

BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY
(APPELLATE JURISDICTION)

Appeal No. 181 of 2010

Dated : 22nd March, 2011

Coram: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice P.S. Datta, Judicial member

In the matter of:

Uttar Gujarat Vij Company Ltd.
Visnagar Road,
Mehsana – 284001
Gujarat

...Appellant

Versus

1. Gujarat State Electricity Regulatory Commission
1st Floor, Neptune Tower
Ashram, Ahmedabad – 380009
Gujarat
2. Consumer Education And Research Society, Ahmdabad
Suraksha Sankul,
Ahmedabad Gandhinagar Highway, Thaltej,
Ahmedabad – 380054
3. Mehsana District Education Foundtion, Dist: Mehsana
Ganpat Vidhyanagar
Mehsana Gojariya High Ways
Kherva, Dist. Mehsana – 382711
4. Gujarat Urja Vikas Nigam Ltd.
Sardar Patel Vidyut Bhavan
Race Course, Vadodra – 390007
Gujarat

...Respondent(s)

Counsel for the Appellant : Mr. M.G. Ramachandran,
Ms. Swapna Seshadri
Ms. Ranjitha Ramachandran
Ms. Sneha Venkataramani

Counsel for the Respondent: Mr. B.M. Baishnav for Resp. 3
Mr. S. R. Pandey, Legal Advisor
for GERC

JUDGMENT

PER HON'BLE MR. JUSTICE P.S. DATTA, JUDICIAL MEMBER

1. The Appeal is directed against the judgment and order dated 20.04.2009 passed in Misc. Application No. 06 of 2009 and the order dated 10th May, 2010 passed in Review Petition No. 967 of 2009 by the Gujarat State Electricity Commission, the Respondent No. 1 herein. The Respondent No. 2 is a consumers right organization in India and duly recognized by the Government of Gujarat, Respondent No. 3 is an institution registered under Bombay Public Trust Act and is running various educational institutions said to be on commercial basis at Vidyanagar, and Respondent No. 4 is a State Government enterprise incorporated under the Companies Act. 1956 and is a bulk purchaser of power in the State of Gujarat for sale to the distribution companies

including the Appellant. The Respondent No. 3 is a high tension consumer (HT) of the Appellant. The said Respondent No. 3 entered into an agreement on 08.02.2007 with the Appellant for supply of electricity against 300 KVA contracted demand, since increased to 425 KVA by a further agreement dated 22nd August, 2007 which clearly mentioned that the tariff category applicable to the Respondent No. 3 would be HTP-II(A) as described by the Commission in the tariff order. The State Commission determined tariff applicable for retail supply to the consumers in the state including the Appellant herein by an order dated 31st July, 2007 in case No. 898 of 2006. The HT consumers have been by the said order categorized into three categories by the Commission which is as under:

| <i>“Category</i> | <i>Applicability / Description</i> |
|-------------------------|--|
| <i>HTP-I</i> | <i>This tariff will be applicable for supply of electricity to HT consumers contracted for 100kVA and above for regular power supply and requiring the power supply for the purpose not specified in Rate HTP-II(A) and HTP-II(B). Research & Development units recognized by the Ministry of Science and Technology, Department of Scientific</i> |

and Industrial Research and Government shall pay at HTP -1 rates. Water works and sewerage pumping stations run by local authorities and GW & SB, GIDC Water Works and Agricultural Consumers having the Contracted demand 100 KVA and above shall pay at HTP-I rates.

HTP-II (A) This tariff shall be applicable for supply of energy to HT consumers contracting for 100 KVA and above, requiring power supply for Railways (Other than Railway Workshops Chargeable under the Rate HTP-I and Railway Traction), hotels, amusement parks, resorts, water parks, aerodromes, cinemas, auditoriums, banks, studios, offices, film production etc. requiring and given separate point of supply and such other establishments as may be approved from time to time.

HTP-II(B) This tariff shall be applicable to supply of energy to HT consumers contracting for 100 KVA and above, requiring power supply for residential colonies, townships, educational institutions governed by the government, and Defence Establishments (Establishments under the Armed Forces and the Ministry of Defence, other than the units of public sector undertakings under the Ministry of Defence), requiring and given separate point of supply.”

2. This classification continued to operate in the various successive tariff orders passed by the Commission from time to time including the tariff order for the Financial Year 2009-10 dated 17th June, 2009.

