BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION AT BANGALORE

In the Matter of Revising the Standard Draft of the Wheeling and Banking Agreement previously approved by the Hon'ble Commission vide order dated 11.07.2008

INDEX

Bangalore
Date; 04.09.2013

ADVOCATE FOR KPTCL, BESCOM,
GESCOM,CESC AND MESCOM

(1)

O/C

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION AT BANGALORE

In the Matter of Revising the Standard Draft of the Wheeling and Banking Agreement previously approved by the Hon'ble Commission vide order dated 11.07.2008

NOTE OF SUBMISSIONS FILED BY KPTCL,MESCOM , BESCOM ,GESCOM AND CESC TO THE DISCUSSION PAPER ON WHEELING AND BANKING CHARGES FOR RENEWABLE ENERGY SOURCES CIRCULATED BY THIS HON'BLE COMMISSION

It is respectfully submitted as under;

1. This Hon'ble Commission had on 9.6.2005 determined the wheeling and banking charges and cross subsidy surcharge under open access payable by all Renewable energy generators in the State of Karnataka. As the validity of the said order was for 5 years from 11.6.2008, this Hon'ble Commission has now undertaken the task of relooking at the same and refixing the tariff from the year 2013-14. In this context, this Hon'ble Commission has been pleased to float a discussion paper on the Wheeling and Banking Charges for Renewable Energy Generators in the State of Karnataka. In this regard, the response of the ESCOM's herein to the proposals put forth by this Hon'ble Commission are as under.

2. **INTRODUCTION OF NON CONCESSIONAL WHEELING AND BANKING FACILTY TO RENEWABLE ENERGY SOURCES**

This Hon'ble Commission has taken into consideration the developments that have taken place in states like Gujarat and Tamil Nadu. This Hon'ble Commission has noted that there has been an introduction of normal Transmission and wheeling charges for Renewable energy generators availing RECs. It has also been noted that in Gujarat banking facility has not been extended and in Tamil Nadu, ToD based monthly banking facility for those RE Generators opting for REC mechanism has been provided. In the light of the same, this Hon'ble Commission has proposed to discontinue banking facility on an annual basis and to introduce Transmission and/or wheeling charges for all RE generators seeking open Access/wheeling to Transmission and/or distribution network on par with charges applicable to non RE/conventional power generating companies. As per the said proposal, these charges would be determined by the Commission in its tariff orders issued from time to time. Based on the Tariff order dated 6.5.2013 for FY 2014, this Hon'ble Commission has indicated wheeling charges payable to each of the ESCOMs and the KPTCL.

a) **Response of BESCOM;** BESCOM is facing adverse revenue impact in view of the Wheeling and Banking transactions with NCE projects. The adverse financial impact is for the following reasons ;

i) Commercial consumers having Bulk consumption are taken away from BESCOM's network by the Wheeling and Banking transactions for meagre benefits. This will result in a

reduction in the cross subsidy component in the tariff of commercial consumers which will in turn burden the smaller retail consumers due to tariff hikes.

ii) Wheeling charges incurred as such do not substantially compensate BESCOM for the transmission loss component and the cost incurred for strengthening the infrastructure required to wheel the power from one remote corner of BESCOM's jurisdiction to the load centers, as the loads are not substantial in the geographic area of generation.

iii) Loss of cross subsidy surcharge component for captive and group captive consumers ; The group captive clause is exploited by incorporating some consumers who are not at all concerned or involved in the project at the time of execution/commissioning but acquire shares at a later point of time of generating IPP's .

iv) Most of the wind based IPP's generate infirm power during off peak hours but draw power during peak hours , thus burdening the utility during high peak demand time. At such times, the ESCOM is forced to purchase power during peak times or bear the burden of UI mechanism.

v) Another problem faced by the ESCOM is that during the peak time for wind generation, the demand for power by the utility will be moderate. This results in a drastic increase of frequency and voltage of the system which at times is uncontrollable even after imposing minimum generation techniques by other generators. This results in flow of power outside the state at zero cost.

b) <u>Response of MESCOM;</u> MESCOM is agreeable to the proposal of the Hon'ble Commission in this regard subject to the suggestions made by MESCOM in the subsequent paragraphs with regard to uniform applicability of the same to all NCE projects in the past, present and future.

c) <u>Response of CESC;</u> CESC concurs with the proposal of this Hon'ble Tribunal to introduce Transmission and or wheeling charges for all Renewable energy generators seeking open access/wheeling using the transmission /distribution network on par with the charges applicable to non renewable energy/ conventional power generating companies, subject to the suggestions made by MESCOM in the subsequent paragraphs with regard to uniform applicability of the same to all NCE projects in the past, present and future.

d) <u>Response of GESCOM;</u> GESCOM concurs with the proposal of this Hon'ble Commission that there is need to introduce a system of non concessional wheeling for renewable sources of energy. GESCOM is also agreeable for levy of Transmission and or wheeling charges for all Renewable energy generators seeking open access/wheeling using the transmission /distribution network on par with the charges applicable to non renewable energy/ conventional power generating companies.

(3)

3. WHEELING CHARGES PAYABLE TO BESCOM

This Hon'ble Commission has suggested the following charges be levied;

i) If both the injection point and drawal point are at HT level: 10 paise/unit & 4.0% loss in kind.

ii) If both the injection point and drawal point are at LT level: 23 paise/unit &8.84% loss in kind.

iii) If the injection point is at HT level and drawal point is at LT level or the injection point is at LT level and drawal point is at HT level: 33 paise/unit &12.84% loss in kind

In response to the same, it is submitted by BESCOM that the Wheeling charges proposed by the Hon'ble Commission in its discussion paper would not substantially compensate the BESCOM for T and D loss (in < 33 kv lines) and the cost of infrastructure invested to mandatorily provide upgradation/strengthening of lines predominantly for the evacuation of power by NCE sources at several voltages. It is submitted that the wheeling charge proposed is insufficient in view of the fact that the NCE sources are far away from the load centers and the same needs to be gradually enhanced.

The proposed Wheeling charges at 10paise/unit plus 4 % of energy in kind (if both injection and drawal point at HT level) works out to approximately 6.7 % of energy as against 5% exiting. The same therefore requires to be enhanced to at least 25 paise/unit plus 4% of energy in kind which works out to around 10.75%. The table below illustrates charges for 100 units of energy wheeled;

Sl. No	**Description**	**As proposed in discussion Paper**	**As proposed by BESCOM**	**Remarks**
1	Wheeling Charges @10 Paise /unit	10.00	*25.00	*@25 Paise/unit
2	Loss 4% in kind @Rs.3.70/unit	14.80	14.80	
3	Total	24.80	39.80	
4	**% of cost of wheeled Energy**	**06.7 %**	**10.75%**	

It is proposed that a processing fee for wheeling transactions at Rs 2000/- per transaction is levied at each ESCOM (injection and drawal point).

4. WHEELING CHARGES PAYABLE BY CESC

This Hon'ble Commission has suggested the following charges be levied;

(i) If both the injection point and drawal point are at HT level: 20 paise/unit &5.31% loss in kind.

(ii) If both the injection point and drawal point are at LT level: 48 paise/unit &8.63% loss in kind.

(iii) If the injection point is at HT level and drawal point is at LT level of the injection point is at LT level and drawal point is at HT level: 68 paise/unit &13.94% loss in kind.

In response to the same, it is submitted by CESC that the excess energy injected to the grid remaining unutilized by the Wheeling and Banking customer at the end of the month, the ESCOM shall pay the generator at 80% of the generic tariff determined by the Commission for the particular RE source, in case the RE generator opts for Non-REC route instead of 85% as proposed by Hon'ble Commission and at the APPC in case the RE generator opts for REC route. It is also suggested that Instead of sharing the wheeling charges among ESCOMs when wheeling involves more than one ESCOM, wheeling charges applicable to each ESCOM shall be collected separately in addition to the applicable transmission charges and the line losses in kind.

5. **CHANGES SUGESTED TO BE APPLICABLE PROSPECTIVELY I.E TO PLANTS COMMISISONED AFTER THE DATE ON WHICH FINAL ORDER IS ISSUED BY THIS HON'BLE COMMISSION;**

This Hon'ble Commission has in its discussion paper suggested that the discontinuation of banking facility on an annual basis and introduction of transmission/wheeling charges on RE generators will be applicable to all plants commissioned after the final order is passed by this Hon'ble Commission and not to existing Wheeling and Banking Agreements.

a) Response of CESC; It is humbly submitted that CESC is of the view that existing contracts ought to be short closed so that a uniform procedure is adopted and applied to all wheeling and banking agreements.

b) Response of MESCOM; It is humbly submitted that MESCOM is of the view that existing contracts ought to be short closed so that a uniform procedure is adopted and applied to all wheeling and banking agreements.

c) Response of GESCOM; GESCOM suggests that uniform charges be made applicable to all Renewable energy projects.

6. **DISCONTINUATION OF YEARLY BANKING FACILITY**

This Hon'ble Commission has suggested that annual banking system be done away with and in its place a system of banking of energy on a month to month basis be adopted. It is proposed that any excess energy injected to the grid and not utilized by the Wheeling and Banking customer shall at the end of the month be deemed to be utilized by the distribution licensee in whose area the Generator is located. For the excess energy injected to the grid and remaining unutilized by the Wheeling and Banking customer at the end of the month, the ESCOM shall pay the generator at 85% of the generic tariff determined by the Commission for the particular RE source, in case the RE Generator Opts for Non-REC route and at the APPC in case the RE Generator Opts for

REC route. The option of Non-REC route or REC route has to be exercised before entering into agreement with the Licensees and the eligibility criteria for accreditation under REC mechanism shall be as specified in the relevant KERC RPO/REC Regulations.

Further, the energy banked [within the month] during off-peak period shall be drawn during off –peak period only and the peak energy banked shall be off-set against peak period drawal.

a) **Response of BESCOM;** BESCOM is agreeable to the discontinuation of banking facilities on an annual basis as proposed by this Hon'ble Commission, in keeping with the norms of Gujarat state. BESCOM is also agreeable for the treatment of unutilized energy during the month to be utilised by the distribution company and payment for the same to be made at 85% of the generic tariff.

It is suggested that a processing fee of Rs 10,000/- per application is considered to be sanctioned for processing of applications for banking made.

b) **Response of MESCOM;** MESCOM is agreeable to the discontinuation of banking facilities on an annual basis as proposed by this Hon'ble Commission, in keeping with the norms of Gujarat state. MESCOM is also agreeable for the treatment of unutilized energy during the month to be utilised by the distribution company and payment for the same to be made at 85% of the generic tariff in respect of Non REC route generators and at the Average Power Purchase Cost in respect of REC route generators. Further, with the banking facility on annual basis being done away with, there will be no need for defining the terms wind year and water year.

c) **Response of CESC;** CESC is in agreement with the proposal to discontinue banking facilities on an annual basis. However, for the excess unutilized energy, CESC proposed that the same be paid for at 80% of the generic tariff.

d) **Response of GESCOM;** GESCOM is in agreement with the proposal to discontinue banking facilities on an annual basis. For the excess unutilized energy, GESCOM is agreeable to the proposal of this Hon'ble Commission to pay for the same at 85% of the generic tariff determined by the Commission for the particular RE source, in case the RE Generator Opts for Non-REC route and at the APPC in case the RE Generator Opts for REC route.

7. INSTALLATION OF TOD (TIME OF DAY) METERS

This Hon'ble Commission has also suggested that Time of Day meters be installed at drawal and injection point in order to monitor banking activities.

a) **Response of BESCOM:** BESCOM suggests TOD meters with identical features and CT and PT's should be fixed at the

generation source as well as the consumer end to compute and compare the energy injected by the generator and the drawal by the wheeling customer in their respective zones. It is suggested that ToD be implemented in at least 4 zones instead of the 3 zones where they are presently proposed to be implemented, incorporating the morning peak hours as a zone i.e

i) 6am to 10 Am
ii) 10 am to 6 pm
iii) 6 pm to 10 pm; and
iv) 10 pm to 6 am

It is humbly submitted that the time synchronisation of ToD metering is absolutely necessary to compute the actual energy generation and drawal in the relevant time blocks.

WHEREFORE it is prayed that this Hon'ble Commission maybe pleased to take on record the submission made by the ESCOMs herein in the interest of justice and equity.

Bangalore
Date;04.09.2013

ADVOCATE FOR KPTCL, BESCOM,
GESCOM,CESC AND MESCOM

COMMISSION'S ORDER

ON

SMALL HYDRO POWER PROJECTS

TARIFF AND OTHER ISSUES

December 18, 2007

HIMACHAL PRADESH ELECTRICITY REGULATORY COMMISSION

KEONTHAL COMMERCIAL COMPLEX,

KHALINI, SHIMLA-171002

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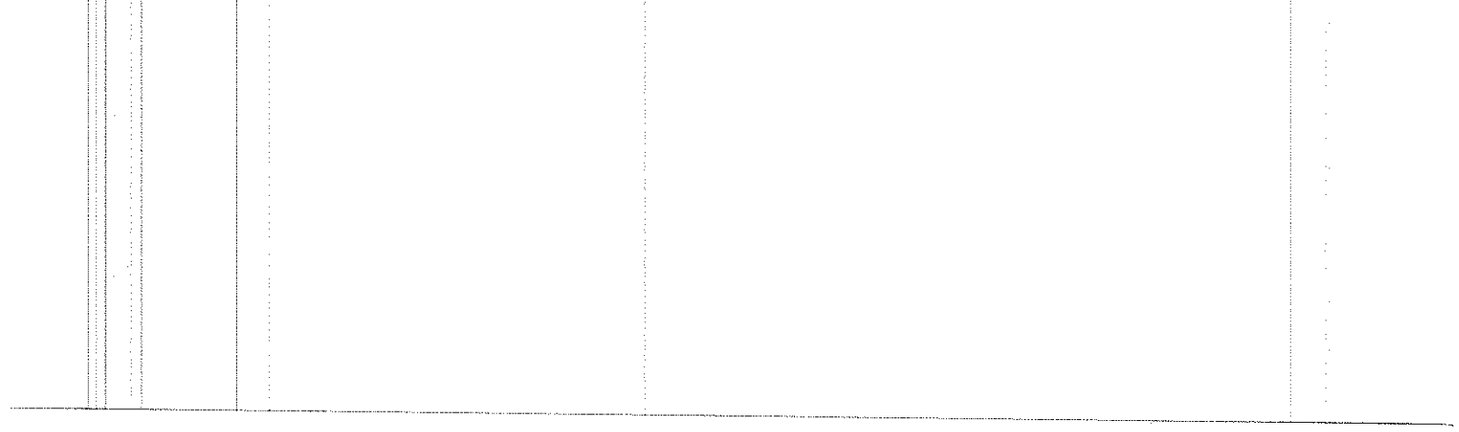

(b) Further, all small hydro projects may not be eligible for earning CDM benefits as not all of them may fulfil the stringent criteria of CDM.

4.99 Thus, CDM projects offer an opportunity for additional revenue for the renewable projects and could result in lower consumer tariff if shared with the distribution licensee. However, the Commission is of the view that such additional revenues (CDM credits) be allowed to be retained by developer and not factored into tariff determination given the uncertainty involved in their award. This would also act as an incentive to attract more clean investment in renewable energy sector.

Banking

4.100 The existing banking provision in other states are summarised as under

(a)	Punjab, Maharastra, A.P.	12 Months
(b)	Kerala	9 Months (June-Feb)
(c)	Gujarat & West Bengal	6 Months
(d)	U.P.	24 Months
(e)	M.P.	Not allowed.
(f)	Karnataka	No time limit, UI linked to injection & drawl, banking charges being equal to rate difference.

4.101 Banking of energy has been a promotional tool. However, with the implementation of the ABT mechanism at the central level and the proposed implementation at the state level, there is a commercial impact on the HPSEB that would need to be factored in. Further, providing a banking facility to a set of generators that would constitute a significant proportion of generation capacity may not be advisable. Several states are in the process of reviewing their banking arrangements in light of the ABT implementation on account of developers pumping energy into the grid during higher frequency conditions (when system has surplus of energy and the utility receives a low tariff for the electricity pumped in) and drawing the banked energy during periods of low frequency (when system has deficit of energy & the utility is faced with a high tariff of electricity for such drawl).

4.102 Himachal Pradesh is energy surplus in summer months and energy deficit in winter months given the hydro based generation profile in the state. This pattern holds true even for generation from SHP. Given this energy profile, HPSEB typically sells surplus energy outside the state in summer months while in

winter months HPSEB procures power from external sources at tariffs as high as Rs. 5 per unit. Providing a provision for banking would result in a situation where the SHP generators would be providing power to the grid in summer while withdrawing power in the energy deficit winter months with a resulting deleterious commercial impact on HPSEB. The Commission, therefore, is of the view that banking of energy would not be permitted for the time being.

(9) 10

(2010) 4 Supreme Court Cases 603

(BEFORE K.G. BALAKRISHNAN, C.J. AND S.H. KAPADIA, R.V. RAVEENDRAN, B. SUDERSHAN REDDY AND P. SATHASIVAM, JJ.)

PTC INDIA LIMITED .. Appellant;

Versus

CENTRAL ELECTRICITY REGULATORY COMMISSION, THROUGH SECRETARY .. Respondent.

Civil Appeals No. 3902 of 2006† with Nos. 4354-55 of 2006, 2875 of 2007, 7437-38 of 2005, 2073, 1471, 2166 of 2007, 2412 of 2010 (D 9870 of 2007) and 2413 of 2010‡, decided on March 15, 2010

A. Electricity Act, 2003 — Ss. 178(1), 178(2), 178(2)(ze) and 79(1)(j) and 61 to 63 — Regulation-making power of Central Electricity Regulatory Commission (CERC) — CERC's powers to issue regulations on trading margin instead of issuing a specific order under S. 79(1)(j) — Availability of — Held, wide power has been conferred under Ss. 178(1) and 178(2)(ze) on CERC to frame regulations of general application — CERC can therefore issue regulations even though it is equally open to CERC to issue specific order under S. 79(1)(j) — Purpose of issuing general regulations under S. 178 instead of issuing specific order under S. 79(1)(j) also explained — Also, CERC by issuing regulations could override even existing power purchase agreements (PPAs) which could not be done by issuing order under S. 79(1)(j) — Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2006 — Power purchase agreement (PPA)

B. Administrative Law — Subordinate/Delegated legislation — Effect on contracts — Held, subordinate legislation can even override existing contracts [*Ed.*: The contracts in question here (PPAs) are in any case heavily regulated by the Electricity Act, 2003, which expressly vests wide powers of contractual intervention to the authorities under the Act] — Contract and Specific Relief — Freedom of contract — Limitations on

The Central Electricity Regulatory Commission (CERC) by its Notification dated 23-1-2006 issued regulations known as the Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2006, fixing ceiling of trading margin at 4 paise/kWh for inter-State trading of electricity. The appellant challenged validity of these Regulations inter alia on the ground that the Commission could cap trading margin by issuing an order under Section 79(1)(*j*) of the Electricity Act, 2003, and by not by issuing regulations under Section 178. The Appellate Tribunal rejected appeal on the ground that it did not have jurisdiction under Sections 111 and 121 to examine the validity of the Regulations. The appellants filed appeal under Section 125 to the Supreme Court.

Dismissing the appeal, the Supreme Court

Held :

There is a reason why regulations have been made in the matter of capping margin under Section 178 of the Act. Instead of fixing trading margin (including

† From the Judgment and Order dated 28-4-2006 of the Appellate Tribunal for Electricity, New Delhi, in Appeal No. 45 of 2006

‡ Arising out of SLP (C) No. 22080 of 2005

capping) on a case-to-case basis, the Central Commission thought it fit to make a regulation of general application to the entire trading activity which has been recognised for the first time under the Act. Making a regulation under Section 178 became necessary because such a regulation has the effect of interfering and overriding existing contractual relationship between regulated entities. A regulation under Section 178 is in the nature of subordinate legislation. Such subordinate legislation can even override existing contracts including power purchase agreements (PPAs) which have got to be aligned with regulations under Section 178 and which could not have been done across the board by an order of the Central Commission under Section 79(1)(*j*). The word "order" in Section 111 cannot include impugned 2006 Regulations made under Section 178 of the Act. Section 121 does not confer power of judicial review on the Tribunal.

(Paras 58, 66, 79, 83 & 84 and 59 to 64)

Shri Sitaram Sugar Co. Ltd. v. *Union of India*, (1990) 3 SCC 223; *City Board, Mussoorie* v. *State Electricity Board*, AIR 1971 All 219; *U.P. SEB* v. *City Board, Mussoorie*, (1985) 2 SCC 16; *Jagdamba Paper Industries (P) Ltd.* v. *Haryana SEB*, (1983) 4 SCC 508; *Kerala SEB* v. *S.N. Govinda Prabhu and Bros.*, (1986) 4 SCC 198; *Hindustan Zinc Ltd.* v. *A.P. SEB*, (1991) 3 SCC 299; *Raman and Raman Ltd.* v. *State of Madras*, AIR 1959 SC 694, *relied on*

In the hierarchy of regulatory powers and functions under the Act, Section 178, which deals with making of regulations by the Central Commission, under the authority of subordinate legislation, is wider than Section 79(1) of the 2003 Act, which enumerates regulatory functions of the Central Commission, in specified areas, to be discharged by orders (decisions). A regulation under Section 178, as a part of regulatory framework, intervenes and even overrides the existing contracts between regulated entities inasmuch as it casts a statutory obligation on regulated entities to align their existing and future contracts with the said regulation. Applying the principle of "generality versus enumeration", it would be open to the Central Commission to make a regulation on any residuary item under Section 178(1) read with Section 178(2)(*ze*). CERC was therefore empowered to cap trading margin under the authority of delegated legislation under Section 178 vide the impugned Notification dated 23-1-2006.

