

**Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal Nos. 37, 38, 133 & 134 of 2006

Dated 31st March, 2011

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam,
Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice P.S. Datta, Judicial Member**

Appeal Nos. 37, 38 & 134 of 2006

In the matter of:

**Himachal Pradesh State Electricity Board,
Vidyut Bhawan, Kumar House,
Shimla-171 004, Himachal Pradesh
Versus**

... Appellant(s)

**Himachal Pradesh Electricity Regulatory Commission,
Keonthal Commercial Complex,
Khalini, Shimla-171 009**

...Respondent(s)

Appeal No. 133 of 2006

In the matter of:

**Himachal Pradesh State Electricity Board,
Vidyut Bhawan, Kumar House,
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... Appellant(s)

Versus

- 1. Himachal Pradesh Electricity Regulatory Commission,
Keonthal Commercial Complex,
Khalini, Shimla-171 009**
- 2. Er. S.K. Gupta,
Chief Engineer (Operation) North,
H.P.S.E.B. Dharamshala Distt. Kangra**

3. **Er. S.P. Sharma,**
Chief Engineer (Operation) Central Zone,
H.P.S.E.B. Mandi Distt. Mandi, H.P.
4. **Er. S.K. Sood,**
Chief Engineer (Operation) South,
H.P.S.E.B. Simla-171004
5. **Er. D.N. Bansal,**
Chief Engineer (Commercial),
H.P.S.E.B. Vidyut Bhawan, Shimla-171004 **...Respondent(s)**

Counsel for the Appellant(s): Mr. M.G. Ramachandran,
Mr. Anand K. Ganesan,
Ms. Swapna Seshdari &
Ms. Ranjitha Ramachandran

Counsel for the Respondent(s): Mr. Sanjay Sen, Ms. Shikha Ohri &
Ms. Surbhi Sharma

JUDGMENT

Hon'ble Mr. Rakesh Nath, Technical Member

These appeals have been filed by Himachal Pradesh State Electricity Board (Electricity Board) against the Orders of Himachal Pradesh Electricity Regulatory Commission (State Commission) constituted under the Electricity Regulatory Commissions Act, 1998, holding the appellant guilty of non-compliance of directions passed by the State

Commission in its Tariff Order dated 29.10.2001 and imposing penalties. The State Commission is the respondent no.1. In appeal no. 133/06, officers of the appellant/Electricity Board are respondent nos. 2 to 4.

2. The brief facts of the cases are as described in the following paras:

Appeal Nos. 37 & 38 of 2006

2.1. The State Commission was constituted on 30.12.2000 under the Electricity Regulatory Commissions Act, 1998. On 14.06.2001, the State Government directed that the State Commission will discharge the functions under Section 22 (1) of the 1998 Act.

2.2. On 29.10.2001 the State Commission issued a Tariff Order on the petition filed by the appellant/Electricity Board which also contained the

directions to the Electricity Board to undertake marginal cost study and financial restructure study.

2.3. On coming to know that there was a non-compliance with the directions, on 15.02.2003 the State Commission issued show-cause notice to the Appellant/Electricity Board, asking it as to why action should not be initiated against it for non-compliance with the above directions. A reply was filed by the Appellant to the State Commission on 13.03.2003.

2.4. On 10.06.2003 the Electricity Act, 2003 came into force. Subsequently, on 18.10.2003 the State Commission passed an order in which the appellant was found guilty of non-compliance of its directions and consequently, there was the initiation of proceedings under Section 142 of the Electricity Act, 2003. Ultimately, on 12.03.2004 an order was passed

by the State Commission imposing monetary penalties on the Appellant.

2.5. Aggrieved by the above orders of the State Commission, the Appellant filed Civil Writ Petitions bearing nos. 426 of 2004 and 428 of 2004 before the High Court of Himachal Pradesh in June 2004. On 26.12.2005, the High Court of Himachal Pradesh disposed of the petitions with leave to the Appellant to file the Appeals in the Appellate Tribunal. Consequently, the appellant has filed these Appeals (37 & 38 of 2006).

APPEAL No. 133 of 2006

2.6. The State Commission by its Order dated 29.10.2001 issued the Tariff Order for FY 2001-02 in respect of the appellant. In this Order, the State Commission also directed that the Complaint Handling

Procedure to be notified by the State Commission should be followed by the Appellant.

