

Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Petition No. 1 of 2005 and
I.A. Nos. 1 & 32 of 2006

Dated: December 22, 2006

Present:

Hon'ble Mr. Justice Anil Dev Singh, Chairperson
Hon'ble Mr. A.A. Khan, Technical Member

Gajendra Haldea

S/o Late Shri Rao T.N. Haldea,

R/o CII/69 Bapa Nagar,

New Delhi – 110003

..... Appellant(s)

V/s

1. Central Electricity Regulatory Commission
(Constituted under the Electricity Act, 2003)
Core-3, 6th Floor,
Scope Complex,
New Delhi – 110003.
2. Assam State Electricity Regulatory Commission,
(Through Secretary)
A-12/334, S.B. Housing Complex,
Tripura Road, Khannapara,
Guwahati - 781022
3. Andhra Pradesh Electricity Regulatory Commission
(Through Secretary)
No. 8-2-283/B/1, Road No. 3,
Banjara Hills,
Hyderabad – 500034.

4. Delhi Electricity Regulatory Commission,
(Through Secretary)
DVB sub-station No. 15,
Sector -7 Pushp Vihar,
New Delhi – 110017
5. Gujarat Electricity Regulatory Commission
(Through Secretary),
1st floor, Neptune Tower,
Opp. Nehru Bridge,
Ashram Road,
Ahmedabad - 380009
6. Himachal Pradesh Electricity Regulatory Commission
(Through Secretary),
Keonthal Commercial Complex,
Khalini, Shimla – 171 002 (HP)
7. Haryana Electricity Regulatory Commission
(Through Secretary),
SCO 180, Sector-5,
Panchkula – 134109
8. Karnataka Electricity Regulatory Commission
(Through Secretary)
No. 9/2 Mahalaxmi Chambers,
6th & 7th floor, M.G. Road,
Bangalore – 560001
9. Madhya Pradesh Electricity Regulatory Commission
(Through Secretary),
Urja Bhawan, Shivaji Nagar,
Bhopal – 462016
10. Maharashtra Electricity Regulatory Commission
(Through Secretary),
World Trade Centre,
Centre No. 1, 13th floor,
Cuffe Parade,
Mumbai – 400 005.

11. Orissa Electricity Regulatory Commission
(Through Secretary)
Bidyut Niyamak Bhavan, Unit –VIII
Bhubaneswar – 751102
12. Punjab State Electricity Regulatory Commission
(Through Secretary),
517, Sector- 33 B,
Chandigarh.
13. Tamil Nadu Electricity Regulatory Commission
(Through Secretary),
Vetha Mansion, No. 8, IIIrd Floor, Main Road,
Seethammal Colony, Alwarpet,
Chennai – 600018
14. Uttar Pradesh Electricity Regulatory Commission
(Through Secretary),
Isan Mandi, 2nd floor,
Gomti Nagar,
Lucknow – 226 010.
15. West Bengal Electricity Regulatory Commission
(Through Secretary),
Flat No. 2 & 3, Building No. B-5,
FD 415 A, Poura Bhaban (3rd floor),
Sector –III, Bidhannagar,
Kolkata – 700091
16. Uttaranchal Electricity Regulatory Commission
(Through Secretary),
80, Vasant Vihar, Phase-I,
Dehradun,
Uttaranchal – 248001
17. Jharkhand State Electricity Regulatory Commission
(Through Secretary),
2nd floor, Rajendra Jawan Bhawan cum Sainik Bazar,
Main Road, Ranchi – 834001.

18. Rajasthan Electricity Regulatory Commission
(Through Secretary),
Shed No. 5, Vidyut Bhawan,
Jyoti Nagar,
Jaipur – 302005.
19. Kerala State Electricity Regulatory Commission
(Through Secretary),
30, Belhavan Gardens, Kawdiar,
Thiruvananthapuram – 695003.
20. Power Trading Corporation of India Ltd.
2nd Floor, Bhikaji Cama Place,
New Delhi – 110 066.
21. West Bengal State Electricity Board,
Bidyut Bhawan, Bidhan Nagar,
Block-DJ, Sector II,
Salt Lake City,
Kolkata – 700 091
22. Grid Power Corporation of Orissa,
Vidyut Bhawan, Janpath,
Bhubaneswar – 751 007.
23. Maharashtra State Electricity Distribution co. Ltd.
Prakashgad, Plot No. G-9, Bandra(East),
Mumbai – 400 051.
24. Calcutta Electricity Supply Corporation,
6th Church Lane, 1st Floor,
Calcutta – 700091.

.....Respondent(s)

Counsel for Appellant : Mr. Sitesh Mukherjee & Mr. Rajiv Yadav
Mr. Gajendra Haldea (Rep.)

Counsel for Respondents : Mr. Shanti Bhushan, Sr. Adv
Dr. Samir Chakravarthy, Ms. Gauri Rasgotra,
Mr. Vikram Bajaj & Mr. Shiladitya Rakshit
for Calcutta Electricity Supply Corpn., - Resp.24

Mr. Amit Kapur with Mr. Shailendra Kumar Singh
N.L. Ganapathi & Mr. Ashish Dholakia for Power
Trading Corporation of India Ltd., -Resp.20
Mr. M.G. Ramachandran, Ms. Taruna Singh
Baghel & Ms. Saumya Sharma for
Orissa Regulatory Commission - Resp.11
Ms. Deepa Chavan, Ms. Alpana Dhake,
Mr. Rajiv Nanda for Maharashtra State
Electricity Distribution Company Limited - Resp.23.
Mr. Pratik Dhar & Mr. C.K. Rai for West Bengal
Electricity Regulatory Commission -Resp.15
Mr. Saurabh Mishra & Mr. Arijit Maitra for Maharashtra
Electricity Regulatory Commission - Resp.10
Mr. R.K. Mehta, Mr. L.N. Mohapatra &
Ms. Suman Kukrety for Grid Corpn., of Orissa – Resp.22
Mr. Suresh Tripathy for DERC & UPERC - Resps. 4 & 14
Mr. Saurabh Mishra for Maharashtra Electricity
Regulatory Commission - Resp.10
Mr. S. Shrivastava for Jharkhand State Electricity
Regulatory Commission - Resp.17
Mr. Jaidipkar, Mr. Suchit Mahanty, Mr. M.K. Ray,
Mr. P.C. Saha, Mr. Deepak Bhattacharya, Mr. C.
Neeladri & Mr. C.L. Kalia for WBSEB - Resp.21
Mr. Yogesh Gupta & Mr. Vibhu Bakhru for Madhya
Pradesh Electricity Regulatory Commission - Resp.9
Mr. Animesh Kr. Mishra for DERC – Resp.4

Mr. Tara Datt Pant & Mr. K.S. Dhingra (Rep.) for Resp.1
Mr. A. Guha (Rep) for Resp.15
Mr. A.K. Mehta, Sect. JSERC (Rep.) for Resp.17
Mr. Rajesh Kumar Monga (Law Officer for HERC)

JUDGMENT

Per Hon'ble Mr. Justice Anil Dev Singh, Chairperson

By this petition, under Section 121 of the Electricity Act, 2003, (for short 'the Act') the petitioner seeks the following reliefs:

- a. Order and direct the Appropriate Commissions to ensure that all generating companies and licensees abide by the provisions of the Act in so far as they relate to sale and purchase of electricity at regulated tariffs.