[Paras 92(*i*), 92(*ii*) and 92(*vi*)]

C. Electricity Act, 2003 — Ss. 111(1) and 121 — Appeal against "order" made by Electricity Regulatory Commission — Whether appeal lies against regulations issued by Central Electricity Regulatory Commission (CERC) under S. 178 — Held, regulations issued under S. 178 are in the nature of subordinate legislation — CERC while issuing regulations under S. 178 performs legislative function — Validity of regulations cannot therefore be challenged by way of an appeal under S. 111 — Only judicial review of the regulations can be sought by filing writ petition under Art. 226 in High Court — However, Appellate Tribunal can interpret regulations in exercise of its appellate power — Further held, observations made in this case with regard to jurisdiction of tribunal are confined to Appellate Tribunal under Electricity Act, 2003 only — These observations could not be extended to other tribunals like Securities Appellate Tribunal and Telecom Disputes Settlement and Appellate Tribunal (TDSAT) — Courts, Tribunals and Special Courts — Statutory tribunals — Powers of — Powers of judicial review — Existence of, held, depends on the statute creating the tribunal — Constitution of India — Art. 226 — Securities and Exchange Board of India Act, 1992 — S. 15-T — Telecom Regulatory Authority of India Act, 1997, S. 14

D. **Administrative Law — Subordinate/Delegated legislation — Challenge to/Judicial review of — Competent court/tribunal — Held, competency of a court or tribunal has to be determined from context of relevant legislation — Parliament may preclude a tribunal from adjudicating on validity of delegated legislation — Constitution of India, Arts. 226 and 227**

Held:

One needs to examine the statutory context in every case to determine whether a court or a tribunal hearing a case has jurisdiction to rule on a defence based on argument of invalidity of subordinate legislation or administrative act under it. There are situations in which Parliament may legislate to preclude such challenges in the interest of promoting certainty about legitimacy of administrative acts on which public may have to rely. (Para 48)

A regulation under Section 178 is made under authority of delegated legislation and consequently its validity can be tested only in judicial review proceedings before courts and not by way of appeal before the Appellate Tribunal for Electricity under Section 111 of the Act. Section 121 of the 2003 Act does not confer power of judicial review on the Appellate Tribunal. The words "orders", "instructions" or "directions" in Section 121 do not confer power of judicial review on the Appellate Tribunal for Electricity. At this juncture, it is not intended to analyse English authorities as it is found from those authorities that in certain cases in England, the power of judicial review is expressly conferred on the tribunals constituted under an Act. In the 2003 Act, the power of judicial review of the validity of the regulations made under Section 178 is not conferred on the Appellate Tribunal for Electricity. If a dispute arises in adjudication on interpretation of a regulation made under Section 178, an appeal would lie before the Appellate Tribunal under Section 111. However, no appeal to the Appellate Tribunal lies on the validity of a regulation made under Section 178.

[Paras 92(*iii*), 92(*iv*), 92(*v*) and 93]

The findings in this case are with reference to provisions of the Electricity Act, 2003. They shall not be construed as a general principle of law to be applied to the Appellate Tribunals vis-à-vis Regulatory Commissions under other enactments. In particular, this decision may not be taken as expression of any view in regard to the powers of the Securities Appellate Tribunal vis-à-vis Securities and Exchange Board of India under the Securities and Exchange Board of India Act, 1992 or with reference to Telecom Disputes Settlement and Appellate Tribunal vis-à-vis Telecom Regulatory Authority of India under the Telecom Regulatory Authority of India Act, 1997. (Paras 93 and 94)

E. **Electricity Act, 2003 — Salient features — Held, is an exhaustive code on all matters concerning electricity — It provides for unbundling of State Electricity Boards (SEBs) into separate utilities for generation, transmission and distribution — The Act has distanced Government from all forms of regulations relating to licensing, tariff, specifying Grid Code, and one of its chief objectives is facilitating competition through open access, etc. (Para 17)**

F. **Electricity Act, 2003 — Ss. 3 and 61 to 66 — Tariff Policy — Salient features — Balancing of consumer interests and incentive for investment — Promotion of trading in electricity for making markets competitive — Competition Law — Modes and methods of ensuring competition — Markets for public utilities — Role of regulator — Administrative Law — Administrative and Regulatory Bodies — Price fixation**

Held :

Tariff policy tries to balance interests of consumers and need for investment while prescribing rate of return. It also tries to promote trading in electricity for making markets competitive. Under the Tariff Policy, there is a mandate given to Regulatory Commissions to monitor transactions continuously and ensure that electricity traders do not indulge in profiteering in cases of market failure. Tariff Policy directs Regulatory Commissions to fix trading margins in a manner which would reduce costs of electricity to consumers and, at the same time, they should endeavour to meet requirement for investment. (Para 19)

G. Electricity Act, 2003 — Ss. 42(2) and 2(47) — Open access — Held, is the most important feature of the Act — Under open access regime, distribution companies and eligible consumers have freedom to buy electricity from generating companies or trading licensees of their choice and correspondingly, generating companies have freedom to sell (Para 22)

H. Electricity Act, 2003 — Ss. 61, 62 and 64 — Tariff determination and terms and conditions of tariff — Held, are two different aspects — Terms and conditions of tariff are prescribed by Regulatory Commission under S. 61 while actual determination of tariff is done under S. 62 — Regulatory Commission performs dual function of decision-making and specifying terms and conditions of tariff determination — This applies to "trading margin" also (Paras 25, 26 and 50)

I. Electricity Act, 2003 — Ss. 111(1), 62(1) and 64 — Tariff fixation under the 2003 Act, held, is a legislative function in character but it is appealable under S. 111 (Paras 26 and 50)

Narinder Chand Hem Raj v. *Lt. Governor, H.P.*, (1971) 2 SCC 747; *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India*, (1985) 1 SCC 641 : 1985 SCC (Tax) 121, *relied on*

Union of India v. *Cynamide India Ltd.*, (1987) 2 SCC 720, *cited*

J. Electricity Act, 2003 — Ss. 176 to 179, 181 and 182 — Delegated legislation under the Act — Three kinds of delegated legislation — Scheme of, explained — Rule-making power conferred on Central and State Governments under Ss. 176 and 180 respectively — Regulation-making power conferred on Central Electricity Authority under S. 177 — Regulation-making power also conferred on Central and State Electricity Regulatory Commissions under Ss. 178 and 181 — Rules and regulations required to be placed before Parliament and State Legislatures — Parliament has power to modify rules and regulations — However, power of modification not given to State Legislatures — Conditions of delegation — Rules and regulations have to be consistent with the Act and should be made for carrying out provisions of the Act (Para 28)

K. Electricity Act, 2003 — Ss. 79 and 178 — Functions of Central Electricity Regulatory Commission (CERC) — Decision-making and regulation-making function, held, both are assigned to CERC (Para 49)

L. Electricity Act, 2003 — Ss. 79 and 178 — Functions of Central Commission — Mandatory, advisory and legislative functions — Held, S. 79 enumerates mandatory and advisory functions while S. 178 specifies legislative functions — Difference between mandatory and advisory functions also explained — Administrative Law — Administrative and Regulatory Bodies

Held:

Central Electricity Regulatory Commission (CERC) is a decision-making as well as regulation-making authority simultaneously. Section 79 delineates functions of the Central Commission broadly into two categories — mandatory functions and advisory functions. Tariff regulation, licensing (including inter-State trading licensing), adjudication upon disputes involving generating companies or transmission licensees fall under the head "mandatory functions" whereas advising Central Government on formulation of National Electricity Policy and tariff policy would fall under the head "advisory functions". In this sense, the Central Commission is a decision-making authority. Such decision-making under Section 79(1) is not dependent upon making of regulations under Section 178 by the Central Commission. Functions of the Central Commission enumerated in Section 79 are separate and distinct from functions of the Central Commission under Section 178. The former are administrative/adjudicatory functions whereas the latter are legislative. (Para 53)

M. **Electricity Act, 2003 — Ss. 178, 79(1) and 61 — Relative scope of powers under — Functions of Central Electricity Regulatory Commission (CERC) under S. 79(1) or S. 61, held, do not depend upon framing of regulations under S. 178 — However, if regulations have been framed, decision taken under S. 79(1) or S. 61 has to be in conformity with the regulations — Similarly, while exercising power to frame terms and conditions for determination of tariff under S. 178, CERC has to be guided by factors specified in S. 61 — Administrative Law — Administrative and Regulatory Bodies — Powers of — Kinds of power — Need for consonance in exercise of general regulatory power and specific decision-making power**

Held:

The Central Commission is empowered to take measures/steps in discharge of functions enumerated in Section 79(1) like to regulate tariff of generating companies, to regulate inter-State transmission of electricity, to determine tariff for inter-State transmission of electricity, to issue licences, to adjudicate upon disputes, to levy fees, to specify Grid Code, to fix trading margin in inter-State trading of electricity, if considered necessary, etc. These measures which the Central Commission is empowered to take, have got to be in conformity with the regulations under Section 178 wherever such regulations are applicable. Measures under Section 79(1) therefore have got to be in conformity with the regulations made under Section 178. (Para 54)

To regulate is an exercise which is different from making of regulations. However, making of a regulation under Section 178 is not a precondition to the Central Commission taking any steps/measures under Section 79(1). If there is a regulation, then measure under Section 79(1) has to be conformity with such regulation under Section 178. Under Section 79(1)(*g*), the Central Commission is required to levy fees for the purpose of the 2003 Act. An order imposing regulatory fees could be passed even in the absence of a regulation under Section 178. If levy is unreasonable, it could be the subject-matter of challenge before the appellate authority under Section 111 as levy is imposed by an order/decision-making process. Making of a regulation under Section 178 is not a precondition to passing of an order levying a regulatory fee under Section 79(1)(*g*). However, if there is a regulation under Section 178 in that regard then

The Judgment of the Court was delivered by

S.H. KAPADIA, J.— Delay condoned. Leave granted. In this batch of civil appeals, we are basically concerned with the doctrine and jurisprudence of delegated legislation.

Questions of law

2. The crucial points that arise for determination are:

(*i*) Whether the Appellate Tribunal constituted under the Electricity Act, 2003 (the 2003 Act) has jurisdiction under Section 111 to examine the validity of the Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2006 framed in exercise of power conferred under Section 178 of the 2003 Act?

(*ii*) Whether Parliament has conferred power of judicial review on the Appellate Tribunal for Electricity under Section 121 of the 2003 Act?

(*iii*) Whether capping of trading margins could be done by CERC (the Central Commission) by making a regulation in that regard under Section 178 of the 2003 Act?

Facts

3. In this batch of civil appeals, the appellants had challenged the vires of the Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2006 as null and void before the Appellate Tribunal for Electricity and had prayed for quashing of the said Regulations. The Tribunal, however, dismissed the appeals holding that its jurisdiction was restricted by the limits imposed by the parent statute i.e. the Electricity Act, 2003. By the impugned judgment, the Tribunal held that the appropriate course of action for the appellants is to proceed by way of judicial review under the Constitution.

4. In view of the importance of the question, the matter was referred by a three-Judge Bench of this Court to the Constitution Bench. While making reference to the Constitution Bench, the question formulated was "whether the Tribunal has jurisdiction to decide the question as to the validity of the Regulations framed by the Central Commission?" Basically, the matters involve interpretation of Sections 111 and 121 of the 2003 Act.

Relevant provisions of the 2003 Act

5.

"PART I

PRELIMINARY

1. *Short title, extent and commencement.*— * * *

(3) It shall come into force on such date as the Central Government may, by notification, appoint:

Provided that different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.

2. *Definitions.*—In this Act, unless the context otherwise requires,—

* * *

(9) 'Central Commission' means the Central Electricity Regulatory Commission referred to in sub-section (1) of Section 76;

* * *

(23) 'electricity' means electrical energy—

(*a*) generated, transmitted, supplied or traded for any purpose; or

(*b*) used for any purpose except the transmission of a message;

* * *

(26) 'electricity trader' means a person who has been granted a licence to undertake trading in electricity under Section 12;

* * *

(32) 'grid' means the high voltage backbone system of interconnected transmission lines, sub-station and generating plants;

(33) 'Grid Code' means the Grid Code specified by the Central Commission under clause (*h*) of sub-section (1) of Section 79;

(34) 'Grid Standards' means the Grid Standards specified under clause (*d*) of Section 73 by the Authority;

* * *

(39) 'licensee' means a person who has been granted a licence under Section 14;

* * *

(44) 'National Electricity Plan' means the National Electricity Plan notified under sub-section (4) of Section 3;

(45) 'National Load Despatch Centre' means the Centre established under sub-section (1) of Section 26;

(46) 'notification' means notification published in the Official Gazette and the expression 'notify' shall be construed accordingly;

(47) 'open access' means the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the appropriate Commission;

* * *

(52) 'prescribed' means prescribed by rules made by the appropriate Government under this Act;

* * *

(57) 'regulations' means regulations made under this Act;

* * *

(59) 'rules' means rules made under this Act;

* * *

(62) 'specified' means specified by regulations made by the appropriate Commission or the Authority, as the case may be, under this Act;

* * *

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(64) 'State Commission' means the State Electricity Regulatory Commission constituted under sub-section (1) of Section 82 and includes a Joint Commission constituted under sub-section (1) of Section 83;

* * *

(71) 'trading' means purchase of electricity for resale thereof and the expression 'trade' shall be construed accordingly;

* * *

(76) 'wheeling' means the operation whereby the distribution system and associated facilities of a transmission licensee or distribution licensee, as the case may be, are used by another person for the conveyance of electricity on payment of charges to be determined under Section 62;"

6. "PART II

NATIONAL ELECTRICITY POLICY AND PLAN

3. *National Electricity Policy and Plan.*—(1) The Central Government shall, from time to time, prepare the National Electricity Policy and tariff policy, in consultation with the State Governments and the Authority for development of the power system based on optimal utilisation of resources such as coal, natural gas, nuclear substances or materials, hydro and renewable sources of energy.

* * *

(4) The Authority shall prepare a National Electricity Plan in accordance with the National Electricity Policy and notify such plan once in five years:

Provided that the Authority while preparing the National Electricity Plan shall publish the draft National Electricity Plan and invite suggestions and objections thereon from licensees, generating companies and the public within such time as may be prescribed:

Provided further that the Authority shall—

(*a*) notify the plan after obtaining the approval of the Central Government;

(*b*) revise the plan incorporating therein the directions, if any, given by the Central Government while granting approval under clause (*a*)."

7. "PART III

GENERATION OF ELECTRICITY

7. *Generating company and requirement for setting up of generating station.*—Any generating company may establish, operate and maintain a generating station without obtaining a licence under this Act if it complies with the technical standards relating to connectivity with the grid referred to in clause (*b*) of Section 73.

* * *

9. *Captive generation.*—(1) Notwithstanding anything contained in this Act, a person may construct, maintain or operate a captive generating plant and dedicated transmission lines:

Provided that the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company:

Provided further that no licence shall be required under this Act for supply of electricity generated from a captive generating plant to any

(19) 20

licensee in accordance with the provisions of this Act and the rules and regulations made thereunder and to any consumer subject to the regulations made under sub-section (2) of Section 42.

(2) Every person, who has constructed a captive generating plant and maintains and operates such plant, shall have the right to open access for the purposes of carrying electricity from his captive generating plant to the destination of his use:

Provided that such open access shall be subject to availability of adequate transmission facility and such availability of transmission facility shall be determined by the Central Transmission Utility or the State Transmission Utility, as the case may be:

Provided further that any dispute regarding the availability of transmission facility shall be adjudicated upon by the appropriate Commission.

* * *

11. *Directions to generating companies.*—(1) The appropriate Government may specify that a generating company shall, in extraordinary circumstances operate and maintain any generating station in accordance with the directions of that Government.

Explanation.—For the purposes of this section, the expression 'extraordinary circumstances' means circumstances arising out of threat to security of the State, public order or a natural calamity or such other circumstances arising in the public interest.

(2) The appropriate Commission may offset the adverse financial impact of the directions referred to in sub-section (1) on any generating company in such manner as it considers appropriate."

8. "PART IV

LICENSING

12. *Authorised persons to transmit, supply, etc. electricity.*—No person shall—

(*a*) transmit electricity; or

(*b*) distribute electricity; or

(*c*) undertake trading in electricity,

unless he is authorised to do so by a licence issued under Section 14, or is exempt under Section 13.

* * *

14. *Grant of licence.*—The appropriate Commission may, on an application made to it under Section 15, grant a licence to any person—

(*a*) to transmit electricity as a transmission licensee; or

(*b*) to distribute electricity as a distribution licensee; or

(*c*) to undertake trading in electricity as an electricity trader,

in any area as may be specified in the licence:

* * *

15. *Procedure for grant of licence.*—(1) Every application under Section 14 shall be made in such form and in such manner as may be

specified by the appropriate Commission and shall be accompanied by such fee as may be prescribed.

* * *

(6) Where a person makes an application under sub-section (1) of Section 14 to act as a licensee, the appropriate Commission shall, as far as practicable, within ninety days after receipt of such application,—

(*a*) issue a licence subject to the provisions of this Act and the rules and regulations made thereunder; or

(*b*) reject the application for reasons to be recorded in writing if such application does not conform to the provisions of this Act or the rules and regulations made thereunder or the provisions of any other law for the time being in force:

Provided that no application shall be rejected unless the applicant has been given an opportunity of being heard.

* * *

16. *Conditions of licence.*—The appropriate Commission may specify any general or specific conditions which shall apply either to a licensee or class of licensees and such conditions shall be deemed to be conditions of such licence:

Provided that the appropriate Commission shall, within one year from the appointed date, specify any general or specific conditions of licence applicable to the licensees referred to in the first, second, third, fourth and fifth provisos to Section 14 after the expiry of one year from the commencement of this Act."

9. "PART V

TRANSMISSION OF ELECTRICITY

* * *

26. *National Load Despatch Centre.*—(1) The Central Government may establish a Centre at the national level, to be known as the National Load Despatch Centre for optimum scheduling and despatch of electricity among the Regional Load Despatch Centres.

(2) The constitution and functions of the National Load Despatch Centre shall be such as may be prescribed by the Central Government:

Provided that the National Load Despatch Centre shall not engage in the business of trading in electricity.

* * *

34. *Grid Standards.*—Every transmission licensee shall comply with such technical standards, of operation and maintenance of transmission lines, in accordance with the Grid Standards, as may be specified by the Authority.

* * *

37. *Directions by appropriate Government.*—The appropriate Government may issue directions to the Regional Load Despatch Centres or State Load Despatch Centres, as the case may be, to take such measures as may be necessary for maintaining smooth and stable transmission and supply of electricity to any region or State.

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38. *Central Transmission Utility and functions.*—(1) The Central Government may notify any government company as the Central Transmission Utility:

Provided that the Central Transmission Utility shall not engage in the business of generation of electricity or trading in electricity:

Provided further that the Central Government may transfer, and vest any property, interest in property, rights and liabilities connected with, and personnel involved in transmission of electricity of such Central Transmission Utility, to a company or companies to be incorporated under the Companies Act, 1956 (1 of 1956) to function as a transmission licensee, through a transfer scheme to be effected in the manner specified under Part XIII and such company or companies shall be deemed to be transmission licensees under this Act.

(2) The functions of the Central Transmission Utility shall be—

(*a*) to undertake transmission of electricity through inter-State transmission system;

(*b*) to discharge all functions of planning and coordination relating to inter-State transmission system with—

(*i*) State Transmission Utilities;

(*ii*) Central Government;

(*iii*) State Governments;

(*iv*) generating companies;

(*v*) Regional Power Committees;

(*vi*) Authority;

(*vii*) licensees;

(*viii*) any other person notified by the Central Government in this behalf;

(*c*) to ensure development of an efficient, coordinated and economical system of inter-State transmission lines for smooth flow of electricity from generating stations to the load centres;

(*d*) to provide non-discriminatory open access to its transmission system for use by—

(*i*) any licensee or generating company on payment of the transmission charges; or

(*ii*) any consumer as and when such open access is provided by the State Commission under sub-section (2) of Section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the Central Commission:

Provided that such surcharge shall be utilised for the purpose of meeting the requirement of current level cross-subsidy:

Provided further that such surcharge and cross-subsidies shall be progressively reduced in the manner as may be specified by the Central Commission:

Provided also that the manner of payment and utilisation of the surcharge shall be specified by the Central Commission:

Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use."

10. "PART VI

DISTRIBUTION OF ELECTRICITY

42. *Duties of distribution licensees and open access.*— * * *

(2) The State Commission shall introduce open access in such phases and subject to such conditions (including the cross-subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross-subsidies, and other operational constraints:

Provided that such open access shall be allowed on payment of a surcharge in addition to the charges for wheeling as may be determined by the State Commission:

Provided further that such surcharge shall be utilised to meet the requirements of current level of cross-subsidy within the area of supply of the distribution licensee:

Provided also that such surcharge and cross-subsidies shall be progressively reduced in the manner as may be specified by the State Commission:

Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use:

Provided also that the State Government shall, not later than five years from the date of commencement of the Electricity (Amendment) Act, 2003 (57 of 2003), by regulations, provide such open access to all consumers who require a supply of electricity where the maximum power to be made available at any time exceeds one megawatt.

* * *

52. *Provisions with respect to electricity trader.*—(1) Without prejudice to the provisions contained in clause (*c*) of Section 12, the appropriate Commission may, specify the technical requirement, capital adequacy requirement and creditworthiness for being an electricity trader.