2.7. On 8.2.2002, the Complaint Handling Procedure to be followed by the appellant was notified by the State Commission.

2.8. On 8.9.2003, the State Commission passed an Order proposing an inquiry into the implementation of Complaint Handling Mechanism & Procedure and directed the Appellant to provide information on the complaints received and violation reported. The requisite information was filed by the Appellant before the State Commission. Subsequently, the State Commission by an order dated 12/22.12.2003, held the Appellant and its four officers guilty of not implementing the Complaint Handling Procedure

specified and ordered initiation of proceedings under Section 142 of the 2003 Act.

2.9. The Appellant filed a Civil Writ Petition bearing no. 61 of 2004 before the High Court of Himachal Pradesh challenging the order dated 12/22.12.2003 of the State Commission. On 28.5.2006, the High Court dismissed the writ petition with a leave to the Appellant to file an Appeal before the Tribunal. Accordingly, this Appeal has been filed.

Appeal No. 134 of 2006

2.10. In the Tariff Order dated 29.10.2001, the State Commission had, *inter alia*, passed directions regarding building up a credible and accurate data base with unbundled costs, physical verification of assets by independent agency, reports on service rules and regulation, energy audit, distribution planning,

demand side management and details of voltage wise costs, etc.

2.11. On 15.2.2003 a show-cause notice was issued to the Appellant/Electricity Board for non-compliance of the above directions. Reply was filed by the appellant.

2.12. The State Commission by its order dated 18.10.2003 found the Appellant guilty of non-compliance of the directions and initiated the proceedings under Section 142 of the 2003 Act. Ultimately, the State Commission by its order dated 12.3.2004 imposed penalties on the Appellant/Electricity Board for non-compliance of its directions.

2.13. In June 2004 the appellant filed Civil Writ Petitions before the High Court of Himachal Pradesh

challenging the directions and orders of the State Commission. The High Court passed an order dated 29.5.2006 in CWP nos. 429, 434, 454 and 449 of 2004 disposing of those petitions by granting leave to the Appellant to file an Appeal before this Tribunal. Accordingly, this Appeal no. 134 of 2006 has been filed by the Appellant/Electricity Board.

2.14. Since in all the above Appeals, common issue relating to the jurisdiction of the State Commission which was constituted under the 1998 Act, prior to enactment of the Electricity Act, 2003 has been raised, this common Judgment is being rendered.

3. Mr. M.G. Ramachandran, the learned counsel for the Appellant has submitted as follows:

“The directions issued by the Respondent/State Commission were outside its jurisdiction, since

the State Commission was vested with the functions only under Section 22(1) of the Electricity Regulatory Commissions Act, 1998 whereas the directions were issued by the State Commission under Section 22(2) of the 1998 Act which had not been conferred upon the State Commission by the State Government. Notwithstanding the jurisdiction issue, the Appellant proceeded to comply with those directions. It was only after the Respondent/State Commission imposed penalty for non-compliance, the Appellant had to challenge the jurisdiction of the State Commission to issue such directions in writ petitions. Further, in the similar writ petitions as against penalty for non-compliance of those directions issued by the State Commission were heard by the High Court of Himachal

Pradesh which in turn in its Judgment dated 21.11.2007 set aside the orders of the State Commission”.

4. Shri Sanjay Sen, learned counsel for the Respondent/State Commission in his reply has stated as follows:

“The directions were issued by the State Commission in its tariff order dated 29.10.2001 which was not challenged by the Appellant/Electricity Board and has thus attained finality. In fact the Appellant had accepted the tariff order with all the directions that were provided therein. The Appellant for the first time before this Tribunal has prayed for setting aside the directions contained in the tariff order dated 29.10.2001. This prayer was not made before the Hon’ble High Court in the Writ Petitions and only

orders dated 18.10.2003 and 12.03.2004 which were issued in proceedings relating to compliance of directions were challenged. Thus the present appeals have to be confined to the correctness and validity of the order dated 18.10.2003 and 12.03.2004, which were passed after the notification of the 2003 Act”.

