ANDHRA PRADESH HIGH COURT

Nava Bharat Ferro Alloys Ltd

Vs.

A.P.S.E. Board

Writ Petns. Nos. 8177, 6204, 9403

(P. Chennakesav Reddi, Actg. C.J. and Ramachandra Raju, J.)

03.04.1985

JUDGEMENT

Ramachandra Raju J.

1. The Petitioners are all H. T. power consumers of one category or other. They seek in common to quash on various grounds the proceedings in B. P. Ms. No. 1014 (Commercial) dated 13-12-1983 (Tariffs'84) issued by the respondent-Andhra Pradesh State Electricity Board ('Board' for short) notifying certain revised tariffs to come into force with effect from 15th January 1984. Prior to the impugned proceedings, the tariffs were governed by B. P. Ms. No. 418 (Commercial) dated 2nd June, 1981 (tariffs' 81).

2. During the course of arguments, our attention was also drawn to : (1) B. P. Ms. No. 689 dated 17-9-1975 (tariffs 1975); (2) B. P. Ms. No. 772 (Commercial) dated 15-9-1979 (tariffs 1979) and B. P. Ms. No. 807 (Commercial) dated 26-9-1980 (tariffs 1980).

3. The tariffs consist of three parts : Part A Part-B and Part-C. Part-A provides for H. T. tariffs which are applicable for supply of electricity to H. T. consumers having loads with a contracted demand not less than 70 KVA or having contracted load exceeding 75 H. P. Part-B provides for L. T. supply. Part-C provides, inter alia, for miscellaneous and general charges.

4. H. T. consumers in Part-A are broadly classified into three categories : H. T. Category-I (Industrial) and H. T. Category-II (Non-Industrial). In tariffs 1975, H. T. power intensive consumers were grouped with H. T. consumers availing supply of electricity for irrigation and agricultural purposes, as a separate category. The Board retained thereunder the power to decide, in accordance with such guidelines as it may determine as to which industries are power intensive and which are not. In the subsequent years, the Board began to deal with the power of intensive industries by notifying them separately from time to time. The H. T. consumers availing supply of electricity for irrigation and agricultural purposes were, in the tariffs after 1975, provided for as a separate category under Part-B applicable to L. T. tariffs. In the result, we, therefore, have currently four classes of consumers availing H. T. supply. They are (1) H. T. consumers falling under H. T. Category I (Industrial); (2) H. T. consumers falling under H. T.

Category-II (Non-industrial); (3) H. T. consumers falling under power intensive industries and (4) H. T. consumers availing supply of electricity for irrigation and agricultural purposes and included in Part-B. The petitioners before us fall under one or the other of the H. T. categories in Part-A.

5. The tariffs for these different categories of H. T. consumers were being enhanced from time to time. What was 21 paise in 1975, was increased to 30 paise in 1979; 33 paise in 1980, 40 paise in 1981 and 48 paise in 1984 for H. T. Category-I (Industrial). Likewise, there was escalation in the energy rates for H. T. Category-II (Non-industrial), the corresponding rates being 28 paise; 37 paise; 40 Paise; 47 Paise and 56 Paise. The tariffs for power intensive industries were, however, being increased by separate notifications issued by the Board from time to time. It was originally 11 paise immediately prior to 1975. The 1975 tariffs contemplated the rate at 15 paise, but for some reason with which we are not concerned, the tariff was not so raised at that time. Energy rates were, however, raised to this class of H. T. consumers from 11 paise to 12.2 paise in 1977; 16 paise in 1978; 18.5 paise in September, 1979; 21 paise in November 1979; 25 paise in 1980, 32 paise in 1981 and 45 paise in 1984. The H. T. Category consumers grouped in Part-B were, however, paying 15 paise under the 1975 tariffs and 16 paise thereafter. Besides the energy charges, as stated above, the H. T. consumers were also subjected to pay at different rates effective from 1-9-1982 an additional charge levied as fuel cost adjustment charges. These H. T. consumers were also required to pay some amounts as voltage surcharges in accordance with the terms of the agreement entered into by the individual consumers with the Board.

6. The tariffs were making a separate provision for supply of energy to townships formed by H. T. consumers coming either under H. T. Category-I (Industrial) or H. T. consumers coming under H. T. Category-V(a) of Part-B. Such provisions enable those H. T. consumers to supply electricity in their turn to the township area, subject to the following conditions - (1) The consumer must obtain the previous permission of the Board before supplying electricity to the township or residential colonies; (2) The Consumer should convert the H. T. supply into L. T. supply at his own cost; (3) The consumer shall lay suitable internal distribution lines in the township area and give service connections and maintain the same at his own cost, in accordance with the statutory rules and Board's directions; (4) Electricity supplied at L. T. will be separately metered on the L. T. side of the transformer and charged at a flat rate of 55 paise per K. W. H., (5) the entire consumption of the colony should be capable of being metered by one separate meter : (6) Residential Colony consumption should be separate and different from factory consumption; (7) The consumer can make available the L. T. supply in the township area for purposes like lighting, fans and heating to their employees or others residing therein and for any non-domestic supply in the residential area and street lighting of such residential colony : (8) Persons to whom the supply is given in turn by the H. T. consumer, shall not be charged for the electricity consumed by them at rates below the rates charged by the Board for similar category of consumers of the Board; and (9) The consumption in colony should not exceed 5% of the total consumption. One significant fact to be noticed is that, in earlier tariff notifications, no provision for supply of electricity for non-domestic purposes was there, but now a provision is made for that purpose as well, which enabled the H. T. consumers to supply power to township residents for non-domestic purposes also. The tariff rates for the township consumption were also charged from year to year. What was in 1973, 35 paise per unit of energy, was enhanced to 45 paise in 1980, 50 paise in 1981 and 55 paise in 1984.

7. Part-B of the tariffs has broadly provided for 8 different categories, which were also subjected

over the years to increased tariff rates. We have earlier made reference to the category of agricultural consumers falling under V (a). We have given below the other categories of consumers and how each such category had suffered the increases in the power rates from time to time : -

(1) L. T. Category-I (Domestic) : What was originally the energy rate of 40 paise in the year 1975, was increased to 43 paise in 1979 and 1980, and 45 paise in 1981. It did not surfer any further escalation in the 1984 tariff.

(2) L. T. Category-II (Non-domestic and Commercial) : What was originally in the year 1975, 75 paise, was increased to 84 paise in 1979; 90 paise in 1980 and 95 paise in 1981. It did not suffer any further escalation in 1984.

(3) L. T. Category-III (1) Industrial: What was originally 35 paise per unit in 1975, was enhanced to 42 paise in 1979; 50 paise in 1980; suffered no escalation in 1981, but suffered escalation in 1984 when the unit rate was fixed at 55 Paise.

Certain other consumers availing L. T. supply were separately grouped as L. T, Category-III(2) industrial in respect of whom, the corresponding energy rates were 32.39,47,50 and 55 paise in the years 1975, 1979, 1980, 1981 and 1984.

(4) L. T. Category-IV (Cottage Industries) : The energy rate of 30 paise in 1975, suffered escalation to 35 paise in November 1979 but thereafter the energy rate remained the same.

(5) L. T. Category-V (b) (Agriculture) : This category provided for the use of agriculture and irrigation purposes by consumers other than those that availed H. T. supply for similar purposes. It was originally 16 paise in the year 1975. It did not suffer any change in 1979 and 1980. In the year 1981, instead of collecting charges on unit rate basis, the Board began to charge these consumers at Rs. 50/- for H. P. per year which was untouched even during 1984.

(6) L. T. Category-VI (Public Lighting) : It was originally a uniform rate of 38 paise in 1975 irrespective of whether the public lighting was in a panchayat, municipal or corporation area. In 1979, rates were enhanced to 41, 42 and 45 paise depending on the areas aforesaid. In the year 1980, there was another escalation increasing the rates to 42, 48 and 50 respectively, depending on the areas. The tariff rates did not suffer any change either in 1981 or in 1984.

(7) L. T. Category-VII (General purpose tariff) : There was no such category in the year 1975 but that category came into existence in March 1977. The tariff rate of 50 paise per unit fixed in 1977, was increased to 55 paise in November 1979 and to 60 paise in 1981. It did not suffer any escalation in the year 1984.

(8) Poultry farming was originally grouped prior to 1984 under L. T. Category-III (Industrial) : In 1984, however, a distinction was made in respect of poultry farming having more than 1000 birds and poultry farming with less than 1000 birds. The former continued to be under L. T. Category-III (Industrial). The later was given a separate category under L. T. Category-V (c) imposing a tariff rate of 16 paise per unit of electric energy.

8. From a comparative statement of the aforesaid tariffs, it is evident that the tariffs for power intensive industries were to start with far less than the tariffs for H. T. Category-I (Industrial) and H. T. Category-II (Non-Industrial). Over the years, those concessional tariffs made available to such power intensive industries have been progressively withdrawn. The concessions were, however, continued only, in respect of consumers availing H. T. or L. T. supply for purposes of irrigation and agriculture or L. T. supply for domestic, cottage industries, public lighting and small poultry farming units.

9. As would appear from the administration reports for three consecutive years 1980-1981; 1981-1982 and 1982-1983, which have been placed before us, power is generated in the State either as hydro or thermal, each source roughly contributing to 50% of the total Power generation. The high tension categories between themselves have been consuming, during these respective years, 57.55%; 61.66% and 58.04%, a substantial part of the total power generated as against several lakhs of individual consumers availing. L. T. supply, who are consuming the balance power. It is stated before us across the bar that consumers availing H. T. supply under Category-I (Industrial) are around 2,000 and consumers availing H. T. supply under Category-II (Non-Industrial) are around 200.