- b. Order and direct the Appropriate Commissions to fix the trading margins for trading licensees.
 - c. Order and direct the Appropriate Commissions to review trading operations/ sales undertaken by generating companies and licensees within their jurisdiction and, where necessary, initiate proceedings for recovery of excess amounts charged by the generating companies and/ or licensees.
 - d. Pass such other or further order(s) and/or direction(s) as may deem fit and proper in the facts and circumstances of the present case.
2. It is averred in the petition that the petitioner has no personal interest in the present petition except as a consumer and a person keenly interested in electricity sector reforms. It is also claimed that the object of the petition is to ensure that the respondents take suitable measures to maintain the sanctity of the tariffs fixed by the Appropriate Commissions for supply of electricity by generating companies and for preventing unscrupulous circumvention of such tariffs by generating companies and trading and distribution licensees in the course of inter state sale of electricity. It is further asserted that there is rampant profiteering by electricity traders and distribution licensees, who are exploiting the scarcity situation in the country

due to inaction of the Appropriate Commissions in enforcing the law and further in fixing trading margin, even though information is available with them, which shows that conditions have arisen warranting the exercise of such power by the Appropriate Commission. According to the petition, the tariffs which are fixed for the generating companies and licensees are being violated in the following manner:

- (i) In case of central generating stations, where the tariffs are being determined by the CERC, the concerned companies are selling some of the allocations, surrendered by the receiving states, to traders at prices that are significantly higher than the tariff fixed by the CERC.
- (ii) The generating companies in states are selling to traders and other licensees outside the state at tariffs higher than those fixed by the respective State Commissions under Part VII of the Act.
- (iii) While the generating companies are selling power to the distribution companies within the state at the tariff fixed by the Appropriate Commission under Part VII, the distribution companies are selling the same power to the licensees outside the state, including traders, at much higher prices thereby making a mockery of both

- the generation tariffs as also the retail tariffs fixed by the State Commissions. Furthermore, such practices are incentivising load shedding by distribution companies within their respective areas, in order to make huge profits through inter-state sales at prices significantly higher than the regulated generation and/or distribution tariff.
- (iv) The said unlawful profits are being utilized to offset the deficit arising from commercial losses, including rampant theft and inefficient operations within the area of the distribution companies. Besides, there is a clear violation of the Act by distribution companies, which are carrying on inter-state sale/trading of electricity without a trading license for inter-state trade, as required under the Act, and although the practice of distribution companies trading illegally in power has become rampant and is a matter of common knowledge, the Appropriate Commissions have failed to take suitable action to prevent the distribution companies from carrying on inter-state trading of electricity without proper trading licenses and at

unregulated prices.

(v) The generating companies are indirectly trading in electricity at higher prices through their wholly owned or controlled subsidiaries to circumvent the tariff applicable to them. To illustrate, the NTPC generating stations are making available power to the GRIDCO in Orissa at tariffs fixed by the CERC under Part VII of the Act, and this power is being resold by the GRIDCO to the NVVN (which is a 100 % owned subsidiary of NTPC) after retaining a large unearned and illegal margin. Subsequently, the NVVN, the trading arm of the NTPC, is reselling the same power at much higher price to different states, where there is scarcity of power.

3. The above instances, according to the petition, account for escalation in the cost of power. It is claimed that the licensees and generating companies are reaping unlawful profits and making windfall gains far in excess of the tariff being fixed under part VII of the Act. In the petition, it is pointed out that such instances are prevalent particularly in Orissa, Uttaranchal,

Himachal Pradesh, West Bengal etc. In the circumstances, it is urged that the consumers are being exploited.

4. The petitioner also seeks an order directing the Regulatory Commissions to fix trading margin.

5. The learned counsel for the respondents (hereinafter whenever the word 'respondents' is used, it will not include respondent no. 23, Maharashtra State Electricity Distribution Co. Ltd. as the stand of respondent no. 23 is identical to the stand of the petitioner), by way of preliminary objections, have urged that the petition is not maintainable for various reasons namely:

- i. That the petitioner has not invoked the original jurisdiction of any Appropriate Commission for determination of the questions involved in the petition.
- ii. That the power of the Appellate Tribunal under Section 121 of the Act is for issuing directions and instructions to the Appropriate Commissions on the administrative side and Section 121 of the Act cannot be utilized by a party for filing a petition which raises a controversy in the nature of an adversarial litigation.
- iii. That the power under section 121 of the Act is not an original power and the same is circumscribed by section 120 thereof. In other words the power can be exercised

only while exercising the appellate power under sections 110 and 111 of the Act.

- iv. The petition is not maintainable for non-joinder of necessary parties since their interest shall be prejudiced by hearing the matter in their absence.
- v. That the CERC has already notified the CERC (Fixation of Trading Margins) Regulations, 2006 whereby ceiling for trading margins for inter-State sale of electricity has already been fixed.
- vi. That the petition is by way of public interest litigation and there is no provision in the Act under which such a petition could have been filed.

6. In so far as the plea of the petitioner that the CERC should be directed to fix trading margin for inter state sale of electricity is concerned, it does not survive as the CERC has already fixed the trading margin for inter state sale of electricity by notifying the Central Electricity Regulatory Commission (Fixation of Trading Margins) Regulations, 2006.

7. As regards the submission of the learned counsel for the respondents that the petition is not maintainable for non joinder of the parties, we are of the view that there are number of respondents from the electricity sector, who represent diverse interests. In the circumstances, therefore, it is not necessary to

join each and every utility or a trader in the electricity sector to be represented before us.

8. As regards other preliminary objections, it will be necessary to have a look at Section 121 of the Act. Section 121 reads as under:-

“121. 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.”

9. A reading of the aforesaid section leaves no manner of doubt that the Tribunal is authorized to issue such orders, instruction, directions as it may deem fit to any Appropriate Commission for performance of its statutory functions under the Act. It is significant that the original Section 121 of the Act conferred on the Chairperson, the general power of superintendence and control over the Appropriate Commissions. But that provision was not notified as required by Section 1(3) of the Act, which provides that the Act shall come into force on such date as the Central Government may, by notification, appoint. Therefore, Section 121, as it originally stood never came into force. The original Section 121, however, was substituted by

the present Section, and the same was duly notified. The difference in the language of the original Section 121 and the present Section 121 is telling. The scope of the two provisions is different. As already pointed out, under the original Section 121 the Chairperson had the jurisdiction of general superintendence and control over the Appropriate Commissions, while present section 121 of the Act confers power on the Appellate Tribunal to issue, from time to time, such orders, instructions or directions as it deems fit, to the Regulatory Commissions for the discharge of their statutory functions assigned to them. Therefore, there can be no real controversy in regard to the power of the Tribunal under Section 121 of the Act to issue appropriate orders, instructions and directions to the Regulatory Commissions for the performance of their statutory functions. The argument of the respondents that the Appellate Tribunal for Electricity has been constituted only for hearing appeals against the orders of the adjudicating officers and Appropriate Commissions under this Act, is based on a misconception of the provisions of Sections 110 and 121 of the Act. The two sections are capable of operating independently of each other in separate spheres.

Similarly, Section 111(6) of the Act shows that the Tribunal is also armed with yet another type of power, different from the appellate power. Section 111(6) of the Act empowers the Appellate Tribunal to examine the legality, propriety or correctness of any order made by the adjudicating officer or the Appropriate Commission, as the case may be, in relation to any proceeding, on its own motion or otherwise, call for the record of such proceedings and make such order in the case as it thinks fit.