Shri Sanjay Sen also argued at length on justification of each of the directions which according to him were directly linked to the tariff determination and within the jurisdiction of the State Commission.

5. In light of the rival contentions of the parties, the following questions may arise for consideration in these appeals:

- i) Whether the State Commission had the jurisdiction to initiate the proceedings for

non-compliance of the various directions issued by the State Commission in the tariff order dated 29.10.2001 under the 1998 Act?

- ii) Whether the State Commission had the jurisdiction to initiate proceedings for non-compliance of the directions relating to implementation of Complaint Handling Mechanism and Procedure framed under the 1998 Act?
- iii) Whether the State Commission can impose penalty for non-compliance of the above directions issued to the Appellant under the 1998 Act?

6. As all the above issues are interwoven we have to answer them together. At first we have to examine the various directions issued by the State Commission/respondent to the appellant in the Tariff

Order dated 29.10.2001, which have been challenged in the Appeals 37, 38 and 134 of 2006. These directions are relating to the following:

- i) Marginal cost study
- ii) Financial Restructuring
- iii) Data base with unbundled costs
- iv) Physical verification of assets
- v) Reports on Service rules and regulations, energy audit, etc.
- vi) Voltage wise assets data.

7. The reasons given in the orders of the State Commission for the above directions are described in the following paras:

7.1. Marginal cost study: The relevant extracts in the State Commission's order dated 18.10.2003, are as

under:

“1.3.4. In Section 7.22 of the Tariff order, the Commission had stipulated as under:-

“The guidelines for “Revenue and Tariff Filing” issued by the Commission require the utility to conduct a study on marginal costs of supply including time-differentiated marginal costs by (a) voltage levels or (b) consumer classes. A written explanation of the methods used to calculate marginal costs, along with all work papers also needs to be provided. In addition, the statement shall include a comparison of the percentage of marginal costs recovered by the current and proposed tariff for each tariff category.

1.3.5. In the concept paper on “Retail Supply Tariff” issued by the State Commission on July 31, 2001, the mind of Commission was given as to how it would like to determine the tariff in future. This paper highlighted that there are two broad options to determine the revenue requirement of the Appellant’s generation, transmission and distribution and these are (i) Historic cost approach and (ii) Marginal cost approach. The primary difference between the Historic cost and marginal cost is that the marginal cost concept is forward looking while the historical cost is backward looking. Marginal cost is the system cost incurred in meeting the demand for an incremental unit of electricity (supplying one additional kWh). In supply constrained system, the cost of supplying electricity increases, whenever the existing

consumer increases their demand or when the new consumers are added to the grid so the prices should reflect the economic value of the future resources.”

Thus the marginal cost study was directed to be carried out to decide the approach to the cost of supply for future tariff determination exercise. Thus, this exercise was related to tariff determination in future.

7.2. Financial Restructuring: The relevant extracts on directions on Financial Restructuring in the Tariff Order dated 29.10.2001 are as under:

“Capital structure and prudent financial management have direct bearing on financial health, operational performance and creditworthiness of the Electricity Board, the

improvement of which is the sole aim and purpose of the ERC Act, 1998. Key financial parameters are the ratios to measure the same. Without these, it is not known as to how the Board can keep an eye on key performance indicators of the utility and manage its finances in a prudent manner. The Commission is mandated to improve the financial health of the Electricity Board which was loosing heavily on account of irrational tariffs and lack of budgetary support from the State Govt.”

Thus this direction was for improving the financial management of the appellant/Electricity Board and is related to regulation of working of the Electricity Board covered under Section 22 (2) (e) of the 1998 Act.

7.3. Data base with unbundled costs: In the Tariff order dated 29.10.2001 the State Commission passed

the following directions:

“The Commission in September 21, 2001 directed the Board to take urgent steps to build a credible and accurate database with unbundled costs and expenditure between the three businesses of generation, transmission and distribution as well between the various customer classes to enable the stakeholders to focus on these costs and expenses and have rational basis for the determination of tariffs under performance based regime with some regulatory certainty. Next tariff petition must be supported by an accurate and credible database with appropriate MIS.”

Thus, the above direction was relating to determination of future tariff under performance based regime with some regulatory certainty and would fall under the functions assigned to the State Commission under Section 22(1) of the 1998 Act.