(2) Every electricity trader shall discharge such duties, in relation to supply and trading in electricity, as may be specified by the appropriate Commission."

11. "PART VII

TARIFF

61. *Tariff regulations.*—The appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:—

(*a*) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;

(*b*) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;

(*c*) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;

(*d*) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;

(*e*) the principles rewarding efficiency in performance;

(*f*) multiyear tariff principles;

(*g*) that the tariff progressively reflects the cost of supply of electricity and also reduces cross-subsidies in the manner specified by the appropriate Commission;

(*h*) the promotion of cogeneration and generation of electricity from renewable sources of energy;

(*i*) the National Electricity Policy and tariff policy:

Provided that the terms and conditions for determination of tariff under the Electricity (Supply) Act, 1948 (54 of 1948), the Electricity Regulatory Commissions Act, 1998 (14 of 1998), and the enactments specified in the Schedule as they stood immediately before the appointed date, shall continue to apply for a period of one year or until the terms and conditions for tariff are specified under this section, whichever is earlier.

62. *Determination of tariff.*—(1) The appropriate Commission shall determine the tariff in accordance with the provisions of this Act for—

(*a*) supply of electricity by a generating company to a distribution licensee:

Provided that the appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;

(*b*) transmission of electricity;

(*c*) wheeling of electricity;

(*d*) retail sale of electricity:

Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the appropriate Commission may, for promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity.

(2) The appropriate Commission may require a licensee or a generating company to furnish separate details, as may be specified in respect of generation, transmission and distribution for determination of tariff.

(3) The appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but

may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required.

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

(5) The Commission may require a licensee or a generating company to comply with such procedure as may be specified for calculating the expected revenues from the tariff and charges which he or it is permitted to recover.

(6) If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee.

63. *Determination of tariff by bidding process.*—Notwithstanding anything contained in Section 62, the appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government.

64. *Procedure for tariff order.*—(1) An application for determination of tariff under Section 62 shall be made by a generating company or licensee in such manner and accompanied by such fee, as may be determined by regulations.

(2) Every applicant shall publish the application, in such abridged form and manner, as may be specified by the appropriate Commission.

(3) The appropriate Commission shall, within one hundred and twenty days from receipt of an application under sub-section (1) and after considering all suggestions and objections received from the public,—

(*a*) issue a tariff order accepting the application with such modifications or such conditions as may be specified in that order;

(*b*) reject the application for reasons to be recorded in writing if such application is not in accordance with the provisions of this Act and the rules and regulations made thereunder or the provisions of any other law for the time being in force:

Provided that an applicant shall be given a reasonable opportunity of being heard before rejecting his application.

(4) The appropriate Commission shall, within seven days of making the order, send a copy of the order to the appropriate Government, the Authority, and the licensees concerned and to the person concerned.

(5) Notwithstanding anything contained in Part X, the tariff for any inter-State supply, transmission or wheeling of electricity, as the case may be, involving the territories of two States may, upon application made to it by the parties intending to undertake such supply, transmission or wheeling, be determined under this section by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefor.

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(6) A tariff order shall, unless amended or revoked, continue to be in force for such period as may be specified in the tariff order."

12. "PART IX

CENTRAL ELECTRICITY AUTHORITY

* * *

73. *Functions and duties of Authority.*—The Authority shall perform such functions and duties as the Central Government may prescribe or direct, and in particular to—

(*a*) advise the Central Government on the matters relating to the national electricity policy, formulate short term and perspective plans for development of the electricity system and coordinate the activities of the planning agencies for the optimal utilisation of resources to subserve the interests of the national economy and to provide reliable and affordable electricity for all consumers;

(*b*) specify the technical standards for construction of electrical plants, electric lines and connectivity to the grid;

(*c*) specify the safety requirements for construction, operation and maintenance of electrical plants and electric lines;

(*d*) specify the Grid Standards for operation and maintenance of transmission lines;

(*e*) specify the conditions for installation of meters for transmission and supply of electricity;

(*f*) promote and assist in the timely completion of schemes and projects for improving and augmenting the electricity system;

(*g*) promote measures for advancing the skill of persons engaged in the electricity industry;

(*h*) advise the Central Government on any matter on which its advice is sought or make recommendation to that Government on any matter if, in the opinion of the Authority, the recommendation would help in improving the generation, transmission, trading, distribution and utilisation of electricity;

(*i*) collect and record the data concerning the generation, transmission, trading, distribution and utilisation of electricity and carry out studies relating to cost, efficiency, competitiveness and such like matters;

(*j*) make public from time to time the information secured under this Act, and provide for the publication of reports and investigations;

(*k*) promote research in matters affecting the generation, transmission, distribution and trading of electricity;

(*l*) carry out, or cause to be carried out, any investigation for the purposes of generating or transmitting or distributing electricity;

(*m*) advise any State Government, licensees or the generating companies on such matters which shall enable them to operate and maintain the electricity system under their ownership or control in an improved manner and where necessary, in coordination with any other

Government, licensee or the generating company owning or having the control of another electricity system;

(*n*) advise the appropriate Government and the appropriate Commission on all technical matters relating to generation, transmission and distribution of electricity; and

(*o*) discharge such other functions as may be provided under this Act.

74. *Power to require statistics and returns.*—It shall be the duty of every licensee, generating company or person generating electricity for its or his own use to furnish to the Authority such statistics, returns or other information relating to generation, transmission, distribution, trading and use of electricity as it may require and at such times and in such form and manner as may be specified by the Authority.

75. *Directions by Central Government to Authority.*—(1) In the discharge of its functions, the Authority shall be guided by such directions in matters of policy involving public interest as the Central Government may give to it in writing.

(2) If any question arises as to whether any such direction relates to a matter of policy involving public interest, the decision of the Central Government thereon shall be final."

13. "PART X

REGULATORY COMMISSIONS

* * *

76. *Constitution of Central Commission.*—(1) There shall be a Commission to be known as the Central Electricity Regulatory Commission to exercise the powers conferred on, and discharge the functions assigned to it under this Act.

* * *

79. *Functions of Central Commission.*—(1) The Central Commission shall discharge the following functions, namely—

(*a*) to regulate the tariff of generating companies owned or controlled by the Central Government;

(*b*) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (*a*), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;

(*c*) to regulate the inter-State transmission of electricity;

(*d*) to determine tariff for inter-State transmission of electricity;

(*e*) to issue licences to persons to function as transmission licensee and electricity trader with respect to their inter-State operations;

(*f*) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (*a*) to (*d*) above and to refer any dispute for arbitration;

(*g*) to levy fees for the purposes of this Act;

(*h*) to specify Grid Code having regard to Grid Standards;

(*i*) to specify and enforce the standards with respect to quality, continuity and reliability of service by licensees;

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(*j*) to fix the trading margin in the inter-State trading of electricity, if considered, necessary;

(*k*) to discharge such other functions as may be assigned under this Act.

(2) The Central Commission shall advise the Central Government on all or any of the following matters, namely—

(*i*) formulation of National Electricity Policy and tariff policy;

(*ii*) promotion of competition, efficiency and economy in activities of the electricity industry;

(*iii*) promotion of investment in electricity industry;

(*iv*) any other matter referred to the Central Commission by that Government.

(3) The Central Commission shall ensure transparency while exercising its powers and discharging its functions.

(4) In discharge of its functions, the Central Commission shall be guided by the National Electricity Policy, National Electricity Plan and tariff policy published under Section 3.

* * *

86. *Functions of State Commission.*—(1) The State Commission shall discharge the following functions, namely—

(*a*) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:

Provided that where open access has been permitted to a category of consumers under Section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;

(*b*) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;

(*c*) facilitate intra-State transmission and wheeling of electricity;

(*d*) issue licences to persons seeking to act as transmission licensees, distribution licensees and electricity traders with respect to their operations within the State;

(*e*) promote cogeneration and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee;

(*f*) adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration;

(*g*) levy fee for the purposes of this Act;

(*h*) specify State Grid Code consistent with the Grid Code specified under clause (*h*) of sub-section (1) of Section 79;

(*i*) specify or enforce standards with respect to quality, continuity and reliability of service by licensees;

(*j*) fix the trading margin in the intra-State trading of electricity, if considered, necessary;

(*k*) discharge such other functions as may be assigned to it under this Act.

(2) The State Commission shall advise the State Government on all or any of the following matters, namely—

(*i*) promotion of competition, efficiency and economy in activities of the electricity industry;

(*ii*) promotion of investment in electricity industry;

(*iii*) reorganisation and restructuring of electricity industry in the State;

(*iv*) matters concerning generation, transmission, distribution and trading of electricity or any other matter referred to the State Commission by that Government.

(3) The State Commission shall ensure transparency while exercising its powers and discharging its functions.

(4) In discharge of its functions, the State Commission shall be guided by the National Electricity Policy, National Electricity Plan and tariff policy published under Section 3."

14. "PART XI

APPELLATE TRIBUNAL FOR ELECTRICITY

* * *

111. *Appeal to Appellate Tribunal.*—(1) Any person aggrieved by an order made by an adjudicating officer under this Act (except under Section 127) or an order made by the appropriate Commission under this Act may prefer an appeal to the Appellate Tribunal for Electricity:

Provided that any person appealing against the order of the adjudicating officer levying any penalty shall, while filing the appeal, deposit the amount of such penalty:

Provided further that where in any particular case, the Appellate Tribunal is of the opinion that the deposit of such penalty would cause undue hardship to such person, it may dispense with such deposit subject to such conditions as it may deem fit to impose so as to safeguard the realisation of penalty.

(2) Every appeal under sub-section (1) shall be filed within a period of forty-five days from the date on which a copy of the order made by the adjudicating officer or the appropriate Commission is received by the aggrieved person and it shall be in such form, verified in such manner and be accompanied by such fee as may be prescribed:

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.

(3) On receipt of an appeal under sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard,

pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

(4) The Appellate Tribunal shall send a copy of every order made by it to the parties to the appeal and to the adjudicating officer concerned or the appropriate Commission, as the case may be.

(5) The appeal filed before the Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within one hundred and eighty days from the date of receipt of the appeal:

Provided that where any appeal could not be disposed of within the said period of one hundred and eighty days, the Appellate Tribunal shall record its reasons in writing for not disposing of the appeal within the said period.

(6) The Appellate Tribunal may, for the purpose of examining the legality, propriety or correctness of any order made by the adjudicating officer or the appropriate Commission under this Act, as the case may be, in relation to any proceeding, on its own motion or otherwise, call for the records of such proceedings and make such order in the case as it thinks fit."

15. "PART XVIII

MISCELLANEOUS

* * *

177. *Powers of Authority to make regulations.*—(1) The Authority may, by notification, make regulations consistent with this Act and the rules generally to carry out the provisions of this Act.

(2) In particular and without prejudice to the generality of the power conferred in sub-section (1), such regulations may provide for all or any of the following matters, namely—

(*a*) the Grid Standards under Section 34;

(*b*) suitable measures relating to safety and electric supply under Section 53;

(*c*) the installation and operation of meters under Section 55;

(*d*) the rules of procedure for transaction of business under sub-section (9) of Section 70;

(*e*) the technical standards for construction of electrical plants and electric lines and connectivity to the grid under clause (*b*) of Section 73;

(*f*) the form and manner in which and the time at which the State Government and licensees shall furnish statistics, returns or other information under Section 74;

(*g*) any other matter which is to be, or may be, specified.

(3) All regulations made by the Authority under this Act shall be subject to the conditions of previous publication.

178. *Powers of Central Commission to make regulations.*—(1) The Central Commission may, by notification make regulations consistent with this Act and the rules generally to carry out the provisions of this Act.

(2) In particular and without prejudice to the generality of the power contained in sub-section (1), such regulations may provide for all or any of the following matters, namely—

(*a*) period to be specified under the first proviso to Section 14;

(*b*) the form and the manner of the application under sub-section (1) of Section 15;

(*c*) the manner and particulars of notice under sub-section (2) of Section 15;

(*d*) the conditions of licence under Section 16;

(*e*) the manner and particulars of notice under clause (*a*) of sub-section (2) of Section 18;

(*f*) publication of alterations or amendments to be made in the licence under clause (*c*) of sub-section (2) of Section 18;

(*g*) Grid Code under sub-section (2) of Section 28;

(*h*) levy and collection of fees and charge from generating companies or transmission utilities or licensees under sub-section (4) of Section 28;

(*i*) rates, charges and terms and conditions in respect of intervening transmission facilities under proviso to Section 36;

(*j*) payment of the transmission charges and a surcharge under sub-clause (*ii*) of clause (*d*) of sub-section (2) of Section 38;

(*k*) reduction of surcharge and cross-subsidies under second proviso to sub-clause (*ii*) of clause (*d*) of sub-section (2) of Section 38;

(*l*) payment of transmission charges and a surcharge under sub-clause (*ii*) of clause (*c*) of Section 40;

(*m*) reduction of surcharge and cross-subsidies under the second proviso to sub-clause (*ii*) of clause (*c*) of Section 40;

(*n*) proportion of revenues from other business to be utilised for reducing the transmission and wheeling charges under proviso to Section 41;

(*o*) duties of electricity trader under sub-section (2) of Section 52;

(*p*) standards of performance of a licensee or class of licensees under sub-section (1) of Section 57;

(*q*) the period within which information to be furnished by the licensee under sub-section (1) of Section 59;

(*r*) the manner for reduction of cross-subsidies under clause (*g*) of Section 61;

(*s*) the terms and conditions for the determination of tariff under Section 61;

(*t*) details to be furnished by licensee or generating company under sub-section (2) of Section 62;

(*u*) the procedures for calculating the expected revenue from tariff and charges under sub-section (5) of Section 62;

(*v*) the manner of making an application before the Central Commission and the fee payable therefor under sub-section (1) of Section 64;

(*w*) the manner of publication of application under sub-section (2) of Section 64;

(*x*) issue of tariff order with modifications or conditions under sub-section (3) of Section 64;

(*y*) the manner by which development of market in power including trading specified under Section 66;

(*z*) the powers and duties of the Secretary of the Central Commission under sub-section (1) of Section 91;

(*za*) the terms and conditions of service of the Secretary, officers and other employees of Central Commission under sub-section (3) of Section 91;

(*zb*) the rules of procedure for transaction of business under sub-section (1) of Section 92;

(*zc*) minimum information to be maintained by a licensee or the generating company and the manner of such information to be maintained under sub-section (8) of Section 128;

(*zd*) the manner of service and publication of notice under Section 130;

(*ze*) any other matter which is to be, or may be specified by regulations.

(3) All regulations made by the Central Commission under this Act shall be subject to the conditions of previous publication.

179. *Rules and regulations to be laid before Parliament.*—Every rule made by the Central Government, every regulation made by the Authority, and every regulation made by the Central Commission shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or regulation or agree that the rule or regulation should not be made, the rule or regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation.

* * *

181. *Powers of State Commissions to make regulations.*—(1) The State Commissions may, by notification, make regulations consistent with this Act and the rules generally to carry out the provisions of this Act.

(2) In particular and without prejudice to the generality of the power contained in sub-section (1), such regulations may provide for all or any of the following matters, namely—

(*a*) period to be specified under the first proviso to Section 14;

(*b*) the form and the manner of application under sub-section (1) of Section 15;

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Provided that no order shall be made under this section after the expiry of two years from the date of commencement of this Act.

(2) Every order made under this section shall be laid, as soon as may be after it is made, before each House of Parliament."

16. We also quote hereinbelow the impugned Notification dated 23-1-2006 fixing trading margin for inter-State trading of electricity, which reads as follows:

"CENTRAL ELECTRICITY REGULATORY COMMISSION

Notification

New Delhi, 23-1-2006

No. L-7/25(5)/2003-CERC.—Whereas the Central Electricity Regulatory Commission is of the opinion that it is necessary to fix trading margin for inter-State trading of electricity.

Now, therefore, in exercise of powers conferred under Section 178 of the Electricity Act, 2003 (36 of 2003), and all other powers enabling it in this behalf, and after previous publication, the Central Electricity Regulatory Commission hereby makes the following Regulations, namely—

1. *Short title and commencement.*—(1) These Regulations may be called the Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2006.

(2) These Regulations shall come into force from the date of their publication in the Official Gazette.

2. *Trading Margin.*—The licensee shall not charge the trading margin exceeding four (4.0) paise/kWh on the electricity traded, including all charges, except the charges for scheduled energy, open access and transmission losses.

Explanation.—The charges for the open access include the transmission charge, operating charge and the application fee.

A.K. Sachan, Secy."

Scope and analysis of the 2003 Act

17. The 2003 Act is enacted as an exhaustive code on all matters concerning electricity. It provides for "unbundling" of SEBs into separate utilities for generation, transmission and distribution. It repeals the Electricity Act, 1910; the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998. The 2003 Act, in furtherance of the policy envisaged under the Electricity Regulatory Commissions Act, 1998 (the 1998 Act), mandated the establishment of an independent and transparent regulatory mechanism, and has entrusted wide-ranging responsibilities with the Regulatory Commissions. While the 1998 Act provided for independent regulation in the area of tariff determination; the 2003 Act has distanced the Government from all forms of regulation, namely, licensing, tariff regulation, specifying Grid Code, facilitating competition through open access, etc.

18. Section 3 of the 2003 Act requires the Central Government, in consultation with the State Governments and the Authority, to prepare the National Electricity Policy as well as tariff policy for development of the

power system based on optimum utilisation of resources. The Central and the State Governments are also vested with rule-making powers under Sections 176 and 180 respectively, while the "Authority" has been defined under Section 2(6) as the regulation-making power under Section 177. On the other hand, the Regulatory Commissions are vested with the power to frame policy, in the form of regulations, under various provisions of the 2003 Act. However, the Regulatory Commissions are empowered to frame policy, in the form of regulations, as guided by the general policy framed by the Central Government. They are to be guided by the National Electricity Policy, the tariff policy as well as the National Electricity Plan in terms of Sections 79(4) and 86(4) of the 2003 Act (see also Section 66).

19. In this connection, it may also be noted that the Central Government has also, in exercise of its powers under Section 3 of the 2003 Act, notified the tariff policy with effect from 6-1-2006. One of the primary objectives of the tariff policy is to ensure availability of electricity to consumers at reasonable and competitive rates. The tariff policy tries to balance the interests of consumers and the need for investments while prescribing the rate of return. It also tries to promote trading in electricity for making the markets competitive. Under the tariff policy, there is a mandate given to the Regulatory Commissions, namely, to monitor the trading transactions continuously and ensure that the electricity traders do not indulge in profiteering in cases of market failure. The tariff policy directs the Regulatory Commissions to fix the trading margin in a manner which would reduce the costs of electricity to the consumers and, at the same time, they should endeavour to meet the requirement for investments.

20. An "electricity trader" is defined under Section 2(26) to mean a person who has been given a licence to undertake trading in electricity under Section 12. Section 2(32) defines a "grid" as the high voltage backbone system of interconnected transmission lines, sub-stations and generating plants. Under Section 2(33), a "Grid Code" is defined as a code specified by the Central Commission under Section 79(1)(*h*), while under Section 2(34), "Grid Standards" are those specified by the Central Authority under Section 73(*d*). Under Section 2(47), "open access" is defined to mean the non-discriminatory provision for access to the transmission lines or distribution system or associated facilities given to any licensee or consumer or a person engaged in generation of electricity in accordance with the regulations specified. Section 2(62) defines the term "specified" to mean specified by the regulations made by the appropriate Commission or the Authority under the 2003 Act. Under Section 2(71), the word "trading" is defined to mean purchase of electricity for resale thereof.

21. Under the 2003 Act, power generation has been delicensed and captive generation is freely permitted, subject to approval as indicated in Sections 7, 8 and 9 of the Act. However, under Section 12, a licence has been provided as a precondition for engaging in transmission or distribution or trading of electricity. Therefore, licences are granted by the appropriate

Commission under Section 14 of the Act on applications made under Section 15. Section 16 provides power to the appropriate Commission to specify any general or specific conditions which shall apply either to a licensee or to a class of licensees. Under Section 18, the appropriate Commission is also vested with the power to amend the licence as well as to revoke it in certain stipulated circumstances, if public interest so requires (see Section 19). Under Section 23, the appropriate Commission has the power to issue directions to licensees to regulate supply, distribution, consumption or use of electricity, if the appropriate Commission is of the opinion that it is necessary or expedient so to do for maintaining the efficient supply and for securing the equitable distribution of electricity and promoting competition.

22. One of the most important features of the 2003 Act is the introduction of open access under Section 42 of the Act. Under the open access regime, distribution companies and eligible consumers have the freedom to buy electricity directly from generating companies or trading licensees of their choice and correspondingly the generating companies have the freedom to sell.

23. Section 52 of the 2003 Act deals with trading of electricity activity. Under Section 52(1), the appropriate Commission may specify the technical requirement, capital adequacy requirement and creditworthiness for being an electricity trader. Under Section 52(2), every trader is required to discharge its duties, in relation to supply and trading in electricity, as may be specified by the appropriate Commission.

24. The standards of performance of licensee(s) may be specified by the appropriate Commission under Section 57 of the Act.

25. The 2003 Act contains separate provisions for the performance of dual functions by the Commission. Section 61 is the enabling provision for framing of regulations by the Central Commission; the determination of terms and conditions of tariff has been left to the domain of the Regulatory Commissions under Section 61 of the Act whereas actual tariff determination by the Regulatory Commissions is covered by Section 62 of the Act. This aspect is very important for deciding the present case. Specifying the terms and conditions for determination of tariff is an exercise which is different and distinct from actual tariff determination in accordance with the provisions of the Act for supply of electricity by a generating company to a distribution licensee or for transmission of electricity or for wheeling of electricity or for retail sale of electricity.

