THE HON'BLE SRI JUSTICE N.V. RAMANA

W.P. Nos. 18212, 17978, 20376, 18075, 18117, 18156, 18211, 17818, 20271, 17869, 18134, 18142, 18144, 18146, 18151, 18152, 18160, 18189, 18205, 18209, 18214, 18217, 18220, 18228, 18233, 18388, 18389, 18390, 18391, 18393, 18394, 18395, 18396, 18397, 18398, 18399, 18400, 18402, 18403, 18404, 18405, 18406, 18409, 18410, 18421, 18422, 18423, 18424, 18633, 18696, 18738, 18748, 18757, 18758, 18760, 18763, 18786, 18791, 18798, 18850, 18853, 18873, 18948, 18956, 18975, 19001, 19008, 19018, 19070, 19074, 19078, 19079, 19080, 19128, 19132, 19135, 19137, 19142, 19145, 19149, 19150, 19151, 19212, 19213, 19214, 19221, 19238, 19246, 19254, 19262, 19272, 19280, 19291, 19292, 19296, 19298, 19301, 19326, 19327, 19331, 19334, 19368, 19382, 19384, 19389, 19396, 19409, 19412, 19429, 19465, 19466, 19467, 19470, 19471, 19472, 19473, 19475, 19505, 19515, 19525, 19526, 19527, 19529, 19536, 19539, 19540, 19545, 19550, 19552, 19554, 19556, 19557, 19561, 19569, 19571, 19573, 19574, 19579, 19581, 19582, 19585, 19588, 19594, 19608, 19613, 19615, 19616, 19624, 19666, 19673, 19703, 19704, 19783, 19791, 19798, 19800, 19802, 19803, 19807, 19808, 19903, 19921, 19928, 19958, 20011, 20078, 20087, 20118, 20157, 20184, 20209, 20215, 20272, 20356, 20706, 20707, 20712, 20906, 20985, 21061, 21091, 21142, 21167, 21176, 21197, 21347, 21355, 21366, 21469, 21470, 21490, 21493, 21495, 21540, 21558, 21639, 21673, 21694, 21717, 21884, 21920, 21926, 21984, 22041, 22112, 22143, 22171, 22175, 22208, 22221, 22222, 22251, 22287, 22288, 22305, 22404, 22428, 22478, 22496, 22537, 22711, 22750, 22773, 22833, 22884, 22907, 22913, 22918, 22919, 22931, 22979, 23022, 23056, 23199, 23246, 23310, 23311, 23367, 23389, 21893, 23502, 19261, 23513, 23543, 23545, 23682, 23739, 24043, 24050, 24101, 24569, 24575, 24576, 24620, 24919, 24922, 25032, 25154, 25371, 25410, 25413, 25421, 25425, 25484, 25491, 25506, 25539, 25552, 25655, 25908, 25910, 25915, 25940, 25963, 25976, 26011, 26024, 26093, 26101, 26107, 26141, 26178, 26252, 26381, 26399, 26556, 26562, 26630, 26862, 26868, 26890, 26917, 26998, 27160, 27174, 27212, 27225, 27235, 27268, 27273, 27274, 27275, 27319, 27329, 27375, 27501, 27558, 27561, 27584, 27624, 27626, 27628, 27637, 27642, 27686, 27693, 27742, 27746, 27747, 27863, 27884, 27899, 27971, 27975, 27988, 28053, 28060, 28073, 28074, 28075, 28077, 28093, 28175, 28205, 28324, 28363, 28434, 28539, 28574, 28664, 28805, 28816, 28828, 28834, 28837, 28838, 28839, 28840, 28841, 28846, 28904, 28978, 28984, 28985, 28986, 28990, 28992, 28993, 28994, 28995, 28996, 28998, 29005, 29069, 29106, 29126, 29138, 29143, 29156, 29158, 29171, 29174, 29183, 29187, 29190, 29191, 29227,

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Common Order:

In this batch of writ petitions, the petitioners, who are High Tension (HT) electricity consumers, have called in question, the proceedings dated 05.06.2010, issued by A.P. Electricity Regulatory Commission, determining and approving the Fuel Surcharge Adjustment (FSA) for the financial year 2008, as illegal and arbitrary, contrary to the provisions of Regulation No.1 of 2003, Electricity Act, 2003, violative of principles of natural justice and the rights guaranteed under Articles 14, 19(1)(g) and 300-A of the Constitution of India.

FACTUAL BACKGROUND

The undisputed facts that are necessary for disposal of this batch of cases may be noted, and they run thus:

The petitioners being HT electricity consumers entered into agreements with A.P. Transmission Corporation Ltd. (AP TRANSCO), for supply of electricity continuously. Pursuant to the said agreements, and the laws governing the supply of power, AP TRANSCO has been supplying power to the petitioners continuously, for meeting their requirements.

The State of Andhra Pradesh, in the process of electricity reforms, enacted A.P. Electricity Reform Act, 1998, for constitution of Electricity Regulatory Commission, restructuring the electricity industry, rationalization of generation, transmission, distribution of supply of electricity and for taking measures conducive to the development and management of the electricity industry in an efficient, economic and competitive manner. Pursuant to the said Act, the A.P. Electricity Regulatory Commission was established. (hereinafter referred to as 'the Commission'). The said Commission was vested with various powers and functions, including granting licenses and determination of and tariffs.

Subsequently, the Union of India enacted Electricity Act, 2003, in order to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and for taking measures conducive to the development of electricity

industry, protecting interest of consumers, rationalization of tariff, ensuring transparent policy regarding subsidies and constitution of regulatory bodies. The Electricity Act, 2003 repealed, the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commission Act, 1998 and, the provisions of the A.P. Electricity Reform Act, 1998, to the extent not inconsistent with the provisions of the Electricity Act, 2003, including the constitution of A.P. Electricity Regulatory Commission, were saved (Section 185(3))

While the matters stood thus, the Government of Andhra Pradesh, vide G.O. Ms. No. 58, Energy (Power-III), dated 07.06.2005, divided AP TRANSCO into four Distribution Companies (DISCOMs), namely AP NPDCL, AP SPDCL, AP EPDCL and AP CPDCL, and transferred and vested the rights and obligations and contracts relating to procurement and bulk supply of electricity or trading of electricity to which AP TRANSCO is a party, in the said four DISCOMs, with effect from 09.06.2005. The DISCOMs are State Government undertakings, incorporated under the provisions of the Indian Companies Act, 1956, for doing business of distribution of electricity.

The four DISCOMs being independent licence holders engaged in distribution business and retail supply business of electricity in their respective areas, submitted separate applications on 30.11.2007 before the Commission, for determination of tariff, for the year 2008-09. The Commission in exercise of its power of determination of tariff, under Section 62 of the Electricity Act, 2003, passed Tariff Order on 20.03.2008. The said Tariff Order determined the tariff and also stated that Fuel Surcharge Adjustment (FSA) will be extra as applicable.

The Government of Andhra Pradesh, for the convenient transaction of business and to ensure co-ordination among the four DISCOMs, constituted a Committee in the name of Andhra Pradesh Power Co-ordination Committee (hereinafter referred to as ‘the Power Co-ordination Committee), was constituted vide G.O. Ms. No. 59, dated 07.06.2005, to advise and guide the four DISCOMs in the discharge of their functions.

The Power Co-ordination Committee, on behalf of the four DISCOMs, submitted proposals on 12.08.2009, claiming FSA, for the four quarters of the financial year 2008-09 before the Commission. The Joint Director of the Commission, who scrutinized the proposals, vide his note dated 21.08.2009, found certain deficiencies, which *inter alia*, include, the non-filing of authorizations of DISCOMs authorizing the Power Co-ordination Committee to file proposals on their behalf, and the reasons for not seeking condonation of delay in filing proposals within 30 days of the end of respective quarter, and called upon the Power Co-ordination Committee, to cure them. Accordingly, as required by the Joint Director of the Commission, the Power Co-ordination Committee cured the defects and furnished the necessary materials in support of its claim for FSA.

The Commission after considering the materials submitted by the Power Co-ordination Committee, including the revised proposal, passed orders on 05.06.2010. By the said orders, the Commission determined FSA, for the four quarters of the financial year 2008-09, payable by the petitioners. It is undisputed that while passing the orders, the Commission did not serve any notice on any person, including the petitioners. It only considered the information and data furnished by the licensees. Aggrieved by these orders, the petitioners have filed this batch of writ petitions, on various grounds.

SUBMISSIONS OF THE PETITIONERS

Sri. K. Gopal Choudary, the learned counsel who led the arguments in this batch of writ petitions made the following submissions against the sustainability of the impugned proceedings:

He submitted that the determination of FSA being an amendment to the main tariff order, and not being a mere arithmetical exercise, based on the formula prescribed, the procedure that is followed for the determination and passing of

tariff order has to be followed. He submitted that the Commission is not empowered to pass any order affecting the rights of any consumer or person, unless it gives notice and hears them, as prescribed by the Business Regulations, duly complying with the requirements of transparency embedded in Section 86(3) of the Electricity Act, 2003, mandatory consultation embedded in Section 10(7) of the A.P. Electricity Reform Act, 1998, hearing as embedded in Regulation 7(2)(ii) of the Business Regulations, the principles of natural justice and other provisions regulating the conduct of proceedings before the Commission, and since the impugned order passed by the Commission, determining FSA, affected the rights of the petitioners, who are consumers, and the same having been passed by the Commission, without following the above provisions of law, is liable to be set aside. In support of this argument, he placed reliance on the judgment of a learned Judge of this Court in **M/s. Ind-Barath Energies Ltd. v. State of A.P.**[1], which was confirmed by a Division Bench of this Court in writ appeals[2].

He submitted that the impugned order, issued by the Secretary of the Commission, cannot be treated as order of the Commission, passed under Regulation 19(1) of the Business Regulations, and therefore, cannot be sustained. He submitted that when the Regulations explicitly provide for the manner in which the order of the Commission is to be made, the same has to be made in the manner prescribed. In support of this argument, he relied on the decisions of the Apex Court in **Vinod Seth v. Devinder Bajaj**[3] and **K.K. Velusamy v. N. Palanisamy**[4].

He submitted that as per the provisions of Section 62 of the Electricity Act, 2003, the licensee has to file application for determination of tariff/FSA, as may be determined by the Regulations, and the Power Co-ordination Committee, not being a licensee, the applications dated 12.08.2009, submitted by the Power Co-ordination Committee on behalf of DISCOMs, for determination and fixation of FSA, are not maintainable, and that being so, the Commission, committed a grave error in entertaining the applications submitted by the Power Co-ordination Committee

on behalf of the DISCOMs and determining the FSA.

He further submitted that as per Condition No. 4 appended to Regulation 45-B of the Business Regulations, the licencee has to file with the Commission all information required for calculation of the FSA within 30 days of the end of the respective quarter, failing which the licensee would forfeit any future claims for such quarter, and since the applications filed by the Power Co-ordination Committee on behalf of the DISCOMs claiming FSA, were after lapse of more than one year ten months, the applications were clearly barred by limitation. He submitted that no applications were filed to condone the delay, and in fact, no power was vested in the Commission to condone the delay, the Commission committed a grave error in entertaining the applications and condoning the delay, even though no such power to condone the delay vests the Commission.

