BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY
Appellate Jurisdiction, New Delhi

Appeal Nos. 17, 18 and 19 of 2007

Dated this 10th day of July, 2007

Coram : Hon'ble Mr. H. L. Bajaj, Technical Member
Hon'ble Ms. Justice Manju Goel, Judicial Member

IN THE MATTERS OF:

Appeal No. 17 of 2007

1. RICO Auto Industries Ltd.
   Regd. Office : 69 KM Stone,
   Delhi-Jaipur Highway,
   Gurgaon – 122001

   Factory : 38 KM Stone,
   Delhi-Jaipur Highway,
   Gurgaon – 122 001.

2. OMAX Autos Ltd.
   Regd. Office : 69 Stone,
   Delhi-Jaipur Highway,
   Village malpura, Dharuhua,
   Distt. Rewar

   Factory : 5/13, Sohna Road,
   Village Tikri, Gurgaon – 122 001

3. ISGEC
   Radaur Road,
   Yamuna Nagar – 135 001. … Appellants

Vs.

1. Haryana Electricity Regulatory Commission
   SCO 180, Sector-5,
   Panchkula, Haryana.

2. Uttar Haryana Bijlee Vitaran Nigam Ltd.,

Shakti Bhawan, Sector – 6,
Panchkula – 134 109.

3. Dakshin Haryana Bijlee Vitaran Nigam Ltd.
Vidyut Nagar, Hissar,
Haryana.

4. Haryana Power Generation Corporation Ltd.
Shakti Bhawan, Sector – 6,
Panchkula – 134 109.

5. Haryana Vidyut Prasaran Nigam Ltd.,
Shakti Bhawan, Sector -6,
Panchkula – 134 109.

6. Confederation of Indian Industry
Plot No. 248-F, Sector 18, Udyog Vihar,
Phase- IV, Gurgaon – 122 015 ... Respondents

Appeal No. 18 of 2007

1. Bhupendra Steel Private Limited
Regd. Office : F-1089 (Basement),
C.R. Park, New Delhi

Factory : Plot No. 25, Sector-6,
Faridabad – 121 006.
Haryana. ... Appellant

Vs.

1. Haryana Electricity Regulatory Commission
SCO 180, Sector-5,
Panchkula, Haryana.

2. Uttar Haryana Bijlee Vitaran Nigam Ltd.,
Shakti Bhawan, Sector – 6,
Panchkula – 134 109.

3. Dakshin Haryana Bijlee Vitaran Nigam Ltd.
Vidyut Nagar, Hissar,
Haryana.

4. Haryana Power Generation Corporation Ltd.
   Shakti Bhawan, Sector – 6,
   Panchkula – 134 109.

5. Haryana Vidyut Prasaran Nigam Ltd.,
   Shakti Bhawan, Sector -6,
   Panchkula – 134 109.

6. Confederation of Indian Industry
   Plot No. 248-F, Sector 18, Udyog Vihar,
   Phase- IV, Gurgaon – 122 015 ... Respondents

Appeal No. 19 of 2007:

1. Tecumseh Products India Pvt. Ltd.
   Regd. Office : Balanagar Township,
   Hyderabad – 110 008
   Factory : 38, K.M. Stone,
   Delhi Mathura Road,
   Ballabgarh – 121 004. … Appellant

Versus

1. Haryana Electricity Regulatory Commission
   SCO 180, Sector-5,
   Panchkula, Haryana.

2. Uttar Haryana Bijlee Vitaran Nigam Ltd.,
   Shakti Bhawan, Sector – 6,
   Panchkula – 134 109.

3. Dakshin Haryana Bijlee Vitaran Nigam Ltd.
   Vidyut Nagar, Hissar,
   Haryana.

4. Haryana Power Generation Corporation Ltd.
   Shakti Bhawan, Sector – 6,
   Panchkula – 134 109.

5. Haryana Vidyut Prasaran Nigam Ltd.,
   Shakti Bhawan, Sector -6,

Panchkula – 134 109.

