

**JHARKHAND STATE ELECTRICITY REGULATORY COMMISSION  
RANCHI**

**Case No. 11 of 2007- 08  
Case No. 12 of 2007- 08  
Case No. 14 of 2007- 08  
Case No. 18 of 2007- 08  
Case No. 19 of 2007- 08**

QUORUM:

(1) Mukhtiar Singh, Chairperson  
(2) P.C.Verma, Member

IN THE MATTER OF

An application for a direction to the Respondent-DVC to raise bills in terms of the judgment and order of this Commission dated 16.04.2007 passed in Case No. 16 of 2006-07 and for setting aside the bills raised on the basis of fuel cost surcharge at an enhanced rate instead of @ paise 63.81 per KWH as directed by this Commission vide order dated 16.04.2007.

AND

IN THE MATTER OF

Application on behalf of Damodar Valley Corporation pursuant to the order dated 28.01.2009 passed by the Hon'ble Tribunal For Electricity in appeal No. 12 of 2008 whereby the matter relating to fuel cost surcharge is to be dealt with by this Commission after hearing DVC and other concerned parties.

AND IN THE MATTER OF

1.	M/s Bihar Foundary & Castings Ltd. (Case No. 11/2007-08)	
2.	M/s Gautam Ferro Alloys (Case No. 12/2007-08)	
3.	M/s Balmukund Sponge & Iron Ltd.(Case No. 14/2007-08)	
4.	M/s Super Steel Casting Limited (Case No. 18/2007-08)	
5.	M/s Sai Electrocastings Limited (Case No. 19/2007-08)	..... Petitioners
	Vrs.	
	Damodar Valley Corporation & others	..... Respondent.

For the Petitioner : Shri Sunil Kumar, Sr. Advocate  
Shri Devashish Bharuka, Advocate  
Shri Nitin Pasari, Advocate

For the Respondent : Shri M.G. Ramchandran, Sr. Advocate  
Shri Srijit Choudhury, Advocate  
Shri C.S. Singh, Advocate  
Shri P.K.Choudhury, C.E. (Commercial), DVC.

**ORDER**  
(27.04.2009)

An application has been filed by the respondent Damodar Valley Corporation (DVC in short) before this Commission, pursuant to the orders dated 28.01.2009 of the Hon'ble Appellate Tribunal for Electricity in Appeal No. 12 / 2008. The aforesaid Appeal No. 12 / 2008 before the Hon'ble Tribunal, was filed by the respondent DVC challenging the orders dated 15.01.2008 passed by the Jharkhand State Electricity Regulatory Commission in Cases No. 11,12 & 14 / 2007-08. The Hon'ble Tribunal, passed orders dated 28.01.2009 in the Appeal without going into the merit of the case and without expressing any opinion; reverting the case back to the Commission to decide the matter on merits on the basis of the documents and arguments to be advanced by the parties concerned. Accordingly, the instant proceedings are before the Commission.

**Case In Brief:**

The Case, in brief, is that the Commission issued suo-moto notice to the respondent DVC for filing application for determination of their retail tariff chargeable to consumers and issued reminders upon which they filed the application before the Commission being Case No. 1 / 2007-08. In the mean time, the petitioners aforesaid, consumers of DVC, filed petitions before the Commission being Cases No.11,12 & 14 / 2007-08, in the common matter, to set aside the letter No 3497 dated 18.01.2007 issued by the Chief Engineer (Commercial) DVC (respondent No.2) communicating increase in the fuel cost surcharge, of paise 21.93 per Unit from April 2006 to September 2006 and further additional ad-hoc increase of paise 2 per Unit from Oct, 2006 onwards, for supply of electricity to the consumer petitioners. The contention of the petitioners in this

case was that the formula for the said fuel cost surcharge being not approved by the State Commission and the distribution tariff of the DVC not determined by the State Commission, the DVC can not levy the said increase in fuel cost surcharge and the same is without authority and not sustainable under law. Both parties were heard. The respondent DVC advanced the argument that the fuel cost surcharge being part of generation tariff, the Commission has no jurisdiction to adjudicate in the matter, more so when the consumers have entered into an agreement with the DVC for supply of electricity which is binding on both and the tariff and fuel cost surcharge formula is a part of the said agreement. The Commission passed orders dated 16.04.2007 in these cases disallowing the increase in fuel cost surcharge, the operative part of which is as follows-

“The respondent DVC in fact has charged increase in Fuel Cost Surcharge as communicated vide the letter No. 3497 dated 18.01.2007 of the Chief Engineer (Commercial) DVC as per the schedule of their Tariff applicable to the consumers that is their retail Tariff i.e. Distribution Tariff which is also a part of their agreement with the petitioners as admitted by the respondent DVC itself in their counter affidavit and this Tariff has been fixed by the respondent DVC themselves which they have not got approved by the Commission or they have not got their Distribution Tariff determined by the Commission as contended by the petitioners and therefore the prayer of the petitioner is allowed and DVC is disallowed to charge the increase in Fuel Cost Surcharge of paise 21.93 per unit for the period from April 2006 to September 2006 and further ad-hoc increase of 2 paise (i.e. total increase of 23.93 paise) per unit from October 2006 onwards as per enhanced rate of Fuel Cost Surcharge as communicated vide letter No.