He further submitted that since the impugned order passed by the Commission, seeks to revive and restore a right forfeited by operation of statutory provision, the same cannot be sustained and is liable to be set aside. According to the learned counsel, Regulation 55(1) and 55(2) of the Business Regulations, on which the respondents placed reliance to justify their act in entertaining the applications filed by the Power Co-ordination Committee on behalf of the DISCOMs belatedly, by reason of the impugned order passed by the Commission, merely enable the Commission to depart from the substantive provisions of the Regulations but not to act contrary to the Regulations. He submitted that the inherent power under Regulation 55 of the Business Regulations, cannot be exercised, when there is express provision governing the field, and since Condition No.4 of Regulation 45-B of the Business Regulations, clearly provides that if the licensee fails to file with the Commission, all the information required for calculation of the FSA within 30 days of the end of the respective quarter, their future claim for FSA for such quarter, shall stand forfeited, and the Commission could not have entertained the applications filed by the Power Co-ordination Commission, allegedly in exercise of its inherent power under Regulation 55 of the Business Regulations, and more so when the impugned order is silent on the provision

under which the order was passed. He submitted that the inherent power under Regulation 55(1) of the Business Regulations can be exercised by the Commission only to meet the ends of justice or to prevent the abuse of its process, and under Regulation 55(2), the Commission can adopt a procedure, which is at variance with the provisions of the Regulations, if the circumstances warrant and after recording reasons in writing.

He further submitted that the impugned order passed by the Commission, is not a majority order, because it does not reflect the view of the Chairman and the Members either approving or dissenting from the views expressed by the Member (Finance) and it is passed without application of mind to the relevant issues, since it does not reflect the details of the claims, based on the materials supplied, and consider whether agricultural consumption has been excluded from computation, because Section 55 of the Electricity Act, 2003, clearly mandates that no licensee shall supply electricity after the expiry of two years from the date of commencement of the said Act, except through installation of a correct meter. He submitted that the non-agricultural consumers cannot be burdened indefinitely for failure of the licensee to comply with the mandatory requirement of Section 55 of the Electricity Act, 2003, and in any case, this was the relevant issue which the Commission was required to take into consideration, while determining the FSA, which it failed to take. He further submitted that from a perusal of the note file relating to the impugned proceedings, it would become clear that even these issues had come up among the Members of the Commission themselves and the so-called majority, had not addressed them, and important issues were ignored and the approach of the Commission, was one of arbitrarily allowing a forfeited claim of the DISCOMs, without any proper consideration. He thus submitted that the impugned orders, issued by the Commission determining the FSA and the consequential demands made by the DISCOMs for FSA, be set aside and the writ petitions be allowed.

Sri. C. Kodandaram, while adopting the arguments advanced by Sri. K. Gopal Choudary, supplemented the following arguments:

He submitted that since the applications filed by the Power Co-ordination Committee on behalf of the DISCOMs claiming FSA were filed after expiry of 30 days period prescribed in Condition No.4 of Regulation 45-B of the Business Regulations, and the same having been barred by limitation, and in the absence of any provision, enabling the Commission to condone the delay, and there being no inherent power conferred on them to condone the delay, the Commission could not have entertained the applications filed by the Power Co-ordination Committee, on behalf of DISCOMs, claiming FSA, which are time-barred. In support of this contention, he placed reliance on the judgments of the Apex Court in **Singh Enterprises v. Commissioner of Central Excise, Jamshedpur**[5], which subsequently was followed in **Amchong Tea Estate v. Union of India**[6].

He further submitted that the Commission while administering the Regulations framed by it, is exercising its administrative power, and it cannot justify its action of deviating from the prescribed procedure since it has inherent power to deviate. He submitted that the provisions of Regulation 55 of the Business Regulations, have no application to the case on hand, and even assuming the same are applicable, as required by the Regulations, reasons have to be recorded for deviating the procedure, and such deviation, should only be to meet the ends of justice or to prevent the abuse of process of the Commission, and not any other purpose.

He submitted that since the order of the Commission is under challenge as being *ultra vires*, the Commission cannot be a party to the proceedings and participate in legal hearing like an adversary and defend its own order. In support of his argument that the Commission cannot engage a counsel to defend its own order, he placed reliance on the judgment of the Karnataka High Court in **Jindal Thermal Power Company Limited v. Karnataka Power Transmission Corporation Limited**[7].

He submitted that when challenge to the impugned order is

made complaining that the order passed by the Commission is *ultra vires* the provisions and Regulations, there can be no alternative remedy, and in support of this argument that in spite of availability of alternative remedy, there can be no bar for filing writ petition, if the order is challenged on the ground of it being *ultra vires* and violation of principles of natural justice, he placed reliance on the judgments of the Apex Court in **Whirlpool Corporation v. Registrar of Trade Marks, Mumbai**[8], **Harbanslal Sahnia v. Indian Oil Corpn. Ltd.**[9], **ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd.**[10], **Popcorn Entertainment v. City Industrial Development Corpn.**[11] and **Mumtaz Post Graduate Degree College v. Vice Chancellor**[12].

Sri. C.R. Sreedharan, the learned counsel, while adopting the arguments advanced by Sri. K. Gopal Choudary and Sri. C. Kodandaram, submitted that in the absence of power mandated by law, there can be no inherent power vested in the Commission, to entertain applications beyond the time period prescribed, and in support of this argument, he placed reliance on the judgments of the Apex Court in **Babu Verghese v. Bar Council of Kerala**[13] and **Damodaran Pillai v. South Indian Bank Ltd.**[14].

Mr. Chandramouli, the learned counsel submitted that issuance of G.O. Ms. No. 59, dated 07.06.2005, constituting the Power Co-ordination Committee, by the Government is impermissible. According to him, the licensees themselves have to file applications for determination of tariff/FSA and not the Power Co-ordination Committee. Referring to the applications filed by the Power Co-ordination Committee, on behalf of the DISCOMs, claiming FSA, he submitted that the applications nowhere refer that the DISCOMs have authorized the Power Co-ordination Committee, to file applications on their behalf claiming FSA, and that being so, the Commission could not have entertained the same, and more so when under the provisions of the Electricity Act, 2003, DISCOMs being individual licensees,

have to file separate applications claiming FSA. He submitted that G.O. Ms. No. 59, dated 07.06.2005, does not confer any power on the Power Co-ordination Committee, to represent the DISCOMs before the Commission, or file applications on their behalf.

He submitted that before determining FSA, the Commission has to examine whether metering has been done as is required under Section 55 of the Electricity Act, 2003 and Condition No.1 of Regulation 45-B of the Business Regulations, but the counter filed by the Commission, is silent on whether agricultural sector is exempted. He further submitted that the liability of the agricultural sector has to be borne by the State Government by way of subsidy under Section 65 of the Electricity Act, 2003 and not by any other person.

He submitted that Regulation 55 of the Business Regulations, does not provide for condonation of delay. As per Condition No.4 of
Regulation 45-B of the Business Regulations, if the information required for calculation of the FSA is not filed by the licensee/DISCOMs within 30 days of the quarter ending before the Commission, the DISCOMs will forfeit their right to claim FSA. Once the right to claim FSA is forfeited, such right can be revived only by way of amendment of the Regulation or legislation or subordinate legislation, and in the absence of any such amendment made till date, the Commission, is not empowered to revive such a forfeited right.

He submitted that the impugned order is not an order under Regulation 19 of the Business Regulations, and there cannot be any challenge to the same in appeal under Section 111 of the Electricity Act, 2003, and as such, writ petition is the only remedy.

Sri. Duba Nagarjuna Babu, the learned counsel for the petitioners submitted that while price fixation by the Commission is a quasi-legislative function, its power to fix tariff for individuals is a quasi-judicial function. In support of this argument, he placed reliance on the judgment of the Apex Court in **Union of India v.**

Cynamide India Ltd[15]. He submitted that price fixation, being a legislative/quasi-judicial function, the order passed by the Commission, determining FSA is not appealable under Section 111 of the Electricity Act, 2003 because the word "order" referred to in Section 111 of the Electricity Act, 2003, relates to some other orders of the Commission, and not orders arising out of legislative/quasi-judicial functions.

He submitted that even if the Tariff Order passed by the Commission is appealable, the writ petition can be maintained, and availability of alternative remedy, cannot be a bar for the maintainability of the writ petition. In support of this argument, he placed reliance on the judgments of the Apex Court in **Rajasthan State Electricity Board v. Union of India**[16] and **Mumtaz Post Graduate Degree College v. Vice Chancellor**[17] and of this Court in **A.P. State Road Transport Corporation v. Central Power Distribution Company of Andhra Pradesh**[18].

He submitted that the Power Co-ordination Committee, is not a statutory body. It has filed applications on behalf of DISCOMs twice. The first application sent by it was returned by the Commission pointing out the defects, and after rectifying the defects, the Power Co-ordination Committee, submitted separate applications for the second time before the Commission claiming FSA on behalf of DISCOMs. He submitted that since the Commission had determined the FSA at the instance of the Power Co-ordination Committee, which is not a statutory body, and its very constitution under G.O. Ms. No. 59, dated 07.06.2005, being unauthorized, the determination of FSA by the Commission, is *ultra vires*, and in support of this argument, he placed reliance on the judgment of the Apex Court in **Bahadursinh Lakhubhai Gohil v. Jagdishbhai M. Kamalia**[19].

He submitted that the Government in exercise of its power conferred on it under Sections 65, 108 and 180 of the Electricity Act, 2003 can give policy directions to the Commission, but it can neither interfere with the functioning of the Commission nor direct

the DISCOMs to collect information, and file applications claiming FSA, and therefore, the application filed by the Power Co-ordination Committee, on behalf of the DISCOMs, claiming FSA, which are filed on the directions of the Government, ought not to have been entertained by the Commission. He further submitted that as per the provisions of Section 64 of the Electricity Act, 2003, the licencee alone has to submit tariff proposals, and the State Government not being a licensee, the Power Co-ordination Committee, constituted by the State Government, under G.O. Ms. No. 59, dated 07.06.2005, could not have submitted applications. This apart, he submitted that the applications submitted by the Power Co-ordination Committee, on behalf of the DISCOMs claiming FSA, before the Commission, are not supported by the authorizations of DISCOMs.

He further submitted that the Commission has to act impartially and not as an agent of the Government, and since the Commission determined the FSA at the instance of the Power Co-ordination Committee, which is an agent of the State Government, the order passed by the Commission determining FSA, is not an order in the eye of law. He submitted that even assuming that the order passed by the Commission determining FSA is appealable, there being no reasons whatsoever spelt out in the order, the appellate authority cannot consider the same effectively.

He submitted that the applications filed by the Power Co-ordination Committee on behalf of the DISCOMs claiming FSA before the Commission, are barred by limitation, and since the applications were not filed within the time period, as specified in Condition No.4 of Regulation 45-B of the Business Regulations, the DISCOMs, have forfeited their right to claim FSA. He submitted that Regulation
45-B being a special regulation, prevails over Regulations 55 and 59 of the Business Regulations, and the respondents, and in particular, the Commission, cannot justify their action of entertaining the applications filed beyond the time-period prescribed, relying on Regulations 55 and 59 of the Business Regulations.

Sri. Narasimha Rao, the learned counsel submitted that under Section 61(d) of the Electricity Act, while specifying the terms and conditions for determination of tariff, the Commission shall *inter alia* safeguard consumers' interest and at the same time, ensure recovery of the cost of electricity in a reasonable manner, and therefore, every consumer has *locus standi* to be heard by the Commission, before it passes an order affecting the interests of the consumer. In support of this argument, he placed reliance on the judgment of the Apex Court in **W.B. Electricity Regulatory Commission v. C.E.S.C. Ltd.**[20]. He submitted that the Commission is clothed with the power of determining FSA, and in support of this argument, he relied on the definition of "surcharge" as defined by the Apex Court in **M/s. Bissa Stone Lime Co. Ltd. v. Orissa Textile Mills Ltd.**[21]. He submitted that in determining FSA, the average cost of electricity has to be recovered as per the procedure prescribed, and since the Commission in the passing of the impugned order, did not follow the procedure, writ petition is maintainable against such an order, and availability of alternative remedy cannot be a ground not to entertain the writ petition. In support of this argument, he placed reliance on the judgment of the Apex Court in **U.P. State Spinning Co. Ltd. v. R.S. Pandey**[22]. He submitted that FSA has to be made within 30 days from the end of each quarter, but in the instant case, the Power Co-ordination Committee, filed applications on behalf of DISCOMs claiming FSA, after lapse of nearly one year and ten months, and the Commission, erroneously entertained the same, even though they are barred by limitation. He submitted that DISCOMs have failed to file annual returns with the Commission.