7.4. Physical verification of assets: The direction given by the State Commission in its order dated 29.10.2001, is as under:

“The Commission believes that the information provided by the Board on its various assets is sketchy, insufficient and incomplete. Accordingly, the Commission directs the Board to conduct a physical verification of assets by an independent agency and submit a report on the Fixed Assets Register by September 30, 2002”.

According to the State Commission, these directions were to work out 3% return on its net fixed assets. Thus this direction was for ensuring prudence check on the return to be allowed to the appellant in the future tariff as the information furnished by the appellant for FY 2001-02 was sketchy and would fall

under the functions assigned to the State Commission under Section 22 (1) of the 1998 Act.

7.5. Reports on Service Rules and Regulations,

energy audit etc.: The relevant extracts of the tariff order dated 29.10.2001 are reproduced below:

“7.27. In the Guidelines for revenue and tariff filing the Commission has asked the Board to submit various reports as part of the filing. The reports wherever provided by the Board have been found unsatisfactory and do not meet the requirements of the said guideline. Accordingly, the Commission directs the Board to submit the following reports complete and comprehensive in all respects, along with the next tariff petition as required in the ‘Guidelines for Revenue and Tariff filing.

(i) Service rules and regulations policy

The Service rules and regulations policy defining (i) level of investment to be made

both by Utility and the consumer to hook up utility's electric system to consumer's electric system, (ii) method and collection of billing (iii) customer/security deposit (iv) manner of dealing with break up by different categories shall be submitted alongside the next tariff petition of the utility.

(ii) Energy Audit

The Board is directed to furnish a report on energy audit already carried out and also submit a program for provision of cent percent metering from the sub-stations to 11 kV feeders and distribution transformers for total energy audit, together with investment needed and its phasing. Program for cent percent metering of all consumers above 20 kW connected load through electronic metering together with the investment needed and the phasing thereof be submitted by the Board with the next tariff petition.

(iii) Distribution Planning

Policy for distribution planning and management with a view to improve the quality of service, improve the revenue and reduce the T & D losses must be submitted along with the next tariff petition.

(iv) Demand Side Management

A plan for demand-side management to achieve optimal supply/demand equilibrium shall also be submitted with the next tariff petition”.

The directions given in (ii) above related to application of prudence check for determination of tariff. On the other hand, direction at (i), (iii) and (iv) above are not directly related to determination of tariff but for improving efficiency in the working of the appellant and investment approval covered under functions given in Section 22(2) of the 1998 Act.

7.6. Voltage-wise Assets:- The relevant extracts from the tariff order dated 29.10.2001, are as under:

“7.29. The Board is directed to provide detailed information on voltage wise assets, costs and sales with the next tariff petition so that the extent of cross subsidy can be measured precisely in the future.”

The above direction was required by the State Commission to determine voltage wise cost of supply of various consumer classes for determination of tariff in future falling under the functions assigned to the State Commission under Section 22(1) of the 1998 Act.

8. The directions challenged in Appeal No. 133/06 were related to Complaint Handling Mechanism & Procedure. The State Commission passed an order dated 08.02.2002 approving the Complaint Handling Mechanism & Procedure in exercise of the powers

under Section 22 (d) of the 1998 Act and its conduct of Business Regulations, 2001 as envisaged in its Tariff Order dated 29.10.2001 for FY 2001-02.

These directions were basically for improving the working of the appellant's distribution business relating to complaints of the consumers covered under Section 22(2) and not related to determination of tariff under Section 22(1) of the 1998 Act.

9. Let us now examine the statement of objects and reasons of the 1998 Act. The relevant extracts are as under:

“(c) the main functions of SERC, to start with, shall be:-

(i) to determine the tariff for electricity, wholesale, bulk, grid and retail;

(ii) to determine the tariff payable for use of the transmission facilities;

(iii) to regulate power purchase and procurement process of the transmission utilities, etc.

(iv) subsequently, as and when each State Government notifies, other regulatory functions could also be assigned to SERCs.