10. In revising tariffs, the Board invariably invokes its power under Section 49 of the Electricity (Supply) Act, 1948 (Supply Act) and all contractual, statutory and other powers. The common ground of revision is : -

> "The cost of production of electricity has gone up considerably since the last revision of tariff due to increase in cost of fuel, labour, interest charges, etc. Consequently the revenue derived by the application of the existing tariffs are no longer sufficient to meet the steadily growing expenses of the Board for generation and supply of Power. The Board has, therefore, reviewed the position and has decided that the rates for various types of supply require to be altered."

11. During the course of the debate before us, it is common ground that : (1) The Board is a "State" within the meaning of Article 12 of the Constitution (2) The Board is a public utility, service oriented monopolist undertaking charged with certain statutory objectives; (3) The Board's monopoly in generation, supply and distribution of electrical power is designed to ensure rationalization of production, supply and distribution of electricity in the most efficient and economical manner adopting measures conducive to electrical development and matters incidental thereto; (4) In achieving those statutory objectives, the Board is governed, guided and restricted in its functioning by the provisions of the Electricity Act, 1910 (1910 Act), the Supply Act, constitutional and public law limitations including the observance of principles of public finance in formulating or revising either uniform or differential tariffs; (5) The Board cannot legally act in the style of a private entrepreneur or a commercial corporation but is obliged to act strictly in accordance with law and reason and neither arbitrarily nor unreasonably nor in excess or abuse of its powers and jurisdiction.

12. The tariffs 1981 and tariffs 1984 are impugned on the following broad grounds : (1) The increase is mala fide. It is motivated by the deliberate declared policy of the Government to discourage power intensive industries for whatever reason and by adopting the objective of

mobilizing funds, as indicated by contemporaneous ministerial statements. The increase has become particularly steep and sudden since the policy statement was made in about 1980-1981. (2) The Increase is discriminatory as between highly power intensive consumers themselves. (3) The tariffs are violative of Section 16 of the Supply Act. (4) The tariffs for townships are violative of Article 14 of the Constitution and Section 49(4) of the Supply Act. (5) the Tariffs are violative of Section 18,49 and 59 of the Act: (i) Once differential tariff was fixed on norms relevant thereto, no question of further increase on basis of costs can legally arise, the Board's power in respect thereof being confined to the statutory criteria applicable to such differential tariff; (ii) In adjustment of tariff, cost is not the only criterion and no adjustment can be made, except as called for under, and in compliance with Section 59. There is no such compliance not only because there is no direction by Government fixing surplus but also because of the illegal and unauthorized procedures adopted contrary to the principles laid down under Section 59; (iii) The increase is discriminatory as between the consumers of high tension power taken at 32 KV and 11 KV; (iv) the increase is also arbitrary and it is far out of proportion to the cost of supply as it includes a rate increase totally unsupported by any reason whatsoever. It is also unreasonable, vis-a-vis, the cost of supply and bulk consumption on a power intensive basis.

13. "Malice or mala fides : In none of the affidavits originally filed in support of the petitions, was any mala fides or malice alleged against the Board. For the first time, such a plea was taken in the additional affidavit which the petitioner in W. P. No. 8177/84, one of the power intensive consumers, was permitted to file as per order made in W.P.M.P. No. 20574/84 dated 19-11-1984. During the pendency of the writ petition, certain interim directions were issued and the Board went before the Supreme Court by way of Special Leave No. 6751/84 against such interim directions. In the reply affidavit filed by the Board, during the course of those proceedings before the Supreme Court, the Board was meeting a case, put forward on behalf of the H. T. consumers regarding the percentage of increase in the tariff. In that context it was stated :

> "The increase in regard to H. T. was limited to 15% in view of the State Government's insistence which commenced from 1980 to discourage the power intensive units which are not labour-oriented but which consume considerable quantity of power depriving rest of the public."

The Board was, as part of that reply affidavit, stating that most of the power intensive industries started on a concessional rate and have been making huge profits and the H. T. consumers cannot be permitted to expect the Board to continue to supply them power at such concessional rate enabling such consumers to make huge profits at the expense of the public. Taking a comprehensive view of the stand taken by the Board, we are inclined to hold that the Board was only trying to justify its stand as to why the H. T. consumers, who were earlier being supplied power at concessional rate, cannot claim the continuance of the benefit of such concessional rate in their favor either in terms of the agreements which these, H. T. consumers had entered into with the Board or for periods beyond the period covered by any special agreements entered into between the Board and the H. T. consumers. If the Board is entitled to revise the tariffs, we do not see how such revision can be characterized either as malicious or mala fide.

14. In the wake of the tariff notification 1984, a press report appeared in the Deccan Chronicle, a local daily dated 17-12-1983. The press reporter attributed certain statements to Mr. Bhaskara

Rao, the then Minister for Finance and Power. It would appear from this press report that the Minister made a statement that the Board expects to get a further amount of 32 crores and the Government hopes to use the same for its developmental activities in the power sector and for meeting the increased establishment costs. The Minister was also justifying the hike in the tariff by stating that the power rate is less in Andhra Pradesh than in some of the other States in the country. We cannot act upon this press report in any manner. It is not a press note issued by the Government. The Government is not made a party to any of these writ petitions. The Board is not the author of this press report and it cannot be expected to take any stand other than the stand it took that it was not aware of this press report. Even assuming that the Board would have been aware of this press report, no occasion arose for the Board to deny the matter that appeared in this press report. The submission made, on behalf of the petitioners, is that the power (sic) was proposed to be raised by 3.5 paise per unit in respect of H. T. power consumers but that actually the tariff was raised from the preexisting rates of 40 paise, 47 paise and 32 paise to 48 paise, 56 paise and 45 paise. No mala fides can be attributed to the Board if the tariff increases went beyond the 3.5 paise, the figure, which appears in the press report. By the date the press report appeared on 17-12-1983, the tariff proceedings 1984 dated 13-12-1983 were already issued. The Board cannot be asked to account for some error in the press report regarding rates of the actual tariffs and the rate of increase indicated in the press report. We accept the explanation offered by Mr. Shanthi Bhushan on behalf of the Board that the figure 3.5 increase stated in the report, even if true, was the overall increase which the Minister meant to mobolise. The Government, in our opinion, should be free to alter its industrial policies from time to time according to its own assessment based on socio-economic conditions of the society. If at one time such industrial policy was oriented in favour of encouraging the growth of heavy industries by offering concessional tariffs, if any, in their favour, it does not prevent the State Government from revising its policy and, instead encourage medium and small scale or light industries, which could be more evenly distributed with a view to remove regional imbalances, if any, in the matter of setting up of such industries and to promote employment potential in different areas of the State. If, in that process, the preexisting concessional tariffs applicable to H. T. consumers are gradually withdrawn or even if such tariffs are fixed at a higher level than the rates at which power is made available for the more needy sections of consumers, no malice can be attributed either to the Government or to the Board. We accordingly reject this submission.

Discrimination vis-a-vis M/s. A. P. Carbides Ltd.,

15. A. P. Carbides was a power intensive consumer, in respect of which the State Government made some directions under Section 78-A of the Supply Act directing the Board to supply energy at concessional rates. Pursuant to such directions, agreements were entered into between the Board and A. P. Carbides, the Board agreeing to supply power at some concessional rates to A. P. Carbides for some years. Subsequently, disputes arose between the Board and the A. P. Carbides and also between the A. P. Carbides and the State Government, resulting in the State Government withdrawing all concessions earlier extended by the Board in favor of A. P. Carbides, at the instance of the State Government. Those disputes were initially subject-matter of W. P. Nos. 5155 to 5158/83 on the file of this Court and are now subject-matter of W. A. Nos. 835, 858, 872 and 905/84, which are pending final hearing. The dispute is whether A. P. Carbides is entitled to be charged only at the concessional tariff rates because of the special agreement which that Company was pleading as continuing to exist and as governing the disputes. The Supreme Court in *Bisra Stone Lime Co. v. O.S.E. Board*[1] after referring to two earlier decisions *Indian Aluminium Co. v. Kerala State Electricity Board*[2] and *Titagarh Paper Mills Ltd. v. Orissa*

State Electricity Board[3] observed (at P. 130 of AIR 1976 SC) :

> "It is clear from the above decision that an agreement entered in exercise of the power conferred by the statute such as under Section 49(3) of the Act, cannot be set at naught by unilateral exercise of power by the Board under the Act to enhance the rates agreed upon between the parties in the absence of any provision in that behalf in the agreement itself .....Sub-Sections (1) and (2) of Section 49 empower the Board to fix uniform rates of tariff. Sub-section (3) of Section 49 on the other hand reserves to the Board the power of fixing different tariffs having regard to certain factors mentioned therein. Section 49(3) contemplates what are known as 'special agreements'. Power under Section 49(1) and (2) cannot be invoked during the subsistence of special agreements providing for stipulation of rates in tariff in absence of any reservation therein. Exercise of power under Section 49(1) and (2) as also that under Section 59 will remain suspended during the currency of the special agreements between the parties and no unilateral enhancement of rates is permissible under the law. There is only a pro tempore ban on revision of rates during the subsistence of statutory special agreements entered in conformity with Section 49(3) of the Act." and proceeded further to say :
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> "That being the position, the objection on the score of discrimination loses all importance. The totality of the provisions under Section 49 does not give any scope for the plea of discrimination raised in this case and in view of clause 13 in the agreement itself."