Sri. Dhulipalla V.A.S. Ravi Prasad, the learned counsel appearing on behalf of some of the petitioners submitted that the application submitted by the Power Co-ordination Committee, claiming FSA, on behalf the DISCOMs, is barred by limitation, because it is not filed within 30 days from the end of each quarter. It is filed after lapse of one year and 10 months. Therefore, having regard to the provisions of Condition No. 4 of Regulation 45-B of the Regulations, the right of the DISCOMs to claim FSA is

forfeited. And the Commission has no power to revive a time-barred claim. He further submitted that the Commission did not issue any notice whatsoever before passing the impugned order fixing FSA. Therefore, the impugned order passed by the Commission, is liable to be set aside.

SUBMISSIONS OF THE COMMISSION

Sri. P. Sri Raghuram, the learned counsel appearing for the Commission submitted that the Commission is a creature of the statute. It is not a quasi-judicial body, it is a regulator, and it exercises regulatory power and not administrative power. He submitted that the regulatory power falls into three categories, namely licensing, rate making and power over business practices and various other miscellaneous powers, as provided under Section 11 of the A.P. Electricity Reform Act, 1998 and under Section 86 of the Electricity Act, 2003. He submitted that the Commission, in determining the FSA for DISCOMs, has exercised its legislative power under Section 62 of the Electricity Act, 2003. He submitted that since the petitioners have not questioned the power of the Commission to levy FSA, which is extra, they cannot have any grievance against the impugned order passed by the Commission, determining FSA.

According to him, FSA is part of tariff, and passing of a Tariff Order is a legislative function. The Tariff Order for each of the categories, clearly prescribes that fuel surcharge allowance shall be in addition to the rates fixed in the tariff order, and FSA being part of the tariff, and not an independent exercise, but a supplement to the same, the procedure contemplated for passing Tariff Order, need not be followed once again. He submitted that fuel surcharge allowance is merely an arithmetical exercise, which is part of the determination of tariff and it is a pass-through (whatever cost incurred is given as it is), and fixation of FSA is a legislative function. In support of this argument, he placed reliance on the judgment of the Apex Court in **Bihar State Electricity Board v. Pulak Enterprises**[23].

He submitted that the Court in exercise of its discretionary

power under Article 226 of the Constitution of India, will interfere with tariff order only if principles of natural justice, regulations and the laws are not followed. He submitted that the contention of the petitioners that for determination of FSA, the Commission exercised quasi-judicial power and not administrative power or regulatory power and that the order is devoid of reasons, is not based on true appreciation of the legal position. He submitted that since FSA fixation is a legislative function, the parameters of quasi-judicial orders, cannot be applied. He submitted that the provisions of the Limitation Act, 1963 apply only in case of adjudicatory process and not for legislative functions. Fixation of tariff and FSA being a quasi-legislative function, the provisions of the Limitation Act, 1905 do not apply, and 30 days time prescribed in condition No.4 of Regulation 45-B of the Business Regulations, from the date of quarter ending, for claiming FSA, is merely a guideline and the claim does not stand forfeited. He submitted that the Commission has power to entertain petitions beyond 30 days period, in exercise of power under Regulation 55 read with Regulation 59 of the Business Regulations in the interest of justice. He submitted that the Electricity Act, 2003, casts a duty on the Commission to balance and protect the interest of DISCOMs as well as consumers. He submitted that fixation of FSA is a balancing act. He admitted that no FSA is fixed for agricultural sector and that metering has not been done.

He submitted that FSA fixation being an exercise akin to tariff fixation, and it being a legislative function, no public notice need be given, and in support of this argument, he placed reliance on the judgment of the Apex Court in **Bihar State Electricity Board v. Pulak Enterprises**.

He submitted that the Power Co-ordination Committee, has filed petition on behalf of DISCOMs claiming FSA before the Commission in its capacity as their agent, and all the DISCOMs have authorized the Power Co-ordination Committee to file applications on their behalf before the Commission, claiming FSA. The relationship between the DISCOMs and the Power Co-ordination Committee, is that of principal and agent, and therefore, the Power Co-ordination Committee, cannot be said to have no

locus standi, to file the petition.

He submitted that the order of the Commission is a regulatory order and not a quasi-judicial order. He submitted that though Section 19(3) of the A.P. Electricity Reform Act, 1998 provides for a majority decision, but in the fixation of FSA, no decision is involved. Since it is part of Tariff Order, and entails mere arithmetical calculation. He submitted that since it is not a judicial or quasi-judicial act, but a legislative act, the order of the Commission need not reflect the views of all the members. He submitted that the decision arrived at by the Commission cannot be faulted if it is shown that it has followed the regulations and complied with the provisions of law. He added that it is not required for each of the members of the Commission to decide all the points raised by each one of them.

He submitted that if the Commission were to pass a quasi-judicial order, it would provide hearing and pass orders recording reasons, and since the order is based on FSA formula, which merely involves arithmetic exercise, there was no necessity for the Commission to record reasons. He submitted that the orders and decisions issued or communicated by the Commission, shall be certified by the signature of the Secretary or an officer empowered in this behalf by the Chairman and bear the official seal of the Commission. Therefore, the contention of the petitioners that the impugned order passed by the Commission cannot be treated as an order under Regulation 19 of the Business Regulations, cannot be accepted.

He submitted that as against the impugned order passed by the Commission under Regulation 45-B read with Section 86(9) of 1998 Act and 62(4) of Electricity Act, there is a remedy of appeal provided under Section 111 of the Electricity Act, 2003, within a period of 60 days from the date of passing the order, which is efficacious because it would re-appreciate the order, and the appeal would be disposed of within 180 days, but the petitioner without availing the said remedy have approached this Court, by filing this batch of writ petitions, which are not maintainable. He submitted that this Court would not entertain writ petitions against

an order, if a remedy of appeal is provided against the same. He relied on the judgment of the Apex Court in **Bissa Stone Lime Co. v. Orissa State Electricity Board**[24], **Kerala S.E.B. v. S.N. Govinda Prabhu and Bros.**[25], **Union of India v. Cynamide India Ltd.**[26], **Hindustan Zinc Ltd. v. A.P.S.E.B.**[27], **Ashok Soap Factory v. Municipal Corpn. of Delhi**[28], **Bihar State Electricity Board v. Usha Martin Industries**[29], **BSES Ltd. v. Tata Power Co. Ltd.**[30], **Bihar State Electricity Board v. Pulak Enterprises**, **Swedish Match AB v. Securities & Exchange Board of India**[31], **Cellular Operators Assn. of India v. Union of India**[32], **Clariant International Ltd. v. Securities & Exchange Board of India**[33], **Tharoo Mal v. Puran Chand Pandey**[34], **Shri Sitaram Sugar Co. Ltd. v. Union of India**[35], **PTC India Ltd. v. Central Electricity Regulatory Commission**[36], **S. Bharat Kumar v. Govt. of A.P.**[37], **Association of Industrial Electricity Users v. State of A.P.**[38], **W.B. Electricity Regulatory Commn. v. CESC Ltd.**[39]**.** He thus prayed that the writ petitions be dismissed.

SUBMISSIONS OF DISCOMS

Sri. D. Prakash Reddy, representing **Sri. O. Manohar Reddy**, the learned counsel for the DISCOMs submitted that the original tariff order dated 23.03.2008 clearly prescribes that FSA is extra. The FSA order was passed on 05.06.2010. He submitted FSA merely being a fuel cost adjustment and being part of the original tariff order, no notice is required to be given to the consumers, because FSA is fixed based on the FSA formula, and the procedure that is followed for passing a tariff order need not be followed once again, while determining FSA. In support of this argument, he placed reliance on the judgment of the Apex Court in **Bihar State Electricity Board v. Pulak Enterprises**.

He submitted that even though Condition No. 4 of Regulation

45-B of the Business Regulations prescribed a period of 30 days from the end of each quarter for filing applications claiming FSA, the Commission in exercise of its power under Regulation 55(1) of the Business Regulations, can entertain applications claiming FSA even beyond the period of 30 days. He submitted that since the impugned order has been passed under Regulation 55(1) of the Business Regulations, there is no need to record reasons. He submitted that recording of reasons by the Commission would be necessary, if the order passed by it is under Regulation 55(2) of the Business Regulations.

He submitted that the applications filed by the Power Co-ordination Committee, on behalf of DISCOMs before the Commission, have the authority of the DISCOMs, and therefore, they are maintainable. He submitted that since the petitioners have availed the power supply, and the FSA being recovered by them, is in respect of the power already supplied to them, no prejudice can be said to have been caused to them, if the application is filed claiming FSA after expiry of 30 days.

He relied on the stand taken by DISCOMs in the counter with regard to delay in filing applications claiming FSA, based on the correspondence entered into by DISCOMs with the Government. He submitted that the Commission, before determining the FSA, looked into all aspects of the matter, including the aspect of delay, which occasioned on account of the correspondence between the DISCOMs and the Government, and therefore, it cannot be said that the Commission did not apply its mind to the facts, before passing the impugned order.

He submitted that the DISCOMs claimed the actual expenditure incurred by them, for purchasing the power supplied to the petitioners, supported by material and by answering all the queries raised by the Commission, and it is only after considering the said material, the Commission fixed the FSA, and therefore it cannot be said that the determination of FSA by the Commission, is arbitrary or illegal. He submitted that ff the petitioners feel that the order passed by the Commission is wrong, they can prefer appeal under Section 111 of the Electricity Act, 2003, which is efficacious.

He submitted that the scope and power of this Court to interfere with the impugned order passed by the Commission, determining FSA, is very limited. He submitted that in fixing the FSA, domestic and agricultural sectors have to be exempted. The impugned order is that of the Commission. The order need not mention, whether it is a majority order or minority order, and it need not reflect the views of all the members. The reasons can be mentioned if it is a quasi-judicial order, and the impugned order being only an order of the Commission communicated by the Secretary of the Commission, it need not reflect all the reasons. Hence, he prayed that the writ petitions be dismissed.

LEGISLATIVE HISTORY PRIOR TO ELECTRICITY REFORMS

To decide the aforesaid contentions, the legislative history governing electricity needs to be taken into account.

Prior to independence, the supply and use of electricity was governed and regulated by the Indian Electricity Act, 1910. After independence, the Union of India enacted, the Electricity Supply Act, 1948, which envisaged the establishment of State Electricity Boards in the States and vesting in them a monopoly for the generation, transmission and distribution of electricity and the functions of regulation relating to electricity. The Electricity Supply Act, 1940, *inter alia*, envisaged not only functions of development and management of the electricity supply system for the State Electricity Boards, but also the regulatory functions, in respect of the electricity supply industry.

The Government of Andhra Pradesh, in terms of the provisions of the Electricity Supply Act, 1948, constituted the Andhra Pradesh State Electricity Board (APSEB). Although the APSEB was intended to be an independent entity, it was subject to all pervasive control of the State Government. It could not discharge its functions in an objective manner. It was found that there was no objectivity in the fixation of tariffs and granting of subsidies. The APSEB was resource-constraint on several occasions it had to depend on financial assistance from the State

Government and heavy borrowing. All these factors made the APSEB ineffective. This led to severe short comings in the supply of power and quality of power supplied.

ELECTRICITY REFORMS

Recognizing that the shortage of electricity was of a chronic problem and that additional resources could not be generated out of public funds alone and with the objective of bringing in additional resources for the capacity addition programme in the electricity sector, the Government of India issued a policy dated 22-10-1991 on private participation in the power sector. The policy envisaged dismantling of the State monopoly in the power sector and allow multiple power players under a regulatory regime.