3. On 17th September, 2007 the Respondent No. 3, the said private educational institution made an application to the Appellant that the tariff categorization in respect of it should be changed from HTP-II(A) to HTP-I, which the Appellant by their reply dated 29th April, 2007 rejected on the ground that HTP-I category was not applicable to the Appellant. Then the Respondent No. 3 made a complaint before the Consumers Grievances Redressal Forum being Complaint No. Reg. No. UG-03-002-2007-08 which also rejected the complaint by an order dated 31st January, 2008 holding the same view as given by the Appellant. Then the Respondent No. 3 approached the Ombudsman, Gujarat being case No. 17 of 2008 which also upheld the order of the Consumer Grievance Redressal Forum. Being undaunted by the defeat the Respondent No. 3 and Respondent No. 2 filed Misc. Petition No. 6 of 2009 before the

State Commission praying for the relief which was turned down by the redressal forum and the Ombudsman. The Commission by the order dated 20th April, 2009 held that the Respondent No. 3 should be categorized under HTP-II(B) category instead of HTP-I as was prayed for by the said Respondent No. 3 and directed the Appellant to review its agreement with Respondent No. 3 vis-à-vis the tariff applicability as per HTP-II(B) category. The relevant extract from the order of the Commission is below ;

“7.2. According to above tariff schedule, the co-petitioner is not covered under HTP-II (A) category as it is a public charitable trust and is thus not a commercial entity. Looking to the functional area of the co-petitioner (which is providing educational activities), it is similar to educational activities provided by Government educational institutions. It is, therefore, appropriate that the co-petitioner’s activities are considered and based on the same, the appropriate tariff schedule be made applicable to them. We, therefore, decided the HTP- II (B) Category is the appropriate tariff category applicable to the co-petitioner.

7.3 Accordingly, Respondent No.1 is directed to make necessary changes in the tariff category of the co-petitioner which will be applicable to the co-petitioner prospectively from the date of this order.

The agreement executed by the parties is required to be revised by the Respondent No.1 by incorporating the HTP-II (B) tariff as appropriate tariff applicable to the co-petitioner. Henceforth the respondents are directed to bill the co-petitioner on HTP-II (B) basis.”

4. Against the order dated 20th April, 2009 the Appellant filed an application for review before the Commission being Review Petition No. 967 of 2008 and in the course of hearing the Appellant placed before the Commission a number of decisions of this Tribunal as also of the Hon'ble Supreme Court which we shall consider when we will go to our own deliberation on the issue, in support of the contention that the Commission is without any jurisdiction to entertain a petition of an individual consumer. Revision Petition was dismissed by the order dated 10th May, 2010 by the Commission holding that there was not point of review, Hence this Appeal.

5. All the Respondents were served with notice more than once but none of them appeared to contest the appeal. We, in such, circumstances requested Mr. Sanjay Sen, Learned Advocate, who

was present before the Tribunal in connection with another case to assist this Tribunal as Amicus Currie and thankfully he did so. Mr. Sen submitted that from the very nature of description of HTP-II(B) it does not appear that the Respondent No. 3 would fall thereunder. We have heard Mr. M.G. Ramachandran, learned advocate appearing for the Appellant who has raised two pertinent points namely (a) jurisdiction of the Commission to entertain the petition by the Respondent No. 3, an individual consumer and (b) legality of the order.

6. These two issues give rise to following specific issues which arise for consideration of this Tribunal :
 - (i) Whether the Ombudsman or the Consumer Grievance Redressal Forum has the authority and power to decide the question of transferability or otherwise of a consumer from one category to another category as was prayed before them by the Respondent No. 3.
 - (ii) Has the State Commission authority and power to decide the question as to whether the categorization of the Respondent No. 3 should be at HTP-II(B) instead of HTP-II(A)?

- (iii) Is the dispute whether the Respondent No. 3 should be classified under HTP-II(B) instead of HTP-II(A) is a billing dispute or a dispute falling under exercise of tariff determination?
- (iv) Whether the State Commission is legally competent to interpret and clarify its order for tariff determination?
- (v) Whether the Respondent No. 3 is in terms of description under HTP-II(B) categorisable under that category?

7. All these issues overlap one another but these are the issues we are to answer. Section 86 describes the functions of the State Commission in sub Section (1) thereof and we just for the purpose of this Appeal quote clause (a) and (k) thereto which are as under :

“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.

(b)

(c)

(d)

(e)

(f)

(g)

(h)

(i)

(j)

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

8. Subsection (5) of Section 42 reads as under:

42 (5) Every distribution licensee shall, within six months from the appointed date or date of grant of licence, whichever is earlier, establish a forum for redressal of grievances of the consumers in accordance with the guidelines as may be specified by the State Commission.