10. Undoubtedly, Section 110 of the Act empowers the Tribunal to exercise appellate power but at the same time Sections 111 (6) and 121 of the Act confer additional powers on the Tribunal. While Section 111 (6) of the Act empowers the Tribunal to examine the legality, propriety or correctness of any order made by the adjudicating officer or the appropriate Commission in relation to any proceedings, as it thinks fit, Section 121 of the Act vests the Appellate Tribunal with the power to issue such orders, instructions or directions, as it may deem fit, to any Appropriate Commission for the performance of its statutory functions under the Act.

11. In case the Tribunal was constituted under Section 110 only for the purposes of hearing the appeals, Sections 111(6) and 121 of the Act would not have been there on the statute book. If the argument of the respondents is accepted, the provisions of Sections 111(6) & 121 of the Act will be rendered otios. We find nothing in Section 120 or any other provision of the Act which even remotely suggests that the Tribunal has only the power to hear and dispose of appeals and the power conferred on it by Sections 111(6) and 121 of the Act must be exercised in connection with matters arising from appeals and not independently of them. Therefore, we reject the preliminary objection of the respondents that Section 121 of the Act does not confer any original jurisdiction on the Appellate Tribunal to issue appropriate orders, instructions and directions to the Regulatory Commissions and Section 121 of the Act can be utilized only when an appeal has been filed.

12. The power under Section 121 of the Act belongs to the Tribunal and can be exercised both on the administrative and judicial sides. It is to be utilized for keeping the Regulatory Commission on the statutory track in case it deflects from the

course or to prevent the danger of such deflection by an advance ruling. When a party files a petition under Section 121 of the Act he is merely acting as an informer. He has no vested right in moving the petition. It is the prerogative of the Tribunal to consider whether or not cognizance of the same should be taken. It is also for the Tribunal to decide the extent to which notice of the information contained in the petition should be taken. It is only in the rarest of the rare cases that the Tribunal is to be moved under Section 121 of the Act by a party. The provisions of Section 121 of the Act cannot be invoked by a party unless the issue has nexus with the performance of the statutory functions of any Regulatory Commission and has far reaching implications, gravely affecting the electricity sector of the country. In the instant case, we have taken cognizance of the petition as we find that the points raised in the petition have far reaching implications affecting the electricity industry in India and the consumers of electricity.

13. In the circumstances, the preliminary objections raised by the respondents are hereby rejected.

14. The basic issue which requires our attention and determination relates to the interpretation of Section 62 (1), 79 (1) (a) & (b), 86 (1) (a). The issue is whether Electricity Regulatory Commissions can fix tariff for sale of electricity by ; (i) a generator to a trader or an intermediary; (ii) a distributor to a trader, and (iii) by a trader to any other person. In order to answer the question, it will be necessary to first look at Section 62 of the Act as it deals with tariff. This Section to the extent relevant is set out below:

“62. Determination of Tariff - (1) The Appropriate Commission shall determine the tariff in accordance with 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.”

15. Thus, according to sub-section (1) of Section 62 of the Act, the Appropriate Commission is empowered to determine tariff for;

(i) supply of electricity by a generating company to a distribution licensee; (ii) transmission of electricity; (iii) wheeling of electricity;

and (iv) retail sale of electricity except to the extent provisos to the sub-section operate. Therefore, under sub-section (1) of Section 62 of the Act, there is no power with the State or the Central Commission to determine or fix tariff, price or rate to be charged for supply of electricity by: (i) a generator to a trader or an intermediary; (ii) a distributor to a trader; and (iii) by a trader to a distributor or any other person. The Parliament if it wanted the Appropriate Commission to fix the tariff for supply of electricity by a generating company to a person other than a distribution licensee, it would have made such a provision in sub-section (1) of Section 62 of the Act or any part of the Section 62, just as it made provision for determination of tariff in respect of the aforesaid four categories as specified in clauses (a) (b)(c) and (d) of sub-Section (1) of Section 62 of the Act, by including a clause to the following effect:-

‘The Appropriate Commission shall determine the tariff for sale of electricity by a generator to a trader or an intermediary, by a distributor to a trader and by a trader to any other person’.

Significantly such a provision is missing.

16. In case the Parliament intended the Commission to determine generation tariff applicable to any person in addition to a distribution licensee, Clause (a) of sub-section (1) of Section 62 of the Act would have simply stated as under:-

‘the Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for supply of electricity by a generating company’.

17. The remaining four words of Section 62(1)(a), namely “to a distribution licensee”, would have been absent. The presence of these words in clause (a) of sub-Section (1) of Section 62 restrict the power of the Appropriate Commission and it can only determine the tariff for supply of electricity by a generating company to a distribution licensee and no one else.

18. Thus it is clear from a perusal of Section 62 of the Act that it does not confer power on the Appropriate Commission to fix tariff for the supply of electricity by a generator to a trader or an intermediary or by a distributor to a trader or by a trader to any other person.

19. It is well settled that what is missing from the statute cannot be brought in by the Court through a process of involved

interpretation, as to do so will be legislation and not construction. Even in case of an inadvertent omission of a matter by the legislature a court or a judicial tribunal is not empowered to supply the omission. In the case of *Magor & St. Mellons Rural District Council vs. New Port Corporation* (1951) 2 All E.R. 839, it was held that the duty of the court is to interpret the words, the legislature has used. Those words may be ambiguous, but even if they are, there is no power with and duty of the Court to travel outside them on a voyage of discovery.

20. In *Baliram Waman Hiray vs. Justice B. Lentin & Ors.*, (1988) 4 SCC 419, it was held that the Court cannot in the guise of interpreting a statutory provision, supply any *casus omissus*.

In this regard, the Supreme Court held as follows:-

“The main thrust of the argument of the learned Advocate-General that a Commission of Inquiry should be regarded as a court for the purposes of Section 195(1)(b) stems from a wrongful hypothesis that sub-Section (4) of Section 5 of the Act is in two parts. He contends for the purpose of his submission that sub-Section (4) of Section 5 of the Act consists of two separate provisions, the first of which deals with the status of a Commission of Inquiry as a civil court and the second deals with the power of the Commission to forward a case under Section 482 of the earlier Code (corresponding to Section 346 of the present Code) when any offence as is described in Section 175, Section 179, Section 180 or Section 228 of the Indian Penal Code is committed in

view of or presence of the Commission, to a Magistrate having jurisdiction to try the same. The submission in that sub-Section (4) is in two parts dealing with separate subject matters and merely because they are joined by the word 'and', the first part cannot be projected into the second. We are afraid, we are unable to agree with this line of reasoning. It would not be correct to contend that the legal fiction contained in the first part of sub-Section (4) is complete in itself and therefore a Commission of Inquiry must, by reason of the legal fiction contained therein, be deemed to be a civil court 'for all purposes'. The argument fails to take note of the fact that the words 'for all purposes' are not there in the first part of sub-Section (4) and the court cannot in the guise of interpreting the provision, supply any casus omissus. The first part of sub-Section (4) merely provides by the legal fiction that a Commission of Inquiry shall be deemed to be a civil court and it stops there. We are quite clear that the first part cannot be read in isolation but must take its colour from the context in which it appears. It would not be correct to contend that the fiction created by the first part by the words 'shall be deemed to be a civil court' is full and complete in itself. The purpose and object of the legal fiction created by the first part of sub-Section (4) is reflected in the second. A Commission of Inquiry is therefore fictionally a civil court for the limited purpose of proceeding under Section 482 of the old Code or under Section 346 of the present Code. A fortiori, the legal fiction contained in sub-Section (5) of Section 5 which relates to the proceedings before the Commission is necessarily confined to offences that are punishable under Sections 193 and 228 of the Indian Penal Code and does not extend beyond that".