The Union of India enacted the Electricity Regulatory Commission Act, 1998, which provided for the establishment of Central Electricity Regulatory Commission, and also prescribed its powers and functions. The said Act also enabled the State Governments to establish, State Electricity Regulatory Commissions and provided for their powers and functions.

REFORMS IN ANDHRA PRADESH

The Government of Andhra Pradesh, enacted A.P. Electricity Reform Act, 1998, which came into force with effect from
01-02-1999. The A.P. Electricity Reform Act, 1998 provides for the constitution of an Electricity Regulatory Commission, re-structuring of the Electricity Industry, rationalization of the Generation, Transmission, Distribution and supply of electricity avenues for participation of private sector in the electricity Industry and generally for taking measures conducive to the development and management of the Electricity industry in an efficient, economic and competitive manner and for matters connected therewith or incidental thereto. Section 3 of the A.P. Electricity Reform Act, 1998 provides for establishment of a Commission called A.P. Electricity Regulatory Commission.

The Commission under the Act was entrusted with all regulatory functions pertaining to the electricity industry in the State of Andhra Pradesh. Since the Governmental undertakings were also subject to regulation along with private sector undertakings, the Commission was made an autonomous statutory body. The Commission is authorized to prescribe the performance standards to the licensees and closely monitor the same and protect the consumer interests. The Commission is charged with the functions as a quasi-judicial authority and is empowered to pass orders and also enforce its decisions. The Commission is also empowered to make regulations under Section 54 of the A.P. Electricity Reform Act, 1998.

After the enactment of the A.P. Electricity Reform Act, 1998, the assets and liabilities of APSEB was transferred to two new entities APGENCO and APTRANSCO. Subsequently, four separate independent Distribution Companies (DISCOMs) namely APNPDPCL, APSPDPCL, APEPDPCL and APCPDPCL, were established as companies under the Companies Act, 1956. On 29.11.2000, the Commission issued licences to the four DISCOMs, for distribution and retail supply, for their respective areas.

ELECTRICITY ACT 2003

While so, the Union enacted the Electricity Act, 2003. The Electricity Act, 2003 was intended, *inter alia*, to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity, and generally for taking measures conducive to development of the electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalization of electricity tariff, ensuring transparent policies regarding subsidies, etc. The Statement of Objects & Reasons for the Electricity Act, 2003 traces the prior legislative history and the maladies which the new legislation seeks to cure. Amongst the main features of the Act were to de-license generation, creation of a Central Transmission Utility and State

Transmission Utility as government companies, provision of open access to the transmission and distribution networks, and enabling trading in electricity. The Act makes provisions for transparency in the functioning of the Commissions and also seeks to address previous maladies including the endemic ill of non-metering of agricultural consumption.

The Electricity Act 2003 repealed the Electricity Act, 1910, the Electricity (Supply) Act, 1948, and the Electricity Regulatory Commissions Act, 1988. Section 185(3) of the Electricity Act 2003, however, it saves the provisions of the enactments listed in the Schedule to the Act, including the A.P. Electricity Reform Act, 1998, to the extent that the provisions of those Acts were not inconsistent with the provisions of the Electricity Act 2003. Thus, the A.P. Electricity Reform Act, 1998, is saved to the extent that it is not inconsistent with the Electricity Act 2003. The Commission constituted under the A.P. Electricity Reform Act, 1998 became the appropriate Commission under the Electricity Act, 2003 as well.

A.P. ELECTRICITY REGULATORY COMMISSION (CONDUCT OF BUSINESS) REGULATIONS AND AMENDMENTS

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The Commission, after its constitution under the A.P. Electricity Reform Act, 1998, and in exercise of its regulation making power under Section 54, issued A.P. Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 (Regulation No. 2/1999), *inter alia*, providing for the manner in which it would conduct its business generally, including the manner in which, it would consult and hear persons likely to be affected by its decisions, as mandated by Section 10(7) of the A.P. Electricity Reform Act, 1998. The relevant provisions of the Regulations will be referred in the later part of this judgment.

Thereafter, on 28.08.2000, the Commission, made amendment to the Business Regulations, by issuing A.P. Electricity Regulatory Commission (Conduct of Business) Amendment Regulations, 2000 (Regulation No. 8/2000),

introducing *inter alia* Regulation 45-B in Chapter IV-A with respect to tariffs and providing for a Fuel Surcharge Adjustment formula. Thereafter, again on 23.6.2003, the Commission issued the Andhra Pradesh Electricity Regulatory Commission (Conduct of Business) Amendment Regulation, 2003 (Regulation No.1/2003), whereby substituting Fuel Surcharge Adjustment formula contained in Regulation 45-B.

Consequent to the coming into force of the Electricity Act, 2003, the Commission on 10.6.2004, issued the A.P. Electricity Regulatory Commission (Transitory Provisions for Determination of Tariff) Regulation, 2004 (Regulation No. 9/2004), whereby the existing Regulations notified by the Commission, including the Conduct of Business Regulations, as amended from time to time, under the provisions of the A.P. Electricity Reform Act, 1998, were to continue to apply as Regulations under the Electricity Act, 2003.

DETERMINATION OF FSA

Under the aforesaid legal regime, the Commission fixed the tariff by passing a Tariff Order. In the same Tariff Order, it was stated that Fuel Surcharge Adjustment will be extra as applicable. Under Regulation 45-B of the Business Regulations, the Commission shall determine the FSA based on an application by the licensee supported by information and data relating to the licensee. Regulation 45-B of the Business Regulations, prescribes a formula for determination of FSA. The data for the application of the formula is based upon the information forwarded by the licensees. The Commission shall make the determination as per the formula, 'unless otherwise agreed by the Commission'. In addition to the formula, Regulation 45-B imposes certain conditions.

It is these orders issued by the Commission determining FSA, which is now under challenge. The following questions arise based on the contentions raised by various parties:

1. ***Whether the writ petitions are maintainable, in view of availability of alternative remedy of an appeal under Section 111 of the Electricity Act, 2003 against the impugned order passed***

by the Commission?

2. ***Whether the A.P. Power Co-ordination Committee, constituted under G.O. Ms. No. 59, dated 07.06.2005, has locus standi to file application on behalf of the four DISCOMs, claiming FSA?***
3. ***Whether the application filed by the Power Co-ordination Committee on behalf of the DISCOMs is barred by limitation? Whether the Commission, has inherent power under Regulation 55 read with Regulation 59 of the Business Regulations to condone such delay?***
4. ***Whether the Commission is obligated to comply with the principles of natural justice while passing the impugned order determining FSA?***

(1) Whether the writ petitions are maintainable, in view of availability of alternative remedy of an appeal under Section 111 of the Electricity Act, 2003 against the impugned order passed by the Commission?

The respondents contend that since the impugned order is appealable before the Appellate Tribunal under Section 111 of the Electricity Act, 2003, the present writ petitions are not maintainable. According to the respondents, the petitioners should be relegated to the remedy of appeal because the remedy of appeal is more efficacious and the Appellate Tribunal is vested with the same powers as are vested in a civil court, and its powers are wider than a civil Court. In support of their case, the respondents placed reliance on the judgment of the Apex Court in **W.B. Electricity Regulatory Commn v. CESC Ltd**.

The petitioners contend that availability of appeal under Section 111 of the Electricity Act, 2003, does not bar exercise of writ jurisdiction by this Court under Article 226 of the Constitution of India, when the impugned order has been passed in violation of principles of natural justice, violation of Fundamental Rights under Articles 14 and 19(1) and Article 300-A of the Constitution of India and in contravention of Regulation 45-B of the Business Regulations, A.P. Electricity Reform Act, 1998 and Electricity Act, 2003.

It is now well established that existence of an alternative remedy, is a factor that has to be taken into consideration in the exercise of writ jurisdiction, but it does not automatically bar the writ jurisdiction.

The Apex Court considered this issue in **State of U.P. v. Mohd. Nooh**[40], and observed:

> But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other legal remedies.

Subsequent thereto, a Constitution Bench of the Apex Court in **A.V. Venkateshwaran v. R.S. Wadhwani**[41], considered the question as to when a writ petition under Article 226 of the Constitution can be entertained against an order, despite availability of alternative remedy against it, and it was held as follows:

> The wide proposition that the existence of an alternative remedy is a bar to the entertainment of a petition under Article 226 of the Constitution unless
> (1) there was a complete lack of jurisdiction in the officer or authority to take the action impugned, or (2) where the order is prejudicial to the writ petitioner has been passed in violation of the principles of natural justice and could, therefore, be treated as void or *non est* and that in all other cases, Courts should not entertain petitions under Art. 226, or in any event not grant any relief to such petitioners cannot be accepted. The two exceptions to the normal rule as to the effect of the existence of an adequate alternative remedy are by no means exhaustive, and even beyond them a discretion vests in the High Court to entertain the petition and grant the petitioner relief notwithstanding the existence of an alternative remedy. The broad lines of the general principles on which the Court should act having been clearly laid down, their application to the facts of each particular case must necessarily be dependent on a variety of individual facts which must govern the proper exercise of the discretion of the court, and in a matter which is thus pre-eminently one of discretion, it is not possible or even if it were, it would not be desirable to lay down inflexible rules which should be applied with rigidity in every case which comes up before the Court.

In **Assistant Collector of Central Excise, Chandan Nagar, West Bengal v. Dunlop India Limited**[42], the Apex Court while considering the circumstances under which the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India, can be invoked observed:

> Article 226 is not meant to short-circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill-suited to meet the demands of extraordinary situations, as for instance where the very vires of the statute is in question or where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to Article 226 of the Constitution. But then the court must have good and sufficient reason to bypass the alternative remedy provided by statute.

The Apex Court in **Whirlpool Corpn. v. Registrar of Trade Marks**, identified three contingencies where the existence of alternative remedy, would not operate as a bar to entertain a writ petition:

> But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely where the writ petition has been filed for the enforcement of any of the fundamental rights or where there has been a violation of the principles of natural justice or where the order or proceedings are wholly without jurisdiction or the *vires* of an Act is challenged.

In **ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd.**, the Apex Court recognized the plenary power of the High Court to entertain a writ petition in appropriate cases, even in cases of availability of other remedies, and it held as follows:

> While entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The High Courts have however imposed upon themselves certain restrictions in the exercise

of this power. This plenary right of the High Court to issue a prerogative writ will not normally be exercised by the High Court to the exclusion f other available remedies unless the impugned action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the High Court thinks it necessary to exercise the said jurisdiction.

The Apex Court in **Committee of Management v. Vice-Chancellor**[43], relying on its earlier judgment in **Whirlpool Corpn. v. Registrar of Trade Marks,** held as follows:

… Availability of an alternative remedy by itself may not be a ground for the High Court to refuse to exercise its jurisdiction. It may exercise its writ jurisdiction despite the fact that an alternative remedy is available, *inter alia*, in a case where the same would not be an efficacious one. Further more, when an order has been passed by an authority without jurisdiction or in violation of principles of natural justice, the superior courts shall not refuse to exercise their jurisdiction although there exists an alternative remedy.