3497 dated 18.01.2007 of the Chief Engineer (Commercial) DVC till determination of the Distribution Tariff of DVC by the Commission.”

In Case No. 1 / 2007-08, in the matter of determination of tariff chargeable by DVC from consumers, since DVC is yet to file required information and documents; the Commission passed an interim order on 27.04.2007 as follows:-

“The Commission agreed to give the time of one month to the DVC to file Tariff Petition as per the Regulation of the Commission and the Electricity Act, 2003. In the meantime, the Commission, as an interim order, allows DVC to charge its consumers in Jharkhand for supply of electricity at the rate which they were charging on 31<sup>st</sup> March 2006 including the rate of Fuel Surcharge as on the date. It must be clearly understood that the Commission has neither accepted the DVC’s distribution tariff as on 1.04.2006 nor the formula for the Fuel Surcharge.”

The DVC, after the order dated 16.04.2007, passed by the Commission in Cases Nos. 11, 12 & 14 / 2007-08, discontinued charging increase in the Fuel Cost Surcharge but in the meantime filed an appeal challenging this order before the Hon’ble Tribunal, in Appeal No. 69 of 2007. This Appeal No. 69 2007 was disposed of by Hon’ble Tribunal by its order dated 9.08.2007 against which a review petition was filed by the Commission before the Hon’ble Tribunal. The review was allowed and the appeal was finally disposed of by an order dated 20.12.2007 passed by the Hon’ble Tribunal which is as follows –

“Learned counsel for the respondent No.1 states that the State Commission does not have jurisdiction to determine the Fuel Cost Surcharge for generation in so far as the appellant is concerned. In view of this statement, the learned counsel

for the appellant states that he does not press the appeal. Accordingly, the appeal is disposed of as not pressed”.

The consumer petitioners, in the mean time, made an application before the Commission that the DVC, after the order dated 9.08.2007 of the Hon’ble Tribunal in the Appeal No. 69 / 2007, has restarted charging the consumers the increased rate of Fuel Cost Surcharge as per its letter No. 3497 dated 18.01.2007 of the C.E. (Commercial) DVC. The consumer petitioners prayed the Commission for directing the respondent DVC not to realize from them the increased rate of Fuel Cost Surcharge and refund any such amount already realized as this is violation of the orders of the Commission dated 16.04.2007 and as this order though challenged by DVC in Appeal No. 69 / 2007 has been upheld by the Hon’ble Tribunal by orders passed on 20.12.2007. Notices were issued and hearing was fixed in the matter on 07.01.2008 on which date both parties, consumer petitioners as well as respondent DVC, were present and on the prayer of both the parties, the case was adjourned for 15.01.2008. On 15.01.2008, the petitioners were present but the respondent DVC neither appeared nor sent any petition or communication to the Commission in this regard. The applications of the consumer petitioners were disposed of vide order dated 15.01.2008 in which the Commission reiterated its order dated 16.04.2007 disallowing the increase in fuel cost surcharge holding that this order is upheld by the Hon’ble Tribunal. The operative part of the order is as follows-

“It appears that as “generation” was missing in the above quoted portion of the order of the Appellate Tribunal the DVC started raising Fuel Cost Surcharge at enhanced rate from its consumers. Now in the order of the Appellate Tribunal in IA 198 of 2007 in Appeal No. 69 of 2007 dated 26<sup>th</sup> Dec, 2007, word

“generation” has been added, so it becomes clear that the Commission’s order dated 16.04.2007 holds good. The Commission had ordered that the increase in Fuel Cost Surcharge, a part of Distribution Tariff which is realized from the consumers in retail sale is to be decided by the State Commission and without getting Distribution Tariff determined by this Commission the DVC could not have realized the same from its consumers.

Accordingly it ordered that the DVC can not charge from its consumers the increase in Fuel Cost Surcharge of paise 21.93 per unit for the period from April 2006 to September 2006 and further ad-hoc increase of 2 paise (i.e. the total increase of 23.93 paise) per unit from October 2006 onwards as per the enhanced rate of Fuel Cost Surcharge communicated vide letter No. 3497 dated 18.01.2007 of the C.E. (Commercial) DVC till determination of the Distribution Tariff of DVC by this Commission.