21. In *Unique Butyle Tube Industries (P) Ltd. vs. U.P. Financial Corporation & Ors.*, (2003) 2 SCC 455, it was held that the court cannot read anything into a statutory provision which is plain and unambiguous and the legislative *casus omissus* cannot be

supplied by judicial interpretative process. The Supreme Court holding so observed as follows:-

“It is a well-settled principle in law that the court cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent. The first and primary rule of construction is that the intention of the legislation must be found in the words used by the legislature itself. The question is not what may be supposed and has been intended but what has been said, “Statutes should be construed, not as theorems of Euclid”, Judge Learned Hand said, “but words must be construed with some imagination of the purposes which lie behind them”. (See Lenigh Valley Coal Co. v. Yensavage (218 FR 547). This view was reiterated in Union of India vs. Filip Tiago De Gama of Vedem Vasco De Gama, (1990) 1 SCC 277: AIR 1990 SC 981 (SCC p. 284, para 16).

In D.R.Venkatachalam v. Dy. Transport Commissioner, (1977) 2 SCC 273: AIR 1977 SC 842, it was observed that courts must avoid the danger of a priori determination of the meaning of a provision based on their own preconceived notions of ideological structure or scheme into which the provision to be interpreted is somewhat fitted. They are not entitled to usurp legislative function under the disguise of interpretation.

While interpreting a provision the court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary. (See Rishabh Agro Industries Ltd. v. P.N.B. Capital Services Ltd., (2000) 5 SCC 515). The legislative casus omissus cannot be supplied by judicial interpretative process. Language of Section 6(1) (Ed. Of Land Acquisition Act, 1894) is plain and unambiguous. There is no scope for reading something into it, as was done in N. Narasimhaiah v. State of Karnataka, (1996) 3 SCC 88. In State of Karnataka

v. D.C. Nanjudaiah (1996) 10 SCC 619 the period was further stretched to have the time period run from the date of service of the High Court's order. Such a view cannot be reconciled with the language of Section 6(1). If the view is accepted it would mean that a case can be covered by not only clauses (i) and/or (ii) of the proviso to Section 6(1), but also by a non-prescribed period. The same can never be the legislative intent.

*Two principles of construction – one relating to casus omissus and the other in regard to reading the statute as a whole – appear to be well settled. Under the first principle a casus omissus cannot be supplied by the court except in the case of clear necessity and when the reason for it is found in the four corners of the statute itself but at the same time a casus omissus should not be readily inferred and for that purpose all the parts of a statute or Section must be construed together and every clause of a Section should be construed with reference to the context and other clauses thereof so that the construction to be put on a particular provision makes a consistent enactment of the whole statute. This would be more so if literal construction of a particular clause leads to manifestly absurd or anomalous results which could not have been intended by the legislature. “An intention to produce an unreasonable result”, said Danckwerts, L.J., in *Artemiou v. Procopiou*, (1966) 1 QB 878: (1965) 3 All ER 539: (1965) 3 WLR 1011 (CA) (All ER p. 544-I) “ is not to be imputed to a statute if there is some other construction available”. Where to apply words literally would “defeat the obvious intention of the legislation and produce a wholly unreasonable result” we must “do some violence to the words” and so achieve that obvious intention and produce a rational construction [Per Lord Reid in *Luke v. IRC*, 1963 AC 557: (1963) 1 All ER 655: (1963) 2 WLR 559 (HL) where at AC p.577 he also observed : (All ER p. 664 I) “ This is not a new problem, though our standard of drafting is such that it rarely emerges”. Therefore, the High Court's conclusions holding proceedings under the U.P. Act to be in order are indefensible.*

22. In P.K. Unni Vs Nirmala Industries and Ors, AIR 1990 SC 933, it was held that the court must proceed on the assumption that the legislature did not make a mistake and that it intended to say what it said and the court cannot add words to a statute or read words in to it, which are not there. In this regard it was observed as under:

“The court must indeed proceed on the assumption that the legislature did not make a mistake and that it intended to say what it said: See Nalinakhya Bysack Vs Shyam Sunder Haldar, 1953 SCR 533 at page 545: (AIR 1953 SC 148 at Page 152). Assuming there is a defect or an omission in the words used by the legislature, the court would not go to its aid to correct or make up the deficiency. The court cannot add words to a statute or read words in to it which are not there, especially when the literal reading produces an intelligible result. “No case can be found to authorize any Court to alter a word so as to produce a casus omissus”. Per Lord Halsbury, Mersey Docks Vs Henderson, {(1988) 13 App Cas 595, 602}. “We cannot aid the legislature’s defective phrasing of an Act, we cannot add and mend, and, by construction, make up deficiencies which are left there.”: Crawford Vs Spooner {(1846) 6 Moore P.C.1,8,9}.”

23. Denning, L. J., as he then was, in Seaford Court Estates Vs Asher, (1949) 2 All ER 155 observed as follows:

“A judge must not alter the material of which the Act is woven, but he can and should iron out the creases.”

24. Again in *Nasiruddin & Ors Vs Sita Ram Aggarwal* (2003) 2 SCC 577, it was held that the court can only iron out the fabric of the legislation but it cannot change its texture.

25. In *Union of India Vs Rajiv Kumar*, (2003) 6 SCC 516, it was held that the intention of the maker of the statute is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said.

26. Thus, we cannot alter the provisions of Section 62(1) of the Act by a process of interpretation requiring the Appropriate Commission to determine the tariff for supply of electricity by a generator to an intermediary or to a trader or supply of electricity by a distributor to a trader or supply of electricity by a trader to any other person, especially when it is not stated in Section 62 (1) of the Act that the Appropriate Commission shall determine tariff for supply of electricity by a generator to a trader or an intermediary etc. rather what is stated is that the Appropriate Commission shall determine tariff for supply of electricity by a generator to a distributor. We cannot rewrite the

provisions. The clear language employed in the statute is the determinative factor of the legislative intent.

27. While construing the statute, we can only straighten out the wrinkles of the legislation but cannot change its pattern.

28. It was pointed out by the petitioner that Sections 79 and 86 of the Act lay down the functions of the Central and the State Commissions respectively. It was further pointed out that according to clauses (a) and (b) of sub-clause (1) of Section 79, the Central Commission has been assigned the functions to regulate the tariff for generating companies owned or controlled by the Central government and also of such generating companies which enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State.

29. The petitioner submitted that according to Section 79 (1)(a) & (b), the Central Electricity Regulatory Commission is required to regulate the tariff of generating companies. According to the petitioner the provision to regulate the tariff of generating

companies is not hedged in by any limitation. As a sequitur, it was submitted that the tariff determined by the Central Electricity Regulatory Commission for generating companies is not only applicable for sale to the distribution licensees, but it also applies to sales made by generating companies to traders or to intermediaries etc.