This Court in **Motor Car Beedi Factory v. Controlling Authority under Payment of Gratuity Act**[44], considered the question whether a party aggrieved by an order can be allowed to maintain a writ petition by bypassing the remedy available to him against the said order, and while considering the said question, observed as follows:

None can dispute the fact that Article 226 of the Constitution of India, confers on all the High Courts very wide power in the matter of issuing prerogative writs. The remedy of writ is absolutely a discretionary remedy, and the High Courts can refuse to exercise their discretion and grant any writ if it is satisfied that the aggrieved party has adequate and suitable remedy by way of hierarchy of appeals provided under the statute. The apex Court has carved out several exceptions for grant of writs by invoking the doctrine of exhaustion of statutory remedy. It held that even if there existed adequate alternative remedies, writ petition can be entertained, if the party invoking the extraordinary jurisdiction, had demonstrated any one or more of these – That there has been a breach of principles of natural justice or procedure required for the decision has not been adopted, seeks enforcement of/complains of infringement of fundamental rights, where the proceedings taken or orders passed are wholly without jurisdiction or *ultra vires* or the *vires* of the Act is challenged or where the proceedings itself are an abuse of process of law.

From the above, it is clear that writ petition under Article 226 of the Constitution of India against an order passed by a statutory authority can be entertained despite availability of alternative remedy against it in the following cases:

(i) if the alternative remedy is not efficacious,

(ii) if the writ petition has been filed for the enforcement of any of the fundamental rights or

(iii) where there has been a violation of the principles of natural justice or

(iv) where the order or proceedings are wholly without jurisdiction or

(i) the *vires* of an Act or Regulations framed thereunder are challenged.

In the instant case, it is the specific case of the petitioners that that the Commission passed the impugned order in gross violation of principles of natural justice and also in violation of the statutory provisions since it failed to give notice and hearing in the manner prescribed by the Business Regulations, failed to comply with the requirements of transparency under Section 86(3) of the Electricity Act, 2003, violated the mandatory consultation requirement under Section 10(7) of the A.P. Reform Act, 1998, failed to give a hearing as required under Regulation 7(2)(ii) of the Business Regulations. This apart, it is their case specific case of the petitioners that the Commission has exercised the jurisdiction that is not vested in it and has condoned the inordinate delay of more than one year ten months in filing applications by DISCOMs for claiming FSA, even though DISCOMs did not file any applications seeking condonation of delay.

However, it is the contention of the respondents that since the impugned order passed by the Commission, is the result of a legislative function, no notice need be given, and principles of natural justice need not be followed. The respondents also contended that the Commission has the inherent power under Regulation 55 read with Regulation 59 of the Business Regulations, to condone the delay by extending the time prescribed by the Regulations, and therefore, no fault can be found with the action of the Commission, in entertaining the application

filed by the Power Co-ordination Committee, on behalf of the DISCOMs claiming FSA, beyond the time period prescribed under the Regulations.

In the light of the aforesaid contentions, several important questions do come up for consideration in the writ petitions, namely

(a) whether the impugned order passed by the Commission is the result of exercise of a legislative power, justifying the Commission in not issuing any notice and following the principles of natural justice before passing the impugned order OR exercise of judicial or quasi-judicial power requiring compliance of principles of natural justice; (b) whether power inheres in the Commission to condone the delay in claiming FSA, despite no such application being filed by the DISCOMs and; (c) whether in passing the impugned order, the Commission has taken into consideration all the materials required to be taken into consideration under the statutory provisions and Business Regulations. These are questions that require consideration by interpretation of the various provisions of the statutes and the applicable Regulations.

Since the petitioners have mainly complained violation of statutory provisions and principles of natural justice by the Commission in passing the impugned order and that the Commission has committed a jurisdictional error by condoning the inordinate delay, I am of the considered opinion that the petitioners have made out a case for maintaining the writ petitions against the impugned order passed by the Commission.

In the above view of the matter, it is held that the petitioners are entitled to maintain the present writ petitions against the impugned order passed by the Commission.

(2.) Whether the A.P. Power Co-ordination Committee, constituted under G.O. Ms No. 59, dated 07.06.2005, has *locus standi* to file application on behalf of the four DISCOMs, claiming FSA?

The petitioners contend that the Power Co-ordination Committee, not being a “licensee” under the Electricity Act, 2003, is not entitled to file application claiming FSA on behalf of the

DISCOMS, and the Commission, committed a grave error in entertaining the same. However, the DISCOMs contend that they have authorized the Power Co-ordination Committee, set up by the Government of Andhra Pradesh, under G.O. Ms. No. 59, dated 07.06.2005, for filing applications claiming FSA on their behalf, before the Commission, and that the said G.O., enables the Power Co-ordination Committee to file such application claiming FSA on their behalf. Further, the DISCOMs contend that the Power Co-ordination Committee is an agent of the DISCOMs and therefore the application is maintainable.

To consider this question, it would be appropriate to refer to the relevant provisions of the Electricity Act, 2003. Section 2(4) of the Electricity Act, 2003 defines "Appropriate Commission" to include the State Regulatory Commission referred to in Section 82. Section 2(38) of the Electricity Act, 2003 defines "licence" to mean a licence granted under Section 14 and under Section 2(39), "licensee", is defined to mean a person who has been granted a license under Section 14. The power to grant licence to the licensee is vested in the Commission under Section 14 of the Electricity Act, 2003. The DISCOMs, admittedly, obtained "licences" from the Commission under Section 14 of the Electricity Act, 2003, and they are "licensees". The Electricity Act, 2003 provides that the licensee shall act in accordance with the conditions of licence, and the licensee shall not do any acts in contravention of the conditions of licence without prior approval of the Commission. Any contravention entails revocation of licence.

Section 62 of the Electricity Act, 2003 deals with determination of tariff by the Commission in accordance with the provisions of the Act. In determination of tariff, the Commission may require the licensee to furnish information in respect of generation, transmission and distribution for determination of tariff. The Commission may also require them to comply with specified procedures for calculating the expected revenues from the tariff and permissible charges. Section 64 of the Electricity Act, 2003, which prescribes the procedure for tariff states that an application for determination of tariff under Section 62 shall be made by a generating company or licensee in such manner and

accompanied by such fee, as may be determined by regulations. The Business Regulations, framed by the Commission, also obligate the licensee, to provide the Commission with its calculation of each fuel surcharge adjustment required to be made pursuant to its tariff before it is implemented with such documentation and other information as the Commission may require, for purpose of verifying the correctness of adjustments.

From a reading of the above provisions of law, it is evident that for determination of tariff, it is only the generating company or the licensee has to make application. Admittedly, when the original Tariff Order was passed by the Commission, the DISCOMs, which are licensees under the Electricity Act, 2003, have filed individual applications. However, for claiming FSA, which is a continuation of the original Tariff Order, the DISCOMs have not filed individual applications.

Instead the A.P. Power Co-ordination Committee, constituted under G.O. Ms. No. 59, dated 07.06.2005, has filed common application claiming FSA on behalf of the four DISCOMs. The said common application was returned by the Joint Secretary of the Commission, stating that it is not supported by authorizations of the DISCOMs. Thereafter, the Power Co-ordination Committee, filed the authorizations of the DISCOMs. Though the petitioners contend that the authorizations are defective, I am not inclined to go into the said issue, because this Court, is proceeding to consider whether the Electricity Act, 2003 enables the Power Co-ordination Committee, to file common application claiming FSA before the Commission, on behalf of the DISCOMs.

In order to decide the said contention, the following aspects need to be taken into account:

(a) Admittedly, the Power Co-ordination Committee, is neither a “generating company” nor a “licensee” as defined under Section 2(39) of the Electricity Act, 2003. Under the provisions of the Electricity Act, 2003, it is only a generating

company or a licensee that can file applications for determination of tariff and FSA being part of tariff, the same provisions also apply for claiming FSA.

(b) Regulation 45-B of the Business Regulations mandate the licensees to provide to the Commission data, inputs and other specified information required for calculation of Fuel Surcharge Adjustment with supporting documentation. The said information may vary for each licensee since the data relates to licensees.

(c) The licensee also has to give a confirmation with respect to the information provide. To illustrate, Condition No.6 of Regulation 45-B mandates a licensee to give a statement confirming that the fuel cost data confirms to the allowed level of fuel cost and no other charges other than transportation cost is included in the fuel cost. If the licensee furnishes wrong data, penalty can be levied.

(d) After the FSA is approved by the Commission, it is the licensee which has the obligation to publish the same.

Thus Regulation 45-B imposes obligation on the licensee and levies penalties on the licensee for non-compliance of the same. Therefore, Regulation 45-B only contemplates a licensee to provide information and not the Power Co-ordination Committee, who is not all “licensee”.

However, it is the contention of the DISCOMs, that even though the Power Co-ordination Committee, is not a “licensee” under the Electricity Act, 2003, but G.O. Ms. No. 59, dated 07.06.2005, enables them to avail the services of the Power Co-ordination Committee and to authorize the said Committee to file application for determination of tariff/FSA as an agent of the DISCOMs. Therefore, the application filed by the Power Co-

ordination Committee, claiming FSA before the Commission, is maintainable.

Since the AP TRANSCO is prohibited from engaging in the business of trading in electricity by virtue of Section 39(1) of the Electricity Act, 2003, the Government of Andhra Pradesh transferred the existing trading functions of AP TRANSCO to four DISCOMs w.e.f. 09.06.2006. To ensure smooth transition as well as building capacity in DISCOMs to handle new functions, the Government of Andhra Pradesh constituted Apex Committee called the "A.P. Power Co-ordination Committee" vide G.O. Ms. No. 59, dated 07.06.2005. There are two sub-Committees called "A.P. Trading Committee" and "A.P. Balancing and Settlement Committee". The said G.O. reads as follows:

The Electricity Act, 2003 came into effect from 10.06.2003. Section 39(1) of the Electricity Act, 2003 provides that 'the State Transmission Utility shall not engage in the business of trading in electricity' and Section 2(71) of the Act defines the word "trading" as 'purchase of electricity for resale thereof'. In view of this provision, the Government of Andhra Pradesh has notified a scheme transferring the existing trading functions from APTRANSCO to four DISCOMs with effect from 9th June, 2005. However, for the purpose of smooth transition to this new arrangement, the Government considers it necessary to put in place an institutional arrangement for effective co-ordination as well as building capacity in DISCOMs to handle the new functions.

2) The Government after careful consideration has decided to put in place the following interim institutional arrangements:

1. An Apex Committee called "AP POWER Co-ordination Committee" (APPCC) and two sub-Committees called "AP Power Trading Committee" (APPTC) and "AP Balancing and Settlement Committee" (APBSC) will be set up from the date of this order.

2. The Sub-Committees shall act under the guidance of the Apex Committee.

3. The Apex Committee i.e. APPCC will carry out the functions as issued in Annexure – A. APPCC would be headed (and convened) by Chairman and Managing Director, APTRANSCO with Director (Finance & Commercial) & Director (Co-ordination) of APTRANSCO and the Chairman & Managing Directors of all four DISCOMs as Members.

4. The AP Power Trading Committee (APPTC) will carry out the functions as listed in Annexure – B. It will consist of SE-Commercials of all four DISCOMs (to be headed on a rotation basis for a three month period) with CE-Grid Operations from APTRANSCO as special invitee.

5. The AP Balancing & Settlement Committee (APBSC) would carry out the functions as listed in Annexure – C. It will consist of CGM-Commercials of all four DISCOMs (to be headed and convened on a rotation basis for a three month period) with Chief Engineer Grid-Operations and Superintending Engineer-EBC from APTRANSCO as special invitee.

3) All the aforesaid Committees shall ensure optimal utilization of the resources for the benefit of the State in a co-ordinate manner.

4) The Government can make any changes to the functions, composition or life of these Committees as it may consider necessary in the interest of the sector.

The functions to be carried out by the apex Committee, namely the Power Co-ordination Committee, as listed in Annexure – A, are:

- APPCC shall guide, direct and approve the activities undertaken by APPTC & APBSC from time to time;
- APPCC shall direct APTRANSCO and distribution licensees to provide necessary information, requisite support and depute its staff for efficient discharge of its functions. AP TRANSCO and distribution licensees shall extend all co-operation to APPCC in the matter;
- APPCC shall examine all commercial issues related to bulk supply and all legal issues related to IPPs and other generators and advise the APDISCOMS suitably, and
- APPCC shall nominate a person to participate in SREB meetings who shall be authorized to represent AP State at regional level.

