is to be calculated. The said increase is to be calculated with respect to the year 1992-93. For computing the increase in average cost of fuel in respect of energy generated from Board's own generating stations the method of computation is indicated in Clauses 16.10.3.1. The method prescribed discloses that for each of the three generating stations, an assumed average cost of coal delivered at the bunkers of the Board's generating stations is taken in the first instance. If there is a rise or fall in the aforesaid cost at any time, the rate per unit will be increased or decreased, as the case may be, 0.3537 paise for each one percent variation in the case of Patratu Thermal Power Station, 0.8539 paise for Barauni Thermal Power Station and 0.7368 paise in the case of Muzaffarpur Thermal Power Station. So far as escalation in cost of energy purchased from other sources is concerned, the actual increase in average unit rate of purchase will apply. It will thus be seen that the numerators in the formula take into account the total units generated or purchased, as the case may be, multiplied by the increase in average cost of fuel or increase in average unit rate of purchase in the case of purchase of electricity from other sources. The total figure arrived at is then divided by the number of units sold out of the units generated by the Board's own generating stations and the units purchased from other sources. Thus the number of units generated at one of the power stations is multiplied by the increase in average cost of fuel calculated according to formula contained in Clauses 16.10.3.1 i.e. multiplied by A3 in the case of power generated from the Board's own generating stations. Similarly, the number of units purchased from another source is multiplied by the actual increase in average unit rate of

purchase in the case of energy purchased from any other source. In this manner the increase is worked out by adding all these figures and this is divided by the total number of units sold by the Board, whether generated by its own generating stations or purchased from any other source, for working out the fuel surcharge. The case of the petitioner is that in working out the formula the values to be taken into account must correspond to the same year. In other words if units generated at the Board's own generating stations, namely, A1, B1 and C1 correspond to the year 1991-92, the units purchased from DVC represented by D1 to H1 must also correspond to the same year. The same rule must apply in the case of units sold as also in the case of increase in average cost of generation or increase in average unit rate of purchase from other sources, if for the purpose of determination of fuel surcharge different base years are taken, it would result in arbitrariness. According to the petitioners while all the other values have been rightly included while working out the fuel surcharge, in respect of D-3 to H-3, i.e., in regard to increase in average unit rate of purchase, the base year is taken as 1992-93 and not 1991-92. This, according to them, is arbitrary. It appears from Annexure-5 that the perception of Board in this regard was also the same. In the short note appended to Annexure-5 it is stated that the Board was governed by three guidelines given by the State Government in framing 1993 tariff. They were (a) Board will adopt the rate of U.P.S.E.B. tariff applicable from January 1992; (b) Fuel surcharge will be calculated taking January 1992 as the base; and (c) The fuel surcharge that will come in June '93 taking January 1992 as base should be added to U.P.S.E.B. rate of January 1992 and that should be made applicable for those consumers from whom fuel surcharge is realisable. It is explained in the note that since the U.P.S.E.B. rate of January 1992 was not available, the base value calculated for 1991-92 had been taken in the tariff. It has further been clarified that what was merged in the tariff under Clause 17 was only increase of 20 paise in the rate of fuel surcharge between January 1992 and June 1993 and that the rate of fuel surcharge was 12 paise per unit in January 1992 while in June 1993 the provisional rate of B.S.E.B. was 32 paise. There being rise of only 20 paise in the intervening period, only 20 paise was admitted to the basic tariff and not 32 paise, as stated in Clause 17 of the tariff notification. It is then pointed out in the note that the rise in fuel surcharge is on account of two factors, namely, rise in fuel cost of the generating stations of the Board and rise in purchase rate in respect of energy purchased from other sources. According to the note the base year for calculation of the rise in fuel surcharge must be the same for both, but while framing tariff the base year for determining the rise in fuel cost of the Board's own generating stations is taken to be 1991-92, in the case if rise in purchase rate the base year is taken as 1992-93. It is pointed out that in the original tariff itself at page 22 the base year mentioned was 1991-92 but it was subsequently corrected as 1992-93. It was, therefore, suggested that the base year for determining the rise in purchase rate of energy from other sources should also be taken to be year 1991-92. From the report of the Committee submitted before this Court also it appears that majority of members (excepting

two representing the Board) have suggested that the base year for calculation of fuel surcharge for 1993-94 and onwards should be taken as 1991-92.