30. It was also submitted that clause (a) of sub-Section (1) of Section 86 empowers a State Electricity Regulatory Commission to determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be within the State. Advancing similar argument, as was cited in the context of Section 79(1)(a) and (b), the petitioner contended that under Section 86(1)(a), the State Commission is required to fix tariff for generation and supply of electricity and the tariff so fixed will be applicable to any person or entity to whom electricity is sold. According to the petitioner, the words "Generation" and "Supply" are of wide amplitude. Therefore, under Section 86 (1)(a), the Commission can determine tariff for supply of electricity by a generating company, which must apply not only to a distribution licensee but also to a trader or an

intermediary etc. Similarly, the Commission can determine the tariff for supply of electricity by a trader to any person, urged the petitioner.

31. On the other hand, it was submitted by the learned counsel for the respondents that Sections 79 and 86 prescribe functions of the Central and the State Commissions respectively. According to the learned counsel, Sections 79 and 86 not only require the Central and the State Commissions to determine tariff but they also assign other functions to them as well. It was canvassed that the provisions for determination of tariff under Sections 79 (1)(a) & (b) and 86 (1)(a) are of general nature and cannot go beyond the provisions of Section 62(1), which relate to determination of tariff and the words used in Sections 79(1)(a)& (b) and 86(1)(a) must be construed in the light of sub clauses (a), (b), (c) and (d) of sub-section (1) of Section 62 of the Act.

32. We have considered the submissions of the parties.

33. Sections 79 and 86 of the Act lay down the functions of the Central Electricity Regulatory Commission and the State

Electricity Regulatory Commissions respectively. Sections 79 and 86 read as follows:-

“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 licenses 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;

- (g) to specify and enforce the standards with respect to quality, continuity and reliability of service by licensees.
 - (h) to fix the trading margin in the inter-State trading of electricity, if considered, necessary;
 - (i) 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 licence;

- (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; and
- (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) reorganization 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”.

34. It appears to us that the general words in Sections 79 (1) (a) & (b) and 86(1) (a) must take colour from the words used in Section 62 (1), particularly Section 62 (1) (a). Otherwise, it is not possible to reconcile the provisions of Section 62(1) on the one hand and Section 79 (1) (a) & (b) and Section 86(1) (a) on the other. It is well established principle of construction of statutes that as far as possible the provisions of a statute on the same subject must be harmonized. Sections 79(1) (a) & (b) require regulation of tariff for generation. They must be construed in the context of Section 62(1) (a), which provides for determination of tariff by the Appropriate Commission for supply of electricity by a generating company to a distribution licensee. Similarly, Section 86(1)(a), which requires determination of tariff, *inter alia*, for ‘supply and generation of Electricity’ must be construed

with reference to Section 62(1), particularly 62 (1) (a) and accordingly are to be interpreted to mean that the State Commission is empowered to determine tariff for supply of electricity by a generating company to a distribution licensee and cannot be construed to mean that the State Commission is possessed of the jurisdiction to fix the tariff for sale of electricity by a generator to trader or an intermediary or supply of electricity by a trader to any person. In case Section 79(1) (a) & (b) and Section 86(1) (a) are not construed in this manner, a grave difficulty would arise for determination of tariff. Section 64 of the Act of 2003 postulates filing of an application under Section 62 thereof by a generating company or a licensee. Section 64 reads as under:

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 concerned licensees 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:

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

35. Thus, it is clear from a reading of Section 64(1) of the Act that an application for determination of tariff can only be made under Section 62. But Section 62(1) only prescribes

determination of tariff for: (a) supply of electricity by a generating company to a distribution licensee; (b) transmission of electricity; (c) wheeling of electricity; and (d) retail sale of electricity. Section 64 (1) does not authorize filing of an application under Section 62 for determination of tariff for supply of electricity by a generator to a trader or an intermediary or by a distributor to a trader or by a trader to any person. It also does not prescribe that the Appropriate Commission can simply fix tariff for generation. According to Section 62 (1) (a), tariff has to be determined of the generating company for supply to a distribution licensee alone. Where the Parliament intended the Appropriate Commission to fix tariff generally, the Commission specifically authorized it to do so as is apparent from clauses (b), (c) and (d) of Section 62(1) of the Act under which the Appropriate Commission is required to determine tariff for transmission of electricity, wheeling of electricity and retail sale of electricity. Therefore, tariff under Section 62 can only be determined by filing an application under Section 64 but the application must be confined to the determination of tariff in respect of four categories of cases

specified in Section 62 and not under Sections 79(1) (a)& (b) and 86 (1)(a) of the Act.

36. In case the Parliament intended the tariff to be determined under Section 79(1)(a) & (b) for generation and under Section 86 (1)(a) for generation and supply independently of and de hors Section 62(1), Section 64 would have authorized the concerned party to file an application under Section 79(1)(a) & (b) and Section 86(1)(a) for determination of tariff. The fact that the statute prescribed filing of an application under Section 62 before the Commission for determination of tariff shows that the provisions of Sections 79(1)(a) & (b) and Section 86 (1)(a) must take colour from the provisions of Section 62(1) of the Act. In this view of the matter, there would be no need for a separate provision for filing an application for determination of tariff under Section 79 (1)(a) & (b) and Section 86 (1)(a). Therefore, the statute did not provide for a provision for filing an application for determination of tariff under Section 79(1)(a) & (b) and 86(1)(a) of the Act.

37. Section 62(6) of the Act lays down that in case any licensee or generating company recovers a price or charge in excess of the tariff determined under Section 62, 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. It is important to note that the amount exceeding the tariff has reference to the tariff determined under Section 62 and not under Sections 79 (1)(a) & (b) or 86 (1)(a) . Assuming, for the sake of argument, that the Appropriate Commission could determine tariff for supply of electricity by a generating company to a trader or an intermediary etc. and the generating company recovers a price exceeding the tariff determined by the Commission, there is no provision like 62(6) for recovery of the excess amount paid beyond the tariff fixed for generating station for supply of electricity to any of the aforesaid parties. In case the Parliament had intended Sections 79 (1) (a) & (b) and 86 (1) (a) to be the provisions for determination of tariff de hors Section 62(1), then provision like Section 62(6) would have been enacted even for

recovery of price exceeding the tariff determined under Section 79 (1)(a)& (b) and 86(1)(a).

38. A statute is best interpreted when it is known why it was enacted. This knowledge is necessary to uncover the intent of the law maker. The text of the statute and the context in which the statute is enacted must be matched; otherwise mismatch between the two is likely to present a distorted view of the statute. In the matter of Special Reference No.1 of 2001, (2002) 8 SCC 237, the Supreme Court held that in interpreting the statutes the word used therein cannot be read in isolation. Their colour is derived from the context and therefore, every word in the statute must be examined in its context. By the word 'context' in its widest sense includes not only the enacting provisions of the statute but its preamble, the existing State of law and the mischief which the statute intended to remedy. While construing the statute the roots of the past, the foliage of the present and the seeds of the future cannot be lost sight of.

39. Therefore, for construing the provisions of the Act, one must examine the objects and reasons of the Bill, Preamble of the Act

etc. as that will reflect what was the State of law earlier, what mischief it intends to remove and what it intends to achieve.

40. The importance of the object and purpose of the Act has also been highlighted by the Supreme Court in Nathi Devi vs. Radha Devi, (2005) 2 SCC 271, wherein it was held that in case of ambiguity in the language of the statute or in the event of it being capable of two interpretations, it is trite that the interpretation which serves the object and purpose of the Act must be given effect to.