From a reading of the above, it is evident that the A.P. Power Co-ordination Committee, has been set up for the purpose of smooth transition of the trading functions of AP TRANSCO to the four DISCOMs. The two Sub-Committees are required to act under the guidance of the Apex Committee. The Power Co-ordination Committee, is required to guide, direct and approve the activities undertaken by the sub-committees, direct APTRANSCO and Distribution licensees to provide the necessary information, examine all commercial issues relating to bulk supply and all legal issues relating to IPPs and other generators and advise the AP DISCOMs, suitably. The G.O., nowhere enables the Power Co-ordination Committee, to file applications for determination of tariff/FSA, before the Commission under the Electricity Act, 2003, on behalf of the licensees i.e. the DISCOMs.

In the light of the above, I am of the opinion that the Power Co-ordination Committee has no *locus standi* to file applications claiming FSA on behalf of the four DISCOMs for the following reasons:

(i) Under the Electricity Act, 2003 and the Business Regulations, an obligation is placed on the licensee and the licensees alone to file applications for FSA. The Power Co-ordination Committee is not a "licensee" within the meaning of the Section 2(39) of the Act.

(ii) G.O. Ms. No. 59, dated 07.06.2005, which constituted the Power Co-ordination Committee, does not vest any power in the said Committee to file applications before the Commission under the Electricity Act, 2003 on behalf of DISCOMs claiming FSA.

(iii) The Business Regulations impose penalty on the licensees if the information furnished by them is found to be wrong. Such penalty cannot be imposed on the Power Co-ordination Committee, which is not a licensee.

(3) Whether the application filed by the Power Co-ordination Committee on behalf of the DISCOMs is barred by limitation? Whether the Commission, has inherent power under Regulation 55 read with Regulation 59 of the Business Regulations to condone such delay?

The Commission, in exercise of its power to frame Regulations, framed Regulations (vide Regulation No.2/1999), providing, *inter alia*, for the manner in which the Commission would conduct its business generally. Subsequently, on 28.8.2000, the Commission, vide Regulation No. 8/2000, amended the Business Regulations, whereby Chapter IV-A was introduced in the Business Regulations with respect to Tariffs. Regulation 45-B, which was introduced as part of that chapter, provided for a Fuel Surcharge Adjustment Formula. Thereafter, again on

23.6.2003, the Commission vide Regulation No. 1/2003 amended the Business Regulations, whereby Regulation 45-B, relating to Fuel Surcharge Adjustment, was substituted. Regulation 45-B of the Business Regulations, as it stands today, is the only provision that deals with FSA. It reads as follows:

Unless otherwise agreed by the Commission, the amount eligible for recovery towards the Fuel Surcharge Adjustment (FSA) for the price and mix variations in the quantity of energy to be purchased as per the tariff order during a quarter '1' shall be determined as per the following formula, aggregated for the quarter '1'.

$$\frac{F_i = (P_i \times E_i + FC_i + Z + A_i)}{Q_i}$$

Where

P_i is the difference in the Weighted Average Variable Cost in Rupees adjusted to four decimal points, of power purchase cost in quarter '1' for the power purchase quantity mentioned in the tariff order compared to the Weighted Average Variable Cost adopted in the tariff order.

E_i is the energy purchase as mentioned in the tariff order in K wh during the quarter to be submitted for each of the generating stations.

PC_i difference in Rupees, of the actual total fixed charges of the generating stations from the base values adopted in the tariff order.

Q_i is the actual energy sold to all categories in K wh in the quarter in DISCOM or RESCO, subject to condition No.1, mentioned hereunder:

Z is the changes in the cost in Rupees as allowed by the Commission for a period extending in the past beyond the relevant quarter.

A_i adjustment in Rupees to account for the financial impact of demonstrated incidents of merit order violation on account of controllable factors or any other events the financial impact of which, in the Commission's view, should be given appropriate treatment.

Condition (1): The FSA as worked out will be distributed among all categories of consumers that existed in the quarter. However the consumption by the agricultural sector will be excluded till the Commission is satisfied that metering of agricultural consumption is complete, as may be notified in the Tariff orders from time to time.

(2) The licensee shall provide the Commission with its calculation of each fuel surcharge adjustment required to be made pursuant to its tariff before it is implemented with such documentation and other information as it may require, for purpose of verifying the correctness of adjustments.

(3) FSA billed to retail categories to be made over to Bulk supplier by individual Distribution Companies and/or RESCOS as the case may be.

(4) APTRANSCO must file with the Commission all information

(including sales data from the DISCOMs/RESCOs) required for calculation of the Fuel Surcharge Adjustment within 30 days of the end of the respective quarter failing which it will forfeit any future claims on this account for such quarter. DISCOMs/RESCOs should use actual consumption details of the relevant quarter when levying FSA.
(5) The licensee will report data for computing the total cost (split for fixed and variable) for each of the generation stations that has supplied power in the respective quarter for which fuel surcharge adjustment is being computed. The total amount eligible for recovery will be computed on an aggregate basis.
(6) Fuel cost data has to conform to the fuel costs to the allowed level and no other charges other than the transportation cost can be included in the fuel cost. Every statement has to be confirmed by the licensee to that effect. The costs arrived at will be compared to the fuel cost indexation which will be developed by the Commission in the future.
(7) Penalties are leviable for furnishing wrong data.
(8) The licensee shall publish the FSA approved by the Commission in one English and on Telugu daily newspaper with circulation in the area of supply, for general information of the consumers, and shall make available copies of the FSA order for the relevant quarter to the public on request, at a reasonable cost.
(9) The FSA shall be implemented after 7 days of such publication.
(10) The actual variable costs and fixed costs computed for Central Generating Stations (CGS) should exclude the effect of UI charges.
(11) The FSA will include not only fixed costs of two part tariff but also of single part tariff wherever applicable.

As per Condition No.4 of Regulation 45-B APTRANSCO (DISCOMs) must file with the Commission all information required for calculation of the Fuel Surcharge Adjustment within 30 days of the end of the respective quarter, failing which they will forfeit any future claims on this account for such quarter.

The DISCOMs, admittedly, did not file applications along with the required information for calculation of FSA before the Commission, within 30 days of the end of the respective quarters, for the financial year 2008-09, as envisaged in Condition No.4 of Regulation 45-B. Instead the Power Co-ordination Committee, filed the application along with the required information on behalf of the DISCOMs, before the Commission, for calculation of FSA, for the

four quarters of the financial year 2008-09, after lapse of nearly one year and ten months.

The petitioners contend that since the DISCOMs have not filed with the Commission all information required for calculation of the Fuel Surcharge Adjustment within 30 days of the end of the respective quarter, their right to claim FSA, by operation of Condition No.4 of Regulation 45-B, stood forfeited. The petitioners contend that the Commission had no power whatsoever to revive a time-barred claim by condoning the delay for filing the application claiming FSA. The respondents-Commission and DISCOMs contend that the Commission has inherent power under Regulation 55 read with Regulation 59, to entertain application, for calculation of FSA, even beyond the time period prescribed in Condition No.4 of Regulation 45-B of the Business Regulations, by condoning the delay, if any.

To consider whether there is inherent power in the Commission under Regulation 55 read with Regulation 59, to entertain application of DISCOMs for FSA beyond the time prescribed in Condition No.4 of Regulation 45-B, by condoning the delay, it would be appropriate if a reference is made to the provisions of Regulation 55 of the Business Regulations, which deals with saving of inherent power of the Commission. The said Regulations reads as follows:

Saving of inherent power of the Commission:

(1) Nothing in these Regulations shall be deemed to limit or otherwise affect the inherent power of the Commission to make such orders as may be necessary for meeting the ends of justice or to prevent the abuse of the process of the Commission.
(2) Nothing in these Regulations shall bar the commission from adopting a procedure which is at variance with any of the provisions of these Regulations, if the Commission, in view of the special circumstances of a matter or class of matters and for reasons to be recorded in writing deems it necessary or expedient.
(3) Nothing in these Regulations shall, expressly or impliedly, bar the commission to deal with any matter or exercise any power under the Act for which no Regulations have been framed, and the Commission may deal with such matters, powers and functions in a matter it thinks fit.

From a reading of Regulation 55(1), it would become clear that the inherent power under the said Regulation can be exercised by the Commission only to meet the ends of justice or to prevent the abuse of the process of the Commission. Under Regulation 55(2), the Commission is entitled to adopt a procedure different from any of the provisions of the Regulations, considering the special circumstances of a matter or class of matters and for reasons to be recorded in writing, as it may deem necessary or expedient. Under Regulation 55(3), the Commission is entitled to deal with any matter or exercise any power for which no Regulations have been framed, and the Commission may deal with such matters, powers and functions in a manner it thinks fit.

Neither the Commission can justify its action nor the DISCOMs can support the action of the Commission, for exercising the inherent power under Regulations 55(1) of the Business Regulations, to entertain application filed by the Power Co-ordination Committee, claiming FSA, beyond the time period prescribed in Condition No.4 of Regulation 45-B, by condoning the delay, because it is not the case of the Commission that to meet the ends of justice or to prevent abuse of the process of the Commission, they have exercised the power under Regulation 55(1).

Assuming that the Commission has exercised the inherent power conferred on them under Regulation 55(2), and has adopted a procedure that is at variance with the Regulations, the Commission must state the special circumstances that warranted the deviation as mandated by Regulation 55(2). There is no material whatsoever placed by the Commission before this Court to show as to what were the special circumstances and what are the reasons that weighed with the Commission for adopting a procedure that is at variance with the Business Regulations, for entertaining the application filed by the Power Co-ordination Committee claiming FSA, beyond the time period prescribed in Condition No. 4 of Regulation 45-B, by condoning the delay.

The Commission also cannot take shelter under Regulation

55(3) of the Business Regulations, to justify their action, because inherent power under the said Regulation can be exercised only when there is no Regulation operating on particular field or aspect. In the instant case, Regulation in 45-B of the Business Regulations, covers the field with respect to FSA. Therefore, the Commission cannot depend upon Regulation 55(3) of the Business Regulations, for justification of its action, in entertaining the application filed claiming FSA, beyond the time prescribed in Condition No.4 of Regulation 45-B of the Business Regulations, by condoning the delay.

It appears from the record that the Member (Finance) while adjudicating the matter raised objection stating that the claim for FSA made by the Power Co-ordination Committee for the year 2008-09, is beyond the prescribed time and that the question of limitation has to be examined as claim is being made after lapse of more than one year and nine months and that Condition No.4 of Regulation
45-B, forfeits any future claims of DISCOMs in case there is failure on their part to file information within 30 days from the end of each quarter and that the Commission has no inherent power to condone the delay. However, neither the Member (Technical) nor the Chairman of the Commission, adverted to this aspect of the matter. This is evident from the Note File relating to the proceedings that preceded the impugned order before the Commission, which the petitioners obtained under the Right to Information Act, 2005.

At any rate, neither the Note File, produced by the petitioners, nor the impugned order, disclose that the application filed by the Power Co-ordination Committee, on behalf of the DISCOMs, claiming FSA, has been entertained by the Commission, in exercise of the inherent power conferred on them under Regulation 55. In fact, as submitted by the petitioners, the respondents have come up with the plea of exercise of inherent power under Regulation 55 of the Business Regulations, for the first time, by way of counter, which cannot be accepted. In the light of the aforesaid discussion, it cannot be said that Regulation 55 of the Business Regulations, enables the Commission to

entertain application claiming FSA beyond the time prescribed in Condition No.4 of Regulations 45-B, by condoning delay.