6. Confederation of Indian Industry
Plot No. 248-F, Sector 18, Udyog Vihar,
Phase- IV, Gurgaon – 122 015 ... Respondents

Counsel for the Appellant : Mr. M. G. Ramachandran, Advocate along with Mr. Anand K. Ganesan, Advocate

Mr. M.K. Sharma, General Manager for Bajaj Motors

Counsel for the Respondents: Mr. Ajay Siwach, Advocate
Mr. Pardeep Dahiya, Advocate for Respondent Nos. 2 to 5
Mr. Neeraj Kumar Jain, Advocate for Respondent No.1
Mr. Sandeep Chaturvedi, Advocate

Mr. D. C. Arya, FA, Head Quarter, Respondent No. 4 & 5

Mr. R. S. Sarna, - SC (Commercial), Respondent No.5 and Mr. Rajesh Kumar Monga, Law Officer, Resp.No. 1

J U D G M E N T

Ms. Justice Manju Goel

These are three appeals directed against the same Impugned Orders of the Haryana Electricity Regulatory Commission dated 01.12.2006 & 05.12.2006 in the matter of Fuel Surcharge Adjustment (FSA) for the FY 2003-04, 2004-05 & 2005-06 as well as for the first half & second halves of 2006-07

for the bulk supply / trading business of Haryana Power Generation Corporation Ltd. (HPGCL), respondent No.4 and for distribution and retail of Uttar Haryana Bijli Vitran Nigam Ltd. and Dakshin Haryana Bijli Vitran Nigam Ltd., the respondents 2 & 3 respectively. The HPGCL is a deemed trading licensee for intra state trading for electricity in Haryana while UHBVNL and DHBVNL, the respondents 2 & 3 respectively, are the distribution licensees for the northern ad southern circles of Haryana. The respondent No.4 filed application soliciting approval of the Haryana Electricity Regulatory Commission (the Commission for short) for levying fuel surcharge for recovering power purchase from various sources. The FSA relates to the bulk supply / trading business to be recovered from its two consumers, namely respondents 2 & 3. The respondents 2 & 3 also came up with applications to recover FSA, which they became liable to pay to respondent No.4, from its own customers. The respondent No.4 claimed a total FSA recoverable of Rs.11,726.04 in the following manner:

Table – 1 HPGCL's FSA Claims

YEAR	Rs. Million
FSA for FY 2003-04	(-) 1162.60
FSA for FY 2004-05	3573.60
FSA for FY 2005-06	8291.41
Trading Business FSA (arrears)	10703
(Less) FSA to be taken over by State Govt.	(-) 3915.56
(Less) Refunds from NTPC	(-) 292.85
FSA Recoverable (FY 2003-04 to FY 2005-06)	6494.60
FSA for FY 2006-07 (1st Quarter)	1730.44
FSA for FY 2006-07 (2nd Quarter)	3501.00
Total FSA Recoverable	**11726.04**

2. The adjustment claimed represented:

(a) The total cost of the power that HPGCL would have purchased for its actual sales and the power loss level allowed by the Commission, using HPGCL's actual average cost of power, and
(b) The aggregate power purchase cost for allowed levels of sales in the ARR Order(s) of the Commission.

For (a), HPGCL used its actual monthly sales volume and power loss figure approved by the Commission in the ARR order.

For (b), the respondents used purchase power costs in the Commission approved ARR in the relevant years. The cost was arrived at by multiplying the volume derived above with Commission approved average rate of power per unit for each source. The respondents 2 & 3 proposed to recover the FSA amount claimed by respondent No.4 by increasing the rate of all consumer classes except the agricultural pump set consumers. The Commission examined the question of limitation and found that the claim for the FSA was not time barred. The Commission then applied the formula provided by Regulation 4(1) and (2) of the Haryana Electricity Regulatory Commission (Tariff)9 Regulations 1999) (Tariff Regulation for short) and also took into consideration the proposal of respondents 2 & 3 and thereafter allowed the following FSA to be recovered:

Net Fuel Surcharge Adjustment Recoverable (Rs. Million)

FY 2003-04 to FY 2005-06 (Arrears)	6494.60
FY 2006-07 (1st Quarter)	1607.04
FY 2006-07 (2nd Quarter)	3448.00
Total	**11549.64**

3. The Commission observed that the FSA for the first quarter of 2006-07 of Rs.1730.44 Million claimed by respondent 4 included Rs.500.46 Million on account of FPA claimed by HPGCL (Generation) for the same period. As per the Commission's estimates the amount works out to Rs.377.06 Million and this difference was accordingly re-adjusted. Similarly, FSA for the second quarter for the FY 2006-07 worked out to Rs.3448 Million, which was allowed as against the claim of Rs.3501 Million. The Commission nonetheless made the observation that the FSA claim should have been made in a timely manner for otherwise the purpose of FSA itself was defeated.