41. The significance of the legislative object of the provisions of a statute for purposes of its interpretation was again emphasized by the Supreme Court in Motor Owners Insurance Co. Ltd. Vs Jadavji Keshavji Modi & Ors. (1981) 4 SCC 660. In this regard the Supreme Court held as under:

“18. We are, therefore, of the opinion that the ambiguity in the language used by the legislature in the opening part of Section 95(2) and the doubt arising out of the correlation of that language with the words "in all" which occur in clause (a), must be resolved by having regard to the underlying legislative purpose of the provisions contained in Chapter VIII of the Act which deals with third party risks. That is a sensitive process which has to accommodate the claims of the society as reflected in that purpose. Indeed, it is in this area of legislative ambiguities, unfortunately not

receding, that courts have to fill gaps, clear doubts and mitigate hardships. In the words of Judge Learned Hand:

It is one of surest indexes of a mature and developed jurisprudence ... to remember that statutes always have some purpose or object to accomplish whose sympathetic and imaginative discovery is the surest guide to their meaning. (Cabell v. Markham, 148 F 2d 737, 739 (1945))

There is no table of logarithms to guide or govern statutory construction in this area, which leaves a sufficient and desirable discretion for the judges to interpret laws in the light of their purpose, where the language used by the law-makers does not yield to one and one meaning only. Considering the matter that way, we are of the opinion that it is appropriate to hold that the word "accident" is used in the expression "anyone accident" from the point of view of the various claimants, each of whom is entitled to make a separate claim for the accident suffered by him and not from the point of view of the insurer".

42. In *Ambica Quarry Works Vs. State of Gujarat & Ors.* (1987) 1 SCC 213, it was held that the interpretation of a statute must sub serve and help in implementation of the purpose of the Act.

43. In *N.K. Jain & Ors Vs C.K. Shah & Ors.* (1991) 2 SCC 495, it was held by the Supreme Court that the provisions of Sections 14 and 17 of the Employees Provident Fund and Miscellaneous

Provisions Act, 1952 must be interpreted in such a way so that the purpose of the legislation is allowed to be achieved.

44. In *K. Veeraswami Vs Union of India & Ors.* (1991) 3 SCC 655, it was held that construction of a statute which would promote the general legislative purpose is to be preferred to the construction which would not.

45. In *Devadoss (dead) by L.Rs, Vs. Veera Makali Amman Koil thalur*, AIR 1998 SC 750, it was held that the Statements of Objects and Reasons, accompanying a legislative bill can be referred to by the courts for understanding the background, the antecedent State of affairs and the surrounding circumstances in relation to the statute.

46. In view of the aforesaid decisions of the Supreme Court, we need to examine the statement of objects and reasons of the Act, the preamble of the Act and various Sections thereof as they will portray what the statute needs to accomplish and therefore, how it should be construed. The statement of objects and reasons of the Electricity Bill, 2001, the Preamble of the Act of 2003 and

relevant provisions of the Act are set out below:-

STATEMENT OF OBJECTS AND REASONS

The Electricity Supply Industry in India is presently governed by three enactments namely, the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948, the Electricity Regulatory Commissions Act, 1998.

1.1 The Indian Electricity Act, 1910 created the basic framework for electric supply industry in India which was then in its infancy. The Act envisaged growth of the electricity industry through private licensees. Accordingly, it provided for licensees who could supply electricity in a specified area. It created the legal framework for laying down of wires and other works relating to the supply of electricity.

1.2 The Electricity (Supply) Act, 1948 mandated the creation of a State Electricity Board. The State Electricity Board has the responsibility of arranging the supply of electricity in the State. It was felt that electrification which was limited to cities needed to be extended rapidly and the State should step in to shoulder this responsibility through the State Electricity Boards. Accordingly the State Electricity Boards through the successive Five Year Plans undertook rapid growth expansion by utilising Plan funds.

1.3 Over a period of time, however, the performance of SEBs has deteriorated substantially on account of various factors. For instance, though power to fix tariffs vests with the State Electricity Boards, they have generally been unable to take decisions on tariffs in a professional and independent manner and tariff determination in practice has been done by the State Governments. Cross subsidies have reached unsustainable levels. To address this issue and to provide for

distancing of government from determination of tariffs, the Electricity Regulatory Commissions Act, was enacted in 1998. It created the Central Electricity Regulatory Commission and has an enabling provision through which the State Governments can create a State Electricity Regulatory Commission. 16 States have so far notified/created State Electricity Regulatory Commissions either under the Central Act or under their own Reform Acts.

2. Starting with Orissa, some State Governments have been undertaking reforms through their own Reform Acts. These reforms have involved unbundling of the State Electricity Boards into separate Generation, Transmission and Distribution Companies through transfer schemes for the transfer of the assets and staff into successor Companies. Orissa, Haryana, Andhra Pradesh, Karnataka, Rajasthan and Uttar Pradesh have passed their Reform Acts and unbundled their State Electricity Boards into separate companies. Delhi and Madhya Pradesh have also enacted their Reforms Acts which, inter alia, envisage unbundling/corporatisation of SEBs.

3. With the policy of encouraging private sector participation in generation, transmission and distribution and the objective of distancing the regulatory responsibilities from the Government to the Regulatory Commissions, the need for harmonising and rationalising the provisions in the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998 in a new self-contained comprehensive legislation arose. Accordingly it became necessary to enact a new legislation for regulating the electricity supply industry in the country which would replace the existing laws, preserve its core features other than those relating to the mandatory existence of the State Electricity Board and the responsibilities of the State Government and the State Electricity Board with respect to regulating licensees. There is also need to provide for newer concepts like power trading and open access. There is also need to obviate the requirement of each State Government to

pass its own Reforms Act. The Bill has progressive features and endeavours to strike the right balance given the current realities of the power sector in India. It gives the State enough flexibility to develop their power sector in the manner they consider appropriate. The Electricity Bill, 2001 has been finalised after extensive discussions and consultations with the States and all other stake holders and experts.

4. The main features of the Bill are as follows:-

(i) Generation is being delicensed and captive generation is being freely permitted. Hydro projects would, however, need approval of the State Government and clearance from the Central Electricity Authority which would go into the issues of dam safety and optimal utilisation of water resources.

(ii) There would be a Transmission Utility at the Central as well as State level, which would be a Government company and have the responsibility of ensuring that the transmission network is developed in a planned and coordinated manner to meet the requirements of the sector. The load despatch function could be kept with the Transmission Utility or separated. In the case of separation the load despatch function would have to remain with a State Government Organisation/ company.

(iii) There is provision for private transmission licensees.

(iv) There would be open access in transmission from the outset with provision for surcharge for taking care of current level of cross subsidy with the surcharge being gradually phased out.

(v) Distribution licensees would be free to undertake generation and generating companies would be free to take up distribution licensees.

(vi) The State Electricity Regulatory Commissions may permit open access in distribution in phases with surcharge for-

(a) current level of cross subsidy to be gradually

*phased out along with cross subsidies; and
(b) obligation to supply.*

(vii) For rural and remote areas stand alone systems for generation and distribution would be permitted.

(viii) For rural areas decentralised management of distribution through Panchayats, Users Associations, Cooperatives or Franchisees would be permitted.

(ix) Trading as a distinct activity is being recognised with the safeguard of the Regulatory Commissions being authorised to fix ceilings on trading margins, if necessary.

(x) Where there is direct commercial relationship between a consumer and a generating company or a trader the price of power would not be regulated and only the transmission and wheeling charges with surcharge would be regulated.