9. As regards the Ombudsman he has been recognized with an authority in the following language:

(6) Any consumer, who is aggrieved by non-redressal of his grievances under sub-section (5), may make a representation for the redressal of his grievance to an authority to be known as Ombudsman to be appointed or designated by the State Commission.

(7) The Ombudsman shall settle the grievance of the consumer within such time and in such manner as may be specified by the State Commission.

10. Thus we find that an individual consumer for redressal of his individual grievance has to approach the grievance redressal forum and then being aggrieved with the decision of this forum to approach the Ombudsman who shall settle grievance of such consumer in such manner and within such a time as may be specified by the State Commission. What exactly are the powers and functions of the Ombudsman have not been specified in the Act, but it only appears that Ombudsman derives his jurisdiction when an individual consumer brings before him a dispute with a distribution licensee. The Act does not provide for any appeal against the order of the Ombudsman. It can not therefore be gainsaid that when the powers and functions of the State Commission have been specifically determined in terms of Section 86 the Ombudsman is necessarily precluded from entering into the domains of the State Commission. In common parlance, the Ombudsman is approached by an individual consumer when a dispute called a 'billing dispute', arises. If we read subsection (5), (6), and (7) of Section 42 of the Act together it becomes clear that the dispute which the forum for redressal of grievance of the consumer or an Ombudsman is called upon to adjudicate has to be a dispute in relation

to a distribution licensee and in that perspective such a dispute may necessarily be a billing dispute or disputes of like nature. But all such disputes which the forum is called upon to adjudicate has to be against a distribution licensee. It is against the decision of the forum that a consumer may approach the Ombudsman who is to settle such disputes or grievance so to speak. The liability for the distribution licensee to establish a forum for redressal of grievance of the consumers or that of the Commission to appoint an Ombudsman entails that the forum or the Ombudsman will hear the complaint against a distribution licensee. As such, the grievances arising out of specific act on the part of a distribution licensee may give rise to cause of action to an individual consumer. This reasoning of ours appears to have been fortified by several decisions of this Tribunal as also a decision of the Hon'ble Supreme Court which we now present here. In *BSES Rajdhani Power Ltd. Vs. DERC reported in 2009 ELR (APTEL) 0363* the question arose whether approach to the Commission was justified in the context of the fact where Respondent No. 2 requested the Appellant for surrendering the electric connection and refund of security amount. The Appellant failed to respond whereupon the complaint was filed by the Consumer before the State

Commission which entertained the complaint and then only the appellant admitted the mistake against whom commission awarded penalty and compensation. In the appeal before the State Commission this Tribunal held that Commission has no jurisdiction to entertain the appeal holding that it was purely a dispute between a consumer and a distribution licensee. In *Polyplex Corporation Ltd., Ghaziabad Vs. Uttrakhand Power Corporation Ltd. reported in 2007 APTEL 115* we find that it was explicitly a billing dispute. Obviously, this Tribunal held that the approach to the said Commission was wrong. In *Dakshin Haryana Vijli Vitran Nigam Ltd. Vs. Haryana Electricity Regulatory Commission and Ors. reported in 2007 (APTEL) 356* it was held in a batch of appeals that it is well settled that no authority however higher or supreme it be, cannot usurp the jurisdiction of a statutory authority created specifically for the purpose. It was held that it is the specific provision which excludes the general provision. Reference was also made to *Venkaeswar Vs. State of Andhra Pradesh reported in AIR 1966 SC 828*. In another case namely, *Dakshin Haryana Vijli Vitran Nigam Ltd. Vs. DLF Services and Ors. Reported as 2007 (APTEL) 766* the same proposition was again reiterated. In *Maharashtra State Electricity Distribution Company Ltd. Vs. Lloyds*

Steel Industries Ltd. reported in AIR 2008 SC 1042 the Hon'ble Supreme Court had the occasion to examine the issue against certain factual background which is thus: the Respondent No. 2 Company approached the State Commission complaining that a demand notice issued by MSEDCL should be declared illegal and that the said company be permitted to avail its power supply to the level of 90 MVA without recovery of any additional charges and to further direct that the Appellant MSEDCL to refund the certain amount of money for reinstatement of contract demand to the original level of 90 MVA alongwith interest at the rate of 12% from the date of payment till the date of refund. Being aggrieved with the decision of the MSEDCL the Respondent Company approached the Commission In this context their Lordships of the Supreme Court observed as follows:

“A complete machinery has been provided in Section 42 (5) and 42 (6) for redressal of grievances of individual consumers. Hence wherever a forum/Ombudsman have been created, the consumers can only resort to these bodies for redressal of their grievances. In the face of this statutory provision we fail to understand how could the Commission acquire jurisdiction to decide the matter when a forum has been created under the Act for this purpose.”