26. The term "tariff" is not defined in the 2003 Act. The term "tariff" includes within its ambit not only the fixation of rates but also the rules and regulations relating to it. If one reads Section 61 with Section 62 of the 2003 Act, it becomes clear that the appropriate Commission shall determine the actual tariff in accordance with the provisions of the Act, including the terms and conditions which may be specified by the appropriate Commission under Section 61 of the said Act. Under the 2003 Act, if one reads Section 62 with Section 64, it becomes clear that although tariff fixation like price fixation is

legislative in character, the same under the Act is made appealable vide Section 111. These provisions, namely, Sections 61, 62 and 64 indicate the dual nature of functions performed by the Regulatory Commissions viz. decision-making and specifying terms and conditions for tariff determination.

27. Section 66 confers substantial powers on the appropriate Commission to develop the relevant market in accordance with the principles of competition, fair participation as well as protection of consumers' interests. Under Sections 111(1) and 111(6) respectively, the Tribunal has appellate and revisional powers. In addition, there are powers given to the Tribunal under Section 121 of the 2003 Act to issue orders, instructions or directions, as it may deem fit, to the appropriate Commission for the performance of statutory functions under the 2003 Act.

28. The 2003 Act contemplates three kinds of delegated legislation. Firstly, under Section 176, the Central Government is empowered to make rules to carry out the provisions of the Act. Correspondingly, the State Governments are also given powers under Section 180 to make rules. Secondly, under Section 177, the Central Authority is also empowered to make regulations consistent with the Act and the rules to carry out the provisions of the Act. Thirdly, under Section 178, the Central Commission can make regulations consistent with the Act and the rules to carry out the provisions of the Act. SERCs have a corresponding power under Section 181. The rules and regulations have to be placed before Parliament and the State Legislatures, as the case may be, under Sections 179 and 182. Parliament has the power to modify the rules/regulations. This power is not conferred upon the State Legislatures. A holistic reading of the 2003 Act leads to the conclusion that regulations can be made as long as two conditions are satisfied, namely, that they are consistent with the Act and that they are made for carrying out the provisions of the Act.

Submissions

On behalf of M/s Tata Power Trading Co. Ltd.

29. On the scheme of the 2003 Act it was submitted by Shri Harish N. Salve, learned Senior Counsel, that, under the said Act the Central Commission and SERCs have to frame regulations as well as pass statutory orders. The Act uses the expression "fixed" in Sections 8, 19, 45 and 79; it uses the expression "determined" in the proviso to Section 9(2), Sections 20, 42, 47, 57, 61 and 67(2) and the word "specified" (i.e. by way of regulations) in Sections 13, 14, 15, 16, 17, 18(2), 28(4), 34, 36, 38, 41, 42, 45, 51, 52, 53, 57, 61 and 67(2) of the 2003 Act. Under the 2003 Act, according to the learned counsel, there are a series of provisions which expressly require the Commission to frame regulations on specific aspects. According to the learned counsel, each of the said three expressions have to be interpreted by the terms and in the context of the scheme of the 2003 Act and not by a priori notions of administrative law. For example, Section 61 posits the framing of regulations by the Commission, which will subject to the provisions of the

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2003 Act, specify the terms and conditions for the determination of tariff. It is possible that such regulations may be licensee-specific or generic. At the same time, Section 62 read with Section 64 refers to determination of tariff in accordance with the provisions of the Act for supply of electricity by gencoms, transmission of electricity, wheeling and trading of electricity. Applying the *Cynamide*[1] principle of administrative law, such tariff order would be characterised as delegated legislation yet under Section 111 of the 2003 Act it is made appealable to the Appellate Tribunal.

30. According to the learned counsel, "price fixation" is ordinarily "legislative" and not "adjudicatory" in character and yet under the 2003 Act tariff fixation is by order and subject to appeal under Section 111. According to the learned counsel, use of different expressions in the Act implies different meanings. For example, in Section 79 the expressions used are "regulate", "determine", "adjudicate", "specify" and "fix". Where the function of the Commission under Sections 79 and 86 requires framing of regulations, the Act has used the expression "specified" as defined. Therefore, according to the learned counsel, the word "fix" in Section 79(1)(*j*) must mean to pass an appropriate order fixing trading margin which is further qualified by the Act saying "if considered necessary". In this connection, learned counsel further submitted that fixing trading margin is same as price fixation and as such margin must be fixed by an order and not by way of regulation. Hence, according to the learned counsel, regulations cannot be framed under Section 79(1)(*j*) and under Section 86(1)(*j*) of the 2003 Act.

31. On the interpretation of Sections 178(1) and 181(1) of the 2003 Act, learned counsel submitted that where rule-making powers are enumerated and there is a general delegation of power to make rules to carry out the provisions of the 2003 Act, the enumeration does not detract from the generality of the power conferred is the principle which has to be read in the context of the scheme of the 2003 Act. In this connection it was submitted that under the Act the power to frame subordinate legislation to carry out the provisions of the Act is contained in Sections 176 and 180 on the Central and State Governments; in Sections 178 and 181 where power to frame regulations is conferred on the Regulatory Commissions and Section 177 where the power to frame regulations is conferred on CEA. Hence, when the Central Government invokes the rule-making power under Section 176(1), it cannot make rules to determine tariff since that can be done only by the appropriate Commission by virtue of Section 61 read with Section 178(2)(*s*).

32. A perusal of the scheme of the 2003 Act suggests that each and every provision of the Act where framing of regulations is contemplated has a counterpart in one of the clauses as set out in Section 178(2). In any event, according to the learned counsel, where the Act requires the discharge of a function by a specific order, then a regulation cannot be framed to achieve that very purpose merely because there is a power to frame regulations.

1 *Union of India* v. *Cynamide India Ltd.*, (1987) 2 SCC 720

Therefore, according to the learned counsel, trading margin can be fixed only by an order under Sections 79(1)(*j*) and 86(1)(*j*) and not by regulations.

33. On the powers of the Appellate Tribunal under Sections 111 and 121 of the 2003 Act, learned counsel urged, that, the said Tribunal was established as an expert second tier regulatory authority to review the actions of the Regulatory Commissions, including regulations framed by first tier regulatory bodies even in the absence of Section 121 of the 2003 Act. In this connection, learned counsel further submitted that the powers envisaged under Section 121 are distinct from the appellate and revisional powers under Section 111(3) and under Section 111(6). A plain reading of Section 121 establishes that the Tribunal has the power to issue orders, instructions and directions to guide the Commission in the due performance of its statutory function; that the said power to issue instructions, orders and directions would include the power to frame or modify the regulations made by the first tier regulatory authority, particularly in cases where the Tribunal is satisfied that the regulation framed is either not consistent with the provisions of the Act or does not result in due performance of the duty or functions entrusted to the Commission under the 2003 Act.

34. In the light of the provisions of Sections 111 and 121 of the 2003 Act, learned counsel urged, that, even in an appeal under Section 111 if the question of validity of delegated legislation arises, the Tribunal can consider the vires and ignore a rule which is ultra vires the rule-making power. The fact that there is no power in the Tribunal to annul the regulation cannot deny the power to the statutory tribunal to ignore ultra vires subordinate legislation. Lastly, there is no need to read down Section 121 on a priori notion of classical administrative law that vires of the rules can only be challenged in the judicial review proceedings before a constitutional court.

On behalf of PTC India Ltd.

35. Shri Vikas Singh, learned Senior Counsel, submitted that fixation of trading margins under normal business conditions is intrinsically contradictory and harmful to power market functioning. In this connection, it was submitted that capping of trading margin does not in any manner whatsoever control the selling price of electricity sold to discoms. Such capping of trading margin results in relegating the electricity traders to mere commission agents. The role of electricity traders is to play a dynamic role of bringing in new products in the market which is beneficial to the consumers as well as gencoms. However, the entire object of having electricity traders stands defeated by impugned capping of trading margins.

36. According to the learned counsel, traders in electricity bring depth to the electricity markets. They make value additions and therefore interventions in trading by regulations should not be contrary to the letter and spirit of the Act (see Section 66). According to the learned counsel, severe regulatory intervention like imposition of margin in a voluntary market should be resorted to only in cases of market failure. According to the learned counsel, on the basis of statistical data, the trading margin is not a return

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guaranteed to a trader and that the actual margin which the trader is getting is lower than the prescribed cap. According to the learned counsel, none of the above facts have been appreciated by the Central Commission in capping the margin as not to exceed 4.0 paise per kWh on the electricity traded.

37. On the question of law, learned counsel submitted that the right to appeal under Section 111 in respect of an adjudicatory/administrative order cannot be defeated by colouring the decision as a regulation. In this connection learned counsel submitted that the rules/regulations framed by the executive under an Act are the law whereas regulations made by the statutory authority itself are not the regulations under which it functions, but the regulation-making itself is its function. In the former case, it is possible to argue that the authority which is the creature of the statute cannot question the vires of the statute, in the latter case, the authority is not the creature of the regulation framed by itself, hence the sanctity given to the former is far greater than the sanctity given to the latter.

38. According to the learned counsel, that, the right to appeal is a substantive right and the same cannot be taken away by a device i.e. by framing a regulation instead of simply passing an order as to denude the appellant of its right of appeal. In this connection, learned counsel urged that the Appellate Tribunal can hear the appeal against the regulation being the function of the Commission and can examine the sanctity of the regulation if the same is framed beyond the power of the Commission to do so. In other words, if the Commission is entitled to adjudicate upon a matter, it does not have the authority under the Act to give its decision the colour of a regulation so as to denude the Tribunal of its authority under Section 111. According to the learned counsel, since the impugned Regulations relegate the trading licensee to a commission agent the same are ultra vires Section 66 of the 2003 Act.

39. According to the learned counsel, under Section 79 the Commission is authorised only to fix the trading margin and since the impugned Regulations are purportedly made under Section 79, the said Regulations are beyond the powers of the Central Commission and are, thus, ultra vires the 2003 Act.

40. Lastly, learned counsel for PTC adopted all the arguments of Shri Harish N. Salve, learned counsel for M/s Tata Power Trading Co. Ltd.

41. Shri Narasimha, learned counsel and others broadly adopted the above arguments advanced on behalf of M/s Tata Power Trading Co. and PTC India Ltd., hence, the same need not be reproduced.

On behalf of CERC

42. After taking us through the provisions of the 2003 Act, the National and the tariff policies, learned Solicitor General of India submitted that the 2003 Act contemplates three kinds of delegated legislation:

(*i*) Under Section 176, the Central Government is empowered to make rules for carrying out the provisions of the Act. A corresponding power is given to the State Governments under Section 180.

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(*ii*) Under Section 177, CEA is empowered to make regulations consistent with the Act and the rules made under Section 176.

(*iii*) Under Section 178, the Central Commission may make regulations consistent with the Act and the rules generally to carry out the provisions of the Act. The corresponding power under Section 181 is conferred on SERCs.

The rules and the regulations have to be placed before Parliament and the State Legislatures, as the case may be, under Sections 179 and 182 respectively. According to the learned counsel, even if the rules have been laid before Parliament and even if there is a resolution of Parliament approving them, the validity of the rules has to be declared by the Court as ultra vires the Act and invalid.

43. According to the learned counsel, there is no power conferred upon the Appellate Tribunal under Section 111 to declare the regulations framed by the Central Commission as null and void. According to the learned counsel, tribunals are creatures of the statute. They have no inherent power that exists in civil courts. Any power exercisable by the tribunal has to be located in the statute under which it is formed. There is no authority for the proposition that under the Indian law, a statutory tribunal has the jurisdiction to deal with the validity of subordinate legislation and pronounce it as ultra vires. Of course, according to the learned counsel, it is open to Parliament to expressly give to a tribunal the power to consider the validity of subordinate legislation. However, such conferment has to be express and unambiguous, which is not there in this case.

44. According to the learned counsel, the mere fact that Section 79(1)(*j*) uses the word "fix" and the mere fact that the other provisions use the word "specify" does not lead to the conclusion that the Central Commission could not have issued the Trading Margin Regulations, 2006 as contended by the appellants herein. The learned counsel further urged that the general power to frame regulations is not limited or controlled by enumeration of topics on which regulations may be framed. In this connection, it was submitted that a holistic reading of the Act leads to the conclusion that regulations can be made as long as they are consistent with the Act and that they are made for carrying out the provisions of the Act. The Act recognises the need to regulate trading in electricity [see Sections 52(2), 53(1)(*a*), 57, 60, 178(2)(*d*), (*o*), (*p*) and (*y*)].

45. Learned counsel further submitted that for the reasons mentioned herein there is no case made out by the appellants to lift the veil over a fake regulation. The Central Commission had to initiate proceedings against 14 traders for non-compliance with licence conditions. Some traders were operating on high margins. Trading margin being the component of the final price paid by the consumers required regulations to protect the consumers. Competition among traders to capture the surplus power for sale resulted in rising prices. Even with a trading margin of 4 paise/unit, traders can make handsome profits. For the above reasons, the Commission thought it fit to

make the impugned Regulations. It was further contended that the doctrine of colourable exercise of power was not applicable to decide the validity of the subordinate legislation.

46. Learned counsel lastly submitted that the power of judicial review cannot be located in Section 121 of the Act. The power under Section 121 is different from the power under Section 111. According to the learned counsel, Section 121 empowers the Tribunal to act only when the Commission is guilty of inaction in carrying out its statutory functions. The power to annul a legislative act cannot be read into Section 121. Even the High Court cannot direct the legislature to enact a law and, therefore, such power cannot be read into Section 121. In order to entertain a challenge, directly or collaterally, the tribunal must have jurisdiction which must be conferred by the statute and since in the instant case the Tribunal is not vested with such a jurisdiction, it is not open to the appellants to place reliance on some of the English judgments. Thus, the Appellate Tribunal is not qualified to go behind a regulation as framed by CERC and to examine whether it acted within the bounds of the statute while framing the regulation.

Determinations

47. On the above submissions, one of the questions which arises for determination is—whether trading margin fixation (including capping) under the 2003 Act can only be done by an order under Section 79(1)(*j*) and not by regulations under Section 178? According to the appellant(s) it can only be done by an order under Section 79(1)(*j*), particularly when under Section 178(2) power to make regulations is co-relatable to the functions ascribed to each authority under the said 2003 Act.

48. In every case one needs to examine the statutory context to determine whether a court or a tribunal hearing a case has jurisdiction to rule on a defence based upon arguments of invalidity of subordinate legislation or administrative act under it. There are situations in which Parliament may legislate to preclude such challenges in the interest of promoting certainty about the legitimacy of administrative acts on which the public may have to rely.

49. On the above analysis of various sections of the 2003 Act, we find that the decision-making and regulation-making functions are both assigned to CERC. Law comes into existence not only through legislation but also by regulation and litigation. Laws from all three sources are binding. According to Professor Wade, "between legislative and administrative functions we have regulatory functions". A statutory instrument, such as a rule or regulation, emanates from the exercise of delegated legislative power which is a part of administrative process resembling enactment of law by the legislature whereas a quasi-judicial order comes from adjudication which is also a part of administrative process resembling a judicial decision by a court of law. (See *Shri Sitaram Sugar Co. Ltd.* v. *Union of India*[2].)

2 (1990) 3 SCC 223

50. Applying the above test, price fixation exercise is really legislative in character, unless by the terms of a particular statute it is made quasi-judicial as in the case of tariff fixation under Section 62 made appealable under Section 111 of the 2003 Act, though Section 61 is an enabling provision for the framing of regulations by CERC. If one takes "tariff" as a subject-matter, one finds that under Part VII of the 2003 Act actual determination/fixation of tariff is done by the appropriate Commission under Section 62 whereas Section 61 is the enabling provision for framing of regulations containing generic propositions in accordance with which the appropriate Commission has to fix the tariff. This basic scheme equally applies to the subject-matter "trading margin" in a different statutory context as will be demonstrated by discussion hereinbelow.

51. In *Narinder Chand Hem Raj* v. *Lt. Governor, H.P.*[3] this Court has held that power to tax is a legislative power which can be exercised by the legislature directly or subject to certain conditions. The legislature can delegate that power to some other authority. But the exercise of that power, whether by the legislature or by the delegate will be an exercise of legislative power. The fact that the power can be delegated will not make it an administrative power or adjudicatory power. In the said judgment, it has been further held that no court can direct a subordinate legislative body or the legislature to enact a law or to modify the existing law and if courts cannot so direct, much less the tribunal, unless power to annul or modify is expressly given to it.

52. In *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India*[4] this Court held that subordinate legislation is outside the purview of administrative action i.e. on the grounds of violation of rules of natural justice or that it has not taken into account relevant circumstances or that it is not reasonable. However, a distinction must be made between delegation of legislative function and investment of discretion to exercise a particular discretionary power by a statute. In the latter case, the impugned exercise of discretion may be considered on all grounds on which administrative action may be questioned such as non-application of mind, taking irrelevant matters into consideration, etc. The subordinate legislation is, however, beyond the reach of administrative law. Thus, delegated legislation—otherwise known as secondary, subordinate or administrative legislation—is enacted by the administrative branch of the Government, usually under the powers conferred upon it by the primary legislation. Delegated legislation takes a number of forms and a number of terms—rules, regulations, bye-laws, etc.; however, instead of the said labels what is of significance is the provisions in the primary legislation which, in the first place, confer the power to enact administrative legislation. Such provisions are also called as "enabling provisions". They demarcate the extent of the administrator's legislative

3 (1971) 2 SCC 747
4 (1985) 1 SCC 641 : 1985 SCC (Tax) 121

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power, the decision-making power and the policy-making power. However, any legislation enacted outside the terms of the enabling provision will be vulnerable to judicial review and ultra vires.

53. Applying the abovementioned tests to the scheme of the 2003 Act, we find that under the Act, the Central Commission is a decision-making as well as regulation-making authority, simultaneously. Section 79 delineates the functions of the Central Commission broadly into two categories — mandatory functions and advisory functions. Tariff regulation, licensing (including inter-State trading licensing), adjudication upon disputes involving generating companies or transmission licensees fall under the head "mandatory functions" whereas advising the Central Government on formulation of National Electricity Policy and tariff policy would fall under the head "advisory functions". In this sense, the Central Commission is the decision-making authority. Such decision-making under Section 79(1) is not dependent upon making of regulations under Section 178 by the Central Commission. Therefore, functions of the Central Commission enumerated in Section 79 are separate and distinct from functions of the Central Commission under Section 178. The former are administrative/adjudicatory functions whereas the latter are legislative.

54. As stated above, the 2003 Act has been enacted in furtherance of the policy envisaged under the Electricity Regulatory Commissions Act, 1998 as it mandates establishment of an independent and transparent Regulatory Commission entrusted with wide-ranging responsibilities and objectives inter alia including protection of the consumers of electricity. Accordingly, the Central Commission is set up under Section 76(1) to exercise the powers conferred on, and in discharge of the functions assigned to, it under the Act. On reading Sections 76(1) and 79(1) one finds that the Central Commission is empowered to take measures/steps in discharge of the functions enumerated in Section 79(1) like to regulate the tariff of generating companies, to regulate the inter-State transmission of electricity, to determine tariff for inter-State transmission of electricity, to issue licences, to adjudicate upon disputes, to levy fees, to specify the Grid Code, to fix the trading margin in inter-State trading of electricity, if considered necessary, etc. These measures, which the Central Commission is empowered to take, have got to be in conformity with the regulations under Section 178, wherever such regulations are applicable. Measures under Section 79(1), therefore, have got to be in conformity with the regulations under Section 178.

55. To regulate is an exercise which is different from making of the regulations. However, making of a regulation under Section 178 is not a precondition to the Central Commission taking any steps/measures under Section 79(1). As stated, if there is a regulation, then the measure under Section 79(1) has to be in conformity with such regulation under Section 178. This principle flows from various judgments of this Court which we have discussed hereinafter. For example, under Section 79(1)(*g*) the Central Commission is required to levy fees for the purpose of the 2003 Act. An order imposing regulatory fees could be passed even in the absence of a

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regulation under Section 178. If the levy is unreasonable, it could be the subject-matter of challenge before the appellate authority under Section 111 as the levy is imposed by an order/decision-making process. Making of a regulation under Section 178 is not a precondition to passing of an order levying a regulatory fee under Section 79(1)(*g*). However, if there is a regulation under Section 178 in that regard then the order levying fees under Section 79(1)(*g*) has to be in consonance with such regulation.

56. Similarly, while exercising the power to frame the terms and conditions for determination of tariff under Section 178, the Commission has to be guided by the factors specified in Section 61. It is open to the Central Commission to specify terms and conditions for determination of tariff even in the absence of the regulations under Section 178. However, if a regulation is made under Section 178, then, in that event, framing of terms and conditions for determination of tariff under Section 61 has to be in consonance with the regulations under Section 178.

57. One must keep in mind the dichotomy between the power to make a regulation under Section 178 on the one hand and the various enumerated areas in Section 79(1) in which the Central Commission is mandated to take such measures as it deems fit to fulfil the objects of the 2003 Act. Applying this test to the present controversy, it becomes clear that one such area enumerated in Section 79(1) refers to fixation of trading margin. Making of a regulation in that regard is not a precondition to the Central Commission exercising its powers to fix a trading margin under Section 79(1)(*j*), however, if the Central Commission in an appropriate case, as is the case herein, makes a regulation fixing a cap on the trading margin under Section 178 then whatever measures the Central Commission takes under Section 79(1)(*j*) have to be in conformity with Section 178.