(xi) There is provision for a transfer scheme by which company/companies can be created by the State Governments from the State Electricity Boards. The State Governments have the option of continuing with the State Electricity Boards which under the new scheme of things would be a distribution licensee and the State Transmission Utility which would also be owning generation assets. The service conditions of the employees would as a result of restructuring not be inferior.

(xii) An Appellate Tribunal has been created for disposal of appeals against the decision of the CERC and State Electricity Regulatory Commissions so that there is speedy disposal of such matters. The State Electricity Regulatory Commission is a mandatory requirement.

(xiii) Provisions relating to theft of electricity have a revenue focus.

5. *The Bill seeks to replace the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998.*

6. *The Bill seeks to achieve the above objects.*

“ Preamble to the Act:

An Act to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalisation of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto.”

42. Duties of distribution Licensee and open access

.....

4. *Where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply.*

“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:-

.....

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

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.

79. Functions of Central Commission

.....

5. *The Central Commission shall advise the Central Government on all or any of the following matters, namely:- (a) 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.*

86. Functions of State Commission:

.....

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;*

.....

47. From the above, it is clear that there is need for adopting measures conducive to the development of electricity industry, promoting competition. This is possible by having minimum regulation. The electricity industry is required to be unshackled.

For long the Electricity Industry had been subjected to controls. There is need to set up electricity generating plants, transmission lines, distribution system etc. The electricity industry is capital intensive, unless the investors feel that it is worthwhile to invest money, development cannot take place. At the same time the interests of the consumers have to be protected.

Having given our general comments with regard to the objects and reasons, Preamble and various provisions of the Act, we need to determine the question with specific reference to the objects and reasons, Preamble and various provisions of the Act.

48. The objects and reasons of the Electricity Bill, 2001 gives a cue to the background and antecedent State of affairs prevailing before enactment of the Act. It also gives insight to the evil which the Act sought to remedy. The Electricity (Supply) Act, 1948 had almost stultified the development of electricity sector. Therefore, it had become necessary to enact a new legislation for replacing the existing law for achieving the development of the power sector.

49. Besides, the objects and reasons of the Electricity Bill, 2001, *inter alia*, spell out the action which requires to be taken to energise the power sector:

- i) encourage private sector participation in generation, transmission and distribution;
- ii) develop the power sector;
- iii) recognize trading as a distinct activity with the safeguard of the Regulatory Commission being authorized to fix ceilings on trading margins, if necessary and to keep free from regulating the price of power;
- iv) where there is a direct commercial relationship between a consumer and a generating company or a trader and only the transmission and wheeling charges with surcharge need to be regulated.

50. Thus, it is important for the growth of the sector to encourage participation of private sector in the development of Electricity Industry. This is sought to be achieved by various provisions. Trading in electricity, which was hitherto unknown, is recognized as a distinct activity with the safeguard of the Regulatory Commission being authorized to fix ceilings on trading margins, if necessary. In case of direct commercial relationship between a consumer and a generating company or a trader, the price of power is intended to be free from the

determination of tariff by the Regulatory Commissions and only the transmission and wheeling charges with surcharge is envisaged to be regulated (see Section 42(4) of the Act).

As per Section 63 of the Act where tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government, it is mandatorily required to be adopted by the Appropriate Commission.

51. The preamble of the Act enshrines the concept of competition to give impetus to development of electricity industry. Similarly Section 61(1) envisages framing of Regulations by the Appropriate Commission which would encourage competition, efficiency, good performance and optimum investments.

52. The thrust of the legislation and its spirit, as reflected from the objects and reasons, the Preamble and various provisions thereof, is for promoting competition and this is also visible from the provisions of Section 79(2) and Section 86(2) of the Act. Viewed thus, the construction of Sections 62(1), 79(1) (a) & (b) and 86 (1) (a) of the Act must be in consonance with the purpose

of the statute, which is the development of the electricity industry based on competition.

53. The whole object of the Act would be frustrated and defeated in case the words 'generation and 'supply' and the words 'tariff of generating companies' occurring in Sections 86(1)(a) and 79(1)(a) & (b) of the Act respectively are construed independently of Section 62(1)(a). In case the tariff for generation is to be regulated/fixed by the Commission under Sections 79(1)(a)&(b) and 86(1)(a) without reference to a price fixation qua the distributor as contemplated by Section 62(1)(a), it would mean that the generator will be bound by the tariff fixed by the Appropriate Commission not only when a distributor buys electricity from it but also when purchase is made by a trader. Again in case the word 'supply' in Section 86(1) (a) is read without being construed in the light of Section 62(1)(a), it would imply that Appropriate Commission will be empowered to fix tariff for the supply of electricity by a trader to any person, which will be even against the provisions of Sections 79 (1) (j) and 86 (1) (j), which provide for fixing of trading margin for inter-State and intra-State trading of electricity respectively. In case such

restrictions are read into the Act, the development of the electricity industry will not take place as private investment, which is needed desperately for development of the electricity sector, will shy away. This will negate the object and purpose of the Act and the Electricity Industry will remain captured in the pre 2003 mould of the Electricity (Supply) Act, 1948, which impeded the growth of the Electricity sector. The Act is meant to meet the new challenges of development and as such its provisions must be read to support the pillars of progress. Therefore, the words “to regulate the tariff of generating companies” occurring in Section 79(1)(a) & (b) are to be read with Section 62(1)(a). When so read they imply: to regulate the tariff of generating companies for supply to a distribution licensee. Similarly the meaning of the words “generation & supply” occurring in Section 86(1)(a) are controlled by Section 62(1)(a) to mean supply of electricity by a generating company to a distribution licensee.

54. In the light of the above, it appears to us that the Central Electricity Regulatory Commission under Sections 62(1) (a) read with Section 79(1) (a) & (b) of the Act is empowered to determine

tariff only for sale of electricity by a generating company to a distribution licensee. Viewed in the same light, the State Electricity Regulatory Commission by virtue of Section 62 (1) read with sub-clauses thereof and Section 86 (1) (a) of the Act is empowered to determine tariff only for : (i) supply of electricity by a generating company to a distribution licensee; (ii) transmission of electricity; (iii) wheeling of electricity; and (iv) retail sale of electricity. This interpretation seems to be in conformity with the purpose of the Act as it will encourage competition and will give fillip to the generation of electricity. It will unleash the energy sector which was hitherto strangled and strangulated by controls. It is this evil which was, inter alia, sought to be eradicated by the Electricity Act, 2003.

In this view of the matter, we hold that the Appropriate Commission under Section 62(1) (a) read with Sections 79 (1) (a) & (b) and Section 86 (1) (a) of the Act has been empowered to determine tariff for sale of electricity by a generating company to a distributor and it does not impose any restriction of tariff on the generating company or the distribution licensee to sell electricity to a trader or an intermediary or on the trader to

sell electricity to any person. This leaves the generator free to have a direct commercial relationship with a trader or an intermediary, a vital factor for encouraging competition, which is extremely important for securing power for the consumers at reasonable rates. This is also clarified in the National Electricity Policy, which has captured the spirit of the Act. At this stage, it would be useful to have a look at the relevant paras of the National Electricity Policy:-

“1.6 Electricity Act, 2003 provides an enabling framework for accelerated and more efficient development of the power sector. The Act seeks to encourage competition with appropriate regulatory intervention. Competition is expected to yield efficiency gains and in turn result in availability of quality supply of electricity to consumers at competitive rates.

5.2 GENERATION

5.2.1 Inadequacy of generation has characterized power sector operation in India. To provide availability of over 1000 units of per capita electricity by year 2012 it had been estimated that need based capacity addition of more than 1,00,000 MW would be required during the period 2002-12.