The Hon'ble Supreme Court referred to the provisions of Subsection (5), (6) and (7) of Section 42 and Section 86 of the Act to show as to who stands in which place under the law so that there cannot be any usurpation of jurisdiction of one over the other.

11. We have found what the law is. We have found that an individual consumer has no right to approach the Commission when his dispute is with the distribution licensee. Our question now is: whether the dispute raised by the Respondent No. 3 and 4 with the Respondent No. 1 is really a dispute which grievances redressal forum or the Ombudsman can legally and factually address. The factual background of the decisions so far mentioned above is clearly distinguishable from ours in as much as here the question is whether the order for determination of tariff in terms of the tariff categorization pursuant to which an individual consumer and the distribution licensee entered into an agreement can be interpreted or clarified by an Ombudsman who is not the author of the said tariff determination order and whether the Ombudsman has authority to entertain a petition for change of one category to another. Be it clearly mentioned that the order for determination of tariff according

to the category was made by the Commission on 31st July, 2007 in case No. 898 of 2006 and the agreement was entered into between the Appellant and the Respondent No. 3 in terms of which the contract demand was fixed on 425 KVA, and so far as the applicability of the tariff category is concerned it would be as per the said agreement HTP-II(A). Therefore, the tariff determination order is prior to the agreement dated 22nd August, 2007. Now, by the parties agreement the Respondent No, 3 came to be classified under HTP-II(A). Section 62(3) is relevant here. It provides

“62(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 for the geographical position of any area, the nature of supply and the purpose for which the supply is required.” (emphasis ours)

It is only to be hoped that while determining the impugned tariff category-wise the Commission would must in its mind the aforesaid provisions of the law.

12. Now, under HTP-1 Category fall research and development units attached to the Ministry of Science and Technology, water works and sewerage pumping stations run by local authorities, and GW& SB, GIDC water works and agricultural consumers. Notably, the Respondent No. 3 wanted to be shifted to and categorized under this HTP-1, not HTP-II(B). It was not its case that it be categorized under HTP-II(B). The grievance redressal forum and the Ombudsman held that the Appellant cannot be shifted from HTP-II(A) to HTP-I. Under HTP-II(B) falls residential colonies, townships, educational institutions governed by Government and defence establishments. Under HTP-II(A) in which by agreement the Respondent No. 3 was categorized fall Railways, hotels, amusement parks, resorts, water parks, aerodrams, cinemas, auditorium, bank, studios, offices films production, etc.

13. Now these are the categories made by the Commission in the tariff order dated 31st March, 2007. In the tariff order it has not been expressly mentioned as to under which category the Respondent No. 1 which is a HT consumer running a number of educational institutions not governed by the Government would fall. Before answering the

question whether the Commission's impugned order is justifiable on merit or not it is necessary to say who is the competent authority under the statute to clarify, explain, interpret or if need be amend the tariff order. A consumer grievance redressal forum or for that matter an Ombudsman cannot possibly give an interpretation or clarification of what a quasi-judicial or quasi-legislative authority intended to mean by framing a tariff order particularly when they do not have the appellate or revision jurisdiction over the Commission. In fact, private educational institutions running on commercial basis or otherwise do not find mention in express words in either of the three categories. There is word 'etc.' that can act as *esjusedem generis* to include a private educational institution, if according to the Commission the categorization of HTP-II(A) would include all such private educational institutions and that the said HTP-II(A) category is intended to cover the institutions and entities which are run from commercial view point or that these entities and institutions as mentioned in HTP-II(A) serve a common purpose. There is no word 'etc'. either in HTP-I or HTP-II(B). To our mind, the power of clarification or interpretation or amendment of the order of the Commission lies with the Commission who is the author of the order

and it is only in accordance with the tariff determination order that an agreement between a distribution licensee and a consumer follows. Therefore, if a particular entity is of the opinion that it has been wrongly categorized or that there has been wrong application of the tariff order because of misunderstanding or misinterpretation then it is the Commission that has to clarify the confusion and make the position clear. Therefore, in our estimation redressal forum or the Ombudsman cannot give legal interpretation of the tariff determination order made by a Commission and /or entertain a petition of a consumer for change of one category to another which involves powers of adjudication of fixation of tariff.