58. One must understand the reason why a regulation has been made in the matter of capping the trading margin under Section 178 of the Act. Instead of fixing a trading margin (including capping) on a case-to-case basis, the Central Commission thought it fit to make a regulation which has a general application to the entire trading activity which has been recognised, for the first time, under the 2003 Act. Further, it is important to bear in mind that making of a regulation under Section 178 became necessary because a regulation made under Section 178 has the effect of interfering and overriding the existing contractual relationship between the regulated entities. A regulation under Section 178 is in the nature of a subordinate legislation. Such subordinate legislation can even override the existing contracts including power purchase agreements which have got to be aligned with the regulations under Section 178 and which could not have been done across the board by an order of the Central Commission under Section 79(1)(*j*).

59. To elucidate, we may refer to the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004. The said Regulations have been made under Section 178 of the 2003 Act. Regulation

15 deals with various components of tariff. It includes advance against depreciation ("AAD", for short). Regulations 21(1)(*ii*) and 38(*ii*) deal with computation of depreciation including AAD.

60. Recently, this concept of AAD came for consideration before this Court in *National Hydroelectric Power Corpn. Ltd.* v. *CIT*[5]. AAD was suggested by the Central Commission as part of the tariff in order to overcome the cash flow problems faced by Central power sector utilities for meeting loan repayment obligations. The important point to be noted is that although under Section 61 of the 2003 Act the Central Commission is empowered to specify AAD as a condition for determination of the tariff, the Central Commission in its wisdom thought it fit to bring in the concept of AAD by enacting a regulation under Section 178 giving the benefit of AAD across the board to all Central power sector utilities. In other words, instead of giving the benefit of AAD on a case-to-case basis under Section 61, the Central Commission decided to make a specific regulation giving benefit of AAD across the board to all Central power sector utilities.

61. There is one more reason why a regulation under Section 178 with regard to AAD had to be made by CERC. Under the 2003 Act, the Central Commission is empowered under Section 61 to include depreciation as an item in the computation of tariff. However, if the rate of depreciation envisaged by the Central Commission under the 2003 Act is different from the rate(s) of depreciation prescribed under Schedule XIV of the Companies Act, 1956 then such differential rate can be prescribed under the 2003 Act only by way of regulation under Section 178 of the 2003 Act which is in the nature of subordinate legislation.

62. It is important to note that the Companies Act, 1956 constitutes a law applicable to companies. It prescribes the format of balance sheet in Schedule VI. It prescribes the requirements as to profit and loss account vide Part II of Schedule VI. It also prescribes the rates of depreciation vide Schedule XIV. If a different rate is required to be prescribed under the 2003 Act, then it could be done only by way of subordinate legislation, which is contemplated by the Regulations framed under Section 178 of the 2003 Act. Similarly, profits earned by a trading company are not only required to be presented in the manner indicated under the Companies Act but it is also required to be computed under the Income Tax Act, 1961. If such profits/income of a trading company is required to be capped under the 2003 Act, it can only be done by a subordinate legislation made under Section 178 of the 2003 Act. Accrual of income/profit under the Companies Act, 1956 or the Income Tax Act, 1961 can only be curbed by a regulation made under the authority of subordinate legislation or primary legislation. This is exactly what is sought to be achieved by the impugned Regulations.

63. One more citation may be noticed. Reserve Bank of India is a regulator under the RBI Act, 1934 (the 1934 Act). Under the 1934 Act, RBI is empowered not only to regulate banks but also financial institutions,

5 (2010) 3 SCC 396 : (2010) 1 Scale 5

NBFCs, etc. Chapter III-B of the 1934 Act deals with provisions relating to financial institutions and NBFCs receiving deposits from the public. Under Section 45-JA of the 1934 Act, RBI is given the power to determine policy and issue directions to NBFCs and financial institutions in public interest or in order to regulate the financial system of the country. Section 45-JA, however, is confined to Chapter III-B. However, under Section 58, which falls in Chapter IV, dealing with general provisions, the Board of Directors of RBI are given the power to make regulations consistent with the 1934 Act to provide for all matters for which provision is necessary. The principle of "generality versus enumeration" is also applicable to Section 58 of the RBI Regulations because under Section 58(2) there is a list of topics enumerated on which regulations could be made. In other words, Sections 58(1), (2) of the 1934 Act are similar to Sections 178(1), (2) of the 2003 Act.

64. Recently, before the Division Bench of this Court, the question arose, inter alia, as to the accounting treatment to be given by NBFCs accepting deposits from the public in the context of provision to be made for non-performing assets (NPAs). An order was passed by RBI under Section 45-JA of the 1934 Act stating that although provision for doubtful debts is required to be reduced from the assets side of the balance sheet under the provisions of the Companies Act, 1956, for proper disclosure under the 1934 Act, such a provision should be shown in the balance sheet specifically on the liabilities side. It is interesting to note that the order was passed under Section 45-JA which, as stated above, is part of Chapter III-B of the 1934 Act, which Chapter expressly deals with provisions relating to NBFCs. There was no regulation enacted under Section 58 on the topic, namely, NPAs. The point to be noted is, that there could be an order/decision of a regulator under the Act even in the absence of regulations. RBI like CERC is a regulator under the 1934 Act. Under Section 45-JA it is empowered to issue directions in contradistinction to its powers to enact regulations under Section 58 of the 1934 Act. Giving directions under Section 45-JA need not be preceded by regulations made under Section 58, however, if in a given case, RBI/Board would have enacted a regulation on making of provision for NPAs under Section 58 then the order of RBI under Section 45-JA of the 1934 Act was required to be in conformity with the said regulations. (See the judgment of this Court in *Southern Technologies Ltd.* v. *CIT*[6].)

65. The above two citations have been given by us only to demonstrate that under the 2003 Act, applying the test of "general application", a regulation stands on a higher pedestal vis-à-vis an order (decision) of CERC in the sense that an order has to be in conformity with the regulation. However, that would not mean that a regulation is a precondition to the order (decision). Therefore, we are not in agreement with the contention of the appellant(s) that under the 2003 Act, power to make regulations under Section 178 has to be correlated to the functions ascribed to each authority

6 (2010) 2 SCC 548 : (2010) 1 Scale 329

under the 2003 Act and that CERC can enact regulations only on topics enumerated in Section 178(2). In our view, apart from Section 178(1) which deals with "generality" even under Section 178(2)(*ze*) CERC could enact a regulation on any topic which may not fall in the enumerated list provided such power falls within the scope of the 2003 Act. Trading is an activity recognised under the said 2003 Act.

66. While deciding the nature of an order (decision) vis-à-vis a regulation under the Act, one needs to apply the test of general application. On the making of the impugned 2006 Regulations, even the existing power purchase agreements (PPA) had to be modified and aligned with the said Regulations. In other words, the impugned Regulations make an inroad into even the existing contracts. This itself indicates the width of the power conferred on CERC under Section 178 of the 2003 Act. All contracts coming into existence after making of the impugned 2006 Regulations have also to factor in the capping of the trading margin. This itself indicates that the impugned Regulations are in the nature of subordinate legislation. Such regulatory intervention into the existing contracts across the board could have been done only by making regulations under Section 178 and not by passing an order under Section 79(1)(*j*) of the 2003 Act. Therefore, in our view, if we keep the above discussion in mind, it becomes clear that the word "order" in Section 111 of the 2003 Act cannot include the impugned 2006 Regulations made under Section 178 of the 2003 Act.

67. We may usefully refer to some decisions relevant in the context.

68. In *City Board, Mussoorie* v. *State Electricity Board*[7] the matter arose under the Electricity (Supply) Act, 1948 (the 1948 Act). Under that Act, grid tariff had to be fixed from time to time under Section 46(1) "in accordance with any regulations made in that behalf". Under Section 79 of the 1948 Act, the Board was also given the power to make regulations not inconsistent with the Act and the Rules made thereunder to provide for all or any of the matters enumerated therein. It was argued on behalf of the appellant that the regulations must exist before a grid tariff can be fixed. This argument was rejected by the High Court which held that there was nothing in the 1948 Act to suggest that existence of a regulation was a precondition to the determination of a grid tariff.

69. It was held in *City Board*[7] that under Section 46 of the 1948 Act, the Board was given a wide discretion to frame the grid tariff depending upon various factors mentioned in the Act. According to the High Court, Section 46 of the Act was a stand-alone provision, therefore, the grid tariff could be fixed even in the absence of the regulations provided such fixation is not inconsistent with the 1948 Act. However, it was further observed that if the Board had made regulations under Section 79 then order framing the grid tariff under Section 46(1) had to conform to such regulations. This view stood affirmed by this Court in *U.P. SEB* v. *City Board, Mussoorie*[8].

7 AIR 1971 All 219
8 (1985) 2 SCC 16

70. A similar question arose for determination by this Court in *Jagdamba Paper Industries (P) Ltd.* v. *Haryana SEB*[9]. In that case, enhancement in the security for meters and for payment of energy bills came to be challenged. It was argued on behalf of the appellants that the Board had not framed any regulations under Section 79 of the 1948 Act for such enhancement. According to the appellants, the supply of electricity was controlled under an agreement between the Board and the appellants and therefore unilateral escalation of security charges by passing of an order under Section 49 would be contrary to any acceptable notion of contract. It was contended that under Section 49(1) of the 1948 Act, the Board was conferred with statutory powers to determine the conditions on the basis of which supply had to be made. Therefore, without determining the conditions under Section 49(1), it was not open to the Board to unilaterally enhance the security charges contrary to the existing contract between the Board and the consumers. This argument was rejected by this Court which held that what applies to the tariff fixation would equally apply to the security. Section 49(1) of the 1948 Act clearly indicated that the Board may supply electricity to any person upon such terms and conditions as the Board thinks fit. It was held that since the contract between the consumer and the Board contemplated enhancement of security charges as a condition of supply of electricity, it was not open to the appellants to say that such enhancement cannot take place without regulations being framed under Section 79.

71. This judgment in *Jagdamba Paper Industries Ltd.*[9] is important from another angle also. It indicates that regulations under Section 79 of the 1948 Act were to be in the nature of subordinate legislation, therefore, all contracts had to be in terms of such regulations. In the present case also, if one examines the terms and conditions of the licences, power to fix trading margin is expressly contemplated by such terms. The said judgment further held that the Board is a statutory authority and has to act within the framework of the 1948 Act. If the act of the Board is not in consonance or in breach of some statutory provisions of law, rule or regulation, it is always open to challenge in a petition under Article 226 of the Constitution.

72. In *Kerala SEB* v. *S.N. Govinda Prabhu and Bros.*[10] the dispute was confined to the question concerning increase in the electricity tariff by the Board under the 1948 Act. The principal ground of challenge was that the Board had acted outside its statutory authority by formulating a price structure intended to yield sufficient revenue to offset not only the actual expenditure as contemplated by Section 59 of the 1948 Act but also expenditure not covered by that section. At this stage, we may point out that, in all these cases, the Supreme Court has considered tariff fixation, price fixation and security charges fixation on a par. In that case, one of the submissions which found favour with the High Court, which accepted the submissions of the consumer, while striking down the impugned notification,

9 (1983) 4 SCC 508 : AIR 1983 SC 1296
10 (1986) 4 SCC 198

was that in the absence of specification by the State Government, it was not open to the Board to adjust the tariffs.

73. What was found by the Supreme Court in *S.N. Govinda Prabhu*[10] was that although the expenditure did not fall strictly within Section 59 of the 1948 Act, the actual expenditure stood incurred to avoid the loss. Therefore, the Supreme Court gave a schematic interpretation to the 1948 Act and it held that the State Electricity Board was obliged to carry on its business economically and efficiently and consequently such charges were admissible even though they did not fall strictly within the ambit of Section 59. On the question as to absence of specification by the State Government, this Court further held that the omission of the rule-making authority to frame rules cannot take away the right to factor in such expenses in the revised tariff structure. This judgment is one more case which indicates that making of regulations is not a precondition to the tariff fixation or price fixation or security charges fixation.

74. In *Hindustan Zinc Ltd.* v. *A.P. SEB*[11] the main attack was to the upward revision of the tariffs for HT consumers in the writ petition before the High Court, inter alia, on the ground that the Board cannot generate a surplus in excess of the surplus specified under Section 59 of the 1948 Act. Section 59 of that Act gave power to the Board to lay down general principles for the Board's finance. It was also contended that the tariff revision was made without prior consultation with the State Electricity Consultative Council as required by Section 16(5) of the 1948 Act.

75. It was held by this Court in *Hindustan Zinc Ltd.*[11] that even in the absence of general principles being specified under Section 59 of that Act, it was open to the Board to generate a surplus in order to carry on the business in a more efficient and economic manner. Following the judgment in *S.N. Govinda Prabhu*[10], it was held that even in the absence of prior consultation with the State Electricity Consultative Council as required by Section 16(5), it was open to the Board which was vested with the power of tariff fixation to make an upward revision of tariff. In other words, specification by making rules or regulations was not a precondition for upward revision of tariff. It was observed that, if in a given case, it is found that such upward revision was arbitrary, then under the judicial review jurisdiction it was open to the courts to strike down such upward revision as arbitrary under Article 14. It was further observed that the "laying down procedure" before the legislature was meant to effectively control the exercise of the delegated power of the Board, however, such laying down procedure will not make the impugned regulation immune from judicial review. [Also see the judgment of this Court in *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India*[4], SCC paras 75-79.]

76. On the question of "generality versus enumeration" principle, it was further held in *Hindustan Zinc Ltd.*[11] that under Section 49(1) of the 1948 Act

10 *Kerala SEB* v. *S.N. Govinda Prabhu and Bros.*, (1986) 4 SCC 198
11 (1991) 3 SCC 299
4 (1985) 1 SCC 641 : 1985 SCC (Tax) 121

a general power was given to the Board to supply electricity to any person not being a licensee upon such terms and conditions as the Board thinks fit and the Board may for the purposes of such supply frame uniform tariffs under Section 49(2). The Board was required to fix uniform tariffs after taking into account certain enumerated factors. It was held that the power of fixation of tariffs in the Board ordinarily had to be done in the light of specified factors, however, such enumerated factors in Section 49(2) did not prevent the Board from fixing uniform tariffs on factors other than those enumerated in Section 49(2) as long as they were relevant and in consonance with the Act.

77. To the same effect is the judgment of this Court in *Shri Sitaram Sugar Co. Ltd.*[2] In that judgment also this Court held that the enumerated factors/topics in a provision do not mean that the authority cannot take any other matter into consideration which may be relevant. The words in the enumerated provision are not a fetter; they are not words of limitation, but they are words for general guidance.

78. One more aspect needs to be mentioned. The judgment of this Court in *Shri Sitaram Sugar Co. Ltd.*[2] has laid down various tests to distinguish legislative from administrative functions. It further held that price fixation is a legislative function unless the statute provides otherwise. It also laid down the scope of judicial review in such cases.

79. Applying the above judgments to the present case, it is clear that fixation of the trading margin in the inter-State trading of electricity can be done by making of regulations under Section 178 of the 2003 Act. Power to fix the trading margin under Section 178 is, therefore, a legislative power and the notification issued under that section amounts to a piece of subordinate legislation, which has a general application in the sense that even existing contracts are required to be modified in terms of the impugned Regulations. These Regulations make an inroad into contractual relationships between the parties. Such is the scope and effect of the impugned Regulations which could not have taken place by an order fixing the trading margin under Section 79(1)(*j*). Consequently, the impugned Regulations cannot fall within the ambit of the word "order" in Section 111 of the 2003 Act.

80. Before concluding on this topic, we still need to examine the scope of Section 121 of the 2003 Act. In this case, the appellant(s) have relied on Section 121 to locate the power of judicial review in the Tribunal. For that purpose, we must notice the salient features of Section 121. Under Section 121, there must be a failure by a Commission to perform its statutory function in which event the Tribunal is given authority to issue orders, instructions or directions to the Commission to perform its statutory functions. Under Section 121 the Commission has to be heard before such orders, instructions or directions can be issued. The main issue which we have to decide is the nature of the power under Section 121.

2 *Shri Sitaram Sugar Co. Ltd.* v. *Union of India*, (1990) 3 SCC 223

53

81. In *Raman and Raman Ltd.* v. *State of Madras*[12] Section 43-A of the Motor Vehicles Act, 1939 (the 1939 Act), as amended by Madras Act 20 of 1948, came for consideration before the Supreme Court. Section 43-A conferred power on the State Government to issue "orders" and "directions", as it may consider necessary in respect of any matter relating to road transport to the State Transport Authority or a Regional Transport Authority. The meaning of the words "orders" and "directions" came for interpretation before the Supreme Court in the said case. It was held, on examination of the scheme of the Act, that Section 43-A was placed by the legislature before the sections conferring quasi-judicial powers on tribunals which clearly indicated that the authority conferred under Section 43-A was confined to administrative functions of the Government and the tribunals rather than to their judicial functions.

82. It was further held in *Raman and Raman Ltd.*[12] that the legislature had used two words in the section: (*i*) orders; and (*ii*) directions. This Court further noticed that under the 1939 Act there was a separate Chapter which dealt with making of "rules" which indicated that the words "orders" and "directions" in Section 43-A were meant to clothe the Government with the authority to issue directions of administrative character. It was held that the source of power did not affect the character of acts done in exercise of that power. Whether it is a law or an administrative direction depends upon the character or nature of the orders or directions authorised to be issued in exercise of the power conferred. It was, therefore, held that the words "orders" and "directions" were not laws. They were binding only on the authorities under the Act. Such orders and directions were not required to be published. They were not kept for scrutiny by legislature. It was further held that such orders and directions did not override the discretionary powers conferred on an authority under Section 60 of the 1939 Act. It was observed that non-compliance with such orders, instructions and directions may result in taking disciplinary action but they cannot affect a finding given by the quasi-judicial authority nor can they impinge upon the rules enacted by the rule-making authority. It was held that such orders and directions would cover only an administrative field of the officers concerned and therefore such orders and directions do not regulate the rights of the parties. Such orders and directions cannot add to the considerations/topics prescribed under Section 47 of the 1939 Act on the basis of which an adjudicating authority is empowered to issue or refuse permits, as the case may be.

83. Applying the tests laid down in the above judgment to the present case, we are of the view that, the words "orders", "instructions" or "directions" in Section 121 do not confer power of judicial review in the Tribunal. It is not possible to lay down any exhaustive list of cases in which there is failure in performance of statutory functions by the appropriate Commission. However, by way of illustrations, we may state that, under Section 79(1)(*h*) CERC is required to specify the Grid Code having regard to the Grid Standards. Section 79 comes in Part X. Section 79 deals with functions of CERC. The word "grid" is defined in Section 2(32) to mean high

12 AIR 1959 SC 694

voltage backbone system of interconnected transmission lines, sub-stations and generating plants. Basically, a grid is a network. Section 2(33) defines "Grid Code" to mean a code specified by CERC under Section 79(1)(*h*). Section 2(34) defines "Grid Standards" to mean standards specified under Section 73(*d*) by the Authority.

84. Grid Code is a set of rules which governs the maintenance of the network. This maintenance is vital. In summer months grids tend to trip. In the absence of the making of the Grid Code in accordance with the Grid Standards, it is open to the Tribunal to direct CERC to perform its statutory functions of specifying the Grid Code having regard to the Grid Standards prescribed by the Authority under Section 73. One can multiply these illustrations which exercise we do not wish to undertake. Suffice it to state that, in the light of our analysis of the 2003 Act, hereinabove, the words "orders, instructions or directions" in Section 121 of the 2003 Act cannot confer power of judicial review under Section 121 to the Tribunal, which, therefore, cannot go into the validity of the impugned 2006 Regulations, as rightly held in the impugned judgment.

85. One of the contentions raised by Shri Shanti Bhushan, learned Senior Counsel appearing on behalf of Calcutta Electricity Supply Company Ltd. needs to be considered. It was contended on behalf of CESC Ltd. that under Section 111 of the 2003 Act, an appeal lies only against an order by the appropriate Commission and not against the Regulations framed by CERC under Section 178 of the 2003 Act. It was contended that Regulations under Section 178 are framed in exercise of delegated power in which there was an element of legislative function. That, the Regulations framed by CERC are required to be laid before Parliament under Section 179 of the 2003 Act. The said Regulations could be modified by the two Houses of Parliament. In the circumstances, it was, therefore, contended that neither Section 111 nor Section 121 would be deemed to have conferred any power on the Appellate Tribunal for Electricity to supervise or sit in judgment over the Regulations. To this extent, learned counsel supported the contentions of the learned Solicitor General, appearing on behalf of CERC (Respondent 1).

86. Further, an interesting argument was advanced by the learned counsel, namely, that, Section 121 of the 2003 Act has not yet been brought into force. In this connection, reference was made to Section 1(3) of the 2003 Act as well as to the Notification dated 10-6-2003 issued under Section 1(3) of the 2003 Act by which the Central Government had fixed 10-6-2003 as the date on which Sections 1 to 120 and Sections 122 to 185 were brought into force, however, Section 121 was not brought into force till Notification dated 27-1-2004, which brought into force the Electricity (Amendment) Act 2003 (57 of 2003), came to be issued. According to the learned counsel, Section 4 of the Electricity (Amendment) Act, 2003 (57 of 2003) which was brought into force on 27-1-2004 merely provided for substitution of the original Section 121 with new Section 121, without issuance of a further notification under Section 1(3) of the original Electricity Act, 2003. According to the

learned counsel, there is a difference between substituting a dormant section in an Act and in bringing a substituted section into force which has not been done in this case and, therefore, Section 121, although being part of the statute, is not brought into force, till today.

87. To answer the above contention, we need to quote Section 1(3) and also Section 121 of the original Electricity Act, 2003 which was not brought into force though, as stated above, Sections 1 to 120 and Sections 122 to 185 were brought into force vide Notification dated 10-6-2003:

> "1. *Short title, extent and commencement.*— * * *
>
> (3) It shall come into force on such date as the Central Government may, by notification, appoint:
>
> Provided that different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.
>
> * * *
>
> 121. *Power of Chairperson of Appellate Tribunal.*—The Chairperson of the Appellate Tribunal shall exercise general power of superintendence and control over the appropriate Commission."