12. The submission of the petitioners, which is supported by the note prepared by the Board itself, as also majority report of the Committee, appears to be sound. If the fuel surcharge is to be determined for any particular year or period, it stands to reason that the numerator, as also the denominator in the formula must relate to the same base year; otherwise it would be open to the Board to choose convenient figures from different years and arrive at a figure which cannot truly represent the increase in the cost of generation, or purchase of electrical energy. Mr. Shanti Bhushan appearing on behalf of the Board submitted that for each of the thermal power stations of the Board a formula is given based on a particular cost of coal and any increase in average cost of coal in the year gives rise to the fuel surcharge and such rise is to be calculated by applying multiples provided in Clauses 16.10.3.1 of the schedule. Since the formula relating to thermal power stations is merely linked to basic assumed on price of coal for a particular year, it has no connection with any base year: The submission ignores the guidelines given by the State Government to calculate fuel surcharge taking January 1992 as the base. The increase in fuel surcharge is, therefore, linked to the base year provided in the guidelines issued by the State Government. Thus, the increase has to be worked out by reference to the base year which is taken to be 1991-92 for all other purposes. Thus, all the values in the formula correspond to the year 1991-92 except D3 to H3 which relate to the year 1992-93. No doubt, this has been done in view of the provision in Clauses 16.10.3 of the tariff. To my mind this would result in arbitrariness and unreasonable demand on the consumers. If the figures relating to Board's own generating plants correspond to the year 1991-92, there is no reason why the increase in average unit rate of purchase should also not correspond to the year 1991-92. It appears to me that originally it was provided that the said increase to be calculated with respect to the year 1991-92 but subsequently the same was changed to 1992-93 without appreciating the purpose behind it. It, therefore, appears to me that the tariff notification may need a modification in Clauses 16.10.3 with a view to provide that for purpose of calculating the increase in the average unit rate of purchase of energy from other sources, the base year should be the year 1991-92, which is the year taken into account for applying the other values in the formula.

13. While on this question it may be necessary to appreciate the effect of this change, according to the majority report, for the period July 1993 to March 1994 the rate of gross fuel surcharge is worked out at 32.38 paise/Kwh, while according to the two members representing the Board on the Committee it works out to 25.98 p/Kwh. For the year 1994-95, according to the majority report it would work out 41.33 paise/Kwh, whereas according to the two dissenting members it will work out to 43.89 p/Kwh. It would thus be seen that if the base year for the purpose of D3 to H3 is taken to be 91-92, the fuel surcharge would be more in the year 1993-94, but slightly less in the year 1994-95. This of

course is without giving credit for 20 paise which the majority members recommended, and which is a separate question altogether. It, therefore, appears that the difference may not be much, but all the same the fuel surcharge is to be correctly calculated in accordance with the formula given in the tariff notification. It cannot be disputed that the tariff notification issued u/s 49 of the Electricity (Supply) Act, 1948 has the force of law and, therefore, no deviation there from can be permitted unless the tariff is amended.

14. I now come to the next question as to the true meaning and import of Clauses 17 of the tariff, and whether the same has been given effect.

15. Clauses 17 of the tariff provides that the existing rate of fuel surcharge modified on 29-3-1993 amounting to 32 paise per unit has been merged in the tariff. However, any increase in the operational surcharge thereafter only shall be levied. The petitioners contend that since the fuel surcharge has been merged in the basic tariff, and Clauses 17 provides that only the increase in the operational surcharge thereafter shall be levied, the petitioners are entitled to the benefit of adjustment to the extent of merger of the fuel surcharge in the basic tariff. The argument proceeds on the basis that the base year as directed by the State Government is taken to be the year 1991-92 and any increase in subsequent years is worked out by reference to the base year. Thus in the matter of calculation of increase in fuel surcharge, after working out the increase, credit should be given to the consumers to the extent of fuel surcharge merged in the basic tariff because Clauses 17 in terms provides that any increase in the operational surcharge thereafter only shall be levied. According to the petitioners as on 1st July, 1993 the fuel surcharge should be taken to be zero, and any increase thereafter can only be charged from the consumers.