If any amount at the enhanced rate of Fuel Cost Surcharge for the aforesaid period has been realized by the DVC from its consumers, those have to be either returned or adjusted towards their future bills.”

However respondent DVC instead of complying with the orders of the Commission dated 15.01.2008, again preferred appeal before the Hon’ble Tribunal, being Appeal No. 12 of 2008. This Appeal No. 12 of 2008 was disposed of by an order dated 28.01.2009 by the Hon’ble Tribunal, reverting the case back to the Commission for deciding the matter on merits, on the basis of the documents and arguments to be advanced by the parties and till then the stay granted by the Hon’ble Tribunal is effective.

In the meanwhile two more petitions were filed one by M/s Super Steel Casting Limited and another by M/s Sai Electrocastings Limited against the respondent-DVC

raising the same issues. Both these petitions were registered as Case No. 18/2007-08 and No. 19/2007-08 respectively. Since the respondent and issues raised were same, these two petitions were also heard together with the cases remanded back by the Hon'ble Appellate Tribunal.

**Issues Involved:**

In short the issues involved are –

- (i) Does this Commission has the jurisdiction to look into the fuel surcharge issue of the consumer petitioners?
- (ii) Is DVC entitled to charge its consumers for supply of Electricity as per its tariff effective from 1<sup>st</sup> September, 2000 fixed and notified by DVC itself under provisions of Section- 20 of the DVC Act, 1948 after enforcement of The Electricity Act, 2003?

**Submissions and Arguments of the Parties:**

Both the parties filed written submissions and documents and both parties were heard at length. Both the parties filed their written arguments as well.

The respondent DVC, through its written submission, filing of documents and arguments by its learned counsel, contended and argued as follows :-

The increase in fuel cost surcharge, in question, is being charged to the consumer petitioners in accordance with the tariff notified by DVC effective from 1<sup>st</sup> Sept. 2000. The increase has been charged as per the fuel cost surcharge formula which is a part of the tariff notified by DVC effective from 1<sup>st</sup> Sept, 2000 and they have not made any change in the tariff. They also contended that section 62(4) of the Electricity Act, 2003

has explicit provisions that any tariff may contain fuel surcharge formula and that fuel surcharge is being applied in tariff pertaining to different generating companies. The said tariff, effective from Sept, 2000, notified by DVC in exercise of its statutory powers to fix its tariff, in terms of the provisions of section 20 of the DVC Act, 1948; is still valid and applicable in full force and effect even after enactment of the Electricity Act, 2003, till such time the tariff is revised or modified by the appropriate commission under the provisions of this Act. The respondent DVC, is relying upon Section 185 (2) (a) of the Electricity Act, 2003, Section 6 of the General Clause Act, 1897 and judgment of the Hon'ble Supreme Court in "Southern Petrochemical Industries Limited Vrs. Electricity inspector (2007) 5 SCC 447" for continued application of their tariff. They also contended that there can not be vacuum in the application of tariff by virtue of any change in the legislation. They contended that the Central Electricity Regulatory Commission (CERC in short) has passed interim order dated 21.06.2005 directing existing tariff to continue till determination of tariff by the CERC. The CERC has passed orders dated 3.10.2006 determining the tariff but the same has been set aside by the Hon'ble Tribunal, the interim order of the CERC for continuance of existing tariff applies. The question of determination of retail tariff will arise only after the CERC has decided generation and inter-state transmission cost, they added.

The DVC contended that fuel surcharge can be related only to generation activity and not to distribution activity. As such, the fuel cost surcharge formula being part of generation tariff; the CERC has the jurisdiction to decide it and it is outside the preview and jurisdiction of Jharkhand State Electricity Regulatory Commission in short JSERC.

The DVC, in this regard, is relying upon observation made by the Hon'ble Tribunal in Appeal No. 273 / 2007 in its order dated 23.11.2007 -

“L Fuel Price Adjustment.

....applicable fuel price adjustment is to be decided by the Commission determining the applicable generation tariff.”

The DVC contended that any dispute as to fuel cost surcharge is required to be adjudicated by CERC in terms of Section 79 (1) (f) of the Electricity Act, 2003 as it is a matter relating to determination of generation tariff set out in Section 79 (1) (a) & (b) of the Act. The DVC also contended that the price at which power is purchased by DVC including the fuel surcharge and the cost of power purchase is input cost which is added to the distribution cost and expenses of the distribution licensee. The State Commission JSERC only determines the cost and expenses incurred on distribution of electricity and it can not determine the power purchase cost of the distribution licensee DVC. In support of their argument they referred to the Rule 8 of the Electricity Rules 2005 notified by the Govt. of India and observations made by Hon'ble Tribunal in its order dated 10.10.2007 in Appeal No. 107 of 2007 wherein it has been observed that out of the total cost and expenditure of DVC on transmission and distribution of electricity 87% is allocated to transmission activity and 13% is allocated distribution activity.