Regarding the A. P. Carbides, the correspondence has disclosed that the Government had, at one time, agreed to reimburse the Board in all amounts which the Board had lost in agreeing to supply energy to A. P. Carbides at concessional rates. The Board is, therefore, in a position to recover normal tariffs either from the A. P. Carbides failing which the Board is bound to be entitled to recover the cost of the differential tariffs from the State Government. That being the position, we have, therefore, no hesitation in rejecting this submission made on behalf of the petitioners.

Section 16 Supply Act - Violation :

16. Section 16 provides for the constitution of "State Electricity Consultative Council" (Council). Rules 9 to 19 of Electricity Supply Rules framed under Section 78 of the Supply Act provide, among other things, for the meeting of the Council, its proceedings etc., We are, in particular, concerned with Section 16(5) of the Supply Act, which lists out the various functions of the Council and Section 16(6) of the Supply Act in terms of which the Board is required to place before the Council the annual financial statement and supplementary statement, if any, and to take into consideration any comments made on

[1] AIR 1976 SC 127 [3](1975) 2 SCC 436

[2] AIR 1975 SC 1967

such statements in the said Council before submitting the annual financial statement and the supplementary statement to the State Government under Section 61 of the Supply Act. Section 61 of the Supply Act requires the Board to submit to the State Government in February of each year the annual financial statement in the prescribed form, disclosing therein the estimated capital and revenue receipts and expenditure for the ensuing year; to take into

consideration any comments made by the Houses of the State Legislature, on the said statement, or on the supplementary statement. One of the functions of the Council is to advice the Board on major questions of policy.

17. We have elsewhere in this judgment held the tariffs come under a major question of policy decision of the Board. There is no dispute before us that the annual financial statements and the annual administration reports do contain a reference to the tariffs in force, during the relevant period. What, however, is submitted on behalf of the petitioners is that it is not enough if reference is made to the tariffs in the annual financial statement, but it is obligatory on the part of the Board to place before the Council the proposed tariffs and seek its prior advice notifying the tariffs. The stand of the Board is that there is no such obligation.

18. In our opinion, any occasion for the Council to offer its advice on the proposed tariffs would arise only, if such advice is sought by the Board and not when the Board does not seek any such prior advice. It is common case that no rules or regulations framed under the Supply Act require the Board to seek such prior advice of the Council. The Council's competence to advice the Board on tariffs matters is one thing and the Board's obligation to seek such prior advice is another thing. Section 16(6) of the Supply Act specifically requires the Board to take into consideration any comments made by the Council before submitting the annual financial statement to the State Government. The Board is not even bound to act in terms of such comments made by the Council. The reason, in our view, is not far to seek. The Council consists of, besides the members of the Board, not less than 8 and not more than 15 as the State Government may appoint from out of the categories mentioned in Section 16 of the Supply Act, including the representatives of consumers of electricity. If the Board is obligated to seek any prior advice of the Council in matters of tariff, the Council will be soon be set with different views, expressed by different categories of consumers, each category trying to get an advantage in tariffs over the others. The members of the Board are all knowledgeable persons, each such member being an expert in his own field. The Chairman of the Board shall, in terms of Section 16(3) of the Supply Act, be the Ex-Officio Chairman of the Council. The decision of the Board regarding fixation or revision of tariffs cannot, in our view, be subjected to any restriction placed on it by way of seeking the prior advice of the Council before the Board had fixed or revised the tariffs.

19. The tariffs 1980 and the tariffs 1981 were attacked once before on the same identical ground in *Akhila Bharatiya Grahak Panchayat v. A.P.S.E.B*[4]. This Court ruled : (1) There is nothing in the said Section, which prescribed that the consultation with the Council, is a condition precedent; (2) Even assuming that the question of enhancement of tariffs is a major question of policy, the non-consultation with the Council, in regard to the

[4]AIR 1983 And Pra 283

enhancement of tariffs, cannot have the effect of invalidating the B.Ps., under which the tariffs have been enhanced. We respectfully endorse the correctness of those two conclusions.

20. The learned Judges, however, hastened to add by referring to a Division Bench judgment of the High Court of Punjab and Haryana in *Laxmi Steel Corporation v. State of Punjab* [5].

> "It should certainly be highly desirable that, in the matter of fixation, or enhancement or modification of the electricity tariffs or the policies pertaining thereto, the views of the

> Consultative Council are ascertained. Section 16 of the Act directs that a Council must be constituted and its meetings should be held once in three months. The Council has important functions under sub-clause (6) of Section 16 which, it is conceded, are mandatory. It is likely that questions relating to tariff may also arise in the Annual financial statement' and 'supplementary statements' and the Council may make its comments thereupon. These aspects certainly have to be borne in mind and we also emphasize, in the same manner as did the High Court of Punjab and Haryana, that it would be desirable that the State Electricity Council is consulted in the matter of fixation, enhancement or modification of the electricity tariffs or the policies relating thereto. But, as already stated, we are of the firm view that the contentions of the petitioners that the impugned B. Ps. are null and void on account of non-consultation with the Electricity Council are liable to be rejected."

(Emphasis supplied)

21. In our view, such of those observations which suggested prior consultation are clearly obiter and not called for. It is not obligatory for the Board to consult the Council, before revising the tariffs, as Section 16 of the Supply Act never required any such prior consultation. That Section did not even contemplate the Board seeking the prior advice of the Council before revising the tariffs. We cannot, therefore, import into that section anything, which is not there, to suggest the desirability of seeking a prior advice or making a prior consultation.

22. Even so, certain observations made by the Supreme Court in *M.S.E. Board v. Kalyan Borough Municipality*[6] are relied upon to submit that such a prior advice which places an effective check on the power of the Board cannot be readily bypassed. We have carefully considered the facts in this Kalyan Borough Municipality case (supra) and the context in which the observations relied upon by the learned counsel were made. In our view, what all the Supreme Court stated in that case was that the Board is bound to place before the Council the annual financial statement and supplementary statement; a duty is cast upon the Board to take into consideration any comments made on such statements; such annual financial statements would be placed before the State Legislature, where it is open for discussion, and there is a duty cast on the Board to take into consideration any comments made on the said statement in the State Legislature. The Supreme Court did not, in our view, express itself in any manner that there was any obligation on the part of the Board

[5] Civil Writ No. 2605/78, dt. 18-9-1979
[6] AIR 1968 SC 991

to seek the prior advice of the Council before notifying the tariffs.

23. The following decisions which have been relied upon by Mr. K. Srinivasa Murthy as supporting this part of the submission are, in our view, inapplicable *Narayana v. State of Kerala*[7] dealt with the revocation of a licence under Section 4 of 1910 Act without consulting the Board, which consultation was a mandatory condition precedent. The revocation was, therefore, struck down. *Naraindas v. State of M.P*[8]*.,* dealt with a case, where the consultation which the Government had only with the Chairman and not with the Board, was held to be not proper

compliance with the requirements of Madhya Pradesh Act No. 13 of 1973. *Shri Mandir Sita Ramji v. Governor of Delhi*[9], dealt with a case where the Land Acquisition Collector failed in making the enquiry and his recommendation as contemplated under Section 5-A of the Land Acquisition Act. We do not also find anything useful, as supporting the case of the petitioners, in the decisions of the Supreme Court in *Edward Mills Co. v. State of Ajmer*[10] or in *Bijay Cotton Mills Ltd. v. State of Ajmer*[11] On the other hand, some of the observations made in the former case go against the petitioners when the Supreme Court observed with reference to the Committee appointed under the Payment of Wages Act:

> "It is to be noted that a Committee appointed under Section 5 of the Act is only an advisory body and that the Government is not bound to accept any of its recommendations. Consequently, procedural irregularities of this character cannot vitiate the final report fixing the minimum wages. *Ramachandra v. Govind*[12] dealt with a case where the surrender of tenancy in clear violation of Section 5(3)(b) and Rule 2-A of the Bombay Tenancy and Agricultural Lands Act was not accepted, as the procedure prescribed by the said section and rules was held to be mandatory. A Division Bench decision of the Orissa High Court in *Basanti Talkies v. State of Orissa*[13] held as invalid the recommendations made under the Minimum Wages Act by a Committee, which was not properly constituted. We accordingly hold that the tariffs 1981 and tariffs 1984 are not violative of Section 16 of the Supply Act.

Supply to township - Article 14 of the Constitution and Section 49(4) of the Supply Act:

24. The tariffs 1981 and the tariffs 1984 made a separate provisions for supply to township or residential colonies of H.T. consumers falling either under Category-I (Industrial) or Category-V (a) of Part-B. Such a separate tariff for township is assailed in these petitions as violative of Article 14 of the Constitution and Section 49(4) of the Supply Act.

25. It is common ground that the Board supplies H.T. power either at 11KV or at 33KV and the H.T. consumers themselves, at their expense, stepped down the energy to the necessary L.T.; laid down further distribution lines; gave individual service connections providing each such service connection with a separate meter and have been maintaining the L.T. Supply to the township. The meters at each such L.T. connection are installed to

[7] AIR 1974 SC 175 [9] AIR 1974 SC 1868 [11] AIR 1955 SC 33
[8] AIR 1974 SC 1232 [10] AIR 1955 SC 25 [12] AIR 1975 SC 915
[13] 1982 Lab IC 474

check and excessive use of L.T. supply made available at a stated number of units to the L.T. consumers in the township free of costs.