(d) it also aims at improving the financial health of the State Electricity Boards (SEBs) which are loosing heavily on account of irrational tariffs and lack of budgetary support from the State Governments as a result of which, the SEBs have become incapable of even proper maintenance, leave alone purposive investment. Further the lack of creditworthiness of SEBs has been a deterrent in attracting investment both from the public and private sectors. Hence, it is made mandatory for State Commissions to fix tariff in a manner that

none of the consumers or class of consumers shall be charged less than fifty per cent of the average cost of supply, it enables the State Governments to exercise the option of providing subsidies to weaker sections on condition that the State Governments through a subsidy compensate the SEBs”.

Thus initially the main functions to be assigned to the State Commission were related to determination of tariff and regulation of power purchase and procurement process of the utilities and subsequently other regulatory functions could also be assigned to the State Commission by the State Government.

10. The functions of the State Commission were divided under Sections 22(1) and 22(2) of the 1998 Act. The functions under sub-Section (1) were to come into effect immediately after the enactment of the Act

and the functions under sub-Section (2) were subject to State Government conferring them upon the State Commission by notification. The Government of H.P. while constituting the State Commission vested in the State Commission the functions under sub-Section (1) of Section 22 of the 1998 Act. The relevant extracts of Section 22 of the 1998 Act dealing with functions of the State Commission are reproduced below:-

“22. Functions of the State Commission

(1) Subject to the provisions of Chapter III, the State Commission shall discharge the following functions, namely,:-

(a) to determine the tariff for electricity, wholesale, bulk, grid or retail, as the case may be, in the manner provided in Section 29;

(b) to determine the tariff payable for the use of the transmission facilities in the manner provided in Section 29;

(c) to regulate power purchase and procurement process of the transmission utilities and distribution utilities including the price at which the power shall be procured from the generating companies, generating stations or from other sources for transmission, sale, distribution and supply in the State;

(d) to promote competition, efficiency and economy in the activities of the electricity industry to achieve the objects and purposes of this Act”.

“22(2). Subject to the provisions of Chapter III and without prejudice to the provisions of sub-Section (1), the State Government may, by notification in the official Gazette, confer any of the following functions upon the State Commission, namely,:-

(a) to regulate the investment approval for generation, transmission, distribution and

supply of electricity to the entities operating within the State;

(b)

(c) to regulate the operation of the power system within the State;

(d)

(e) To regulate the working of the licensees and other persons authorized or permitted to engage in the electricity industry in the State and to promote their working in an efficient, economical and equitable manner;

(f) To require licensees to formulate perspective plans and schemes in coordination with others for the promotion of generation, transmission, distribution, supply and utilization of electricity, quality of service and to devise proper power purchase and procurement process;

(g) To set standards for the electricity industry in the State including standards relating to quality, continuity and reliability of service.”

Admittedly, the State Commission was only entrusted with the functions under Section 22 (1) of the 1998 Act. However, the State commission has to determine tariff in the manner provided in Section 29.

11. Section 29 of the 1998 Act describes the determination of tariff by the State Commission. The relevant extracts of Section 29 are reproduced below:

“(2) The State Commission shall determine by regulations the terms and conditions for the fixation to tariff, and in doing so, shall be guided by the following, namely:

(a) the principles and their applications provided in sections 46, 57 and 57A of the Electricity (Supply) Act, 1948

- (54 of 1948) and the Sixth Schedule thereto;*
- (b) in the case of the Board or its successor entities, the principles under section 59 of the Electricity (Supply) Act, 1948 (54 of 1948);*
- (c) that the tariff progressively reflects the cost of supply of electricity at an adequate and improving level of efficiency;*
- (d) the factors which would encourage efficiency, economical use of the resources, good performance, optimum investments, and other matters which the State Commission considers appropriate for the purpose of this Act;*
- (e) the interests of the consumers are safeguarded and at the same time, the consumers pay for the use of electricity in a reasonable manner*

based on the average cost of supply of energy;

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

(g) national power plans formulated by the Central Government.

(3)

(4) The holder of each licence and other persons including the Board or its successor body authorized to transmit, sell, distribute or supply electricity wholesale, bulk or retail, in the State shall observe the methodologies and procedures specified by the State Commission from time to time in calculating the expected revenue from charges which he is permitted to recover and in determining the tariffs to collect those revenues.”