Though Regulation 55, does not empower the Commission, to exercise its inherent power to entertain a belated application by condoning the delay in the present case, Regulation 59 of the Business Regulations, empowers the Commission, to extend or abridge the time prescribed in the Regulations. Regulation 59 reads as follows:

> Subject to the provisions of the Act, the time prescribed by these Regulations or by order of the Commission for doing any act may be extended (whether it has already expired or not) or abridged for sufficient reason by order of the Commission.

A reading of the above provision shows that the time prescribed by Regulations may be extended by sufficient reason by an order of the Commission. Since Condition No.4 of Regulation 45-B prescribes a time limit, the same can be extended under Regulation 59. There is nothing in the language of Regulation 45-B which precludes the Commission from extending the time prescribed therein, under Regulation 59.

Even though the above provision empowers the Commission to extend or abridge the time prescribed in the Regulations, such power can be exercised by the Commission only for sufficient reason pursuant to an order of the Commission. Therefore, it has to be examined whether there was sufficient reason for the Commission, to extend the time beyond the 30 days prescribed period for filing application, claiming FSA, as provided in Condition No.4 of Regulation 45-B.

Neither the impugned order nor the record produced before the Court discloses that the Commission has entertained the application filed on behalf of DISCOMs and extended the time limit prescribed in Condition No.4 of Regulation 45-B, in exercise of power under Regulation 59. If the Commission, intended to invoke its power under Regulation 59 of the Business Regulations, it should have applied its mind and ascertained whether there was

sufficient reason for extending the 30 day period prescribed in Condition No.4 of Regulation 45-B. It is for the first time before this Court, by way of oral arguments, the respondents have sought to justify the action of the Commission in entertaining the belated application filed on behalf of DISCOMs, in exercise of power under Regulation 59.

Though the petitioners contend that the right of DISCOMs to claim FSA stood forfeited, but it is their admitted case that as per the original tariff order, they are required to pay FSA, which is extra. FSA is nothing but the additional expenditure incurred by the DISCOMs and sought to be recovered from the petitioners. Even though the petitioners contend that the Commission has no power whatsoever to condone the delay and revive a time-barred claim, having regard to the provisions of Regulation 59, I am of the considered opinion that the Commission, is entitled to extend the time prescribed in the Regulations, which has already expired, for sufficient reason by passing a reasoned order in that regard.

(4) ***Whether the Commission is obligated to comply with the principles of natural justice while passing the impugned order determining FSA?***

The petitioners submit that the proceedings before the Commission are in the nature of judicial proceedings, and while passing an order affecting the rights of individuals and consumers, the Commission has to comply with the provisions of transparency, embedded in Section 86(3) of the Electricity Act, 2003, mandatory consultation embedded in Section 10(7) of the A.P. Reform Act, 1998, opportunity of hearing, as required by Regulation 7(2)(ii) of the Business Regulations, and since the Commission has passed the impugned order determining the FSA, which is part of the original tariff order, affecting the rights of individuals and consumers in gross violation of the above statutory provisions, the Business Regulations and principles of natural justice, the same is liable to be set aside. In support of this argument, that an order passed by the Commission, affecting the rights of individuals and consumers, without following the statutory

provisions and Regulations framed by it, amounts to violation of principles of natural justice, they placed reliance on a judgment of this Court in **M/s. Ind-Barath Energies Ltd. v. State of A.P.**, which was confirmed by a Division Bench of this Court in writ appeals, and submitted that the proceedings of the Commission are quasi-judicial in nature and hence principles of natural justice have to be followed.

The respondents while admitting that FSA is part of the original tariff order, contended that tariff determination is a legislative function and determination of FSA being part of such legislative function, the principles of natural justice are not applicable, and more so when it is calculated by application of a mere mathematical formula, and in support of this argument, they placed reliance on the judgment of the Apex Court in **Bihar SEB v. Pulak Enterprises**. Refuting the contention of the respondents that determination of FSA is by application of a mathematical formula, the petitioners submitted that FSA determination by the Commission, does not merely involve application of mathematical formula, but in its calculation, certain inputs given by the DISCOMs, are taken by the Commission, which are disputable.

In view of the above submissions, the issue that arises for consideration is - *Whether the Commission is required to follow the principles of natural justice before passing an order determining the FSA*?

The issue of whether discharge of a particular function by the executive falls within the realm of executive function or legislative function has been the subject matter of several decisions of the Hon'ble Supreme Court of India. If a particular function falls within the realm of legislative function, the principles of natural justice do not apply. However, if it falls within the realm of executive/quasi judicial functions, the principles of natural justice need to be complied.

The Supreme Court in a catena of cases has laid down the test for determination whether the price fixation or tariff determination falls within the realm of legislative function or quasi-

judicial/executive functions. A seven-judge bench of the Hon'ble Supreme Court in **Prag Ice and Oil Mills v. Union of India**[45] observed that:

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

Thus the default rule is that price fixation is legislative in character unless by the terms of the particular statute or order, it is made quasi-judicial in character.

Therefore whether the fixation of FSA is a legislative function or a executive/quasi judicial function has to be decided based on the terms of the statute i.e. Electricity Act 2003 and the Electricity Reforms Act, 1998 read with applicable rules.

Section 62(1) of the Electricity Act, 2003 states that "*appropriate commission shall determine the tariff* ***in accordance with the provisions of the Act****".* Section 62 (3) mandates the Respondent commission not to show "***undue preference to any consumer of electricity*** *but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity 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."*

Section 62(4) states that "*No tariff or part of any tariff may ordinarily be amended, more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified*".

Section 86(3) mandates that "*the State Commission* ***shall ensure transparency*** *while exercising its power of discharging its functions*".

Section 10(7) of the A.P. Electricity Reforms Act, 1998 states that "*In the discharge of its function the Commission* ***shall***

be entitled to and shall consult to the extent the Commission considers appropriate from time to time such persons or group of persons who may be affected or are likely to be affected by the decisions of the Commission".

Regulation 7(2) of the A.P. Electricity Regulatory Commission (Business Rules of the Commission) Regulations, 1999 states that "*except where the Commission may provide otherwise for reasons to be recorded in writing,* ***all matters affecting the rights or interests of the licensee or any other person or class of persons shall be undertaken and discharged through hearing in the manner specified in these Regulations***".

The order of the Commission fixing the FSA is an appealable order under Section 111 of 2003 Act. The appeal to the Appellate Tribunal is confined not just to questions of law, but also on questions of fact.

I am inclined to hold that determination of FSA falls within the realm of executive/quasi judicial function rather than legislative function and consequently principles of natural justice have to be complied with for the following reasons:

*First***,** the order passed by the Respondent Corporation determining the FSA is an appealable order under Section 111 of the 2003 Act. A five judge bench of the Supreme Court in ***PTC India Limited v. Central Electricity Regulatory Commission*** while interpreting the Electricity Act, 2003 observed "*price fixation exercise is really legislative in character****, unless by the terms of a particular statute it is made quasi judicial as in the case of tariff fixation under Section 62 made appealable under Section 111 of the 2003 Act****, though Section 61 is an enabling provision for one the framing of regulations by CERC. If one takes "tariff" as a subject matter, tariff is done by the appropriate Commission under Section 62 whereas Section 61 is the enabling provision for framing of regulations containing generic propositions in accordance with which the appropriate Commission has to fix the tariff."*

The Supreme Court specifically observed that if the order relates to tariff determination under Section 62, it is a quasi-judicial order. Since fixation of FSA is part of tariff determination under Section 62, it is a quasi-judicial order. In the present case, the Order determining FSA is an appealable order under the 2003 Act. This clearly reveals the intention of the legislature that it falls within the realm of quasi-judicial function rather than the legislative functions. If the determination of FSA were a legislative function, the Legislature would not have prescribed an appellate remedy against the order.

Further, the Appellate Tribunal can interfere with the Respondent Commission's Order fixing FSA on the grounds of "*legality, propriety or correctness*" of any Order made by the Respondent Commission [Section 111(6)]. As the Supreme Court in ***UP Power Corporation v. NTPC***[46] observed:

"*the jurisdiction of the Appellate Tribunal is wide. It is also an expert tribunal, and thus, it can interfere with the finding of the Central Commission both on facts as also on law".*

If the Appellate Tribunal has to effectively perform its duties to review the Commission's Order on grounds of "*legality, propriety or correctness*", it can only do so if it has the material placed it. This can only happen if the Respondent Commission gives an opportunity to persons affected by the Order fixing FSA.

*Second***,** the determination of FSA affects the rights and obligations of the licensees and the consumers. It has civil consequences for both licensees and consumers.

Under the Business Regulations, the Commission is obligated to conduct a hearing in respect of the matters "a*ffecting the rights or interest of the licensee or any other person or class of persons*". This Regulation supports the inference that the determination of FSA is a quasi-judicial function. Since the determination of FSA affects the rights and obligations of the Petitioners, the Respondent Commission is obligated under Rule

7(2) to give a hearing.

This is further clarified by Section 10(7) of the A.P. Electricity Reforms Act, which states that the Respondent Commission shall be entitled and shall consult to the extent the Commission considers it appropriate from time to time such persons or group of persons who may be effect or likely to be effected by the decision of the Commission. Section 10(7) confers a discretion coupled with an obligation to consult people and may be effected or likely to be effected by the decisions of the commission.

The Supreme Court in ***Commissioner of Police v. Gordhandas Bhanji***[47]**, observed:**

"An enabling power of this kind conferred for public reasons and for the public benefit is, in our opinion, ***coupled with a duty to exercise it when the circumstances so demand****. It is a duty which cannot be shirked or shelved nor can it be evaded; performance of it can be compelled..."*

In ***L Hriday Narain v. Income-Tax Officer, A Ward, Bareilly***[48]***,*** the Supreme Court observed that:

"*Even if the words used in the statute are prima facie enabling, the Courts will readily infer a duty to exercise power which is invested in aide of enforcement of a right – public or private of a citizen."*

If the Respondent Commission's Order determining FSA affects the rights and obligations of any person, the commission is obligated to hear the persons who may likely to be affected by its order determining FSA.

Third, any person "aggrieved by an Order" made the Appropriate Commission can file an appeal before the Appellate Tribunal under the 2003 Act [Section 111(1)]. Thus any person whose rights are affected by the Respondent Commission's Order fixing FSA, can file an appeal before the Tribunal and is entitled to a hearing.

If it is held that the Respondent Commission is not obligated

to comply with the principles of natural justice, it would indeed create an absurd scenario whereby a person will not be entitled to a hearing when the Respondent Commission is passing an Order, but is entitled to a hearing only when he challenges the same order before the Appellate Tribunal. This could not have been the intention of the Legislature.

Fourth, the provisions of Regulation 45-B of the Business Regulations also reveal that the determination of FSA is a quasi-judicial function rather than a legislative function. Although Regulation 45-B prescribes the formula for fixation of FSA, the following factors reveal the existence of the discretion.

(a) Regulation 45-B begins with phrase "*unless otherwise agreed by the commission".* This phrase clearly confers discretion on the Commission to deviate from the formula prescribed for determination of FSA. It enables a person to make a case before the Commission that despite the formula prescribed in Regulation 45-B, the Commission should not apply the formula for extraordinary reasons. On such a representation, the Commission has to examine the case and pass an Order. This can happen only if the Commission gives notice to the people likely to be affected by the determination of FSA and gives an opportunity to present their case.

(b) Although Regulation 45-B prescribed a formula, the application of the formula requires data and inputs. There is sufficient scope for discretion in the selection of data. The FSA would be high if the data selected is on the higher side. For instance, one of the components of the formula requires the commission to make "*adjustment in rupees for the financial impact of the demonstrated incidents of the order violation on account of controllable factors or any other events the financial impact of which in the commissions view should be given appropriate treatment*." This confers a substantial discretion on the Commission in determining the adjustment. Before exercising such discretionary power, the principles of natural justice should be complied.