88. We also quote hereinbelow Sections 1 and 4 of the Electricity (Amendment) Act, 2003 (57 of 2003) which was brought into force on 27-1-2004:

> "1. (2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.
>
> * * *
>
> 4. *Substitution of new section for Section 121.*—For Section 121 of the principal Act, the following section shall be substituted, namely—
>
> '121. *Power of Appellate Tribunal.*—The Appellate Tribunal may, after hearing the appropriate Commission or other interested party, if any, from time to time, issue such orders, instructions or directions as it may deem fit, to any appropriate Commission for the performance of its statutory functions under this Act.' "

89. As stated above, the Electricity (Amendment) Act, 2003 (57 of 2003) was brought into force by Notification dated 27-1-2004 which is reproduced hereinbelow:

> "MINISTRY OF POWER
>
> *Notification*
>
> New Delhi, 27-1-2004
>
> *No. S.O. 119(E).*—In exercise of the powers conferred by sub-section (2) of Section 1 of the Electricity (Amendment) Act, 2003 (57 of 2003), the Central Government hereby appoints *27-1-2004, as the date on which the provisions of the said Act shall come into force.*
>
> [F. No. 23/23/2004-R&R]
>
> Ajay Shankar, Jt. Secy."
>
> (emphasis supplied)

90. In our view, there is no merit in the above contention advanced on behalf of CESC Ltd. At the outset, we may state that material brought on record indicates that Section 121 of the original Electricity Act, 2003, quoted hereinabove, was never brought into force because some MPs expressed the concern that the power, under that section, conferred upon the Chairperson of the Appellate Tribunal, could lead to excessive centralisation of power and interference with the day-to-day activities of the Commission by the Chairperson of the Tribunal. Therefore, Section 121 was amended by the Electricity (Amendment) Act, 2003 (57 of 2003) which is also quoted hereinabove and which Amendment Act came into force from 27-1-2004. In our view, by necessary implication of the coming into force of the Electricity (Amendment) Act, 2003 (57 of 2003) all provisions amended by it also came into force, hence, there is no requirement for a further notification under Section 1(3), particularly when Section 121 in its amended form has come into force w.e.f. 27-1-2004.

91. In this connection, it may be seen that Section 121 of the original Act stood substituted by Amendment Act 57 of 2003. Substitution of a provision results in repeal of the earlier provision and its replacement by the new provision. Substitution is a combination of repeal and fresh enactment. (See *Principles of Statutory Interpretation* by G.P. Singh, 11th Edn., p. 638.) Section 121 of the original Electricity Act, 2003 was never brought into force. It was substituted by new Section 121 by Amendment Act 57 of 2003 which was brought into force by a Notification dated 27-1-2004. Substitution, as stated above, results in repeal of the old provision and replacement by a new provision. Applying these tests to the facts of the present case, we find that the Electricity (Amendment) Act, 2003 (57 of 2003) was brought into force by Notification dated 27-1-2004. That, notification was issued under Section 1(2) of the Electricity (Amendment) Act, 2003 (57 of 2003). If one reads Section 1(2) of the Electricity (Amendment) Act, 2003 (57 of 2003) with Notification dated 27-1-2004 issued under Section 1(2) of the amended Act, 2003, it becomes clear that on coming into force of the Electricity (Amendment) Act, 2003 (57 of 2003) all provisions amended by it also came into force. Hence, there was no requirement for a further notification under Section 1(3), consequently, Section 121 in its amended form came into force with effect from 27-1-2004.

Summary of our Findings

92. (*i*) In the hierarchy of regulatory powers and functions under the 2003 Act, Section 178, which deals with making of regulations by the Central Commission, under the authority of subordinate legislation, is wider than Section 79(1) of the 2003 Act, which enumerates the regulatory functions of the Central Commission, in specified areas, to be discharged by orders (decisions).

(*ii*) A regulation under Section 178, as a part of regulatory framework, intervenes and even overrides the existing contracts between

the regulated entities inasmuch as it casts a statutory obligation on the regulated entities to align their existing and future contracts with the said regulation.

(*iii*) A regulation under Section 178 is made under the authority of delegated legislation and consequently its validity can be tested only in judicial review proceedings before the courts and not by way of appeal before the Appellate Tribunal for Electricity under Section 111 of the said Act.

(*iv*) Section 121 of the 2003 Act does not confer power of judicial review on the Appellate Tribunal. The words "orders", "instructions" or "directions" in Section 121 do not confer power of judicial review in the Appellate Tribunal for Electricity. In this judgment, we do not wish to analyse the English authorities as we find from those authorities that in certain cases in England the power of judicial review is expressly conferred on the tribunals constituted under the Act. In the present 2003 Act, the power of judicial review of the validity of the regulations made under Section 178 is not conferred on the Appellate Tribunal for Electricity.

(*v*) If a dispute arises in adjudication on interpretation of a regulation made under Section 178, an appeal would certainly lie before the Appellate Tribunal under Section 111, however, no appeal to the Appellate Tribunal shall lie on the validity of a regulation made under Section 178.

(*vi*) Applying the principle of "generality versus enumeration", it would be open to the Central Commission to make a regulation on any residuary item under Section 178(1) read with Section 178(2)(*ze*). Accordingly, we hold that CERC was empowered to cap the trading margin under the authority of delegated legislation under Section 178 vide the impugned Notification dated 23-1-2006.

(*vii*) Section 121, as amended by the Electricity (Amendment) Act 57 of 2003, came into force with effect from 27-1-2004. Consequently, there is no merit in the contention advanced that the said section has not yet been brought into force.

Conclusion

93. For the aforesaid reasons, we answer the question raised in the reference as follows:

The Appellate Tribunal for Electricity has no jurisdiction to decide the validity of the Regulations framed by the Central Electricity Regulatory Commission under Section 178 of the Electricity Act, 2003. The validity of the Regulations may, however, be challenged by seeking judicial review under Article 226 of the Constitution of India.

94. Our summary of findings and answer to the reference are with reference to the provisions of the Electricity Act, 2003. They shall not be construed as a general principle of law to be applied to Appellate Tribunals vis-à-vis Regulatory Commissions under other enactments. In particular, we make it clear that the decision may not be taken as expression of any view in

regard to the powers of the Securities Appellate Tribunal vis-à-vis Securities and Exchange Board of India under the Securities and Exchange Board of India Act, 1992 or with reference to the Telecom Disputes Settlement and Appellate Tribunal vis-à-vis Telecom Regulatory Authority of India under the Telecom Regulatory Authority of India Act, 1997.

95. In view of our findings, we dismiss these appeals as having no merit with no order as to costs.

(2010) 4 Supreme Court Cases 651

(BEFORE V.S. SIRPURKAR AND DR. M.K. SHARMA, JJ.)

Civil Appeals Nos. 2043-46 of 2010†

ANDHRA PRADESH PUBLIC SERVICE COMMISSION .. Appellant;

Versus

PRASADA RAO AND OTHERS .. Respondents.

With

Civil Appeal No. 2047 of 2010‡

K.V. MURALI KRISHNA .. Appellant;

Versus

ANDHRA PRADESH PUBLIC SERVICE COMMISSION AND OTHERS .. Respondents.

Civil Appeals Nos. 2043-46 of 2010 with No. 2047 of 2010, decided on February 25, 2010

Service Law — Recruitment process — Vacancies — Directions — Action taken in compliance with *Mouleesware Reddy case*, (2006) 8 SCC 330 by authorities concerned — To avoid complications arising thereby, directions issued modifying order(s) of forums below — Constitution of India — Arts. 136 and 142 — Exercise of power — Directions to avoid complications (Paras 2 and 3)

A.P. Public Service Commission v. *P. Chandra Mouleesware Reddy*, (2006) 8 SCC 330 : 2006 SCC (L&S) 1981, *applied*

P-D/45607/CL

Advocates who appeared in this case :

Altaf Ahmed, R. Sundaravardan, Shyam Divan and H.S. Gururaja Rao, Senior Advocates [Guntur Prabhakar, Y. Rajagopal Rao, Y. Ramesh, Ms Y. Vismai Rao, R. Santhan Krishnan, Praveen K. Pandey (for D. Mahesh Babu), Ms D. Bharati Reddy, Ms Anuradha Rustagi, G.V.R. Choudary, K. Shivraj Choudhuri, C.S.N. Mohan Rao, Satish Galla and N. Rajaraman, Advocates] for the appearing parties.

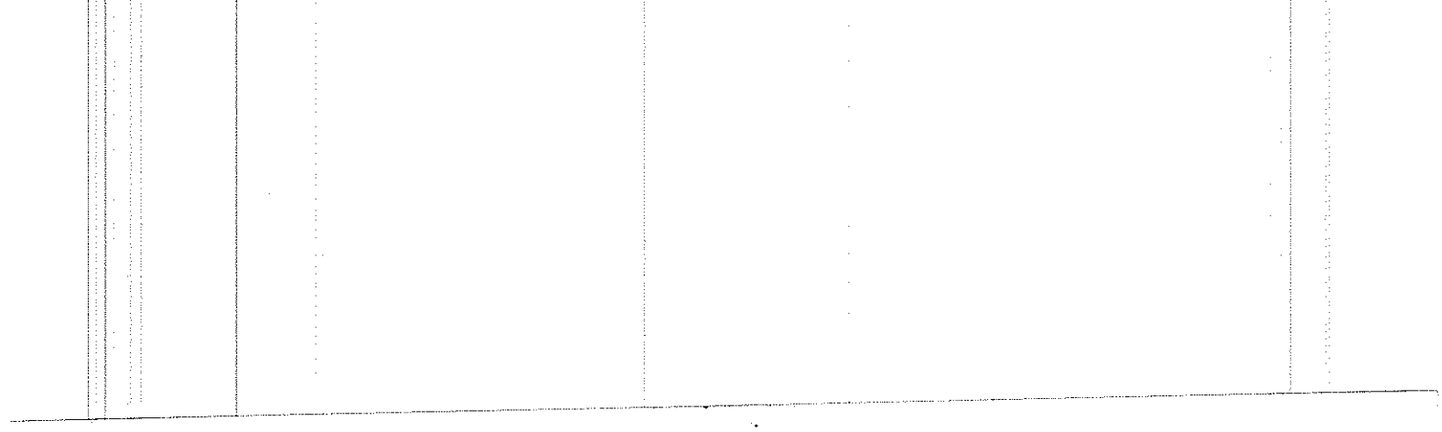
Chronological list of cases cited

on page(s)

1. (2006) 8 SCC 330 : 2006 SCC (L&S) 1981, *A.P. Public Service Commission* v. *P. Chandra Mouleesware Reddy* 652*c*

† Arising out of SLPs (C) Nos. 284-87 of 2008. From the Judgment and Order dated 8-10-2007 of the High Court of Andhra Pradesh in WPs Nos. 17397-400 of 2007

‡ Arising out of SLP (C) No. 504 of 2009



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47. In the result, the impugned judgment of the High Court is affirmed and the appeal is dismissed.

(1992) 2 Supreme Court Cases 124

(BEFORE S. RANGANATHAN, M. FATHIMA BEEVI AND N.D. OJHA, JJ.)

Civil Appeal No. 1306 of 1988†

KANORIA CHEMICALS AND INDUSTRIES LTD. AND ANOTHER .. Appellants;

Versus

STATE OF U.P. AND OTHERS .. Respondents.

With

Civil Appeal No. 128 of 1992

U.P. STATE ELECTRICITY BOARD AND ANOTHER .. Appellants;

Versus

KANORIA CHEMICALS AND INDUSTRIES LTD. AND OTHERS .. Respondents.

Civil Appeal Nos. 1306 of 1988 and 128 of 1992, decided on January 16, 1992

Electricity (Supply) Act, 1948 — Ss. 60(5) [as introduced by Electricity Laws (U.P. Amendment) Act, 1983], 59 (as amended by Act 16 of 1983) and 49 — Revision of contractual rate for supply of electrical energy to appellant from Rihand Hydro Electric Generating Station — Failure to specify manner in which revised rate arrived at would not vitiate the rate revision proceedings when appellant got full and fair opportunity to state all the special features and the authorities fully considered them before finally fixing the enhanced rate — Administrative Law — Natural justice — Hearing

Electricity (Supply) Act, 1948 — Ss. 60(5) [as introduced by Electricity (U.P. Amendment) Act, 1983] and 49 — Compared (Para 20)

Electricity (Supply) Act, 1948 — S. 60(5) [as introduced by Electricity Laws (U.P. Amendment) Act, 1983] — Contract with appellant for supply of electrical energy at concessional rates on special consideration — Held, Board can fix rates for the appellant higher than the uniform tariff (HV-2) as applicable to other bulk power consumers — Board can also give the rates so fixed retrospective effect — However, in view of the fact that electrical energy was being supplied from the grid as a result of which transmission and distribution losses were borne by appellant, held, enhancement of rates above HV-2 rates not justified

Electricity (Supply) Act, 1948 — S. 60(5) [as introduced by Electricity Laws (U.P. Amendment) Act, 1983 (12 of 1983)] — 'Payment will be due for the

† From the Judgment and Order dated April 2, 1987 of the Allahabad High Court in Writ Petition No. 1818 of 1984

first time on or after the said date' — Absence of words 'for the first time' in the Hindi version of S. 7 of the Amending Act 12 of 1983 inconsequential — Without those words meaning becomes more clear — Official Languages Act, 1963, S. 6 — Constitution of India, Art. 348(3)

The appellant-company had set up an industry for manufacture of caustic soda at Renukoot in District Mirzapur in 1964. The industry involved use of electricity as one of the main raw material apart from salt. According to the appellant, despite considerable disadvantages, it was induced to set up the industry in the district of Mirzapur on account of the assurance given by the State that it will supply hydroelectric power to the assessee from the Rihand power plant on a long term basis at a cheap rate. The plant was set up at Pipri and a contract was entered into between the State Government and the appellant on September 30, 1963 ensuring the supply of electricity from the point of generation to the appellant for a period of 25 years from April 1, 1964. The supply, to the extent of 6.5 MW, was to be from Rihand hydel station at a fixed rate of 2.5 paise per unit. An additional supply of 1.5 MW was also promised from an inter-connection at the rate of 5 np per unit. The rates could be revised after the first sixteen years but any enhancement in rates was not to exceed 10 per cent of the rates agreed upon. The State agreed further to supply 4.5 MW to the appellant from the Obra Hydro-Electric Project on such rates as would be fixed subsequently. Since it was not economical to continue supplying energy at the low rates, the Electricity Laws (U.P. Amendment) Act, 1983 was enacted which came into force from May 20, 1983. S. 7 of the said Act amended S. 60 of the Electricity (Supply) Act by inserting sub-ss. (3) to (5) with retrospective effect from April 1, 1965. At about the same time Parliament amended S. 59 of the Supply Act. Thereafter, the Board sought to revise the rates under S. 60(5)(*a*) of the Supply Act by informing the appellant that the State Government had approved the levy of rates as per Schedule HV-2 (as defined in the U.P. Gazette Notification dated October 29, 1982) applicable to heavy power consumers in substitution of the rates mentioned in the agreement of September 20, 1963. The demands amounted to several crores of rupees and disconnection was threatened in case of non-payment. However, the High Court, on a writ petition filed by the appellant, quashed the revision of the rates but it left the Board and the State to fix revised rates afresh. Accordingly the Board fixed the rates afresh which the State Govt. approved. These rates were much higher than the HV-2 rates fixed earlier. The appellant preferred appeal before the Supreme Court. The Supreme Court by its interim order directed the Board and the State Govt. to reconsider the fixation effected by them on the basis of the following directions: (1) The appellant will file a representation within 3 weeks setting out the individual factors which should be taken into account in fixing the rates

(2) The Board will consider this representation and make appropriate recommendations to the State Government. However, before doing so, and particularly if the Board intends to take into account any factors other than those mentioned in the appellants' representation, they should indicate the factors which they so wish to take into account, in their recommendations to the

State Government. A copy of the recommendations should be forwarded to the appellants within seven weeks.

(3) On receipt of the recommendations made by the Board, the appellants may submit to the State Government, any representation which they wish to make regarding the recommendations within a period of three weeks thereafter.

(4) The State Government will consider the recommendations of the State Board as well as the representations made by the appellants to the Board as well as to themselves and approve of the rates which they consider proper in the circumstances of the case by a reasoned order, giving a broad indication of the factors which they have taken into account in fixing the rates. While complying with the above directions the Board and the State, however, adhered to the rates fixed on March 28, 1988. Consequently, the appellant faced huge demands in respect of the period since May 20, 1983 and till March 31, 1989 when the agreement expired, at rates which will be higher than the HV-2 rates which had been sought to be applied in the first instance. The appellant challenged the fixation of rates on March 28, 1988 and August 31, 1991. Allowing the appeal in part

Held:

The rate revision proceedings were not vitiated on ground of the Board's failure to set out the precise manner in which the rates recommended by them were arrived at. Section 60(5) of the Supply Act does not require the Board or the State Government to explain each and every step in its calculation. All that the State Government has to do is to take into consideration the factors relevant under Section 60(5) and propose rates for fixation to the State Government. It is in order to ensure that these recommendations take into account all relevant factors that an opportunity had been provided to the consumer to satisfy the Board as well as the State Government that the fixation had not taken into account certain relevant factors. Therefore, the appellant must be held to have been given a fair opportunity under Section 60(5)(*a*) so long as it had an opportunity to explain to the Board and the State Government the factors individual to its case and also as to how and why the rates recommended by the Board need modification. Moreover, apart from the general factors which have been taken into account in fixing the general tariff rates, the Board has, in making its recommendations, taken into account the purpose for which supply was required by the petitioner along with the factor of recurring losses incurred by the Board year after year and its statutory requirements to maintain a minimum surplus of 3 per cent as required under Section 59 of the Supply Act, 1948. Therefore, the appellant had full opportunity to place all its special features before the Board and the State Government and that all aspects have been fully considered by the authorities. The fixation of rates on August 31, 1991 is not, therefore, vitiated. (Para 20)

Indian Aluminium Company v. *Kerala State Electricity Board*, (1975) 2 SCC 414: AIR 1975 SC 1967: (1976) 1 SCR 70, *referred to*

There are no obstacles, statutory or theoretical, standing in the way of the Board fixing rates for the company which will be higher than the rates

applicable to bulk consumers. The provision in Section 60(5)(*a*) is intended to enable the Board and State to cut off the shackles cast by an ancient contract entered into at a time when conditions were totally different. It confers an absolute and unrestricted enabling power to revise the rates in an appropriate manner. In doing this, the only limitation which the statute requires the authorities to keep in mind are the factors mentioned in the section. Whether the revised rates for the consumer governed earlier by the contract should be higher or lower than, or equal to, the tariff rates would depend on a large number of considerations, in particular, the basis on which, and the point of time at which, those general rates were fixed. In principle, it is quite conceivable that, in an appropriate case, a consideration of the relevant factors may justify even a rate higher than the general tariff rates intended for the particular category of consumers. (Para 22)

A retrospective effect to the revision is also clearly envisaged by S. 60(5). If the section were interpreted as conferring a power of revision only prospectively, a consumer affected can easily frustrate the effect of the provision by initiating proceedings seeking an injunction restraining the Board and State from revising the rates, on one ground or other, and thus getting the revision deferred indefinitely. Or, again, the revision of rates, even if effected promptly by the Board and State, may prove infructuous for one reason or another. The language of the section also supports this view. The powers of the Board in fixing the rates — including the dates from which they will be operative — are not restricted in any manner. The Board is at complete liberty to fix different rates from different dates and that scheme of fixation will be read with the contract. Only the Board cannot revise the rates in respect of supplies for which payment under the contract, fell due before May 20, 1983. The power under Section 60 is exercisable more than once. while this could be a basis of substantial harassment if repeated revisions are automatically dated back to May 20, 1983, it is left open to the Board and State to fix the dates with effect from which revisions will be effective. Thus while making a subsequent revision, the authorities will not normally tamper with an earlier revision(s) or alter the dates of effectiveness fixed for the earlier revision(s) without a valid reason to do so. If this is done, it will be open to a court to examine the basis thereof and sustain it only where the earlier fixation was based on an error or misconception or the like and called for modification. (Paras 23 and 24)

Even though the Hindi version of S. 7 of the Electricity Laws (U.P. Amendment) Act, Which inserted S. 60(5) in the Supply Act, is differently worded and does not contain the words "for the first time" found in the English version, but the Hindi version does not really alter the position; actually it is the presence of the words "for the first time" in the English version that create an ambiguity. Without these words, the clause clearly provides that all supply of electricity, for which payment is to be made after May 20, 1983, will be charged at the rates to be fixed by the Board. Therefore, the fixation by the Board of rates from May 20, 1983 and, at different rates for different periods of time, is unexceptionable. (Para 24)

Mata Badal Pandey v. *Board of Revenue*, 1974 UPTC 570, *referred to*

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There is, however, no material to justify any departure from the HV-2 rates in the case of the appellant. There is no force in the appellant's contentions for reduction of the rates applicable to the appellant below HV-2 level. The special circumstances pleaded have lost their importance with the passage of time. The conditions that prevailed in 1963 are not valid and the appellant has had the benefit of concessional rates for twenty years. The consideration that electricity is a "raw material" in the assessee's business is, again, irrelevant for it can mean nothing more than that the appellant needs substantial quantities of the energy and there is no reason why it should not pay for it at the normal market rates. (Para 26)

Equally, the authorities have no case for seeking to raise the rates beyond the HV-2 rates. They are supplying energy to the appellant from the grid since 1968 and they cannot justifiably seek to demand higher rates from the appellant than from the HV-2 consumers. The justification for the higher rates on the basis of the huge losses that the Board has been incurring and the statutory justification for escalation in the rates keeping in view the necessity to build up a surplus are aspects of working which should affect all the consumers equally. May be the Board can, in appropriate circumstances, seek to make up for a part of the losses by hiking up the rates to one particular category of consumers but that would not be justified here as the transmission and distribution losses in respect of the supply to the appellant are borne by it and, in the absence of some special vital reason, it would not be equitable to fix the rates of supply to the appellant above the rates applicable to other HV-2 consumers. Some reference was made to the difficulties in completely fitting the scheme of computations for determining the HV-2 rates into the scheme under the appellant's contract. It is, however, unnecessary to go into that aspect. Moreover, the appellant has been paying for the Obra supply at HV-2 rates since 1989. In 1972 the appellant took a further additional supply of 8 MW and agreed to pay therefor at HV-2B rates as applicable to other Bulk Power Consumers in the State. (Para 27)

Hence there is no justification to charge more than HV-2 rates from the appellant. Accordingly, the determinations of 1988 and 1991 are quashed and it is directed that the appellant should be charged from May 20, 1983 to March 31, 1989 at the HV-2 rates applicable to other consumers. (Para 28)

R-M/T/11085/C

Advocates who appeared in this case:

H.N. Salve, P.P. Tripathi, Manoj Swarup and K.J. John, Advocates, for the Appellants;
B. Sen, Senior Advocate (Gopal Subramanium, Prashant Kumar, Ms S. Dikshit, Advocates, with him) for the Respondents.