14. Still the fact remains that the approach was made by an individual consumer. Before we answer this question we have to answer the question on merit as to whether the Respondent No. 3 really falls under HTP-II(B) as categorized by the order dated 31st July, 2007 by the Commission. Here there is an express mention of power supply for residential colonies, townships, defence establishments attached to the Ministry of Defence and the education institutions governed by the Government. The educational institutions governed by the

Government means the institutions owned and run by the Government. Respondent No. 3's is admittedly not an institution run by Government; it is a set up of private charitable trust which is not expressly provided for in HTP-II(B) even though purpose for which supply is required is the same i.e. education. It was in the Commission's mind as to behind which principles or purpose these three categories were made but it is, of course, clear that the Commission was not right in saying that the Respondent No. 3 falls under HTP-II (B) to which the Respondent No. 3 even did not aspire for. It is the salutary principle of law that we cannot read anything more in the order which is not there. There is no scope of supposition and assumption. The Commission also could not ignore the fact that expressly the Respondent No. 3 is not covered by the HTP-II(B). The State Commission has also decided to place Respondent No. 3 in HTP-II(B) prospectively and not retrospectively. Thus Commission also seems to be aware that it is not merely a clarification but amendment to the tariff order to include a category which was not specifically included in HTP-II(B) category.

15. This situation gives rise to the last question: when an individual consumer approached the Commission or when the Commission found the arena of dispute to be resolvable only by the Commission itself what was required of the Commission to do. As the law stands, a commission cannot make any order for a particular or individual consumer irrespective of whether such consumer has good merit in his case or otherwise by departing from its tariff determination order which is a product of a quasi-legislative authority. For, a law cannot be molested to afford relief to an individual howsoever hardship he is beset with. Appropriate course of action would then be to amend the law which is always generic. The law stands thus that the Commission's function is not to redress grievances of a particular consumer amongst thousands of consumers attached to different distribution licensees in a particular area or areas. Unquestionably, the matter requires an interpretation or clarification or amendment of the order by the Commission alone on the ground that its categorization leaves scope for confusion. The Commission states that the Respondent No. 3 should be treated like an educational institution governed by Government. Well, if this is the perception of the Commission then there may be in Gujarat hundreds of such

educational institutions who administer education in the same manner as the Respondent No. 3 does. If, according to the Commission a special dispensation is necessary for such institutions which are not covered under HTP-II(B) then appropriate course would have been to issue a public notice to all the concerned distribution licensees and all such entities / persons so as to have them heard before it proceeds to amend the tariff order, provided of course the Commission is of the opinion that such institutions do not fall under any of the categories. Whatever the Commission would think it proper to do it is legitimately authorized to do covering the entities or institutions who are similarly circumstanced the like Respondent No. 3. That is to say, by an order covering all such institutions or entities it can amend the tariff instead of making a special dispensation to a particular educational institution by an interpretation which unless the category HTP-II(B) is amended cannot be covered with. It is not our jurisdiction to say under which categorization Respondent No. 3 should be placed, for it is within the domain of the Regulator. It is the Regulator who has to hear all the distribution licensees and the persons likely to be affected by a possible order and then to arrive at a tariff order to cover the institutions resembling the Respondent No. 3.

We can only say by way of interpretation of the category HTP-II(B), as it is there in the order dated 31st July, 2007, that it does not cover the private educational institutions like the Respondent No. 3. If special dispensation is to be given it has to be given to all such institutions similarly placed by an appropriate tariff order.

16. Thus, our findings are as follows:

- (i) The Grievance Redressal Forum or the Ombudsman has no jurisdiction to entertain a petition from a HT consumer for change of one category, for the purpose of tariff determination, to another category.
- (ii) The function of change of such category by interpretation of tariff order or by amendatory process rests with the Commission as it is intrincally related to Section 61(a) of the Act.
- (iii) As the same time, the Commission has no jurisdiction to adjudicate upon a petition of an individual consumer and

give relief to only such individual consumer by conscious distraction from the tariff order.

(iv) The Respondent No. 3 does not fall under HTP-II(B) category according to tariff order dated 31.07.2007.

17. The result is that the impugned order is unlawful and cannot be sustained.

18. The Appeal is allowed and the impugned order is set aside. No cost.

(Justice P.S.Datta)
Judicial Member

(Mr. Rakesh Nath)
Technical member

Dated: 22nd March, 2011

Index: Reportable/Non-Reportable

PK/ZA