26. On behalf of the petitioners, it is submitted that their employees who reside in the township area are in the same position like any other domestic consumer living in areas immediately outside the township and that some of the employees themselves who live outside the township are charged less by the Board; for making supply available to consumers outside the township it is the Board that incurs the necessary capital expenditure for laying distribution lines; meeting the cost of maintenance; in respect of public street lighting in panchayat area immediately outside the township, the tariff rate is lower than the rate at which the H.T. consumers are

charged and a hostile discrimination is, therefore, writ large and that, in any event, the Board is not justified to collect in respect of such township any fuel surcharge. The learned counsel for the Board, in justification of the separate tariff for the township, submitted that supply is made available to the L.T. consumers in the township not only for domestic purposes but also for non-domestic and commercial purposes such as shops, hotels, cinemas and flour mills and such supply is also availed of for public street lighting. According to the Board, the township is treated as a separate category because of the several multipurposes for which the L.T. consumers in the township area availed electric supply and that, if the individual consumers in the township area so desire, they can make the necessary application for giving them supply and the Board is prepared to arrange such supply and charge them tariffs, depending upon the category to which the L.T. consumers belong.

27. We have carefully considered these rival submissions. The energy charges for H.T. power availed of by these different H.T. categories vary from 48 paise to 56 paise. Electric power is consumed in the township not only for various domestic purposes like lighting, fans and heating but also for various non-domestic and commercial purposes, including street lighting. The petitioners are now being charged for all such energy consumed in the township area at a flat rate of 55 paise per K.W.H., a rate roughly corresponding to the rate charged by the Board from consumers falling under the category of L.T. III (Industrial). The unit rate payable by L.T. consumers falling under the category of non-domestic and commercial purposes is 95 paise. Consumers availing electric supply even for religious, charitable purposes or service in educational institutions and hostels and guest houses, either maintained by the municipality, or by the Government are obligated to pay at the rate of 60 paise. It is not as if the Board is supplying the energy direct to these different categories of consumers in the township area. Instead of maintaining a separate establishment to look after the needs of these various categories of consumers in the township area, the Board has, so to say, farmed out the right of distribution of electric power to the petitioners by adopting a via media of uniform rate of 55 paise applicable for all such electric power consumed within the township area. The circumstance cannot be overlooked that power is made available to these high tension consumers at the comparatively lesser rates varying from 48 paise to 56 paise per unit, nor can we overlook the fact that, in making available the distribution lines to the petitioners, the Board has denied to itself the benefit of collecting the miscellaneous charges, consumption and other deposits and higher energy rates for non-domestic and commercial purposes which the Board would otherwise have collected from the L.T. consumers, falling in such category in the township area. We cannot also overlook the circumstance that, at no earlier point of time, the petitioners had expressed any grievance about the separate tariff fixed for townships and they were without any demur, all along paying the Board the special tariff fixed for township.

28. The relevant Condition No. 24 of the Terms and Conditions of Supply are :

> (1) The Price and the methods of charging for supply of electricity shall be those as fixed by the Board from time to time.
> (2) Unless otherwise specified all high tension and low tension rates refer to one point of supply and each separate establishment will be given separate point of supply.

The point of supply to the township area is at the transformer of the H.T. Consumer. The H.T.

consumer would, therefore, be charged at the H.T. rate applicable to him for all such energy supplied to him at that point of supply. The Board is not concerned how the H.T. consumer, after stepping down the voltage at the transformer, would supply the residents in the township area for a charge or free of cost. The only safeguard which the Board has provided for itself was that, if the H.T. Consumers wants to charge any resident in the township area for energy availed of by him, the H.T. consumer shall not charge such L.T. consumer at rates below the rates the Board would have charged from similar category of L.T. consumers. Nothing prevented these H.T. consumers from charging its employees at the same differential rates, as the Board would itself have charged such consumers.

29. In our view, these townships formed by industrial houses, form a separate category by themselves. The Board adopted a uniform tariff rate for all such consumption in the township area. It is so to say a comprehensive package agreement. The tariff rates for H.T. energy availed of by the H.T. consumers for factory purposes is lower than the rates payable by several other L.T. categories falling under Part-B. No doubt the township tariff is slightly higher than the tariff charged by the Board from a few other L.T. categories grouped in Part-B. All such lesser rates are fixed for L.T. consumers in the agricultural section, cottage industries, public lighting and small poultry farming units. The H.T. consumers cannot, therefore, be permitted to retain the advantages of a lesser tariff rate for H.T. power availed of by them for their factory purposes and permitted to challenge the tariff for the township merely because such tariff is in excess of tariff of some L.T. categories, set out above. When the Board decided to leave the modalities of distribution to these H.T. consumers, they are no longer concerned as to whether the H.T. consumers would make available the L.T. supply to the residents in the township area for a domestic, non-domestic or commercial, industrial or public lighting purposes or for a charge or free of cost. In our view, the Board is not concerned, if the H.T. consumer is making a large number of units available in the township for commercial or non-domestic purposes, carrying a higher tariff rate. We are, therefore, of the clear view that there is no hostile discrimination made by the Board against these H.T. consumers, in fixing the uniform tariff for the township.

30. Mr. Srinivasa Murthy submitted that in the township there are in fact no cinemas, hotels and shops and that this is a matter which can be easily verified. The board, in its counter as also during the arguments, maintained that in the township there are also consumers availing L.T. supply for non-domestic and commercial purposes. It is not desirable that we should direct any enquiry to be made into these disputed questions of fact. It is for the petitioners for whose township benefit the electricity supply is made available to permit the residents of the township to avail the L.T. supply purely for domestic purposes or also for non-domestic and commercial purposes. Mr. Srinivasa Murthy has further submitted that the words "for any non-domestic supply in the residential area and street lighting of such residential colony" may be struck down. Such supply to township is part of the agreement which has been entered into by these H.T. consumers with the Board. We cannot interfere with that term of the agreement merely because it suits the H.T. consumers now to make such a request while at the same time continuing to avail a relatively concessional tariff in respect of the H.T. power supplied for their factories. We have separately considered the submission of the petitioners regarding fuel cost adjustment under its proper head. We are accordingly of the definite opinion that the tariff condition regarding supply to township is not in any manner violative of either Article 14 of the Constitution or of Section 49(4) of the Supply Act.

Sections 18, 49 and 59 of the Supply Act - Violations :

31. Section 18 provides for general duties of the Board. Section 49 provides for the sale of electricity by the Board to consumers. Section 59 sets out general principles for Board's finances. Chapter VI of the Supply Act which contains Section 59 generally provides for the Board's finance, accounts and audit. These several provisions have been earlier interpreted by the Supreme Court as well as by other High Courts repeatedly. We have, therefore, not extracted any of those sections.

32. The Annual Accounts of 1980-1981,1982-1983; the Administration Reports of 1980-1981, 1981-1982 and 1982-1983; the Annual Financial Statements of 1983-84 and 1984-1985, published by the Board, have been placed before us. The Board has been indicating in its Administration Reports its Financial achievements, which are to the effect that, after taking into account, the subsidy to be received from the State Government, they were trying to maintain the rate of return on capital base at 9.5%. The tariff rates were being shown in Sec.VI of the Administration Reports, relating to the finance of the Board. The revenue received by sale of power to various categories and the various sources from which the Board was getting monies, the capital expenditure the Board was incurring were all being disclosed in that Sec.VI of the Administration Reports. What is equally relevant to be noticed is that the Board was, in every year, heavily indebted to the State Government under loans borrowed by the Board from the State Government, the provision for which is to be found in Section 64 of the Supply Act. These various reports have disclosed that the Board was indebted to the State Government in an amount of 563 crores during 1980-1981; 584.25 crores in 1981-1982; 611-71 crores during 1980-1981; 552.13 crores in 1983-84 and 612.81 crores in 1984-85.

33. The main submissions made before us, on behalf of the petitioners, are : (1) The Board, as a public utility undertaking, is expected to function in the most efficient and economical manner; (2) It cannot plan its activities, with a view to derive any sizeable profits on its undertaking except in accordance with Section 59 of the Supply Act; (3) The State Government did not specify any surplus to be maintatined by the Board under Section 59 of the Supply Act; (4) The Board was in fact making every year a surplus : (5) The Board is not right in preparing its financial statements in any manner contrary to Section 59 of the Supply Act by improperly taking into account expenses properly chargeable to capital by showing such expenses as charged to revenues and by improperly taking into account the depreciation permissible under law; (6) If only the Board had duly observed the requirements of Sections 49 and 59 of the Act, there was no justification for the Board to have revised the tariffs either in 1981 or in 1984 or for levying any fuel surcharge; and (7) The entire exercise, indulged in by the Board, in making such tariff revisions raising the tariffs steeply from 1980 are invalid, besides being arbitrary.