On the other hand the petitioners through their written submissions and documents and through argument by their learned counsel contended and argued as follows:-

The control and statutory powers to regulate and impose their own tariff of the respondent DVC with respect to generation, transmission and distribution of electricity has undergone drastic change after enactment of the Electricity Act, 2003. After

enactment of the Electricity Act, 2003, in terms of the 4<sup>th</sup> Proviso of Section 14 of the Act, the DVC carries out generation, transmission and distribution of electricity as distinct activities and in distinct capacities namely as a generating company, as a transmission licensee and as a distribution licensee respectively. The electricity supply to the consumers in the state of Jharkhand being distribution activity is carried out by the DVC in the capacity of a distribution licensee and in that capacity, the DVC is just equal to any other distribution licensee in the state of Jharkhand.

The consumer petitioners also contended that the DVC, being distribution licensee, under provisions of Section 45 of Electricity Act, 2003, is bound to charge for electricity supply to them in accordance with the tariff fixed from time to time as per the provisions of the Act. The tariff that can be charged for electricity supplied to the consumers by the distribution licensee DVC in the State of Jharkhand falls under the purview of Section 62(1) (d) of the Electricity Act, 2003 and this is called 'tariff for retail sale of electricity'. Only State Commission i.e JSERC has the jurisdiction to fix such tariff under the provisions of Section 86(1) (a) of the Act and this may include fuel surcharge as decided by the Commission. Therefore any charge other than the tariff fixed by the Commission is in violation of the Act. The DVC is not entitled to charge the said increase in fuel cost surcharge in accordance with the fuel cost surcharge formula contained in their tariff fixed by themselves as the same is not approved by the State Commission.

The learned lawyer of the petitioner further contended that the CERC has the jurisdiction to fix only generation and transmission tariff of DVC in terms of the provisions of Section 79 (1) (b) & (d) read with Section 62 (1) (a) & (b). This generation

and transmission tariff is chargeable for power supply to the distribution licensees (State Electricity Boards) and not to the consumers.

He also added that under provision of law the distribution licensee DVC has to get the retail tariff chargeable to consumers determined by the Commission as ordered by the Commission in its order dated 27.04.2007 in Case No. 1 / 2007-08. Until and unless, the DVC gets the tariff fixed by the State Commission; it is legally bound to charge the consumers for supply of the electricity in accordance with the interim direction contained in the order of the Commission dated 27.04.2007 i.e

“In the meantime, the Commission, as an interim order, allows DVC to charge its consumers in Jharkhand for supply of electricity at the rate at which they were charging in 31<sup>st</sup> March 2006 including the rate of fuel surcharge as on that date.”

The learned counsel of the petitioners argued that the order of the Commission dated 27.04.2007 being not set aside by the Hon’ble Tribunal has attained finality. The tariff fixed by DVC, under provisions of Section 20 of the DVC Act, 1948, being inconsistent with provisions of Section 86 (1) (d) read with Section 62 (1) (d) of the Electricity Act, 2003, is no more valid and applicable in view of the 4<sup>th</sup> Proviso of Section 14 of the Act as already ruled by Hon’ble Tribunal in Para 4 of the order of the Hon’ble Tribunal dated 23<sup>rd</sup> November 2007 in Appeal No. 273 / 2006. The learned counsel for the petitioners argued that the reliance of the respondent DVC on the interim order dated 21.06.2005 passed by CERC for continuance of its tariff is of no consequence because the said interim order dated 21.06.2005 was passed by CERC with respect to generation and transmission tariff. The CERC has no jurisdiction in matter of Distribution Tariff of the DVC. A Final order was rendered by CERC on 03.10.2006 and the aforesaid interim order stands merged into the final order which has also been set aside by the Hon’ble Tribunal.

The learned lawyer of the consumer petitioners also contended that fuel surcharge charged to the consumers is for retail tariff and it is not for generation tariff. Fuel surcharge for generation tariff can not be charged to the consumers. He added that the reliance of the respondent DVC upon observation in Para 'L' of the Hon'ble Tribunal in order dated 23<sup>rd</sup> November 2007 passed in Appeal No. 273 / 2007 to contend that only CERC has power to decide fuel surcharge is irrelevant and misplaced. The entire issue before the Hon'ble Tribunal in this Appeal was relating to the CERC's order determining the generation and transmission tariff. Neither the issue of distribution tariff nor the issue of fuel cost surcharge being part of distribution tariff was before the Hon'ble Tribunal. The observation in this Para 'L' is clearly about the fuel surcharge pertaining to generation tariff.