The Judgment of the Court was delivered by

RANGANATHAN, J.— There was a time when, in almost every State in India, people were invited to avail of the supply of the electric energy produced in the State and offered special concessions when they agreed to do so in bulk under long term contracts. A situation, however, has since developed when the demand for the energy increased so rapidly

that, despite the quantity of available electric energy also having gone up tremendously the rates of supply agreed upon became uneconomical. The State and its instrumentalities, who were supplying the energy, found themselves without power to revise the rates to meet the altered situation until the legislature came to the rescue. It is this situation in the case of Kanoria Chemicals and Industries Ltd. (hereinafter referred to as 'the appellant') which has given rise to these appeals.

2. The Electricity (Supply) Act, 1948 (hereinafter referred to as 'the 1948 Act') entrusted the control over the generation and distribution of electric energy to Electricity Boards constituted under the Act. In the State of Uttar Pradesh, the U.P. State Electricity Board (hereinafter referred to as 'the Board') was constituted on April 1, 1959. At that time, the State Government (hereinafter referred to as 'the State') was in the process of establishing the Rihand Hydro-Electric Generating Plant, which became operational w.e.f. February 1, 1962, and attained an ultimate installed capacity of 300 MW. The control of this remained with the State till March 31, 1965. Since the supply of electrical energy was then available in abundance and only the eastern area of the State was served by the plant, the State considered it expedient to enter into contracts with bulk purchasers both with a view to ensure maximum utilisation of the electricity available and with a view to the industrialisation of the eastern areas of the State. In particular the State was keen on the industrial development of the district of Mirzapur, which was considered to be an extremely backward area. The State was keen that power intensive units be set up in close proximity of Rihand so that electricity could be supplied to these units from the Rihand power plant. One feature of the supply of electricity from Rihand was that the metering was done at the point of generation so that transmission and distribution losses and costs could be borne by the consumers of electricity.

3. The appellant set up an industry for manufacture of caustic soda at Renukoot sometime in 1964. According to the appellant, this industry involved the use of electricity as the main raw material, the other raw material needed being salt. It is said that there were considerable disadvantages in setting up the proposed caustic soda unit in the district of Mirzapur, principally due to its distant location from areas from which salt had to be transported. The appellant, it is said, could easily have set up its factory in some other State with greater facilities and advantages but it was induced to set up the caustic soda plant at Pipri in the district of Mirzapur on account of the assurance given by the State that it will supply hydroelectric power to the assessee from the Rihand power plant on a long term basis at a cheap rate. It is claimed that, but for this

promise, the appellant would never have chosen Pipri or the district of Mirzapur for the location of this plant.

4. After elaborate discussions between the State Government and the promoters of the appellant company, the plant was set up at Pipri and a contract was entered into between the State Government and the appellant on September 30, 1963 ensuring the supply of electricity from the point of generation to the appellant for a period of 25 years from April 1, 1964. The supply, to the extent of 6.5 MW, was to be from Rihand hydel station at a fixed rate of 2.5 paise per unit. An additional supply of 1.5 MW was also promised from an inter-connection at the rate of 5 np per unit. The rates could be revised after the first sixteen years but any enhancement in rates was not to exceed 10 per cent of the rates agreed upon.

5. The State agreed further to supply 4.5 MW to the appellant from the Obra Hydro-Electric Project on such rates as would be fixed subsequently. It may be mentioned that this clause gave rise to disputes which were referred to arbitration. An award was made by Justice D.P. Madon, a retired Judge of this Court, which was made a decree of this Court by an order dated April 1, 1987. Under the award, the rate of supply was fixed at 8.69 paise per unit. The State's grievance is that it incurred a loss of Rs 10.55 crores by supplying electricity from Rihand between April 1, 1964 and May 19, 1983 at concessional rates instead of applying the uniform tariff applicable to other "bulk power" consumers, briefly referred to as "HV-2 rates." It says also that it likewise suffered a loss of Rs 12.4 crores due to the supply at 8.69 paise instead of normal rates, from Obra between April 1, 1971 and March 31, 1989, when the agreement came to an end by efflux of time.

6. Obviously, it was not economical to continue supplying energy at the preposterously low rates to which the State had committed itself in 1963 on account of the conditions that prevailed at the time of the agreement. The powers of the State or the Boards to revise contractual rates unilaterally were examined by this Court in *Indian Aluminium Company* v. *Kerala State Electricity Board*[1]. It is sufficient to say that, after considering the provisions of Sections 49 and 59 of the Supply Act, the Court held that the Electricity Boards were not entitled to enhance charges in derogation of stipulations contained in agreements entered into between parties. This decision led to the provisions of the Supply Act being amended by various States. The States of Karnataka, Orissa and Rajasthan brought in amendments enabling the Electricity Board to supersede contracts and revise the rates contained in earlier agreements. The U.P. Government also enacted the Electricity Laws (Uttar Pradesh

1 (1975) 2 SCC 414 : (1976) 1 SCR 70 : AIR 1975 SC 1967

Amendment) Act, 1983, to vest the State's agreement with the Board and to enable the Board to revise the contractual rates. The Act came into force from May 20, 1983. Section 7 of the said Act amended Section 60 of the Supply Act, 1948 by inserting the following sub-sections (3) to (5) with retrospective effect from April 1, 1965:

> 7. (3) All expenditure which the State Government may, not later than two months from the commencement of the Electricity Laws (Uttar Pradesh Amendment) Act, 1983, declare to have been incurred by it on capital account in connection with the purposes of this Act in respect of the Rihand Hydro Power System shall also be deemed to be a loan advanced to the Board under Section 64 on the date of commencement of this sub-section and all the assets acquired by such expenditure shall vest in the Board with effect from such commencement.
>
> (4) The provisions of sub-sections (1) and (1-A) shall, subject to the provisions of sub-section (5) apply in relation to the debts and obligations incurred, contracts entered into and matters and things obliged to be done by, with or for the State Government in respect of the Rihand Hydro Power System after the first constitution of the Board and before the commencement of this sub-section as they apply in relation to debts and obligations incurred, contracts entered into, matters and things engaged to be done by, with or for the State Government for any of the purposes of this Act before the first constitution of the Board.
>
> (5) All such contracts entered into by the State Government for supply of electrical energy based on or connected with the generation of electricity from the Rihand Hydro Electric Generating Station to any consumer and any contract entered into by the Board on or after April 1, 1965 for the supply of electrical energy to such consumer shall operate subject to the modifications specified in the following clauses, which shall have effect from the date of the commencement of the Electricity Laws (Uttar Pradesh Amendment) Act, 1983 (hereinafter referred to as the said date):—
>
> (*a*) the rates to be charged by the Board for the energy supplied by it to any consumer under any contract for which the payment will be due for the first time on or after the said date shall be such as may with the previous approval of the State Government be fixed by the Board, having due regard to the geographical position of the area of supply, the nature of the supply and purpose for which supply is required and any other relevant factor;
>
> (*b*) if the State Government directs the Board under Section 22-B of the Indian Electricity Act, 1910 or under any other

law for the time being in force to reduce the supply of energy to a consumer and thereupon the Board reduces the supply of energy to such consumer accordingly, the consumer concerned shall not be entitled to any compensation for such reduction, and if the consumer consumes energy in excess of the reduced limit fixed under the said Section 22-B or any other law for the time being in force as the case may be, then the Board shall have the right to discontinue the supply to the consumers without notice, and without prejudice to the said right of the Board, the consumer shall be liable to pay for such excess consumption at double the normal rate fixed under clause (*a*);

(*c*) Any arbitration agreement contained in such contract shall be subject to the provisions of this sub-section."

Parliament also, at about the same time, amended Section 59 of the Act by Act 16 of 1983. The amended Section 59(1), which is sufficient for our purposes reads thus:

"59. *General principles for Board's finance.*— (1) The Board shall, after taking credit for any subvention from the State Government under Section 63, carry on its operation under this Act and adjust its tariffs so as to ensure that the total revenues in any year of account shall, after meeting all expenses properly chargeable to revenues, including operating, maintenance and management express, taxes (if any) on income and profits, depreciation and interest payable on all debentures, bonds and loans, leave such surplus as is not less than three per cent, or such higher percentage, as the State Government may, by notification in the official Gazette, specify in this behalf, of the value of the fixed assets of the Board in service at the beginning of such year.

Explanation.— For the purposes of this sub-section, 'value of the fixed assets of the Board in service at the beginning of the year' means the original cost of such fixed assets as reduced by the aggregate of the cumulative depreciation in respect of such assets calculated in accordance with the provisions of this Act and consumers' contributions for service lines."

7. It has been pointed out to us that the U.P. State amendment is somewhat different from those of the other States. The Karnataka legislature amended Section 49 of the 1948 Act and the Orissa and Rajasthan legislatures inserted Section 49-A in the said Act. These provisions enabled the Boards to prescribe tariffs and these rates were to prevail over those specified in the agreement. The latter two amendments actually declare the relevant clauses in the agreement void from inception. The U.P. amendment, however, retains the effectiveness of the earlier contracts and only reads into them the rates that may be prescribed

by the Board. This is the first difference. The second is that while the other legislations affect all agreements entered into before a specified date, the U.P. amendment is restricted to contracts for supply of electricity from the Rihand Hydro-Electric Generating Station. We are informed that, when the above amendment was sought to be effected, the only outstanding contract of the State for the supply of electricity from the Rihand Hydro-Electric Generating Station was the contract with the appellant on September 30, 1963. There had been two agreements entered into for supply of electricity from this power station but the other one with Hindustan Aluminium Company had become ineffective since that company gave up its claim to supply from the above power plant in 1975-76 having been successful in putting up a power plant for its captive use. Thus, though the Act purports to be one of general application, it was really intended to enable the State and the Board to modify the rates of supply of electricity to appellant under the contract of September 30, 1963.

8. At this stage it may be useful to refer also to the terms of Section 49 of the Act. It reads thus :

> "49. (1) Subject to the provisions of this Act and or regulations, if any, made in this behalf, the Board may supply electricity to any person not being a licensee upon such terms and conditions as the Board thinks fit and may for the purposes of such supply frame uniform tariffs.
>
> (2) In fixing the uniform tariffs, the Board shall have regard to all or any of the following factors, namely:—
>
> (*a*) the nature of the supply and the purposes 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, with particular reference to such development in areas not for the time being served or adequately served by the licensee;
>
> (*c*) the simplification and standardisation of methods and rates of charges for such supplies;
>
> (*d*) the extension and cheapening of supplies of electricity to sparsely developed areas.
>
> (3) Nothing in the foregoing provisions of this section shall derogate from the power of the Board, if it considers it necessary or expedient to fix different tariffs for the supply of electricity to any person not being a licensee, having regard to the geographical posi-

tion of any area, the nature of the supply and purpose for which supply is required and any other relevant factors.

(4) In fixing the tariff and conditions for the supply of electricity, the Board shall not show undue preference to any person."

9. After the statute was thus amended, the Additional Chief Engineer of the Board wrote to the appellant on February 6, 1984 stating that, though the bills were being drawn on the basis of the agreement, the rates were subject to revision with effect from May 20, 1983 with the approval of the State Government and that a supplementary bill would be sent for the arrears as and when the rates were revised in pursuance of Section 60(5)(*a*). On April 5, 1984, the appellant filed Writ Petition No. 1818 of 1984 in the High Court of Allahabad assailing the validity of Section 7 of the amending Act and the right of the Board to enhance the rates. While admitting the writ petition, the High Court passed an interim order to the effect that the State Government should provide an opportunity of hearing to the appellant before bringing about any change in the terms and conditions of the agreement or tariff rates and that no revised rates shall be charged from the appellant till it is heard, and the matter decided, by the State Government. On June 11, 1984, the Law Officer of the Board wrote to the appellant requesting it to give in writing the points which they wanted to urge before the rates were approved by the State Government. According to the appellant, this was not sufficient compliance with the court's order and it moved the High Court for amending its petition and made further applications to the court. It may be mentioned that the stand taken up by the Board in the writ petition was that the writ petition was premature as the State's approval had not been obtained and no injury had been caused to the appellant. But, suddenly, on January 31, 1985, the Board wrote to the appellant informing it that the State Government had approved the levy of rates as per Schedule HV-2 (as defined in the U.P. Gazette Notification dated October 29, 1982) applicable to heavy power consumers in substitution of the rates mentioned in the agreement of September 20, 1963. It was stated — curiously enough — that the approval of the State Government had been given on September 28, 1983. The effect of the revision was to oblige the petitioner to pay 57.71 paise per unit for 1983-84 and 61.60 paise per unit for 1984-85. An idea of the magnitude of the revision can be had by pointing out that supplementary bills raised on the basis of the revision for the period May 20, 1983 to December 31, 1984 were to the tune of Rs 3.07 crores. The appellant's allegation is that no such approval had been given and it is asserted that the internal correspondence between Board and State would show that the Legal Department of the Board had raised certain objections to the levy of

HV-2 rates on the appellant, and that consequently Board had sent a fresh proposal in December 1983 seeking approval of the State Government for imposing a flat rate in respect of supplies to the appellant in place of earlier proposal. It is also stated no proposal was made, or approval sought, for imposing the revised rates w.e.f. May 20, 1983.

10. The Board, however, proceeded to make demands against the appellant on the basis of the revised rates. According to the Board, reference was made to a resolution dated January 30, 1985 to the withdrawal on that date of the proposal for a flat rate in place of HV-2 rates. Thus, demands on the basis of HV-2 rates were sought to be sustained. The demands amounted to several crores of rupees and disconnection was threatened in case of non-payment. The appellant obtained certain interim orders from High Court (which have been subsequently considered and modified from time to time by this Court during the pendency of these appeals). It is, however, not necessary to refer to these interim orders as the final liability of the appellant will have to be decided on the basis of the orders of this Court on the appeals.

11. The writ petition was heard by a bench of two judges. Both judges repelled the challenge to the validity of the Amendment Act but differed on some of the points which came up for their consideration. Srivastava, J. was of the opinion that the intention and purpose of the Amendment Act was to revise the existing contractual rate of energy charges and charge higher rates up to the extent of uniform tariff rates for the supply of electricity to the consumers whose contract stood modified by the said statute. The rates so fixed had to be dependent upon the factors enumerated in Section 60(5). According to him, the material on record showed that the factors enumerated in Section 60(5) had not been taken into account by the Board before fixing the rates or by the State Government in according its approval to the same. The Board and the government appeared to have acted upon a consideration of the factors mentioned in Section 49(2) of the Act of 1948 while framing a uniform tariff but this was not sufficient compliance with the provisions of Section 60(5). On the other hand, Mathur, J. was of the opinion that the move for amendment of the Act and enforcement of HV-2 tariff was initiated by the Board and that the notings contained a detailed justification for enforcing the said tariff. It also appeared from the statement of objects and reasons of the amending bill that the supply of electricity at concessional rates despite losses and the desirability of replacing the said rate by uniform tariff came up for discussion in the State legislature and that the Board did not act wrongly or illegally if it felt that it had no option but to apply uniform rates in view of the statement contained

in the objects and reasons of the Bill and the discussion in the State legislature. He was also of the opinion that the factors contemplated by Section 60(5)(*a*) were similar to those envisaged by Section 49(2), and since consideration had been given to the latter factors while framing the uniform tariff, no consideration of factors relevant to individual consumers was called for. The two learned Judges thus differed on the following two points:

(*a*) Whether the language of Section 60(5)(*a*) of U.P. Act 12 of 1983 required consideration of factors prescribed in Section 60(5)(*a*) viz., geographical position of the area of supply, the nature of supply and purpose for which supply is required and other relevant factors with reference to petitioner company for refusing the existing contractual rate of H.C. tariff ?

(*b*) Whether the factors mentioned in Section 49(2) of Electricity (Supply) Act, 1948, having already been considered at the time of framing uniform tariff no fresh consideration of any factors mentioned in Section 60(5)(*a*) of U.P. Act 12 of 1983 was required when the uniform tariff itself was being fixed while revising the rate?

The difference of opinion was, therefore, referred to a third Judge, Mehrotra, J. This learned Judge answered the question referred to him as follows:

(*a*) The language of Section 60(5)(*a*) of U.P. Act 12 of 1983 requires consideration of factors prescribed in it with reference to the petitioner company for revising the existing contractual rate; and

(*b*) Fresh consideration of the factors mentioned in Section 60(5)(*a*) was required irrespective of the fact that factors mentioned in Section 49(2) of the Electricity (Supply) Act, 1948 had already been considered at the time of framing of the uniform tariff which was being fixed for the petitioner company while revising the rates.

Consequent on the opinion of this learned Judge the writ petition was allowed and a writ of certiorari was issued quashing the approval dated September 28, 1983 given by the State Government to the new rates and the consequent resolutions, sanctions, bills and demands of the Board and the State Government. A writ of mandamus was also issued commanding the respondents not to charge the uniform tariff rate for the period beginning from May 20, 1983 till the rates were fixed in accordance with Section 60(5)(*a*) of U.P. Act 12 of 1983. The order disposing of the writ petition finally is dated April 2, 1987.

12. Immediately the judgment was pronounced the State Electricity Board and the State Government sought a certificate of fitness for preferring an appeal to this Court and the High Court granted the certif-

icate, as prayed for. This appeal has not been numbered on account of delay. Though the High Court had quashed the revision of the rates, it had left it to the Board and State to fix revised rates afresh. That apart, the appellant had also a grievance that, in applying the HV-2 rates which were applicable to other consumers, the Board and the State had not taken into account the special factors relevant to the supplies made to it. The appellant also, therefore, filed SLP No. 13967 of 1987 for leave to appeal from the judgment dated April 2, 1987. Leave has been granted by this Court on April 8, 1988 and the appeal of the company has been registered as C.A. No. 1306 of 1988.

13. In the meantime the Board and State were, apparently, carrying on an exercise for the revision of the rates afresh as directed by the High Court and on March 28, 1988, the Board purported to fix the following revised rates for the supply from May 20, 1983.

Period	Rate (Paise per unit)
May 20, 1983 to March 31, 1984	70.21
April 1, 1984 to March 31, 1985	74.93
April 1, 1985 to March 31, 1986	85.14
April 1, 1986 to March 31, 1987	88.60

It will be observed that rates thus fixed, and said to have been approved by the State Government, were much higher than the HV-2 rates fixed earlier, objected to by the appellant and quashed by the High Court. Having done this, the Board sought leave to withdraw the appeal preferred by it. So far the appellant's appeal was concerned, it was contended that the appellant's remedy was to challenge the revision of March 28, 1988, if so advised, in fresh proceedings. This was the position when these appeals came to be heard by us on April 10, 1991.

14. We heard the appeals at length and reserved orders. In doing so we passed the following order :

> "The appeals pertain to the fixation of tariff rates for supply of electricity to the appellants' caustic soda plant at Renukoot. The appellants originally came to court challenging the levy of the electricity charges on the basis of HV-2 rates applicable generally to consumers drawing supply from the U.P. State Electricity Board. However, the High Court held that the rates applicable to the appellants should be determined having regard to the individual circumstances of the appellants. This was by a majority judgment in the High Court. Subsequently, the Electricity Board has proposed, and the State Government has approved, certain rates for the period from May 20, 1983 to March 31, 1987 which are somewhat higher than the HV-2 rates originally approved. This is the bone of controversy between the parties.

We find that the State Government and Board have filed no counter-affidavits in regard to the challenge by the appellants to the revision of rates effected subsequent to the High Court judgment. In the circumstances, before we pronounce our judgment we think that, in the interests of justice, it would be proper to direct the State Board and the State Government to reconsider the fixation effected by them on the basis of the following directions :

1. Within a period of three weeks from today, the appellants will file before the State Electricity Board (with a copy to the State Government) a representation setting out what, according to them, are the individual factors which should be taken into account in fixing the rates applicable to them within the meaning of Section 60(5)(*a*) of the Electricity (Supply) Act, 1948 as amended in 1983.