On the other hand, Counsel for the Board submitted that the merger clearly meant that what was chargeable as fuel surcharge under the old tariff notification of 1991 had been merged in the basic tariff and, therefore, the fuel surcharge payable by the consumers would now be calculated as per the different formula contained in Clauses 16.10.3 of 1.993 tariff notification. Once the old fuel surcharge was merged in the basic tariff, that amount was no longer for the near year 1993-94 being charged as fuel surcharge, and the fuel surcharge as calculated according to the new formula was to be paid in addition to the basic tariff rate. There was no question of the old fuel surcharge which had been merged in the basic tariff to be deducted out of the fuel surcharge which was payable under and in accordance with the formula contained in the new notification for new year 1993-94. He submitted that it would be an absurdity to deduct from the computed fuel surcharge something which had been merged in the basic tariff with the object of increasing the total charge payable for electricity. According to him, the last part of Clauses 17 only made it clear that after the old tariff notification stood superseded, and the fuel surcharge calculated according to the formula contained in 1991 tariff notification continued only up to 31-1993, for the remaining period commencing from February 1993

and ending with the end of June 1993 the increased fuel surcharge could be levied on the consumers. He, therefore, submitted that the very purpose of merger of fuel surcharge in the basic rate would be completely lost if the fuel surcharge calculated for the previous year was to be deducted out of the fuel surcharge calculated in the year 1993-94 or any subsequent year.

16. It is no doubt true that after merger of the fuel surcharge in the basic tariff, the fuel surcharge lost its character as fuel surcharge and became part of the basic tariff. The same could not be deducted from the basic tariff with a view to give effect to Clause 17 of the tariff notification. I, therefore, have no hesitation in accepting the submission to the extent that the basic tariff rate cannot be reduced by reference to Clause 17 of the tariff notification because it changes its character from fuel surcharge to basic tariff. In the instant case however, that is not what the petitioners claim. Their case is that since the base year is taken to be the year 1991-92 in accordance with the Government guidelines, any increase in fuel surcharge has to be worked out by reference to the figures of the year 1991-92. After the increase of fuel surcharge is so worked out which may be described as the gross fuel surcharge, last part of Clause 17 of the tariff notification has to be given effect. This means that treating the fuel surcharge as zero on 1st July, 1993, the escalation in fuel surcharge has to be worked out. This is emphasised by the use of words "any increase in the operational surcharge thereafter only shall be levied"

17. The submission urged on behalf of the petitioners also found favour with the Board when the letter (Annexure-5) was written by the Board to the State Government, and a modification of Clause 17 of the tariff was proposed with a view to provide that any increase in the fuel surcharge thereafter shall be levied after accounting for the increase already merged in the tariff. In the short note as well it was indicated that as per the guidelines of the State Cabinet the fuel surcharge for any period has to be calculated taking January 1992 as basis which was taken as the year 1991-92 by the Board, and after arriving at this figure which is increase over 1991-92, 20 paise should be subtracted because out of this increase, 20 paise had already been merged in the tariff. It was pointed out that this subtraction of 20 paise from the value of total increase had not been made. The majority report of the Committee also recognized that the credit of 20 paise per Kwh which has been merged in the tariff of June 1993 should be considered for adjustment for subsequent years in place of 32 paise indicated in Clause 17 of June notification (1993 tariff).

18. While Clause 17 of the tariff notification mentions the figure of 32 paise, it was found by the Board earlier, which finding has been confirmed by the majority report of the Committee that what was actually merged in the basic tariff was only 20 paise per Kwh and not 32 paise as mentioned in Clause 17 of the tariff notification. This was because according to the Board the rate of fuel surcharge in January 1992 was 12 paise per Kwh while it was 32 paise at the time of introduction of 1993 tariff. There was thus a rise of 20 paise in the rate of fuel

surcharge between January 1992 and June 1993 and in accordance with the guidelines issued by the State Government, only the rate of 20 paise had been added to U.P.S.E.B. tariff rate of January 1992.