34. In support of these submissions, strong reliance is placed on behalf of the petitioners on an reported decision of the Kerala High Court in *Govinda Prabhu v. Kerala State Electricity Board*[13], A full report of this case is made available to us. The case was originally heard by a Division Bench consisting of Kochu Thomen, J. and Paripoornan, J. The learned Judges differed, the former taking the view that the Act never prohibited the Board from making any profits required for the purposes of achieving the objective under Section 49(2) of the Act and that the failure on the part of the State Government to specify a surplus under Section 59 of the Act does not disentitle the Board from achieving a revenue surplus. Paripoornan, J. however, took the contrary view. According to the learned Judge, in the absence of any specification of the surplus

by the State Government under Section 59 of the Act, the Board has to work out its finances on the basis of break even or achieve a marginal surplus and that the Board cannot revise the tariffs, with a view to derive any large revenue surplus. The matter was thereupon referred to Narendran, J. who agreed with Paripoornan, J. We have been taken through the separate judgments, pronounced in that case by the three learned Judges. The crux of the dispute depends upon the manner in which the various loans borrowed by the Board should be treated in interpreting Section 59 of the Act. According to the majority view, the repayment of the principal amounts borrowed by the Board cannot be charged to the revenue, they can properly be charged only to the capital and if they are so charged to the capital, the Board has no justification, in revising its tariffs to achieve any revenue surplus. The minority view is that the Board cannot be expected to continue to be indebted to various authorities, including the State Government, and try to run the Board always at a loss, without discharging the financial obligations, it had undertaken to repay the various loans and that, if the repayment of the loans borrowed by the Board is also kept in view, the Board never makes a surplus and is, therefore, justified if revising its tariffs so as to balance its budget to the extent possible. The Board has, in all these cases, before us, stated that the Board is running every year at a loss. We have given due consideration to the terms of Sections 49, 59 and 67 of the Supply Act and we are of the opinion that, though repayment of principal amounts cannot properly be charged to revenue, they are still in the nature of obligatory payments, which the Board can ill afford to ignore. The Board has to find the resources to repay the loan amounts and can revise the tariffs so as to be in a position to raise such surplus as to be able to provide for the discharge of loans to the extent of at least paying the principal amounts, which became due for payment in that year.

35. Section 67 provides for the priorities in which the Board should discharge its liabilities, if in any year the revenue receipts are no adequate to enable compliance with the requirements of Section 43. The Board is obligated to first provide for all its operating, maintenance and management expenses and then to provide for the payment of taxes, if any, on income and profits. The Section then lists out the order in which the
balance of the revenue receipts, as far as they are available, should be discharged.

[13]O.P. No. 760-81-D and connected cases dated 29-11-1984

36. Chapter VI of the Act provides for the Board's finance, accounts and audit. The Board can, with the previous sanction of the State Government, borrow any sums required for the purposes of the Act. Some such loans could either be guaranteed in accordance with Section 66 of the Act or are not covered by any, guarantee of the State Government, under Section 66. The priorities are arranged first in favour of the payment of interest on loans not guaranteed under Section 66 and secondly, for repayment of the principal of any loan raised under Section 65 which becomes due for payment in the year. The third and fourth priorities are given in respect of payment of interest on loans guaranteed under Section 66 and payment of interest on sums paid by the State Government, in pursuance of guarantees under Section 66. Section 64 provides for loans to be advanced by the State Government to the Board from time to time. The fifth priority is, therefore, given to the payment of interest on such loans. The sixth priority is then given to repayment of principal of any loan guaranteed by the State Government under Section 66. It was only after all these priorities are fulfilled, the repayment of the principal advanced by the Government to the Board is also provided for. It is thus evident that the Board has got to provide for the discharge of its liabilities. The priorities would arise only, if during any particular year, the revenue receipts are not adequate to meet all the stated obligations of the Board. If during any year repayment of principal of any loan due to the Government under Section 64 could be postponed, it does not

mean that the Board cannot so arrange its tariffs to ensure that it will not be placed at any time in any precarious financial position whatsoever or place itself in a position to discharge its financial obligations. We cannot expect the Board to plan its tariffs always ignoring its obligations to repay the loans it had borrowed either from the State Government or from others and whether in respect of loans borrowed from others the State Government had given guarantee or not. The Board is an autonomous body and in that respect is distinct from the State Government. We cannot expect the Board to behave as a dishonest debtor. It can never avoid its obligation to repay the loan amounts which the Government may have been advancing to the Board under Section 64 from time to time with a view to enable the Board to achieve the co-ordinated development of the supply and distribution of electricity and the extending and cheapening of the supplies of electricity to sparsely developed areas or to salvage the Board from any financial embarrassment. The Board has to expand its activity and cater to a variety of consumers, reaching in that process remote and even inaccessible places, for which capital expenditure is necessarily involved. The Board should be in a position to meet its essential financial obligations of repaying the loans, in accordance with the terms on which such loans had been contracted by the Board. In our view, it makes no difference, if under accounting principles, some repayments cannot be shown as expenses chargeable to revenue. The basic premise on which the arguments proceeded that the Board was having any real revenue surpluses or excess of income over expenditure is clearly demonstrated to be incorrect. If then, there is no real surplus and the Board has been every year incurring losses, we fail to see why it cannot adjust its tariffs so as to ensure at least the progressive minimising of such losses. The failure of the State Government to specify a surplus does not prohibit the Board from achieving a surplus at least to enable itself to discharge its essential financial obligations, even though such expenses are not properly chargeable to revenue. We have to keep in view the background against which Section 59 was amended in 1978. Prior to the amendment, the Board was directed to see it does not as far as possible carry on its activities at a loss. It was a negative attitude and the Boards were found not making an activist approach. Even prior to 1978 amendment, the legislature never said the Board shall not make a profit. The Board could still have achieved a surplus. The 1978 amendment was made with a view to stir the Board to a greater activity and make a positive approach to achieve surpluses with a p> view to mobilise some resources at least on their own to further development instead of always leaning on the Government for loans or to get subsidies. The Board has no right to receive any subsidy. As explained by the Supreme Court in Kalyan Municipality case (supra) the State has a discretion to grant subsidy or not. It is in the nature of a discretionary grant which is not capable of legal enforcement. Mr. Veera Swamy is not, therefore, right in submitting that all deficits could be met by obtaining subsidies under Section 63 or the Board can afford to ignore its essential financial obligations which may not amount to expenses chargeable to revenue. As is clear from the administration reports and annual accounts and annual financial statements the Board continues to be heavily indebted to the State Government and others.

37. Prior to 30-7-1982, it was usual for the Board to take into account various escalation charges, including pay revisions etc., and increases in the cost of fuel and revise its tariffs frequently from time to time. We had four such revisions in tariffs, during the period 1975 and 1981. With a view to avoid making such frequent tariff revisions necessitated by frequent escalations in the cost of fuels like coal and diesel oil, the Board, in its proceedings B.P. Ms. No. 589 dated 30-7-1982, evolved a formula known as "fuel cost adjustment". That formula was introduced by way of condition No. 11 under H.T. tariffs Part-A. The said cost in terms of that condition, is since September, 1982 loaded against all categories of consumers availing H.T. supply specified in

Part-A including the power intensive consumers. Immediately after 30-7-1982, the fuel cost adjustment charge was fixed at 2.74 paise per unit. Subsequently, the said cost was gradually increased to 2.95 paise; 3.79 paise; 11.68 paise and 7.89 paise.

38. A common grievance is expressed by all H.T. consumers that: (1) The fuel adjustment charge cannot be recovered as part of the tariffs; (2) There is discrimination when the Board is burdening only the H.T. consumers with the entire fuel cost adjustment; (3) Fairness demands that a reasonable proportion of the burden should have been cost on the category of consumers listed under Part-B and (4) The fuel adjustment charge is excessively computed.

39. *Rohtas Industries Ltd. v. Chairman, B.S.E.B*[14]. in our view, provides the complete answer for all these submissions. As observed therein (at p. 661) :

> "Though the nomenclature given to the levy is "fuel surcharge", it is really a surcharge levied to meet the increased cost of generation and purchase of electricity."

40. The learned counsel for the petitioners sought to distinguish the said decision. We have, therefore, noticed the material facts. In that case, in terms of the material Para 16.7 of the relevant 1979 tariffs, the fuel surcharge was directed to be borne exclusively by : (1) consumers of low tension industrial service; (2) high tension service; (3) extra high tension service; and (4) railway traction service. The consumers of electricity for domestic, commercial and irrigation purposes were left unaffected by any such burden.

[14] AIR 1984 SC 657

Para 16.7 was questioned as arbitrary, void and devoid of legal sanction. The burdened industries were consuming 65% of the total power generation. The Supreme Court, in rejecting the contention based on hostile discrimination observed :

> "Apparently with a view to encouraging the establishment of industries in the State, the general tariff rate applicable in respect of high tension supply to industries and factories has been fixed at rates which are much lower when compared to those applicable to other types of consumers. While the general rate applicable for supply of high tension electric energy for industries of the class to which the appellants belong was 22 paise per unit, consumers belonging to "commercial" categories were charged at rates ranging between 48 paise to 58 paise per unit, "agricultural" consumers at 29 paise per unit, lower tension "consumers at 24 to 38 paise per unit and "domestic" consumers at rates ranging between 38 to 43 paise per unit. Thus, in the fixation of general tariff rate, a substantial concession has been shown in favour of industrial lower tension and high tension consumers.....In our opinion, the Board was perfectly within its rights in deciding to restrict the levy of fuel surcharge to those categories of consumers who were enjoying the benefit of a concession in the general rate and in sparing smaller type of consumers such as the agriculture, irrigation and commercial consumers from being subjected to that burden, in view of the fact that they were already being subjected to a basic levy on substantially higher rates. The true consequence of the action so taken by the Board is only to effect a reduction in the quantum of concession that was being enjoyed by the

consumers belonging to the industrial and railway traction categories. A classification which is legally valid and permissible for the grant of a concession in the basic rates will equally hold good for the purpose of a subsequent scheme of distribution of the burden in the form of fuel surcharge..... Having regard to all these facts and circumstances we find no substance in the contention advanced by some of the appellants that the imposition of fuel surcharge under paragraph 16.7 of the 1979 tariff is arbitrary and violative of Article 14 of the Constitution."