12. Now let us examine whether the directions issued by the State Commission prior to enactment of the 2003 Act were in conformity with the functions assigned to it under Section 22 (1) of the 1998 Act. According to Shri Ramachandran, learned counsel for the Appellant, the directions would not fall under Section 22 (1). According to Shri Sanjay Sen, learned counsel for the State Commission, the State Commission is not a mere rubber stamp to attest the tariff numbers/figures given by the utility and has to carry out the tariff determination functions in a manner that could promote competition, efficiency and economy in the activities of the Electricity Industry. According to Shri Sen, the Tribunal could not decide the validity and efficacy of the directions contained in the Tariff order dated 29.10.2001 and the present Appeals have to be confined to the correctness and

validity of the orders dated 18.10.2003 and 12.03.2004.

13. The orders dated 18.10.2003 and 12.03.2004 were relating to non-compliance of directions and penal action against the non-compliance of the directions given in the Tariff order dated 29.10.2001. Thus, to examine correctness and validity of the orders relating to penal action it would be necessary for us to determine whether the directions for which penal action has been taken fall within the purview of the State Commission.

14. Admittedly, the State Government did not vest the functions under Section 22(2) upon the State Commission and its functions were restricted to Section 22(1) only. However, we agree with Mr. Sen that the State Commission has not just to calculate the tariff

by applying some formula on the data submitted by the Electricity Board. The State Commission has to carry out prudence check and to bring in factors in tariff which promote competition, efficiency and economy. The State Commission has to determine by regulations the terms and conditions for fixation of tariff and in doing so is guided by Section 29. The tariff should progressively reflect the cost of supply of electricity at an adequate and improving level of efficiency according to Section 29 (2)(c) of the 1998 Act. The State Commission has to ensure that the electricity generation, transmission, distribution and supply are conducted on commercial principles according to Section 29 (2) (c), the interests of the consumers have to be safeguarded and at the same time the consumers have to pay the cost of supply as per Section 29 (2) (e). It is evident from the impugned

orders of the State Commission that the data submitted by the appellant was sketchy and inadequate. We notice that some of the directions given by the State Commission to the appellant were related to carrying out some studies and streamline submission of data which would allow prudence check by the State Commission in the tariff determination process as per the mandate given under the 1998 Act. Unless the State Commission is provided with the relevant data and studies required for formation of Tariff Regulations and prudence check required for determination of tariff, it would not be possible for the State Commission to carry out the functions assigned to it under Section 22 (1) of the Act. Moreover, according to Section 29 (4) the Appellant had to observe the methodologies and procedures specified by the State Commission in calculating the expected

revenue from charge which he is permitted to recover and in determining tariffs.

15. As discussed in para 7 above, the following directions challenged under Appeal nos. 37, 38 and 134 of 2006 would be related to determination of tariff covered under the functions assigned to the State Commission under Section 22(1) of the 1998 Act.

- i) Marginal cost study.
- ii) Date base with unbundled cost
- iii) Physical verification of assets
- iv) Report on Energy Audit
- v) Voltage-wise assets.

(i) above has been challenged under Appeal Nos. 37 and 38 while (ii) to (v) have been challenged under Appeal no. 134 of 2006. The other directions challenged under appeals 37, 38 and 134 of 2006 were not directly related to determination of tariff and would fall under the

functions under Section 22 (2) of the 1998 Act which were not assigned to the State Commission. However, it has been submitted by the Respondent/State Commission that the State Commission in a subsequent order dated 16.12.2008, had decided not to press the direction relating to marginal cost study in view of the fact that such a study has not been carried out in any part of the world.

16. In so far as the directions challenged in the Appeal No. 133 of 2006, these directions do not relate to determination of tariff or regulating purchase of power by the appellant and would fall under the functions given in Section 22(2) of the 1998 Act which were not conferred upon the State Commission.

17. As submitted by Shri M.G. Ramachandran, all the directions issued earlier under the 1998 Act are now covered under the functions assigned to the State

Commission under the 2003 Act. The Appellant is now complying with these directions or in the process of doing so and now has no reservation in carrying out the directions of the State Commission. Thus, the present appeals are only of academic interest. Shri Sen has also submitted current status of the compliance of the directions issued by the State Commission. Shri Sen has also stated that the State Commission would not wish to make any submission on the quantum of punishment and the same may be determined by the Tribunal as it may consider it appropriate.