4. In the order of 05.12.06, the Commission observed that out of a sum of Rs. 11549.64 million, Rs. 3915 million had been taken over by the govt. towards agricultural pump set consumers. Further additional amount of Rs.2059 million was also found recoverable on review of the tariff order for FY 2006-07 on the petitions of the respondents 2 & 3 and on account of this Tribunal's orders of 07.07.06 & 12.09.06. A sum of Rs.1620.2 million was also recoverable on truing up of earlier years. The Commission did not burden the agricultural sector with any additional burden as per the request of the respondents 2 & 3.

Thus except the sum of Rs.7154.31 million, being the agriculture components and to be subsidized by Govt. rest of the FSA as well as other amounts, as sanctioned above, was found recoverable. However, keeping in view that the amount due to be recovered was for the past period and to soften the impact of the extra burden, the Commission directed that the amount be recovered in 36 months starting from 01.12.06. The total recoverable amount came to Rs.19761 million shown in Table I as under. A "Table 2: Scale of Recovery" was provided in the order laying down the impact per unit (KWH) of energy sale for different consumers. The HT industries, who are the appellants, herein were to bear an impact of 38 paise per unit (KWH) of energy sale.

Table 1: FSA & Other Charges (Rs. Crores)

		TOTAL
1	Impact of orders of the Appellate Tribunal related to HVPNL Tariff Orders for FY 2002-03, 2003-04, 2004-05, 2005-06	162.02
2	Fuel Surcharge Adjustment	1546.51
	Less: FSA taken by GOH (to be adjusted against Agriculture Pumpset Consumers)	-391.55
3	Review Petition filed by HVPNL and HVPNL and UHBVNL related to ARR orders for FY 2006-07	205.96
4	Revenue Gap as per ARR Order for Distribution and Retail Supply Business for FY 2006-07	453.13
	TOTAL	**1976.07**

5. The grounds for challenging the order of 01.12.06 & 05.12.06 may be briefly stated as under :

1. The orders were passed without any public hearing and as such were in gross violation of the principles of natural justice.
2. There was no explanation for the delay in claiming FSA for the period commencing from 01.04.03 onwards in the year 2006 and hence grant of FSA by the impugned orders was wrong particularly because the Commission had already expressed in an earlier order of 27.07.00 that there should not be any delay in claiming FSA
3. Principles of limitation incorporated in section 56 of the Electricity Act 2003 was violated by the Commission in granting belated claim for FSA
4. The Commission failed to appreciate that between 2004 and 2006 there was a large change in the consumer profile and hence those industrial consumers who started operation in 2006 would have to contribute towards FSA for the earlier years when they had not consumed any electricity

6. The appeal is defended by the respondents 1 to 5. The respondent No.5 viz. Haryana Vidyut Prasaran Nigam Ltd. is a proforma respondent. The respondent, Haryana Power Generation Co. Ltd., the respondent No.4, took over the trading function of the respondent No.5 w.e.f. 01.04.05. All the respondents contended that there was no necessity of a public hearing since the Commission under the Tariff Regulations, has

no discretion but to accept the claim for FSA as per a formula given in Regulation 4(2). The plea of delay, latches & limitation with reference to section 56(2) has been met by contending that the period of two years mentioned in that section could commence only after the claim for FSA was approved as it was only then that FSA could become a 'sum due'. The Commission further contends that although the claim for FSA was delayed, no indefeasible right accrued to the consumers to avoid such payment since the dues had not become time barred. The Commission further contends that the FSA for several years had to be allowed to prevent utilities from falling into a debt trap. Further the impugned orders are justified by the prudence of staggering the recovery of FSA over 36 months which would avoid a tariff shock.