41. We have, in the cases before us, more or less similar facts and circumstances. We had earlier set out the basic tariffs applicable to these several categories in 1975 and noticed how those rates were increased from time to time with reference to some of such categories. In 1975, H.T. Category I (Industrial, H.T. Category II Non-industrial) and power intensive industries were paying only the respective unit rates of 21 paise, 28 paise and 11 paise while many of the consumers under Part-B were paying for higher rates. There were progressive tariff increases made subsequently from time to time. Even under the tariff notification 1984, the H.T. categories referred to above were paying the respective unit rates of 48 paise, 56 paise and 45 paise which basic rates are, less than the tariffs for some of the L.T. consumers falling under Part-B though such basic rates are, in certain cases, higher than the basic rates which are being paid by L.T. consumers using the energy for purposes of agriculture, public lighting, cottage industries and small poultry farming units. In substance what the Board tried to evolve over these years was a gradual reduction in the quantum of concession that was being made available to the H.T. power industries. The arbitrariness or unreasonableness amounting to violation of Article 14 of the Constitution would, therefore, stand negatived.

42. We have earlier referred to the fact that about 50% of the total power generation is thermal which type of generation requires fuel. There is a steady escalation in the prices of either coal or diesel oil which are the fuel used for the generation of thermal power. Such escalation in the fuel cost would naturally result in raising the cost of power generation at the thermal stations. The power in Andhra Pradesh generated either by hydel or by thermal systems is fed into a common grid. The explanation given on behalf of the Board is that, prior to 1982, the tariffs fixed for all categories took into account the fuel costs till then incurred and it was only after 1982 the burden of further increase in the fuel charge is loaded on the various H.T. power consumers excepting on such consumers availing H.T. supply for agricultural and irrigation purposes and that there is nothing unreasonable if these H.T. power consumers who are using more than 50% of the total power are required to bear the burden of further increase as a result of the increased fuel costs. We find this explanation offered by the Board as not only fair but reasonable and convincing and we accordingly reject the submission made on behalf of the petitioners that there was any unfairness or unreasonableness if the Board decided to collect the further fuel escalation changes only from these specified different categories of H.T. power consumers.

43. Till 7-1-1984 the fuel escalation charge was worked out at 3.79 paise per unit. The fuel cost had abnormally increased by 7-1-1984 when it was worked out at 11.68 paise per unit. What the Board would appear to have done is that in rescheduling the tariffs, it has absorbed 3.79 paise as part of the tariffs applicable to these H.T consumers and indicated the balance of 7.89 paise only as the fuel cost adjustment charges. We do not find anything sinister or irrational in the manner in which the Board has adjusted the fuel cost prices. If one can draw an analogy, it is something like

absorbing a part of dearness allowance as substantial pay. Quoting from an earlier decision of the Supreme Court in *Prag Ice and Oil Mills v. Union of India*[15], the Supreme Court in Rohtas Industries case (supra) proceeded to say :

> "In the ultimate analysis, the mechanics of price fixation is necessarily to be left to the judgment of the executive and unless it is patent that there is hostile discrimination against a class of persons, the processual basis of price fixation is to be accepted in the generality of case as valid."

and later :

> "Some of the appellants have endeavoured to persuade us to go into the minutest details of the mechanism of the tariff fixation effected by the Board in an endeavour to demonstrate in relation thereto that a factor here or a factor there which ought to have been taken into account has been ignored. We have declined go into those factors which are really in the nature of matters of price fixation policy and the Court will be exceeding its jurisdiction if it is to embark upon a scrutiny of matters of this kind which are essentially in the domain of the executive to determine, subject, of course, to the Constitutional limitations."

Similar is the effort which was made before us and for the aforesaid reasons given by the Supreme Court, we reject this submission.

[15] AIR 1978 SC 1296

44. According to the learned counsel for the petitioners, in Rohtas Industries case (supra) the Board was found to be incurring losses by supplying power at less than the cost of production and that as in this case it is demonstrated that the tariffs are fixed at rates higher than the cost of generation and supply, we ought not to place any reliance on Rohtas Industries case (supra). We have, in another part of this judgment, found that the Board is still not in a position to discharge its essential financial obligations and continues to be heavily indebted to the State Government and other under loans borrowed by the Board from time to time. We are, therefore, clearly of the opinion that the observation made by the Supreme Court in Rohtas Industries case (supra) cannot be distinguished. We would still arrive at the same conclusion even if the Board had been making some small profits in some years. We cannot deny to the Board the right to earn a little profit, so that it can operate the utility successfully and maintain its financial integrity.

44A. We have in this context also to refer to a certain research thesis of one Mr. G.F.K. Herrmann, xerox copies of portions of which have been made available to us. It would appear from these extracts :

> "Most electric utilities have fuel price clauses in their supply contracts, although in many cases these clauses are applied only to relatively large consumers. There is, of course, no reason why only the charges to large consumers would be adjusted automatically for increased fuel costs."

It would appear from this thesis that the writer was making out a case for adjusting such fuel price variations on all electric consumers by pressing into service, computers for billing purposes and also for exercising a closer vigilance over such surcharges, depending upon the specific heats of the fuels used and the nature of the furnaces where the power is being generated. Those proposals suggested by the Research Scholar may be good for adoption by developed countries and they are impracticable of being implemented by a developing country like ours. It is not disputed that the fuel cost adjustment if is to be made in respect of the various consumers falling under Part-B, there will be difficulty in billing these different consumers separately for these fuel costs adjustments. It is suggested that the Board could at least have increased the tariff rates of these categories falling under Part-G and should have off-set a part of the fuel escalation charges, the entire burden of which is now being exclusively passed on to the H.T. consumers. This again is a question of policy. We cannot find anything irrational if the Board felt that certain concessions in the tariff ought to be continuously made available in favour of certain categories of L.T. consumers and that the remaining categories of L.T. consumers cannot be loaded again with any additional burden in the tariffs as in its view a heavy burden was already cast on those L.T. consumers. We do not, therefore, find anything irrational or unreasonable if, in the circumstances, the cost attributable to further fuel costs is exclusively passed on to be borne by the H.T. consumers who are utilising the power for industrial purposes. Ultimately it is a question of policy which is to be left to the administrators and experts in the field to decide which category of consumers can bear the additional burden, keeping in view the socio-economic policies of the Government and the relatively larger capacity of the H.T. consumers to initially bear the extra burden. These are not matters where this Court can, in exercising its jurisdiction under Article 226, suggest any alternate policies which are the exclusive domain of the administrators and experts in the field.

45. That apart, these H.T. consumers could not have complained against the revised tariffs if the Board merely increased the tariff without attributing the increase to fuel cost adjustment. The mere circumstance that, with a view to avoid frequent tariff revisions, the Board has evolved a working formula which can automatically adjust the escalation charges, the H.T. consumers cannot be permitted to complain against the validity of the fuel adjustment clause.

46. As exclusive to the power intensive consumers, certain subsidiary submissions were made. The first submission is that the billing practice adopted by the Board with reference to H.T. industries cannot be applied, in respect of the power intensive industries. In 1975 tariffs, it was originally contemplated to group together the power intensive industries with consumers availing H.T. supply for irrigation and agricultural purposes. That proposal was not ultimately given effect to. Instead, the Board grouped the H.T. consumers availing supply for irrigation and agricultural purposes in Part-B, The power intensive consumers were since then continued as a separate class in respect of whom the Board was giving separate tariff notifications. At that time, the Board, in its memo dated 18-11-1975, said :

> "with regard to other charges such as miscellaneous charges, terms and conditions of supply not mentioned specifically herein, those applicable to normal H.T. consumers will apply."

Whenever a new power intensive consumer had sprung up, the Board was issuing similar memos which, while making specific reference to the aforesaid memo dated 18-11-1975, proceeded

further to say that the other conditions stipulated in that reference would stand. This is clearly brought out from the successive memos issued by the Board on 12-8-1977; 2-5-1978; 2-8-1979; 4-10-1979; 26-6-1980 and 2-6-1981.

47. The protest to pay such fuel cost adjustment was voiced by the petitioner in W.P. No. 8177/84 who, by its letter dated 11-10-1982, expressed itself :

> "We observe that an amount of Rs. 3,05,442.05 p. was included towards fuel cost adjustment as per B. P. No. 589, dt. 30-7-82. The above B. P. notices an amendment to Part-A of H.T. Tariffs notified under Board's proceedings, vide B. P. No. 418 dt. 2-6-1981. As ours is a special tariff not governed by Part-A of H.T. Tariffs, the increase notified, vide B.P. No. 589, will not be applicable to us."

In reply thereto, the Board, through its Superintending Engineer's letter dated 16-10-1982, took the stand :

> "Your contention is not correct as the tariff applicable to you is same for H.T. Tariff I with separate unit rate of 0.32 paise. But all other terms and conditions of supply under the H.T. tariff are applicable to you."

Thereafter, the petitioner paid all amounts claimed as fuel costs adjustment under protest as can be seen from the petitioner's letters dated 18-11-1982, 13-12-1982, 12-1-1983, 11-2-1983, 14-3-1983, 11-4-1983, 11-6-1983 and 12-8-1983.