18. In view of above, we feel that the ends of justice would be met if the appellant is asked to pay a notional penalty of Rs. 1,000/- for non-compliance of directions in Appeal No. 134 of 2006 relating to data base with unbundled cost, physical verification of

assets, energy audit and voltage wise assets which were related to determination of tariff under Sections 22 (1) of the 1998 Act. The State Commission has already directed in a subsequent order to drop the study on marginal cost and, therefore, we deem it fit to waive off the penalty imposed for the same challenged in appeal nos. 37 and 38 of 2006. The order dated 12/22.12.2003, for initiation of proceedings for non-compliance of Complaint Handling Mechanism & Procedure challenged in appeal no. 133 of 2006 is held invalid as the directions were it is not covered under the functions assigned to the State Commission under Section 22 (1) of the 1998 Act. Accordingly the State Commission order dated 12/22.12.2003 is set aside.

19. In view of above, the Electricity Board is directed to pay the notional penalty of Rs. 1,000/- within 45

days of this order for non-compliance of the directions of the State Commission.

20. **Summary of findings**

(1) The main issue in these appeals is the jurisdiction of the Respondent/State Commission constituted under the 1998 Act to initiate proceedings for non-compliance of the various directions issued to the appellant/Electricity Board in Tariff Order dated 29.10.2001, and to impose penalties for non-implementation of the directions.

(2) Admittedly, the State Commission was assigned functions only under Section 22 (1) of the 1998 Act by the State Government regarding determination of

tariff, etc. According to the Appellant, with the enactment of the 2003 Act, the State Commission has been vested with wide functions and powers and all the directions issued in tariff order dated 29.10.2001 would now fall under its purview. These directions have either been implemented or under process of implementation. Thus, the present Appeals are of academic interest only and are being dealt with accordingly.

- (3) In our opinion, the State Commission was not expected to just calculate tariff by applying some formula based on the data submitted by the Appellant. It was expected to carry out prudence check and**

to bring in factors in tariff which promote competition, efficiency and economy. The State Commission is also required to determine tariff in the manner provided in Section 29 of the 1998 Act. The Tariff Order dated 29.10.2001, was the first Tariff Order of the State Commission and the State Commission found deficiency in the data submitted by the appellant and, therefore, the State Commission gave some directions which were related to determination of tariff in future.

(4) In our opinion, the directions relating to marginal cost study, unbundled cost, physical verification of assets, report on energy audit and voltage-wise assets as

challenged in appeals 37, 38 and 134 of 2006 would be in connection with determination of tariff covered under the functions assigned to the State Commission under Section 22 (1) of the 1998 Act. The other directions challenged in these appeals do not fall under the functions conferred on the State Commission under Section 22(1). Therefore, the Appellant succeeds in these appeals partly. However, in a subsequent order dated 16.12.2008, it has been decided by the State Commission not to press the directions relating to marginal cost study. Accordingly, we deem it fit to waive off the penalty imposed for non-compliance of directions which were

challenged in appeal nos. 37 & 38 of 2006. For non-compliance of some of the directions related to determination of tariff (Appeal No. 134 of 2006), we feel that the ends of justice would be met if the appellant is directed to pay a notional penalty of Rs. 1,000/- within 45 days from the date of this order. Accordingly ordered.

(5) In so far as non-compliance relating to Complaint Handling Procedure challenged in appeal no. 133 of 2006 are concerned, these directions were not related to tariff determination and would fall under the functions given in Section 22(2) of the 1998 Act which were not conferred on the

State Commission. Accordingly, the State Commission's order dated 12/22.12.2003 is set aside.

CONCLUSION

21. In view of above, we allow the Appeals 37, 38 and 134 of 2006 in part. We also direct the appellant to pay a notional penalty of Rs. 1,000/- within 45 days of this order. Appeal No. 133 of 2006 is allowed and the State Commission's order dated 12/22.12.2003 is set aside.

22. Pronounced in the open court on this **31st day of March, 2011.**

(Justice P.S. Datta) (Rakesh Nath) (Justice M. Karpaga Vinayagam)
Judicial Member Technical Member Chairperson

REPORTABLE / NON-REPORTABLE
vs