If the principles of natural justice are complied and the hearing is given, the people affected by the order can satisfy the commission as to the extent and nature of the adjustment.

(c) Condition No. 1 of the formula in S45B provides that the FSA as worked out will be distributed among all category of consumers, "*however the consumption by the agricultural section will be excluded till the Commission is satisfied for metering the agricultural consumption is complete*". The satisfaction has to be based on objective criteria and this exercise can be done objectively only after the Respondent Commission hearing the concerned persons. This is because the impact of the said determination will affect the burden placed on the consumers. With regard to payment of FSA, if the Commission is satisfied that the metering of agricultural consumption is complete, the burden will be higher on agricultural consumers and lower for all other categories of consumers and vice versa. Thus both agricultural consumers and the other consumers will be affected by such determination and therefore if the hearing is given, it will enable the Commission to make an objective determination.

Fifth, Regulation 45-B vests considerable discretion on the Commission in selection of the data required for the application of the formula. Since the data required for determining FSA is based on the data supplied by the DISCOMs, the Commission would effectively hear only one set of affected persons i.e. the generating companies. The DISCOMs will have a natural incentive to furnish data points which would lead to a higher FSA. If a hearing were given to all affected persons, it would ensure an objective determination. It would also fulfil the statutory mandate of the Commission in Section 86(3) to ensure "transparency" in the discharge of all its functions.

Sixth, the rationale for excluding the principles of natural justice with respect to price fixation does not strictly apply to the independent regulatory bodies like the Electricity Regulatory Commission. The Electricity Regulatory Commission is a new regulatory structure which has been introduced through the Electricity Reforms Act, 1998. Like several other regulatory bodies

like SEBI and TRAI, the Electricity Reforms Commission combines legislative, executive and judicial powers and is therefore an exception to the Doctrine of Separation of powers (See ***Clariant v. SEBI***). The very purpose of creating an Electricity Regulatory Commission is to ensure an independent regulatory body that is autonomous from the Government. This was required since the Government is also an entity, which would be regulated by the Respondent Commission. Prior to the creation of this new body, the Government did the tariff determination. Since the government was accountable to the legislature under constitutional scheme, its tariff determination in exercise of legislative functions can be questioned in a legislature. However, with respect to electricity regulatory commission, the same does not apply since the Respondent Commission is not directly accountable to the legislature in any manner. The very purpose of creating an Electricity Commission is to ensure that it is independent of the Government.

Therefore to ensure accountability and transparency in functioning of the electricity regulatory commission, there have to be safeguards in the exercise of power. The legislature has instituted two safeguards. It has mandated that the Electricity Regulatory Commission should ensure transparency while discharging its functions [Section 86(3)]. It has also mandated that the order of the Respondent Commission shall be an appealable order and the scope of the appeal is confined not just to the question of law, but also extends to question of fact.

Giving a hearing to the parties who are likely to be affected is an effective safeguard against any abuse of powers by the Respondent Commission and also fulfills the statutory mandate to ensure transparency.

The Respondent placed extensive reliance on the decisions of the Supreme Court in ***Bihar State Electricity Power v. Pulak Enterprises***. The Respondents have placed reliance on the following observations:

"***In a sense, fixing rate of fuel surcharge under Clause 16.10 of***

the tariff notification is different from fixing the tariff under Section 49 of the Act. Fuel surcharge is undoubtedly a part of tariff. But fixing rates of consumption charges or the guaranteed charges or the fixed charges or the delayed payment surcharges etc., and fixing rates of fuel surcharge do not stand on a part. *Though rates of consumption charges etc., are based on objective materials, there is enough scope for flexibility in fixing the rates****. It also involves policy to fix different rates for different categories of consumers.*** *Such is not the position with the fuel surcharge****. ..****There is no scope for exercise of any discretion or flexibility****. This distinction, however, does not help the Petitioners****.*** *It rather goes against them because if fixing rate of fuel surcharge is just an arithmetical exercise, giving opportunity of hearing would hardly serve any useful purpose****".***

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

The said case is distinguishable from the facts of the present case. The said case arose under the Electricity Supply Act, 1948, whereas the present case is a decision under the Electricity Reform Act, 1998 Electricity Act, 2003. There is complete overhaul of the regulatory structure from the provisions of Electricity Supply Act, 1948 to the Electricity Act, 2003. Under the 1948 Act, the tariff determination and fuel surcharge determination was done by the Government accountable to the legislature, whereas under the Electricity Act, 2003 an independent autonomous body which is not accountable to any entity makes the determination of FSA.

Further, the Supreme Court in ***Bihar State Electricity Power v. Pulak Enterprises*** in coming to the conclusion held that hearing was not required for determination of FSA relied upon two reasons:

(a) There is no scope for any exercise of discretion of

flexibility in the fixation of first surcharge and;

(b) There is no provision either in the statute or in the tariff notification providing for a hearing.

Both these facts are absent in the present case.

First, the statute clearly provides for hearing by the Commission while discharging any of its functions. As elaborated above, the provisions of the Electricity Reforms Act and the rules framed by the Commission categorically show that the hearing is not only provided for, but it is also mandated since the determination of FSA affects the rights and obligations of the Petitioners.

Second, as elaborated above, there is sufficient scope for exercise of discretion and flexibility in fixation of FSA, and therefore, there is an obligation for the Commission to give a hearing before exercising any discretionary powers.

MERITS OF THE ORDER:

The petitioners have also raised the following contentions with respect to the merits of the impugned order:

(1) The impugned order is not that of the Commission, and that it does not meet the requirements of Regulation 19 of the Business Regulations, in that it is neither signed by the Chairman nor its Members, nor does it reflect the dissenting opinion of the Member (Finance).

(2) The impugned order is not a reasoned order, much less made by the Commission by application of its mind to the relevant facts, because it does not disclose any reasons whatsoever that weighed with the Commission for determining the FSA as indicated in the impugned order, nor it adverts to the several issues of allowable and dis-allowable items, propriety and legality of purchases, exceeding of quotas fixed in tariff orders, etc., which are disputable, and much less the consumers who had a right to object and dispute them, were heard.

(3) The agricultural consumption was to be excluded only on the basis of the metering of agricultural consumption, but the impugned order does not disclose whether the Commission considered whether metering for the agricultural sector has been done as required by Section 55 of the Electricity Act, 2003.

(4) Relying on the proceedings relating to the FSA that preceded the passing of the impugned order, which were obtained by the petitioners under the Right to Information Act, it is contended by the petitioners that the Chairman and Member (Technical) failed to consider several issues that were raised by the Member (Finance), even though they agreed that the issues raised are relevant.

Though the petitioners have also raised other issues with regard to the locus of the Commission to defend its own order by engaging a counsel and also the irregularities committed by the Commission in the passing of the impugned order, fixing FSA, but as this Court has decided to set aside the impugned orders of the Commission, there is no necessity for this Court to go into those issues and express any opinion on the merits. However, the question as to whether the Commission can be a party to the proceedings in which its own order is in question, and defend its own order by engaging a counsel, is a question that can be decided in appropriate proceedings, and this Court leaves the said question open for the petitioners to agitate the same in appropriate proceedings.

CONCLUSIONS

However, before I end the judgment, I feel it appropriate to summarize my conclusions, which are as follows:

1. Even though alternative remedy of appeal is available against the impugned order, yet for the reasons stated in issue No.1, writ petitions are maintainable.
2. Considering the definition of “licensee” as defined under Section 2(39) of the Electricity Act, 2003, it is only the DISCOMs that can file applications before the Commission claiming FSA. The Power Co-ordination Committee, not

being a “licensee” as defined under Section 2(39) of the Electricity Act, it has no *locus standi* to file applications before the Commission claiming FSA on behalf of the DISCOMs.

3. Under Regulation 59 of the Business Regulations, the Commission has the power to condone the delay in filing applications by the licensees claiming FSA beyond the time prescribed.
4. While considering the applications filed by the licensees claiming FSA, the Commission has to follow the principles of natural justice.

For the above reasons, I set aside the impugned order passed by the Commission determining and granting FSA to the licensees and the consequential demands made by the DISCOMs.

Since this Court has set aside the impugned order passed by the Commission and the consequential demands made by the DISCOMs, it is open to the licensees i.e. DISCOMs to file applications afresh claiming FSA, and if any such applications are filed by the licensees, the Commission shall consider and decide them in accordance with law, and in the light of the observations made by this Court recorded hereinabove, and pass appropriate orders, expeditiously.

Before parting with this judgment, I am compelled to observe that the functioning of the Commission as revealed in the present proceedings is unsatisfactory and not in consonance with the objective for which the Commission was created. The record of proceedings show the failure of the Commission to discharge its functions. The proceedings indeed show a state of affairs and leave much to be desired.

As noted in the earlier part of the judgment, the Commission was specifically created to ensure objectivity and transparency in the regulation of generation, distribution and transmission of electricity. The institution of the Commission was created since the previous regulatory model where the State Government was the sole regulator turned out to be an abject failure. It was

expected that the Commission, which would be independent of the Government would bring about transparency and objectivity with respect to regulation of electricity. The Commission was specifically obligated to consider the interest of the licensees and the consumers. The Commission has been made an independent and autonomous body to ensure that there is no State interference in exercise of its functions. Since the Commission is not accountable either to the Legislature or the Government, the Commission has to ensure that it protects the interests of all the stakeholders and acts in a transparent manner.

Since the Commission is an autonomous body, the Government has to take utmost care while appointing the Chairman and Members and ensure that persons with requisite qualifications, having competence and expertise, who can discharge the functions of the Commission in accordance with the provisions of the Electricity Act, 2003 and the object for which the Commission was created, are appointed.

Accordingly, the writ petitions are allowed. No costs.

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N.V. RAMANA, J.

Dated: July, 2011

Note:

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[1] AIR 2000 AP 298
[2] W.A. Nos. 651 of 2000 and batch, dated 04.04.2002
[3] (2010) 8 SCC 1
[4] 2011 (4) SCC 61
[5] 2008 (221) ELT 163 (SC)
[6] 2010 (257) ELT 3 (SC)

[7] 2004 ILR (Kar) 3463
[8] AIR 1999 SC 22
[9] (2003) 2 SCC 107
[10] (2004) 3 SCC 553
[11] (2007) 9 SCC 593
[12] 2009 (2) SCC 630
[13] (1999) 3 SCC 422
[14] AIR 2005 SC 3460
[15] (1987) 2 SCC 720
[16] (2008) 5 SCC 632
[17] (2009) 2 SCC 630
[18] 2008 (5) ALT 87
[19] AIR 2004 SC 1159
[20] (V (2002) CLT 103 (SC)
[21] AIR 1976 SC 127
[22] IV (2005) CLT 179 (SC)
[23] 2009 (5) SCC 641
[24] 1976 (2) SCC 167
[25] 1986 (4) SCC 198
[26] 1987 (2) SCC 720
[27] 1991 (3) SCC 299
[28] 1993 (2) SCC 37
[29] 1997 (5) SCC 289
[30] (2004) 1 SCC 195
[31] (2004) 11 SCC 641
[32] (2003) 3 SCC 186
[33] (2004) 8 SCC 524
[34] (1978) 1 SCC 102
[35] (1990) 3 SCC 223
[36] (2010) 4 SCC 603
[37] 2000 (6) ALT 1 (DB)
[38] AIR 2002 SC 1361
[39] (2002) 8 SCC 715
[40] AIR 1958 SC 86
[41] AIR 1961 SC 1506
[42] AIR 1985 SC 330
[43] (2009) 2 SCC 630
[44] 2009 (2) ALT 50
[45] (1978) 3 SCC 459.
[46] , (2009) 6 SCC 235
[47] [1952] SCR 135, 148
[48] [1970] 78 ITR 26 at page 31