The learned counsel of the petitioners further argued that the respondent DVC relying upon Section 185 (2) of the Electricity Act, 2003 for continuation of the tariff fixed by DVC itself is of no consequence as the provisions apply only to Statutes which have been repealed by the Electricity Act, 2003. Admittedly the Electricity Act, 2003 does not repeal the DVC Act 1948. The Section 6 of the General clauses Act also do not have any relevance and applicability in the context as this provision applies only in such situation where Central Act or regulation has been repealed, whereas the DVC Act 1948 is not repealed.

**Findings:**

We feel that the issues involved are essentially legal in nature and that it is but natural to encounter such issues when an Act to consolidate the laws relating to electricity is enacted, namely the Electricity Act, 2003, with paradigm shift in legislative framework. The provisions of law shall have to be given effect to streamline and resolve the issues in

such a manner so that it fulfil the intent and purpose of law. The objectives of The Electricity Act, 2003, as mentioned in its preamble, are:- *“An Act to consolidate the laws relating to generation, transmission, distribution trading and use of electricity and generally for taking measures conducive to ..... to promoting competition therein, protecting interest of consumers and supply of Electricity to all areas, rationalization of electricity tariff”*. The Electricity Act, 2003 repeals the previous Central laws in the matter of electricity i.e. The Indian Electricity Act, 1910, The Electricity Supply Act 1948 and the Electricity Regulatory Commission Act, 1998. The DVC Act 1948 is a Central Act with the objectives of (as mentioned in its preamble) – *“An Act to provide for the establishment and regulation of a corporation for the development of the Damodar Valley in the provinces of Bihar and West Bengal.”*. The DVC, under provisions of the DVC Act, 1948, is entrusted with the functions of irrigation, water supply, flood control, promoting navigation, afforestation, control of soil erosion, and promotion of public health and agriculture and also the functions of generations, transmission, and distribution of electricity.

To begin with, the DVC Act being not repealed, it is purposeful to examine the status of the DVC in so far as its activities relating to the generation, transmission and distribution of electricity is concerned. Specific provisions have been made with respect to the DVC in the Proviso 4 of Section 14 of the Electricity Act, 2003. Apart from the above specific provision, there is a general provision under Section 174 of this Act which would govern the DVC and which provides that the provisions of the Electricity Act, 2003 shall have effect notwithstanding anything contained inconsistent with these provisions in any other law for the time being in force subject to the Section 173 of the Act (which saves the Consumer Protection Act, 1986, The Atomic Energy Act 1962 and the Railways

Act 1989). Under provisions of the DVC Act, 1948, the DVC was entitled to carry out the activities of generation, transmission and distribution of electricity in an integrated manner with statutory powers to fix its own tariff and terms and conditions for power supply. The legal framework with respect to DVC has undergone a basic change in view of the provisions of Section 14 read with Section 12 of the Electricity Act, 2003, according to which the transmission and distribution of electricity are separate and distinct activities to be carried out under different capacities and authorizations, there being distinct provisions for them. In other words transmission of electricity can be carried out only by a person who is a transmission licensee and has obtained license for the same from the appropriate Commission. Similarly distribution of electricity can be carried out by a person who is a distribution licensee and has obtained license for the same from the appropriate Commission. The generation of electricity being un-licensed activity under the Act, may be carried out by any person, subject to the provisions of Section 7 and Section 10 of the Electricity Act, 2003. Proviso 4 of Section 14 of the Electricity Act, 2003 provides that – *“PROVIDED also that the Damodar Valley Corporation ,established under sub-section (1) of section 3 of the Damodar Valley Corporation Act, 1948, shall be deemed to be a licensee under this Act but shall not be required to obtain a license under this Act and the provisions of the Damodar Valley Corporation Act, 1948 insofar as they are not inconsistent with the provisions of this Act, shall continue to apply to that Corporation.”* This mandates that the respondent DVC is a transmission licensee in so far as its activities with respect to the transmission of electricity are concerned. Similarly the DVC is distinctly a distribution licensee in so far as its activities with respect to distribution of electricity are concerned. The DVC is also a generating company in so

far its activities with respect to generation of electricity is concerned in terms of Section-7 and Section -10 of the Act.

Section 62 of the Electricity Act 2003, provides for distinct tariffs pertaining to generation, transmission and distribution of electricity to be fixed by appropriate Commission under distinct provisions as follows-

- (i) Section 62 (1) (a) provides for the Tariff for “supply of electricity by a generating Company to a distribution licensee”. This is generally called Generation tariff in common language.