48. We now proceed to consider the various other submissions exclusively made on behalf of the power intensive consumers. The first such submission is that the power intensive industries, stand as a class by themselves and do not fall under Part-A of the tariffs 1984 and, therefore, no fuel cost adjustment can be recovered from them. This submission stands to be rejected. The 1975 tariff notification was made so as to group these power intensive industries, under the then proposed Category II. For some reason, these power intensive industries came to be treated separately because of a greater concessional tariff rate which was extended to them under special agreements which the Board was entering with them from time to time. As there was no separate condition for fuel cost adjustment prior to 30-7-1982, such a condition could not have appeared in any of the tariff notifications made prior to the tariffs 1984. There is no dispute that these power intensive consumers are availing H.T. supply at 33 KV or 11 KV in much the same manner as the H.T. supply is being availed of by H.T. consumers falling either under Category-1 or under Category II as per the tariff notifications made subsequent to 1975. Even these power intensive consumers were admittedly paying the tariffs for townships, which appear only in Part-A. The power intensive industries were no doubt raising a protest, but such protest appears to us to be more formal and oblique than real. If the protest was real, the petitioner, as representing the power intensive consumers, would have taken some remedial measures even in November 1982 or shortly thereafter to avoid the payment of these fuel cost adjustment charges. It looks to us that the grievance is more felt by these power intensive consumers when there was a steep escalation in such charge made in the Board's memo dated 28-1-1984 which followed the tariffs 1984.

49. In Rohtas Industries' case (supra) the Supreme Court, while dealing with a similar fuel surcharge levied by the Board, observed :

> "Though the nomenclature given to the levy is "fuel surcharge", it is really a surcharge levied to meet the increased cost of generation and purchase of electricity".

If, therefore, the fuel cost adjustment is in substance a surcharge levied to meet the increased cost of generation, we fail to see how the power intensive industries can seek to avoid the incidence of this fuel cost adjustment by taking any technical and hollow plea when in terms of the agreement they have entered into with the Board, they bound themselves to pay all surcharges which the Board may fix from time to time.

50. It is faintly submitted that the Board has been referring to some of these H.T. consumers as highly power intensive industries and not merely as power intensive industries and that; therefore, these highly power intensive industries should be relieved against the imposition of this fuel cost adjustment. We find no substance in this submission either. The Board might have been loosely referring to some of these industries as highly power intensive industries to justify a larger concession in the energy rates extended in their favour under various agreements. The fact remains that power is supplied only on 33 KV or 11 KV alike to all these industries, whether power intensive or highly power intensive. There can be nothing like a power intensive industry and a higly power intensive industry. The connotation would appear to have figured in the context of some of these power intensive industries using electric energy as a basic raw material in the manufacture of their products. Mr. Shanthi Bhushan has in a lighter vein referred to these highly power intensive consumers as power grabbers. The humour apart, we are satisfied, that some considerations, ought to apply to the power intensive industries whether they are merely power intensive or highly power intensive.

51. It is also faintly argued on behalf of these power intensive consumers that in the various memos issued by the Board, reference was made only that charges such as miscellaneous charges, terms and conditions of supply applicable to normal H.T. consumers would apply to the highly power intensive consumers and that miscellaneous charges have a definite meaning and that, therefore, the fuel cost adjustment, which could probably be made in respect of ordinary H.T. consumers, cannot be *ipso facto* applied to these highly power intensive industries. In the tariff notifications, miscellaneous charges are separately provided for in Part-C. The argument is that only these miscellaneous charges applicable to ordinary H.T. consumers are made applicable to highly power intensive consumers but not the fuel cost adjustment which, for the first time, had taken shape in the Board's proceedings B.P.Ms.No. 589 dated 30-7-1982. We have earlier held that the fuel cost adjustment is in substance a surcharge and the petitioners cannot, therefore, derive any comfort in advancing this argument based on miscellaneous charges. We accordingly reject all these submissions made by the H.T. consumers regarding the fuel cost adjustment.

52. It is lastly submitted that there is no justification for the Board to charge fuel escalation charges for the units supplied for the township. If the fuel cost adjustment could legally be collected by the Board from H.T. consumers, we do not see any valid reason why the Board should be disentitled to collect such fuel cost adjustment in respect of H.T. supply made available to the H.T. consumers. The Board, as earlier stated, is not concerned as to how the H.T.

consumers have, after receiving such H.T. supply, stepped it down and made that power available in L.T. for township consumption. The petitioner in W.P. No. 8177/84 has come forward with an amendment seeking to quash the fuel cost adjustment memo, which was issued as far back as 31-7-1982. The petitioner was no doubt making a protest about it, but he never took any active steps to question its validity for over 2+ years. The delay on its part stands unexplained. The petitioners are clearly not entitled to question the fuel cost adjustment memo at this distance of time.

53. The question remains whether the decision of the Board regarding tariffs comes under a major question of policy. Section 18 of the Supply Act charges the Board with the duty of arranging for the supply of electricity and for the transmission and distribution of the same in the most efficient and economical manner. Section 49 of the Supply Act requires the Board to have regard to all or any of the factors set out therein in fixing the uniform tariffs. Those factors are : (a) the nature of the supply and the purpose for which it is required; (b) the co-ordinated development of the supply and distribution of electricity within the State in the most efficient and economical manner etc. That section also provided that, if the Board considered it necessary or expedient to fix different tariffs for the supply of electricity to any person, it can do so having regard to the geographical position of any area, the nature of the supply and purpose for which supply is required and any other relevant factors and that, in fixing the tariff and terms and conditions for the supply of electricity, the Board shall not show undue preference to any person.

54. Under Section 78-A of the Supply Act, the Board, in the discharge of its functions, shall be guided by such directions on questions of policy as may be given to it by the State Government. The State has got manifold functions, including the giving of encouragement to entrepreneurs to set up industries either in the private sector, public sector or joint sector. In the initial periods, the industries would be requiring supply of power at concessional rates. If the matter was to be left to the Board, the Board may not be in a position to offer any concessions to such entrepreneurs. It is clear that the Government steps in and gives directions to the Board as may be necessary to supply power to those new industries at concessional tariffs, during the formative years. The State, in formulating its socio-economic policies, would be inclined to show some concessions in favour of consumers availing supply for agricultural or community purposes and such like occupations justifying the fixation of tariffs at a lower level. In our view, the fixation of tariffs is, therefore, a major policy decision which the Board can take concerning which the Government can effectively intervene by acting under Section 78A of the Supply Act. In one of the early cases which came up before this Court in W.A. No. 359/74 and batch this question arose before a Division Bench consisting of Obul Reddi, C.J. and Lakshmaiah, J. whether a certain decision taken by the State Government on 12-4-73 was a policy decision. There was a difference of opinion between the two learned Judges and the matter was subsequently referred to Sambasiva Rao, J. (as he then was). Obul Reddi, C.J. held :

> " Section 49(3) does not prevail over the powers vested in Government by Section 78-A. It is open to the Government to lay down its policy in the matter of fixation of tariff rates; but any policy decision of its must be in consonance with the requirements of sub-section (3) of Section 49. The requirements of sub-section(3) of Section 49 must be satisfied."

Sambasiva Rao, J. held : -

> "In this connection the power of the Government to issue directions under Section 78A of the Act on questions of policy should also be borne in mind. Once a direction is given on a policy matter, which must necessarily include in its ambit the rates that should be charged from consumers, the Board is bound to be guided by them."

In *Nava Bharat Ferro Alloys Ltd. v. A.P.S.E.B*[17]*.,* a Division Bench of this Court expressed itself:

> "The location of the plant had no bearing on the question of granting concessional rates, which is really a policy decision to be taken in a larger context."

55. A Division Bench of the Madras High Court in *Madras Aluminium Company Ltd. v. Tamil Nadu State Electricity Board*[18] observed :

> "Under Section 78-A of the Supply Act in the discharge of its functions, the Board shall be guided by such directions on questions of policy as may be given to it by

[17] W.P. No. 4405/77 dt. 5-12-1980

[18] C.S.No. 308/77 and batch dt. 22-10-1984

> the State Government. Since the discharge of its functions include agreeing to supply at a Special rate for a specified period of time, the Government could give directions under this section to the Board in regard to the rate of supply with reference to a case falling under Section 49(3) if it was considered to be a policy matter."

56. Reliance is, however, placed on behalf of the Board on a decision of another Division Bench of this Court in *Poddar Project Limited Multi Steels v. A.P.S.E. Board*[19]*,* to contend that the fixation of tariffs is not a major question of policy and the State Government has, therefore no right to issue any directions under Section 78-A of the Supply Act. On going through the said decision, we find that the earlier Division Bench decisions of this Court referred to above were not cited in Poddar's case (supra) and the Division Bench proceeded on the footing that, because the G. O. did not expressly refer to be a directive under Section 78-A of the Supply Act, it cannot be construed as a direction issued by the Government under Section 78-A.

57. There is a direct decision of the Supreme Court in *S. Narayan v. Union of India*[20]*,* which held (Para 7) :

> "The Courts have no jurisdiction under Article 226 to go into the reasonableness of rates. These rates are decided as policy matter in fiscal planning. There is legislative prescription of rates. Rates are matters of a legislative judgment and not for judicial determination."

In view of the Supreme Court decision, the observations made in Poddar's case (supra) would no longer be applicable. We hold that the fixation of tariffs is a matter of major policy decision taken by the Board which is entrusted by the legislature with the duty of fixing the tariffs. "

58. One of the submissions made before us is that the price policy of public corporation should be neither to make a loss nor a profit after meeting all capital charges and this is expressed by covering all costs or breaking even and that the price of charges for the services should correspond to relative costs. The Supreme Court in *P. Nalla Thampy Thera v. Union of India*[21], was considering a case put forward by a railway commuter against the Indian Railways. Without expressing any final opinion, the Supreme Court observed (at P. 77) :

> "The commendable view to accept may be that the rates and fares should cover the total costs of service which would be equal to operational expenses, interest on investment, depreciation and payment of public obligations, if any."