7. We have heard the counsel for the parties appearing before us. The appellant & the Commission have also filed written submissions. We now deal with the issues raised.

8. The most important contention of the appellants is that of delay and limitation. Let us look at the claim for FSA as reproduced in para I of the judgment. Although the table mentions the year 2003-04, there is no demand for FSA for that year. In fact FSA for 2003-04 is shown as (-) Rs.1162.60 Million. For 2004-05 FSA claim is of Rs.3573.60 Million. The limitation period as provided by the Limitation Act had not expired when claim of FSA for 2004-05 was made much before the end of 2006.

9. Now let us see the section 56(2) of the Electricity Act 2003.

"56.(2) Notwithstanding anything contained in any other law for the time being in force, no sum due from any consumer, under this section shall be recoverable after the period of two years from the date when such sum became first due unless such sum has been shown continuously as recoverable as arrear of charges for electricity supplied and the licensee shall not cut off the supply of the electricity."

10. A sum can be shown as recoverable only when it becomes legally recoverable. FSA claim cannot be shown as sum due by any utility unless it gets the approval of the Commission. The sum representing the consumer's share of FSA can be shown in bills only after the Commission has determined how and what amount of FSA can be recovered. The utilities i.e. the respondents 2, 3 & 4 cannot be deprived of their dues towards fuel price in the situation at hand on the plea of limitation prescribed by Section 56(2) of the Electricity Act.

11. Our attention has been drawn towards Regulation No. 4(1) of the Tariff Regulations 1999 which reads as under :

'4(1) No tariff may be amended more frequently than once in any financial year except that tariff rates shall be adjusted quarterly in accordance with any fuel surcharge adjustment

formula (FSA) incorporated in the tariff with the approval of the Commission"

12. It is submitted on behalf of the appellants that the adjustment on account of FSA can be done quarterly whereas in the present case no demand for FSA was made for nearly two years in as much as the adjustment for 2004-05 is prayed for in 2006-07. Having carefully read the Regulation 4(1) we are of the opinion that adjustment on account of fuel price hike cannot be denied only because the demand is made beyond the 2nd quarter in question. The word 'quarterly' has to be read in the context of the whole Regulation. The Regulation is merely laying down the frequency in which a tariff may be amended. The idea is to maintain stability in the tariff. Normally, the Regulation provides, the tariff should not change more than once in a financial year. FSA is an exception. But even for that the frequency is limited to once a quarter. The Regulation merely provides that although FSA can be made more than once in a year, the adjustment should be made quarterly and not more frequently than that. The intention of the rule is not to provide a period of limitation.

13. Hence, the claim for FSA as made by the respondents 2, 3 & 4 was not barred by any law or rule of limitation. It is true that it would have been prudent on the part of theses respondents to make a timely prayer for FSA. The Commission also made a due comment on the delay. As pointed out by the appellant, in its earlier order of 27.07.2000 the Commission had observed "*The*

Commission observes that since the publication of Tariff Regulations, considerable time has elapsed but the licensee did not show any urgency to levy the FSA. The Commission Order on Review Petition also made observation in this regard. The Commission expects the licensee to operate economically and manage its functions efficiently. The purpose of the FSA mechanism is defeated if the licensee does not care to adjust timely the over (or under) expenditure in respect of power purchase cost. ***The Commission does not appreciate the delay by HVPNL in filing the application for FSA. In future, the Commission would expect that the licensee will file the FSA timely and quarterly. As a special case, the Commission is allowing a multi-period application this time."***

14. It is indeed unfortunate that despite such a comment being made on an application of respondent No.5, the respondent No.4, successor in interest of respondent No.5 has again fallen into the same default. However, this should not disentitle the respondent No.4 or the respondents 2 & 3 to recover the FSA falling due for the years 2004-05 & 2005-06. The National Electricity Policy published by the Ministry of Power; Govt. of India on 12.02.2005 inter alia prescribes the following:

5.5 RECOVERY OF COST OF SERVICES & TARGETTED SUBSIDIES

5.5.1 There is an urgent need for ensuring recovery of cost of service from consumers to make the power sector sustainable.