This generation tariff, for the DVC generating stations being controlled by Central Govt. shall be fixed by CERC under the provisions of Section 79 (1) (a) of the Act read with Rule 8 of the Electricity Rules 2005 notified by Govt. of India.

- (ii) Section 62(1) (b) provides for the Tariff for – “Transmission of Electricity”. This is generally called transmission Tariff in common language.

The transmission tariff for the interstate transmission of electricity by DVC shall be fixed by the CERC under the provisions of Section 79(1) (d) of the Act.

- (iii) Section 62 (1) (d) provides for the Tariff for – “retail sale of electricity” i.e for supply and sale of electricity to the consumers and this is called Distribution Tariff in common parlance.

Let us examine the issues in question under provisions of law. The first issue is whether this Commission has the jurisdiction to look into the fuel surcharge issue of the consumer petitioners. We accept the plea of the respondent DVC that the increase in fuel cost surcharge has been charged in accordance with the fuel cost surcharge formula

contained in their tariff for the consumers, effective from 1<sup>st</sup> Sept, 2000, fixed by them and they have not made any change in the tariff and the fuel cost surcharge formula is a part of this tariff. The increase in fuel cost surcharge is being charged, for power supply, to the petitioners who are consumers in the State of Jharkhand. This is a distribution activity and the respondent DVC is a distribution licensee for that. In terms of the provision of Section 62(1) (d), the tariff that is charged to the consumers by a distribution licensee is ‘tariff for retail sale of electricity’ that is Distribution Tariff as is generally called. The increase in fuel cost surcharge is a part of the retail tariff or Distribution Tariff chargeable to consumers as can be seen from the tariff of DVC, Clause 1 of which is quoted below for ready reference-

“ELECTRICITY TARIFF FOR H.T. SUPPLY  
DVC POWER SYSTEM

EFFECTIVE FROM 1<sup>ST</sup> SEPTEMBER, 2000.

- |    |   |  |
|----|---|--|
| 1. | 33 KV TARIFF ( FOR ALL CONSUMERS)   |  |
|    | (a) <u>Energy Charge</u><br>(On monthly consumption subject to minimum guaranteed energy charges )  | Paise/KWH<br>163.00  |
|    | Plus  |  |
|    | (b) <u>Demand Charge</u><br>[On whole of the maximum demand when the drawl does not exceed the contract demand ( for unrestricted supply) and/or the restricted allocation ]                    | Rs./ KVA/ Month<br>365.00  |
|    | (c) <u>Penal demand charge</u><br>( Excluding SEBs)<br>[ On whole of the maximum demand when the drawl exceeds the contract demand ( for unrestricted supply) and/or the restricted allocation] | 10% higher than normal Demand Charge as mentioned in 1(b) above. |
|    | Plus  |  |
|    | (d) <u>Fuel Cost Surcharge</u><br>Plus  |  |
|    | (e) <u>Power Factor Surcharge/ Rebate”</u>  |  |

The retail tariff (Distribution Tariff) chargeable to consumers in the State of Jharkhand shall be fixed by Jharkhand State Electricity Regulatory Commission in terms of Section 86(1)(a) of the Electricity Act, 2003. The CERC has no jurisdiction in the matters relating to the retail tariff (Distribution Tariff) chargeable to consumers.

The tariff is fixed for specified period. However, certain explicit items of cost and expenditure incurred for supply of electricity, being clearly beyond the control of utility may vary in the mean time from what has been allowed in the tariff. Such expenditure being indisputably pass over to the tariff; intermediate adjustment of such expenditure in tariff on regular basis (monthly, quarterly or half-yearly) may be allowed by way of fuel surcharge. Fuel surcharge was initially started for adjustment of the variation in the most obvious cost beyond the control of utility i.e. price of fuel (coal and oil) for generation of electricity and accordingly this is named “fuel surcharge”; though eventually it includes all such explicit items of cost and expenditure even non-fuel. That is to say any change in tariff by way of the ‘fuel surcharge’ may be allowed by the appropriate Commission not only for the adjustment of fuel cost as it appears by the name but for any such cost and expenditure as permitted by the Commission as explicitly provided in Section 62 (4) of the Act. There is specific provisions in Section 62 (4) of the Electricity Act, 2003 with respect to fuel surcharge as rightly contended by the DVC which provides that the changes in the rate chargeable under a tariff has to be in accordance with the fuel surcharge formula as may be ‘specified’. The term ‘specified’ is defined under Section 2 (64) according to which it means that the fuel surcharge formula has to be specified by regulations made by the appropriate Commission. The appropriate Commission for framing regulations on fuel surcharge formula with respect to any tariff is the Commission which determines the tariff. Therefore, the regulation with respect to the