2. The State Electricity Board will consider this representation and make appropriate recommendations to the State Government. However, before doing so, and particularly if the Board intends to take into account any factors other than those mentioned in the appellants' representation, they should indicate the factors which they so wish to take into account, in their recommendations to the State Government. A copy of the recommendations should be forwarded to the appellants within seven weeks from today.

3. On receipt of the recommendations made by the Board, the appellants may submit to the State Government, if they so desire, any representation which they wish to make regarding the recommendations within a period of three weeks thereafter.

4. The State Government will consider the recommendations of the State Board as well as the representations made by the appellants to the Board as well as to themselves and approve of the rates which they consider proper in the circumstances of the case by a reasoned order, giving a broad indication of the factors which they have taken into account in fixing the rates. This decision should be arrived at within a period of four weeks from the date of the receipt of the representation of the appellants.

5. As indicated above, since the High Court has decided that in fixing the rates the individual circumstances of the appellants should be taken into account, the State Board as well as the State Government should take into consideration the special circumstances of the appellants in fixing the rates.

6. The government's order may also, in case different rates for different periods are fixed, indicate the respective dates from which the several rates will come into operation. The rates and dates so

fixed by the government, will naturally be subject to the decision on these appeals."

15. Subsequent to our order, the appellant made a representation to the Board on April 29, 1991. The Board made its recommendations thereon to the State Government on June 26, 1991. Thereafter the appellant made its representation to the State Government on July 22, 1991. The State Government has subsequently passed an order on August 31, 1991 and submitted the same to us. It is perhaps sufficient to extract the concluding paragraphs of the order :

> "After analysing the contentions of Kanoria Chemicals and the State Electricity Board, the State Government comes to the conclusion that M/s Kanoria Chemicals and Industries Ltd. has taken benefit of establishing this unit in a backward area for the last 19 years and there is no justification in giving this benefit continuously in future also because this area has been developed in comparison to earlier years. The request of M/s Kanoria Chemicals and Industries Ltd. that the factors shown by State Electricity Board should be limited to Rihand Hydel Power Station, is without jurisdiction (*sic* justification) since, at present, they are getting supply from U.P. Grid and not from Rihand Power Station. Hence, the point of view of the State Electricity Board is justifiable.
>
> 8. After due consideration of representation dated April 29, 1991 and July 22, 1991 of M/s Kanoria Chemicals and Industries Ltd. and the recommendations of the State Electricity Board dated June 26, 1991, the State Government comes to the conclusion that M/s Kanoria Chemicals and Industries Ltd. has failed to indicate any fact which comes under the provisions of Section 60(5)(*a*) of the Electricity (Supply) Act, 1948 and which has not been considered by the State Electricity Board while fixing the rates in March, 1988. Not only this, the State Electricity Board while fixing the rate in March 1988 has kept in mind the decision of Hon'ble High Court of Allahabad and complied with the provisions of Section 60(5)(*a*) of the Electricity (Supply) Act, 1948. Since keeping in view the factors enumerated in Section 60(5)(*a*) of the Electricity (Supply) Act, 1948, the Rules were revised in March, 1988 in the following manner, hence there appears no necessity to change these rates :

S. No.	Period	Rate
1.	May 20, 1983 to March 31, 1984	70.21 paise/unit
2.	April 1, 1984 to March 31, 1985	74.93 paise/unit
3.	April 1, 1985 to March 31, 1986	85.14 paise/unit
4.	April 1, 1986 to March 31, 1987	88.60 paise/unit

In other words, the State and Board adhere to the rates fixed on March 28, 1988.

16. It may be interesting to set out a comparative table of the revisions effected by the Board originally (which was quashed by the High Court) and the rates now approved :

Period	HV-2 rate paise/unit	Revised rate paise/unit
May 20, 1983 to March 31, 1984	55.71	70.21
1984-85	59.86	74.93
1985-86	63.89	85.14
1986-87	80.88	88.60
*1987-88	84.64	88.60
*1988-89	93.39	88.60

* The revised rates for 1987-88 and 1988-89 are stated to be provisional but so far till today no fresh rates have been fixed in respect of these periods.

17. The resultant position is that the appellant is now facing huge demands in respect of the period since May 20, 1983 and till March 31, 1989 when the agreement expires, at rates which will be higher than the HV-2 rates which had been sought to be applied in the first instance. The appellant vehemently challenges the fixation of rates on March 28, 1988 and August 31, 1991.

18. A good part of the argument before us in these appeals, in the first instance, was addressed on the question whether the State Government was obliged to give a hearing to the consumer before revising the rates under Section 60(5) and whether the factors relevant under Section 60(5) can be said to have been taken into account on the ground that they had already been taken into account while fixing uniform rates under Section 49. In this context, reference was made to several decisions and contentions were canvassed in regard to the nature of the process of fixation of rates of charges for supply of electricity. It is, however, necessary to go into all these aspects because, in pursuance of the directions of this Court dated April 10, 1991, the matter has been reconsidered by the Board and the State Government and fresh rates have been fixed along with the respective dates of operation after hearing the appellant's representatives.

19. Broadly two principal submissions have been addressed before us at this stage on behalf of the appellants. The first is that the fixation of rates as on August 31, 1991 is not valid as the respondents have not complied with the directions given by this Court in the order dated April 10, 1991. It is argued that the respondents have neither disclosed the factors based on which the rates were revised in March 1988 nor have they indi-

cated the monetary incidence or impact of the factors taken into account, though a specific request was made in this regard by the appellant to the Board and to the State Government. The appellant, it is said, has been gravely prejudiced and handicapped, in the absence of any such disclosure, in making any effective representation. Further in the final order dated August 31, 1991, the State Government has stated that the fixation of rate by the State Government was based upon the consideration of facts and data communicated by the Board to the State Government in March 1988 but, admittedly, no facts, data or basis had been placed before this Court at the time of the original writ petition on the basis of which the State Government had fixed the rates in March 1988 compelling this Court to remand the matter for fresh consideration. Suddenly the Board, while concluding its recommendation to the State Government on September 26, 1991 reminded the State Government that prior approval of the State Government for the rates had already been obtained in March 1988 and persuaded the State Government to mechanically uphold the predetermined rates. Finally, it is contended that even in this process of re-fixation of the rates there was no genuine exercise to consider relevant factors in determining the rate under Section 60(5)(*a*).

20. We do not think that there is any force in these contentions. By the time the matter came up before us for hearing in the first instance the State Government had already passed its order of revision dated March 28, 1988. The rates which had been recommended by the State Electricity Board and approved by the State Government were within the knowledge of the appellant. It was of course necessary and equitable that, before giving effect to these rates (if not even before they were recommended), the consumer should have had an opportunity of placing before the Electricity Board and the State Government its side of the picture. This opportunity has, however, been provided to the appellant. The appellant has also filed its representation. After considering the representation, the Board made its recommendations to the State Government and a copy of these recommendations were also available to the appellant. The appellant also had full opportunity to meet the various points set out in the recommendations of the Board. The comments of both the Board and the appellant have been taken into account by the State Government before finally approving of the rates proposed by the Board. The grievance of the appellant seems to be that the Board has not set out anywhere the precise manner in which the rates recommended by them were arrived at and that this has considerably handicapped any effective representation being made by it to the Board and

to the State Government. We do not think the proceedings are vitiated for this reason. It is true that the actual computations of the rates were not set out by the Board in its recommendations made in 1983 or 1985 or 1988 but the proper approach to the issue is not the one adopted by the petitioner. The section does not require the Board or the State Government to explain each and every step in its calculation. All that the State Government has to do is to take into consideration the factors relevant under Section 60(5) and propose rates for fixation to the State Government. It is in order to ensure that these recommendations take into account all relevant factors that an opportunity has been provided to the consumer to satisfy the Board as well as the State Government that the fixation has not taken into account certain relevant factors. We, therefore, think the appellant must be held to have been given a fair opportunity under Section 60(5)(*a*) so long as it had an opportunity to explain to the Board and the State Government the factors individual to its case and also as to how and why the rates recommended by the Board need modification. Moreover, the issue here was in a narrow compass for the following reason. On the passing of the Amendment Act, the Board decided to substitute the contract rates by the HV-2 rates. But this was rendered infructuous because of the terms of Section 60(5)(*a*) which, it was said, were different from those of Section 49. If the factors under Section 49 were alone to be taken into account then the consumers, one and all, would have been liable to pay for the electricity at the tariff rates. The claim of the appellant was that in applying these rates certain factors individual to it had not been taken into account. If one compares the two provisions, one will find that most of the elements are common to the two provisions. Both under Section 49 and Section 60 the authorities have to take into account the geographical position of any area, the nature of supply and purpose for which supply is required and any other relevant factor. The only difference between the two provisions is that since Section 49 deals with a general fixation while Section 60(5) deals with a fixation for a particular individual case, there may be some special factors to be taken into account which may or may not be germane while fixing the general tariff under Section 49. Hence the only point which needed to be considered, when the matter was re-examined pursuant to our directions, was whether, having regard to the factors prevailing in the case of the appellant the rates to be fixed should be higher or lower than the HV-2 rates or whether they should be the same. It was open to the petitioner to contend, as it in fact did, that there are special features in its case which make it legitimate to fix some concessional rates as compared to other consumers. On the other hand, it is equally open to the State Electricity Board to contend that having regarding to the

prevalence of certain circumstances, the rates to be fixed should be higher than the tariff rates applicable generally. This is a short aspect on which both parties have made their positions clear. Apart from the general factors which have been taken into account in fixing the general tariff rates, the Board has, in making its recommendations, taken into account the purpose for which supply was required by the petitioner along with the factor of recurring losses incurred by the Board year after year and its statutory requirements to maintain a minimum surplus of 3 per cent as required under Section 59 of the Supply Act, 1948. We are, therefore, satisfied that the appellant had full opportunity to place all its special features before the Board and the State Government and that all aspects have been fully considered by the authorities. The fixation of rates on August 31, 1991 is not, therefore, vitiated for the reasons urged by the appellant.

21. The only other aspect that requires consideration is regarding the maintainability of the rates as now fixed by the Board and the State. Three questions arise in regard to this :

(*i*) Can the Board fix rates higher than HV-2 rates in respect of bulk consumers like the company for whom a concessional rate had been granted on special considerations?

(*ii*) Can the Board determine rates in 1991 and make them retrospective w.e.f. 1983 ?

(*iii*) Was there material for the Board to fix the rates which they have eventually fixed ?

22. We find that the answer to the first two questions posed above can only be in the affirmative. On the first issue, there are no obstacles, statutory or theoretical, standing in the way of the Board fixing rates for the company which will be higher than the rates applicable to bulk consumers. The provision in Section 60(5)(*a*) is intended to enable the Board and State to cut off the shackles cast by an ancient contract entered into at a time when conditions were totally different. It confers an absolute and unrestricted enabling power to revise the rates in an appropriate manner and contains no restriction of the nature suggested for the appellant. In doing this, the only limitation which the statute requires the authorities to keep in mind are the factors mentioned in the section. Whether the revised rates for the consumer governed earlier by the contract should be higher or lower than, or equal to, the tariff rates would depend on a large number of considerations, in particular, the basis on which, and the point of time at which, those general rates were fixed. In principle, it is quite conceivable that, in an appropriate case, a consideration of the relevant factors may justify even a rate higher than

the general tariff rates intended for the particular category of consumers. We shall examine later whether this was justified in the present case. At the moment, all we are concerned with is the legality of fixing such higher rates and we see no difficulty in this either on the language of the statute or on other considerations.

23. A retrospective effect to the revision also seems to be clearly envisaged by the section. One can easily conceive a weighty reason for saying so. If the section were interpreted as conferring a power of revision only prospectively, a consumer affected can easily frustrate the effect of the provision by initiating proceedings seeking an injunction restraining the Board and State from revising the rates, on one ground or other, and thus getting the revision deferred indefinitely. Or, again, the revision of rates, even if effected promptly by the Board and State, may prove infructuous for one reason or another. Indeed, even in the present case, the Board and State were fairly prompt in taking steps. Even in January 1984, they warned the appellant that they were proposing to revise the rates and they did this too as early as in 1985. For reasons for which they cannot be blamed this proved ineffective. They revised the rates again in March 1988 and August 1991 and, till today, the validity of their action is under challenge. In this state of affairs, it would be a very impractical interpretation of the section to say that the revision of rates can only be prospective.

24. The language of the section also supports this view. Slightly rearranging the syntax of the clause to facilitate easier understanding, what it provides is that the revised rates fixed by the Board shall be the rates to be charged by the Board for the energy supplied by it to any consumer for which the payment will be due for the first time on or after May 20, 1983. In other words, the rates eventually fixed will, by force of statute, apply to all supply of electricity for which the charges become payable in terms of the contract, after May 20, 1983. There are three objections suggested against this interpretation. The first is that it precludes the Board and State, where they choose to do so, from revising the rates prospectively or with effect from such dates, after May 20, 1983, which they may consider appropriate. We think this consequence does not flow from the language of the provision. The mandate is only that the rates to be charged on supplies for which payment becomes due after August 20, 1983 shall be as fixed by the Board. The powers of the Board in fixing the rates — including the dates from which they will be operative — are not restricted in any manner. The Board is at complete liberty to fix different rates from different dates and that scheme of fixation will be read with the contract. Only the Board cannot revise the rates in respect of supplies for which payment under the contract, fell due before May 20, 1983.

The second objection, which is a follow-up of the first, is that if the power under Section 60 is held exercisable more than once, the interpretation will permit successive revisions, each superseding the earlier one, a position that could lead to immense harassment. We have no doubt the power under Section 60 is exercisable more than once. All the same, the answer to the appellant's objection is that, while this could be a basis of substantial harassment if repeated revisions are automatically dated back to May 20, 1983 (as argued, on the first point, for the assessee), it loses all force on our interpretation leaving it open to the Board and State to fix the dates with effect from which revisions will be effective. In view of this, one can take it that, while making a subsequent revision, the authorities will not normally tamper with an earlier revision(s) or alter the dates of effectiveness fixed for the earlier revision(s) without a valid reason to do so. If this is done, it will be open to a court to examine the basis thereof and sustain it only where the earlier fixation was based on an error or misconception or the like and called for modification. The third objection is that the Hindi version of the Amendment Act is differently worded and does not contain the words "for the first time" found in the English version. Reliance is placed on the decision of a Bench of seven Judges of the Allahabad High Court in *Mata Badal Pandey* v. *Board of Revenue*[2] to the effect that, where there appears a doubt or ambiguity on a plain reading of the English words as to the true intention of the legislature and the Hindi version is conflicting or different, the Hindi text will be the key for finding the answer. We do not think the Hindi version really alters the position; actually it is the presence of the words "for the first time" in the English version that create an ambiguity. Without these words, the clause clearly provides that all supply of electricity, for which payment is to be made after May 20, 1983, will be charged at the rates to be fixed by the Board. We, therefore, reject the appellant's contention and hold that the fixation by the Board of rates from May 20, 1983 and, at different rates for different periods of time, is unexceptionable.

25. This takes us to the real and crucial question in the case as to whether rates to be fixed in the present case should, on proper considerations, be less than, equal to or higher than the general HV-2 rates. The appellant contends that it should be charged at the cost of generation plus a reasonable margin of profit or at the rate at which the supply is made to the Madhya Pradesh State Electricity Board. At any rate, it is said, the rates charged to the appellant should be less than HV-2 rates. For this it relies on : (*a*) the special circumstance that the appellant, at

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great detriment to itself, agreed to set up a caustic soda plant in a backward area at the request of the State Government and in public interest only because of a promised concession in rates of electricity supply; (*b*) the fact that the supply to the appellant is metered at the point of generation with the result that the transmission and distribution losses, insofar as the appellant is concerned, are borne by the appellant and not by the Board as in the case of other consumers and (*c*) the important fact that electricity, in the case of the appellant, is one of the only two raw materials needed for its business. On the other hand, for the Electricity Board, it is contended that the appellant should be called upon to pay higher than HV-2 rates for the following reasons :

(*i*) The appellant has been having substantial supplies of electricity at *nominal* rates of 2.5 paise and 2.75 paise per unit between 1963 and 1983:

(*ii*) The supply to the assessee is being made only from the State Grid and there is no reason why it should draw the supply at lower rates than others;

(*iii*) The Board has been incurring heavy losses over the years. This is to a considerable extent due to the spiralling demand for electricity, the Board's responsibilities under the statute to coordinate development of the supply of energy throughout the State and the necessity to supply energy at concessional rates to certain sectors such as the agricultural sector.

(*iv*) The Board is also entitled, under Section 59 of the 1948 Act, to take into account the necessity of building up a surplus, statutorily fixed, in the fixation of rates of supply to all or any of its consumers.

26. We have given careful thought to the considerations urged before us and we are of opinion that there is no material to justify any departure from the HV-2 rates in the case of the appellant. We find no force in the contentions put forward on behalf of the appellant to reduce the rates applicable to the appellant below HV-2 level. The special circumstances pleaded have lost their importance with the passage of time. It is obvious that the conditions that prevailed in 1963 are not valid and the appellant has had the benefit of concessional rates for twenty years. No doubt the benefits would have continued for five more years but for statutory intervention. But the statute permits a reconsideration of the situation as in May 1983 and it is unarguable, it seems to us, that the rate of 2.75 paise should continue even after 1983 or that the appellant should be entitled to any special concession. The consideration that electricity is a "raw material" in the assessee's business is, again, irrelevant for it can mean nothing more than that the appellant needs substantial

quantities of the energy and there is no reason why it should not pay for it at the normal market rates. The point regarding take-off of supply at the generating point will no doubt have some relevance on the question of rates and we shall refer to this aspect later in the context of the pleas put forward by the Board. We are, therefore, of the view that the appellant has no valid justification for staking a claim to less than the HV-2 rates.

27. Equally, it seems to us, the authorities have no case for seeking to raise the rates beyond the HV-2 rates. They are supplying energy to the appellant from the grid since 1968 and they cannot justifiably seek to demand higher rates from the appellant than from the HV-2 consumers. This is sought to be justified on the basis of the huge losses that the Board has been incurring and the statutory justification for escalation in the rates keeping in view the necessity to build up a surplus. This, however, is an aspect of working which should affect all the consumers equally. May be the Board can, in appropriate circumstances, seek to make up for a part of the losses by hiking up the rates to one particular category of consumers but that would not be justified here as the transmission and distribution losses in respect of the supply to the appellant are borne by it and, in the absence of some special vital reason, it would not be equitable to fix the rates of supply to the appellant above the rates applicable to other HV-2 consumers. Some reference was made to the difficulties in completely fitting the scheme of computations for determining the HV-2 rates into the scheme under the appellant's contract. It is, however, unnecessary to go into that aspect as we are only on the question of rates and holding that there is no justification for charging more than HV-2 rates from the appellant. Moreover, the appellant has been paying for the Obra supply at HV-2 rates since 1989. We have also been informed that in 1972 the appellant took a further additional supply of 8 MW and agreed to pay therefor at HV-2B rates as applicable to other Bulk Power Consumers in the State.

28. In these circumstances, we have reached the conclusion that there is no justification to charge more than HV-2 rates from the appellant. We, therefore, allow this appeal in part, quash the determinations of 1988 and 1991 and direct that the appellants should be charged from May 20, 1983 to March 31, 1989 at the HV-2 rates applicable to other consumers. The appeal of the appellant is partly allowed to the above extent. The Board's appeal has not yet been numbered as it is delayed by a few days. It was, however, stated that the Board wishes to withdraw its appeal because of the subsequent developments. For these reasons and

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also in view of our above conclusion the Board's appeal also stands dismissed. In the circumstances, we direct each party to bear its own costs.

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(BEFORE A.M. AHMADI AND S.C. AGRAWAL, JJ.)

DR P.K. JAISWAL .. Appellant;

Versus

MS DEBI MUKHERJEE AND OTHERS .. Respondents.

Civil Appeal No. 138 of 1992†, decided on January 7, 1992

Service Law — Appointment — Selection — Right to be considered for selection — Crystallises only after candidate is called for interview after advertisement — Where prior to issuance of advertisement by Public Service Commission, government withdrew the requisition for selection with a view to amend the rules so as to make appointment by promotion instead of resorting to direct recruitment but even then the Commission proceeded with the selection process, held, candidate called for interview by the Commission pursuant thereto acquired no vested right to be considered for selection — Constitution of India, Article 320

When a vacancy arose in the post of Assistant Director General (Prevention of Food Adulteration) in the Ministry of Health and Family Welfare of the Govt. of India, a requisition was sent by the government to the Union Public Service Commission for selection of a candidate for filling the vacancy in accordance with the recruitment rules then operating which provided for the said post being filled in by direct recruitment only. However, before the Commission could advertise the post the govt. informed the Commission not to proceed with the process of selection because it was examining the question of opening up an avenue for promotion from Assistant Secretary to the post in question. Notwithstanding the said communication, the Commission advertised the post. The appellant applied for the post and was called for interview by the Commission. Thereupon the respondent who was then serving as Assistant Secretary, and was hoping to be promoted as Assistant Director General on the amendment of the recruitment rules, approached the Central Administrative Tribunal and obtained an interim order staying the process of selection initiated by the Commission. In the meantime two further layers above that of Assistant Secretary came to be created providing for higher pay scales by an amendment of the rules. The Tribunal ultimately disposed of the petition with a direction to the concerned Ministry to provide promotional avenues to the applicant who had functioned in the post of Assistant Secretary for several years and had held the charge of Assistant Director General as and when the occasion arose. On behalf of the appellants two contentions were made : Firstly, once the process for selection had started it was not open to the government as well as the Tribunal to freeze the process and the Commission was entitled to complete the selection; and secondly, the fact of the creation of two layers by the amend-

† Arising out of SLP No. 16083 of 1991