We have earlier noticed the existence of heavy loans which the Board had incurred from the State Government and how the discharge of those loans would be a public obligation, on the part of the Board. The petitioners will not, therefore, be right in submitting that the Board should so function only to cover all costs or breaking even without satisfying the

[19] AIR 1982 And Pra 189 [21] AIR 1984 SC 74
[20] AIR 1976 SC 1986

public obligations it had incurred for running the socialised public utility undertaking.

59. A working sheet indicating the generation cost, supply cost at 33 KV and 11 KV and L.T. and tariff rates has been placed before us. On the basis of this statement, it is submitted that the Board was supplying energy to the power intensive units at less than the cost of generation till about 4-7-1981 and that thereafter the tariffs are substantially increased in respect of these power intensive industries. So far as supply of power to the other H.T. categories are concerned, it was always admittedly higher than the cost of generation. The point which is sought to be made out is that tariffs fixed far in excess of the cost of generation are arbitrary. The words used "having regard to" have received judicial interpretation at the hands of the Supreme Court first in *Mysore State Electricity Board v. Bangalore W.C. and S. Mills*[22], as only requiring the Board that those provisions must be taken into consideration. Later, in *S. I. Syndicate Ltd. v. Union of India*[23], those words were interpreted as only obliging the authority to consider as relevant data material to which it must have regard. The cost of generation may be a relevant factor, but it will not be a determining factor. In Kalyan Municipality case (supra) the Supreme Court has clearly stated that though the cost has to be taken into account, the cost is not the sole or only criteria for fixing the tariffs. We do not therefore, accept as correct the submission made on behalf of the petitioners that any tariff fixed at a rate which is far higher than the cost of generation should automatically be treated as arbitrarily fixed. Some earlier correspondence is relied upon to say that these power intensive industries were set up in the State because the Government at that time agreed to make available electric power at concessional rates for specified periods. The fact now remains that for whatever period the Government agreed to make available the power at concessional rates, such periods have all expired. The supply is now being availed of by all these H.T. consumers in terms of agreements binding them to pay such tariffs, as may be determined by the Board from time to time. These are not instances where the principles of promissory estoppel could at all be invoked against the Board. The State Government would have held out some concessions in the tariff rates to persuade them to agree to locate their industries. That does not enable the H.T.

consumers to disown their obligations to pay higher tariffs for periods beyond the periods covered by the special agreements.

60. It is argued on the basis of the tabular statement that, during the period 1975 and 1981, the tariffs were increased nearly by 100% and that again during the period 1981 and 1984 the Tariffs had been further increased by about 60% over the 1981 tariffs. We cannot overlook the inflationary trends in the country and the increases in the costs of establishment and services, during the periods 1975-1981 and 1981-1984. None of the consumers had any grievance about the tariff rate till tariffs 1981. Some consumers, who felt aggrieved by 1981 tariffs approached this Court, but failed to get any relief as is evident from the Akhila Bharatiya Grahak Panchayat case (supra). The writ petitioner in W.P. No. 8177/84 has, by way of an amendment, sought in W.P.M. No. 3074/84 to quash the tariffs 1981 as well, after nearly a lapse of about three years. Both for the reason that the 1981 tariffs were upheld by this Court in Akhila Bharatiya Grahak Panchayat case

[22] AIR 1963 SC 1128

[23] AIR 1975 SC 460

(supra) and also for the reason that as there is unexplained delay on the part of these petitioners in questioning the 1981 tariffs, the petitioners cannot be heard now to complain about the 1981 tariffs.

61. In *Association of Natural Gas Consuming Industries of Gujarat v. O.N.G.C*[24]. the question arose whether the Commission acted arbitrarily in fixing the tariff rates. A Division Bench of the Gujarat High Court held that the fixation of the tariff rate made in 1983 was nearly 30 times over the price of gas fixed in the year 1967 and gave certain directions, regarding the re-fixation of the price of gas. The petitioners have requested this Court to do likewise. The O.N.G.C. case (supra) stands on its own facts. The initial price itself was got fixed by an arbitrator, appointed by the State Government, and the Central Government. There are no in-built checks regarding fixation of the price of gas as we have under the Supply Act. The petitioners cannot, therefore, derive any assistance from the O.N.G.C. case (supra). The difference in tariffs is not very significant regarding H.T. Consumers I (Industrial) and H.T. Consumers II (Non-industrial). Those small difference have, therefore, been ignored as inconsequential. It is, however, submitted that there is discrimination shown against the H.T. consumers when concession tariffs continue to be given in favour of: (1) consumers availing L.T. supply for agricultural and irrigation purposes; (2) cottage industries. (3) public lighting purposes, and (4) small poultry farming units. Our country depends purely on agriculture. The price of the agricultural produce ultimately controls the country's economy. Agriculturists are generally weaker sections, living mostly in rural areas and cannot be expected to take any greater burdens on account of electric power. So is the case with cottage industries and small poultry farming units which are mostly located in the rural areas. Public lighting serves a community purpose. If the Board has allowed certain concessional tariffs in favour of these categories of L.T. consumers, they satisfy the test of both reasonableness and public interest, the tests approved by the Supreme Court in *Kasturilal v. State of Jammu and Kashmir*[25], The petitioners cannot, therefore, justly complain of any hostile discrimination against them if in respect of the aforesaid categories of consumers the concessional tariffs are continued by the Board.

62. It is stated that the industries availing H.T. supply cannot bear the burden of such heavy increases made from time to time in the tariffs and that the petitioners would be compelled to

close down their industries. This question is no longer res Integra in view of the decision of the Supreme Court in Rohtas Industries case (supra) where it is stated that the inability of the industry to survive is not a relevant consideration which the Board need keep in view in fixing its tariffs. We cannot overlook two relevant circumstances. One circumstance is that in most of the power intensive industries, electricity is consumed as a raw material in different proportions. The petitioners cannot complain of any escalation in costs made in respect of the other raw-materials required to run the industry. We fail to see how the petitioners can at all complain that electric power used by them as a raw material now costs more than what it used to cost when the industry was first set up. Ultimately the burden of cost increases is passed on to the consumers and the petitioners would not in reality suffer any financial losses. It is stated in this connection that, if the industry is established in States depending on hydel power, the petitioners would have got the benefit of electricity being charged at lesser rates. This argument

[24]1983 (2) 24 Guj LR 1437

[25] AIR 1980 sc 1992

overlooks the circumstance that so far as Andhra Pradesh is concerned, it depends both on hydel as well as thermal power which are fed into a common grid, and power failures are rare. If the industries are to depend only on hydel power, it is not uncommon that hydel power is not made available continuously or at all times during the year. The petitioners cannot, while enjoying the benefit of an uninterrupted supply of electric power, complain of having to pay a little more than pay less and suffer the consequences of frequent failures of electric supply. We do not feel impressed with the submission made on behalf of the petitioners that, because power is supplied to the petitioners in bulk and at a single point the Board would not suffer the transformer, distribution or line losses as the Board would suffer when it supplies LT. power to different consumers and that the Board is acting arbitrarily in raising the tariffs concerning the H.T. consumers. The H.T, consumers pay only for the power availed of by them. They are not in any event paying for any line losses. They are still enjoying the benefit of a concessional tariff compared to L.T. consumers falling under certain other categories. This grievance expressed on behalf of the petitioners has, therefore, no substance.

63. We have heard very illuminating arguments based on an intensive study of the subject from Sarvasri K. Veera Swamy and K. Srinivasa Murthy, who appeared for the petitioners and Sarvasri Shanthi Bhushan and M. Chandrasekhara Rao who appeared for the Board. We are thankful to them. The writ petitions are each dismissed with costs. Advocate's fee Rs. 250 in each.

64. These writ petitions have been set down on this day viz., on Thursday the Fourth day of April one thousand nine hundred and eighty five for being mentioned in pursuance of the letter of Mr. A. Panduranga Rao, K. Srinivasa Moorty and G. Sarangan, the Advocates of the petitioner in all dt. 3-4-1985 and upon perusing the petitions and upon hearing the arguments of Mr. K. Srinivasa Moorty, Advocate for petitioners in WPs 6204, 8001, 8333, 9403, 9421, 9425, 13671 of 1984 and in WP 9312/84 and Mr. K. Veeraswamy for Mr. A. Panduranga Rao, Advocate for petitioner in WP No. 8177/84 and of Mr. G. Sarangan, Advocate for petitioner in WP No. 14236/84 and of Mr. Shantibushan for Mr. M. Chandrasekhara Rao, standing Counsel for A.P.S.E.B. in all the cases, the court delivered the following : -

> JUDGMENT :- Learned Counsel state that they could not be present in the court when the Judgment was pronounced yesterday due to traffic Jam. They now make an oral

application for leave to appeal to the Supreme Court.

In our opinion no substantial question of Law of general importance that requires to be decided by the Supreme Court arises in these cases. Therefore, the oral request is rejected.

Learned Counsel pray that the Respondent-A.P.S.E.B. may be directed not to enforce their demand for the arrears of tariff due from the petitioners till today for a period of four weeks to enable the petitioners to approach the Supreme Court and obtain necessary orders. There shall be stay of collection of the arrears of tariff due from the petitioners for a period of four weeks from today.

Order accordingly.