fuel cost surcharge formula for retail tariff chargeable to the consumers shall be framed by the State Commission's only. In fact most of the State Commissions have issued regulations with respect to fuel surcharge formula mainly to adjust the variation in the cost of power purchase. The JSERC has also notified regulations with respect to the fuel cost surcharge formula. Under Clause 6 JSERC (Terms and Conditions of Distribution Tariff) Regulations 2004, it has been provided that the Distribution licensee has to submit the calculation of fuel surcharge for approval by the Commission. Obviously any tariff may have its fuel surcharge formula framed by the appropriate Commission. The Distribution Tariff may have its own fuel surcharge formula and Generation Tariff may have its own. As contended by the DVC, it is correct that the power purchase cost is an input cost for the distribution and that the State Commission has to accept the power purchase price i.e the Generation Tariff fixed by CERC for purchase of power by the DVC as distribution licensee from NTPC and DVC generating stations. But the plea of the DVC that the State Commission does not determine the power purchase cost for Distribution Tariff is not sustainable under the law. Power purchase cost is not dependent on power purchase price or generation tariff alone. It also depends on the quantum of power purchased by the distribution licensee. The quantum of power purchased by the distribution licensee is completely regulated under the power procurement regulations of the State Commission in terms of the provisions of Section 86 (1)(b) of the Electricity Act, 2003. Through power procurement regulations, the State Commission regulates the total quantity of power to be purchased allowing permissible level of losses and the proportion of the total power to be purchased from different sources under available options and merit order dispatch to optimize the power purchase cost in the long run as well as in the short run and to that extent the State Commission determines the total power

purchase cost of the distribution licensee for determination of tariff. Apart from this, there can be no doubt that the power purchase cost has no relationship with a generating station and as such it can not be a part of fuel surcharge for Generation Tariff. The power purchase cost is necessarily a part of the input cost of distribution licensee and as such it can be a part of the fuel surcharge of Distribution Tariff only. The plea of the DVC, that only CERC has the jurisdiction in the matter of fuel surcharge, relying upon observation made by Hon'ble Tribunal in Para 'L' of its order dated 23.11.2007 in Appeal NO. 273 / 2007 is of no avail as this is with respect to the fuel surcharge of generation tariff only.

Therefore, in view of the above, we hold that the fuel cost surcharge chargeable to the consumer petitioners in the State of Jharkhand, being a part of retail tariff (Distribution Tariff) has to be decided by the JSERC.

Now, let us examine, whether the DVC is entitled to charge its consumers, for supply of electricity, as per its tariff effective from 1<sup>st</sup> September, 2000 fixed and notified by DVC itself under provisions of Section- 20 of the DVC Act, 1948 after enforcement of the Electricity Act, 2003. The respondent DVC had statutory powers to fix its own tariff under provisions of Section – 20 of the DVC Act 1948, and the DVC has fixed the Tariff chargeable to consumers effective from 1<sup>st</sup> Sept 2000 under these provisions. The DVC is a distribution licensee under the meaning and provision of the Electricity Act, 2003 just like any other distribution licensee in the State of Jharkhand for the purpose of making power supply to the consumers in State of Jharkhand.

In view of 4<sup>th</sup> Proviso of Section 14 of the Electricity Act, 2003; Section 20 of the DVC Act 1948, being inconsistent with the provisions of section 86(1) (a) read with section 62 (1) (d) of the Electricity Act, 2003, is not valid and applicable as ruled in Para 4

of the Hon'ble Tribunal order dated 23<sup>rd</sup> November, 2007 in Appeal No. 273/2007 which is quoted as follows-

“4 According to the above said provision, it is the appropriate Commission which is required to determine tariff. Section 20 of DVC Act providing for determination of tariff by the DVC being incompatible with Section 62 of the Act, 2003, can not apply.”

Section 20 of the DVC Act, 1948 being not valid and applicable, the DVC tariff effective from 1<sup>st</sup> Sept, 2000 fixed and notified by DVC, under these provisions, is not valid and applicable and can not be sustained under law and the contention of the consumer petitioners, to that extent, is tenable. The respondent DVC's reliance upon Section 185 (2) (a) of the Electricity Act, 2003 for validity of the tariff fixed by them is of no help as this provision relates to the laws repealed by the Electricity Act, 2003 i.e The Indian Electricity Act, 1910, The Electricity Supply Act, 1948 and the Electricity Regulatory Commission Act, 1998 and has nothing to do with the DVC Act. Also the DVC's reliance on Section 6 of the General Clauses Act, 1897 in this respect is of no consequence and is not applicable as the said provision of the law applies only in such situation where a Central Act has been repealed. Obviously, the DVC Act, 1948 has not been repealed. The respondent DVC has also referred to the judgment of Hon'ble Supreme Court in “Southern Petrochemical Industries Limited Vrs. Electricity Inspector (2007) 5 SCC 447” in this regard which again has no applicability in the present case as the referred case of Hon'ble Supreme Court is related to levy of duty on sales of electricity (sales tax) in view of the repeal of the Tamil Nadu Electricity (Taxation on Consumption) Act, 1962 by the Tamil Nadu Tax on Consumption or Sale of Electricity Act, 2003, which has been referred to as “the 2003 Act” in the said judgment. As said