5.2.2 The Government of India has initiated several reform measures to create a favourable environment for addition of new generating capacity in the country. The Electricity Act 2003 has put in place a highly liberal framework for generation. There is no requirement of licensing for generation. The requirement of techno-economic clearance of CEA for thermal generation project is no longer there. For hydroelectric generation also, the limit of capital expenditure, above which concurrence of CEA is required, would be raised suitably from the present level. Captive generation has been freed from all controls.

5.2.3 In order to fully meet both energy and peak demand by 2012, there is a need to create adequate reserve capacity margin. In addition to enhancing the overall availability of installed capacity to 85%, a spinning reserve of at least 5%, at national level, would need to be created to ensure grid security and quality and reliability of power supply.

5.8.4 Capital is scarce. Private sector will have multiple options for investments. Return on investment will; therefore, need to be provided in a manner that the sector is able to attract adequate investments at par with, if not in preference to, investment opportunities in other sectors. This would obviously be based on a clear understanding and evaluation of opportunities and risks. An appropriate balance will have to be maintained between the interests of consumers and the need for investments.

5.8.6 Competition will bring significant benefits to consumers, in which case, it is competition which will determine the price rather than any cost plus exercise on the basis of operating norms and parameters. All efforts will need to be made to bring the power industry to this situation as early as possible, in the overall interest of consumers. Detailed guidelines for competitive bidding as stipulated in Section 63 of the Act have been issued by the Central Government.

55. Thus, the National Electricity Policy recognizes the fact that the generation is inadequate. The country needs capacity addition of more than 1,00,000 MW and this is required to be achieved by the year 2012. In addition, spinning reserve of at least 5%, at national level needs to be created to ensure grid security and quality and reliability of power supply. To create the additional capacity and spinning reserve, private sector

participation is required. This is possible by providing an opportunity to private players to set up new generating stations to make power market competitive. The setting up of the generating stations require huge amount of capital. The capital will be invested in case the generators have the flexibility to sell power to the traders, intermediatories directly at a competitive price. Having said that we hasten to add that it does not mean that there is no need to protect the consumers.

56. Since the generator is free to sell power to the traders and intermediatories directly, which can have an impact on the consumers, the Appropriate Commission must take recourse to Sections 60 and 66 of the Act.

57. The Indian Power sector is in nascent stage of development and the State continues to be a dominant monopoly player in the power market. The competition is almost non-existent. Section 60 of the Act envisages the intervention of the Appropriate Commission to issue such directions as it considers appropriate to a licensee or a generating company in case such licensee or

generating company enters into any agreement or abuses its dominant position or enters into a combination which is likely to cause or causes an adverse effect on competition in the electricity industry. Therefore, the Appropriate Commission is duty bound to issue directions to any dominant player, so that it does not cause by its actions any deleterious effect on competition. Any adverse effect of market domination not only adversely affects the competition but ultimately hits the consumers. The legislature was also conscious of the fact that the electricity market needs to be developed. This vision is contained in Section 66 of the Act. The whole object of incorporating Sections 60 and 66 in the Act, appears to create a balance so that electricity sector grows and at the same time it is not dominated by any licensee or generating company to cause an adverse effect on competition in the electricity industry.

58. Section 66 of the Act clearly empowers the Appropriate Commission to promote development of the electricity market including trading, in a manner specified by the Regulations and in doing so; it is to be guided by the National Electricity Policy. The powers under Sections 60 and 66 need to be exercised to

meet the new challenges of power sector, namely, to prevent market domination, boost development of electricity industry and create competition.

59. Since we have held that the generator can sell power directly to the trader and intermediaries, we consider it appropriate to place some check on the price to be charged by the generator, by utilizing Sections 60 and 66 of the Act, as the electricity market is in a developing stage and ultimately the consumer can be exploited. The control which may be placed by us can be reviewed after sometime depending upon the development of the market.

METHODOLOGY FOR FIXATION OF PRICE AT WHICH GENERATOR CAN SELL ELECTRICITY TO THE TRADERS AND INTERMEDIARIES

60. The price which is fixed by the Appropriate Commission for supply of electricity by a generating company to a distribution licensee must be taken as the base price or the lower band and the maximum price or the upper band at which the generator can be allowed to sell power to any person other than the distributor shall not be allowed to exceed the base price plus 4% thereof. In other words, if the base price for 'X' units is Rs. 100/-

as fixed by the Appropriate Commission, the maximum price at which the generator is to be allowed to sell electricity to a trader or an intermediary shall not be more than Rs. 104/- for the same units of electricity. In this way the generator in a competitive market would be able to sell electricity even below the base price fixed by the Appropriate Commission. Stated differently the generator has the flexibility to sell electricity to the aforesaid category of entities upto and below the upper price band. We would also like to clarify that the generator will not supply electricity to entities, utilities or persons other than the distributor, unless it fulfils its obligation to supply electricity to the distributor for the consumption of the consumers. The agreement between the generator and the trader or an intermediary must be so tuned that it complies with the aforesaid directions.

RESALE BY THE TRADERS, INTERMEDIATORIES AND DISTRIBUTORS OR REASALE OF ELECTRICITY TO PERSONS OTHER THAN CONSUMERS AND PRICE MECHANISM

61. Traders, intermediatories and distribution licensees, undertaking trading as permitted by last proviso to Section 14 of the Act are to be prevented from exploiting the shortage of electricity to make big profits at the cost of the consumers and

this is to be achieved by fixation of trading margin. The danger of allowing trader to sell electricity without fixing trading margins was highlighted by us in an earlier decision rendered in Appeal No. 81 of 2006. In this regard, it was observed as under:-

“Allowing electricity traders to sell electricity at unregulated price without fixing trading margins will have baneful effect on the development of the power sector. In order to make extra money, a licensee will resort to selling power to inter-State trader at unregulated price and acquire a vested interest in stifling any move to provide electricity to every household in the State, particularly in the rural areas. It was submitted by Mr. Mehta, the learned counsel for GRIDCO that only surplus power in the state of Orissa was sold. We fail to appreciate how the power could be surplus, when 80% of the households in the villages of the State of Orissa are not electrified. Even on the basis of the facts and figures furnished by the GRIDCO in its affidavit of August, 2006, it is clear that only 22.83% of house-holds have been electrified in the State of Orissa. This presents a dismal picture.”

In the circumstances, a direction needs to be issued to the Appropriate Commission to fix trading margin for intra-State trading.

62. In this view of the matter we order and direct as under:
1. While the generator can sell power directly to traders and intermediaries at a mutually agreed price, the agreed price shall not exceed the base price, referred to above, *plus 4%* thereof. This price will continue till such time the Appropriate Commissions acting under Sections 60 and 66 of the Act fix a limit over and above the price at which the sale could be effected.
 2. Appropriate commissions all over the country shall fix trading margins for intra-State trading in a reasonable manner, taking into account the interests of the consumers and keeping in view that the trading is also to be encouraged. This shall be done in four (4) weeks from the date of receipt of copy of this Order.
 3. The distributors and the traders while trading in electricity shall ensure that they abide by the trading margin fixed by the Appropriate Commissions.

With the aforesaid observations and directions, the petition is disposed of along with the applications.

(Justice Anil Dev Singh)
Chairperson

(A.A. Khan)
Technical Member

Dated: the December 22, 2006