19. Having regard to the facts and circumstances noticed above I am satisfied that a prima facie case has been made out for reconsideration of the matter by the respondent-Board on two points urged on behalf of the petitioners. As submitted by Sri Shanti Bhushan appearing on behalf of the respondent Board, the tariff notification has the force of law, and can only be amended by similar notification issued by the Board u/s 49 of the Electricity (Supply) Act, 1948. Counsel for the petitioners, on the other hand, submitted that the majority report of the Committee should be taken to be the report of the Committee and since the respondent-Board had agreed to the constitution of the said Committee, it should be held bound by its findings. It was, therefore, submitted that a direction be issued to the respondent-Board to modify the tariff notification in the manner prayed for by the petitioners. On the other hand, it is contended that the recommendation of the Committee was only to be considered by the Chairman of the Board, and there is nothing to show that this Court intended that the findings of the Committee shall be binding upon the respondent-Board. I am inclined to agree with the submission urged on behalf of the respondents. The earlier order of this Court dated 17-10-1996 disposing of batch of writ petitions before this court (C.W.J.C. No. 2771 of 1995 (R) with analogous cases) directed the Committee to submit its detailed report to the Chairman of the Bihar State Electricity Board. After the submission of such report, if any party felt aggrieved it was left open to that party to move the appropriate forum or Court of law. It is apparent from a perusal of the order that there was no direction to the Board to act upon the recommendation of the Committee. The Court intended that the report of the Committee would assist the Board in coming to a fair and just decision, and if the Board was satisfied that the tariff notification required any modification, it was open to the Board to modify the tariff notification in accordance with law. It is no doubt true that by order dated 12-3-1997 passed in the instant batch of writ petition the report was directed to be submitted to this Court Pursuant to the aforesaid direction the report has been submitted before this Court. The respondent-Board as such had no occasion to consider the report of the Committee. This Court intended that after the submission of the report of an expert body consisting of two impartial members and two members each nominated by the consumers and the Board, the Board may decide to take appropriate steps in the matter. If it was satisfied that having regard to the findings of the Committee some changes in the tariff notification were necessary, it could do so. On the other hand, if the Board after considering the report did not find it appropriate to make any modification in the tariff notification, it would be open to the aggrieved parties to challenge the same before any forum including a Court. In my view that intention of the Court should be given effect, because ultimately it is for the respondent-Board to issue a modifying notification.

20. In these circumstances these writ, petitions are disposed of with a direction

to the respondent-Bihar State Electricity Board to consider the report of the Committee submitted before this Court on 16th March, 1997, and in consultation with the State of Bihar take a final decision in the matters enumerated below: by a reasoned order:

(i) Whether any modification of Clauses 16.10.3 of the tariff notification published on 23rd June, 1993 is required so that increase in the average unit rate of purchase of energy from D.V.C... N.T.P.C. etc. should be calculated with respect to the year 1991-92 instead of the year 1992-93.

(ii) Whether in terms of Clauses 17 of the aforesaid tariff notification, 20 paise per Kwh representing the increase in fuel surcharge which has been merged in the basic tariff, should be considered for adjustment, instead of 32 paise, in terms of Clauses 17 of the aforesaid notification. If so, whether the impugned Circular dated 5-2-1997 be not withdrawn and the consumers be given the benefit of this credit for the period July 1993 to March 1994 and thereafter Clauses 17 of the tariff notification 1993 be amended appropriately.

Till the Board takes a final decision in the matter, the interim order passed by this Court on 21-3-1997 shall operate. Thereafter the petitioners will be liable to pay fuel surcharge in accordance with the decision that may be taken by the Board. Any person aggrieved by the decision of the Board will be at liberty to challenge the same in accordance with law.