above, the DVC Act is not repealed. Similarly, the contention of the DVC that the consumer petitioners have entered into agreement with them and they are charging as per the agreement is of no avail as there can be no agreement against the provisions of law.

The respondent DVC, for continued application of its tariff, has relied upon the interim order dated 21.06.2005 passed by the CERC on Petition No.66/2005 of the DVC for determination of Tariff. The CERC has passed the interim order, directing the DVC to continue to charge provisionally the tariff that it was charging on 31.03.2004 till further order and subject to the tariff that may be determined by the CERC. In the first place, this application before the CERC is for determination of generation and inter-state transmission tariff of the DVC, chargeable from the distribution licensee i.e State Electricity Boards of West Bengal and of Jharkhand and not from the consumers. The interim order was, evidently, with respect to the generation and inter-state transmission tariff of the DVC. This interim order has nothing to do with the distribution tariff in question chargeable to the consumer petitioners on which the CERC has no jurisdiction as rightly contended by the consumer petitioners. Moreover, the CERC has determined the generation and inter-state transmission tariff of the DVC by its order dated 03.10.2006 whereby the aforesaid interim order stands merged into it and the interim order is no more in existence.

The DVC has also advanced the argument that the tariff fixed by them effective from 1<sup>st</sup> Sept, 2000 continues to apply till such time the tariff is revised or modified by the appropriate Commission under the provisions of the Act as there can be no vacuum in the application of tariff by virtue of any change in the legislation and that the question of determination of retail tariff (Distribution Tariff) will arise only after the CERC decides generation and inter-state transmission cost. This plea, of the respondent DVC, is not

sustainable under law. Under provisions of Section 45, of the Act, the distribution licensee DVC is entitled to charge for power supply to the consumer petitioners in the State of Jharkhand only in accordance with the tariff and charges approved by the State Commission. Moreover, the State Commission issued suo-moto notice and issued reminders to the DVC for filing application for determination of retail tariff (Distribution Tariff) with required information and documents and upon this, the DVC has filed Tariff application before this Commission being Case No1/ 2007-08. All the required information and documents, for the determination of retail tariff, being yet to be submitted, the Commission has passed an interim order dated 27.04.2007 in Case No. 1 of 2007-08, as follows-

“In the meantime, the Commission, as an interim order, allows DVC to charge its consumers in Jharkhand for supply of electricity at the rate which they were charging on 31<sup>st</sup> March, 2006 including the rate of fuel surcharge on the date.”

and as such there is no question of vacuum. The CERC and the State Commission have independent and exclusive jurisdiction of their own. The determination of retail tariff (Distribution Tariff) is in the exclusive jurisdiction of the State Commission and the CERC has nothing to do with this. Admittedly the DVC is making power supply to the consumers in the State of Jharkhand and is incurring cost and expenditure on the same which is on their records. The Commission has to determine the retail tariff (Distribution Tariff) on the basis of the cost and expenditure incurred by the DVC, after scrutinizing the same under the provisions of the Act and regulations. The DVC, for determination of retail tariff, has only to submit the details of their cost and expenditure incurred on power supply to the consumers in the State of Jharkhand as per their records with relevant documents.

In view of the above, we hold that the respondent DVC is not entitled to charge the petitioners consumers in the State of Jharkhand, the tariff fixed by them under provisions of Section 20 of the DVC Act, 1948 effective from 1<sup>st</sup> Sept, 2000 since the same is not determined by the JSERC. Accordingly, we reiterate our orders dated 16.04.2007 and dated 15.01.2008 in Cases No.11 and others of 2007-08 disallowing charging the consumers the increase in fuel cost surcharge of paise 21.93 per unit for the period from April 2006 to Sept. 2006 and further ad-hoc increase of 2 paise (i.e. total increase of 23.93 paise) per unit from October, 2006 onwards communicated vide Chief Engineer (Commercial), DVC, letter No. 3497 dated 18.01.2007.

The matter is disposed of accordingly.

Sd/-  
(P.C.Verma)  
Member (Tech)

Sd/-  
(Mukhtiar Singh)  
Chairperson