

**BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY**  
**Appellate Jurisdiction, New Delhi**

Appeal No. 189 of 2005

Dated this **30<sup>th</sup> day of October, 2007**

**Coram : Hon'ble Mr. H. L. Bajaj, Technical Member**  
**Hon'ble Ms. Justice Manju Goel, Judicial Member**

**IN THE MATTER OF:**

Uttaranchal Jal Vidyut Nigam Ltd.  
"Ujjawal", Maharani Bagh,  
G.M.S. Road, Dehradun  
through its Director (Finance)

... Appellant

Versus

1. Uttaranchal Electricity Regulatory Commission  
80, Vasant Vihar, Phase-I, Dehradun,  
Uttaranchal

2. Government of Uttaranchal,  
Department of Energy and Irrigation,  
Sachivalaya Building,  
Dehradun

3. Uttaranchal Power Corporation Ltd.

... Respondents

For the Appellant : Mr. V. R. Reddy, Sr. Advocate  
Mr. Hemant Sahai, Advocate  
Mr. Sitesh Mukherjee, Advocate  
Mr. Sanjay Sen, Advocate  
Mr. Sapan Kumar Mishra, Advocate  
Mr. Sakya Singha Chaudhuri, Advocate

For Respondents : Mr. Suresh Tripathy, Advocate  
Mr. A. S. Chahal, Advocate

Mr. M. G. Ramachandran, Advocate  
Ms. Taruna Singh Baghel, Advocate,  
Mr. Anuvrat Sharma, Advocate  
Mr. Sanjay Kumar Singh, Advocate and  
Ms. Saumya Sharma, Advocate

## **J U D G M E N T**

### **Ms. Justice Manju Goel, Judicial Member**

Appeal No. 189 of 2005 was disposed of by this Tribunal vide a judgment dated 14.09.2006. Appeal against the judgment was preferred before the Hon'ble Supreme Court of India. The appeal was registered as 238 of 2007 and is still pending. However, vide an order dated 24.08.2007 the Supreme Court observed that the question "as to whether Section 43A of the Electricity (Supply) Act 1948 as repealed in respect of the State of Uttar Pradesh was applicable in respect of the State of Uttaranchal after the Uttar Pradesh Re-organisation Act 2000 and till the State Electricity Regulatory Commission was created on 05.09.2002", had not been addressed by us. The Supreme Court directed this Tribunal to record its findings on this issue after hearing the counsel for the parties. Accordingly, the parties counsel were heard. It can be stated at the outset that the controversy is actually related to sub-

section 2 of Section 43A of the Electricity Supply Act and not to the sub-section 1. We, accordingly, proceed to examine whether Section 43-A (2) of the Electricity Supply Act was applicable in respect of the State of Uttaranchal for the period mentioned above. When the Uttar Pradesh Re-organisation Act 2003 hereinafter referred as Re-organisation Act was passed, the electricity sector in that State was governed by several enactments namely the Indian Electricity Act 1910, The Electricity (Supply) Act 1948, the Electricity Regulatory Commissions Act 1998 herein after referred to as the 'Central Act' and UP Electricity Reforms Act 1999 (hereinafter referred to as the Reforms Act. The Central Act 1998 provided for establishment of Electricity Regulatory Commissions who were entrusted with the power of fixing tariff. The earlier Act, namely Electricity (Supply) Act 1948, had given the power of tariff fixation to the Central Government. Section 43A(2) provided that the tariff for sale in respect of generating company shall be determined by the Central Government or the State Government depending upon whether the generating company was owned by the Central Government or the State Government. The relevant provision is extracted below :

*“43-A (2): The tariff for the sale of electricity by a Generating Company to the Board shall be determined in accordance with the norms regarding operation and the Plant Load Factor as may be laid down by the Authority*

*and in accordance with the rates of depreciation and reasonable return and such other factors as may be determined, from time to time, by the Central Government, by notification in the Official Gazette:*

*Provided that the terms, conditions and tariff for such sale shall, in respect of a Generating Company, wholly or partly owned by the Central Government, be such as may be determined by the Central Government and in respect of a Generating Company wholly or partly owned by one or more State Governments be such as may be determined from time to time, by the government or governments concerned”.*

02. The Central Act came into force on 25.05.1998. Soon thereafter the Reforms Act was passed which received the assent of President of India on 23.06.1999.