5.5.2 A minimum level of support may be required to make the electricity affordable for consumers of very poor category. Consumers below poverty line who consume below a specified level, say 30 units per month, may receive special support in terms of tariff which are cross-subsidized. Tariffs for such designated group of consumers will be at least 50% of the average (overall) cost of supply. This provision will be further re-examined after five years.

5.5.3 Over the last few decades cross-subsidies have increased to unsustainable levels. Cross-subsidies hide inefficiencies and losses in operations. There is urgent need to correct this imbalance without giving tariff shock to consumers. The existing cross-subsidies for other categories of consumers would need to be reduced progressively and gradually.

5.5.4 The State Governments may give advance subsidy to the extent they consider appropriate in terms of section 65 of the Act in which case necessary budget provision would be required to be made in advance so that the utility does not suffer financial problems that may affect its operations. Efforts would be made to ensure that the subsidies reach the targeted beneficiaries in the most transparent and efficient way."

15. In view of the above policy declaration, Commission is under a duty to recover the cost of production & supply of electricity from the consumers rather than burdening either the govt. or the utilities.

16. The Commission has duly considered the impact of the delay on the consumers. Accordingly, it has burdened the utilities with the holding cost and has directed recovery of the adjustment allowed in thirty six months. The Commission has thus duly balanced the equities and we express our appreciation for the same.

17. So far as the plea of violation of natural justice is concerned we see no force in it. Fuel surcharge adjustment has to be made as per a formula incorporated in the Tariff Regulation itself and the Commission has hardly any discretion in the fixation of FSA. Even the counsel for the appellants have not argued that on every amendment in tariff caused by FSA a public hearing is called for.

18. The last submission to deal is that the delay in granting FSA has caused hardship to those who were not consumers in the year 2004 & 2005 but are now made to bear the burden of the surcharge recoverable for those two years. It is true that the composition of the consumers keep changing over time. But since tariff can be fixed only periodically or yearly and not on a daily basis, such like situations are inevitable. All that can be done is to soothen the hardship caused which the Commission has done by spreading the recovery over thirty six months and by declining to allow any holding cost to the utilities.

19. Before parting with the judgment we will like to put on record our disapproval to the creation of confusion over the sum of Rs.3195 Million which was taken over by the State Govt. to

meet the FSA that would have fallen on the agricultural pump sets. One of the counsel appearing for the plaintiffs submitted that this amount was not meant only for the agricultural sector but was meant for all consumers of electricity and because of such a mistake the whole 'Scale of Recovery' given in Table 2 of the order of 05.12.2006 is vitiated. There was no documentary support for such an allegation and yet the Commission offered to clarify the situation and a letter of the Additional Advocate General was sent to this Tribunal stating therein: "R*eference to this office fax dated 5.3.2007. It is clarified that Rs.391.55 Crore FSA liability taken over by the Haryana Government. was in respect of all categories of consumers.* " This letter was written on the basis of a letter from a law officer. It was not however explained on what basis such a statement could be made on behalf of the Commission despite the Commission's own (impugned) order in which this sum has been shown to have been received to meet the FSL liability of the agricultural pump sets. There was no option but to seek more clarification. The Commission was directed to file an affidavit in support of the contention of the Additional Advocate General to the effect that a sum of Rs.3915 Million was towards liability in respect of all categories of consumers. Pursuant to this direction an affidavit was filed by the Secretary of the Commission in which it was admitted that the Govt. had taken a decision to provide relief of the said amount to the agricultural consumers and as such an entry recorded in the Table 1 in Commission's order of 05.12.2003 was correct and Rs.391.55 Crore was to be adjusted against agricultural pump set consumers only. The Secretary

attributed the mistake to the staff and expressed regrets for the same. The episode is unfortunate, it is only expected that in future the Commission will behave in a more responsible manner in presenting facts before this Tribunal.

20. The appeals have no force and they are accordingly dismissed.

Pronounced in open court on this 10th day of July, 2007.

(Mrs. Justice Manju Goel)
Judicial Member

(Mr. H. L. Bajaj)
Technical Member

The End