03. This Act, inter alia, made provisions for un-bundling of the UP State Electricity Board. Section 3 of the Reforms Act also prescribed for establishment of a Commission known as the UP Electricity Regulatory Commission and said that the Commission already established under Section 17 of the Central Act shall be deemed to be the Commission established under the Reforms Act.

Section 10(1) of the Reforms Act entrusted the U.P. Electricity Regulatory Commission with the function of determining tariff for electricity, wholesale, bulk or retail

04. Section 54(1) of the Reforms Act gives overriding effect to the Act over the Indian Electricity Act 1910 and Electricity (Supply) Act 1948, but does not repeal the two Acts for the State of Uttar Pradesh. Section 54(1) is reproduced below:

*“54(1) Except as provided in Section 55, the provisions of this Act, notwithstanding that the same are inconsistent with or contrary to the provisions of the Indian Electricity Act, 1910, or the Electricity (Supply) Act, 1948 shall prevail in the manner and to the extent provided in sub-section (3).”*

05. Section 54(3) then proceeds to say that upon establishment of the UP Electricity Regulatory Commission, the provisions of the Electricity (Supply) Act 1948 be read subject to modifications and reservations provided in this Act including those given in Clause (i) to (ix) of this sub-section. The portion relevant for us is Clause (vi) and the same is as under :

54.(3) *Subject to sub-sections (1) and (2), upon the establishment of the Commission, the provisions of Indian Electricity Act 1910 and the Electricity (Supply) Act 1948 shall, in so far as this State is concerned, be read subject to modifications and reservations provided in this Act including the following:*

(i) ....

(ii) .....

(iii) .....

(iv) ....

(v) ....

(vi) *In respect of matters provided in sections 5 to 15, 16, 7, 18, 19, 20, 23 to 26, 27, 37, 40 to 43, 44, 45 to 54, 56 to 69, 72, 75 an 76 to 83 of the Electricity (Supply) Act, 1948, to the extent this Act has made specific provisions, the provisions of the Electricity (Supply) Act, 1948, shall not apply in the State.”*

(vii) .....

(viii) .....

(ix) .....

06. The obvious impact of this clause is that Section 43-A which does not find mention in clause (vi), shall apply to the State of Uttar Pradesh despite coming into force of the Electricity Reforms Act.

07. The Reforms Act does not affect the Central Act in any way. Section 51 of the Central Act authorises the Central Government to omit Section 43-A(2) of the Electricity (Supply) Act 1948 by a Gazette Notification. The provision is extracted below:

***“51. Amendment of Act 54 of 1948 : With effect from such date as the Central Government, may by notification, in the Official Gazette appoint, sub-Section (2) of Section 43 A of the Electricity (Supply) Act, 1948 shall be omitted.”***

The purpose of making such provision may have been:

- (i) to allow time for the State Regulatory Commissions to start functioning and to allow the Government to fix the tariff till the establishment of the State Regulatory Commissions and
- (ii) in order to avoid the conflict of power given to the Government and the Commissions by Section 43(A) of the Electricity (Supply) Act 1948 and by the Electricity Regulatory Commissions Act respectively.

08. In exercise of the power under Section 51 of the Central Act 1998 the Central Government issued notifications in respect of different States for omitting Section 43-A of the Electricity (Supply) Act. Vide a notification dated 11.09.2000, the Central Government omitted sub-section 2 of Section 43-A of the Electricity (Supply) Act 1998 for the State of Uttar Pradesh. The notification is reproduced below :

**“NOTIFICATION**

*New Delhi, the 11<sup>th</sup> September, 2000*

*S.O. 826(E)- In exercise of the power conferred by Section 51 of the Electricity Regulatory Commission Act, 1998 (14 of 1998), the Central Government hereby appoints with effect from the date of publication of this notification, as the date on which sub-section (2) of Section 43 A of the Electricity (Supply) Act 1948 (54 of 1948) shall be omitted in respect of the States of Andhra Pradesh, Karnataka, Uttar Pradesh, West Bengal, Madhya Pradesh and Delhi.*

*( F. No. 25/24(iv)/98 R&R)  
Ajay Shankar, Jt. Secretary”*

09. Interestingly by then the Re-organisation Act 2000 had already been passed but the State of Uttaranchal had not been created. The UP Re-organisation Act is dated 25.08.2000. Section 3 of the



Re-organisation Act prescribes that the new State known as State of Uttaranchal shall be formed on the appointed day. The appointed day means the day which the Central Government may by notification in the official gazette appoint. The State of Uttaranchal was notified on 09.11.2000.

10. Section 63 of the Re-organisation Act said that the UP Electricity Regulatory Commission shall continue to function in Uttaranchal subject to provisions of the section and to such direction as may be there from time to time issued by the Central Govt. Section 63(3) of the Re-organisation Act empowered the Central Govt. to dissolve the UP Electricity Regulatory Commission. Section 63(4) of the Re-organisation Act gave the State of Uttaranchal the power to constitute its own Electricity Regulatory Commission. The relevant provisions are extracted below:

- “63. Provisions for Power Corporation Limited, etc. –**  
*(1) The following bodies corporate constituted for the existing State of Uttar Pradesh, namely:-*
- (a) the Uttar Pradesh Power Corporation Limited, the Uttar Pradesh Jal Vidyut Nigam Limited and the Uttar Pradesh Rajya Vidyut Utpadan Nigam Limited;*
  - (b) the Uttar Pradesh Electricity Regulatory Commission; and*
  - (c) the State Warehousing Corporation established under the Warehousing Corporation Act, 1962 (58 of 1962)*

*Shall, on and from the appointed day, continue to function in those areas in respect of which they were functioning immediately before that day, subject to the provisions of this section and to such directions as may, from time to time be issued by the Central Government.*

*(2) ...*

*(3) The Power Corporation, Commission or Warehousing Corporation referred to in sub-section (1) shall cease to function as from, and shall be deemed to be dissolved on such date as the Central Government may, by order, appoint; and upon such dissolution, its assets, rights and liabilities shall be apportioned between the successor States of Uttar Pradesh and Uttaranchal in such manner as may be agreed upon between them within one year of the dissolution of the Power Corporation, Commission or Warehousing Corporation, as the case may be, or if no agreement is reached, in such manner as the Central Government may, by order, determine:*

*Provided ....*

*Provided .....*

*(4) Nothing in the preceding provisions of this section shall be construed as preventing the Government of*

*the State of Uttar Pradesh or, as the case may be, the Government of the State of Uttaranchal from constituting, at any time on or after the appointed day, a State Power Corporation, an Electricity Regulatory Commission or a State Warehousing Corporation for the State under the provisions of this Act relating to such Power Corporation, Commission or Warehousing Corporation; and if such a Power Corporation, Commission or warehousing Corporation is so constituted in either of the States before the dissolution of the Power Corporation, Commission or Warehousing Corporation referred to in sub-section (1)-*

*(a) ....*

*(b) .....”*

11. So far as the applicability of the existing laws is concerned, the following two provisions of the Re-organisation Act are relevant:

**“86. Territorial extent of Laws** – *The provisions of Part II shall not be deemed to have affected any change in the territories to which the Uttar Pradesh Imposition of Ceiling of Land Holding Act, 1961 and any other law in force immediately before the appointed day, extends or applies,*

*and territorial references in any such law to the State of Uttar Pradesh shall, until otherwise provided by a competent Legislature or other competent authority be construed as meaning the territories within the existing State of Uttar Pradesh before the appointed day.”*

*“**87. Power to adapt laws** – For the purpose of facilitating the application in relation to the State of Uttar Pradesh or Uttaranchal of any law made before the appointed day, the appropriate Government may, before the expiration of two years from that day, by order, make such adaptations and modifications of the law, whether by way of repeal or amendment, as may be necessary or expedient, and thereupon every such law shall have effect subject to the adaptations and modifications so made until altered, repealed or amended by a competent Legislature or other competent authority.”*

12. Thus Section 86 makes all laws applicable within the territory of Uttar Pradesh applicable within the territory of Uttaranchal since it was a part of Uttar Pradesh before the appointed day. Section 87 gave further power to adapt laws and for this purpose also to make some modifications in the laws being adapted. Hence, the Uttar Pradesh Electricity Reforms Act 1999 was in force in the State of Uttaranchal. This position is acknowledged in the introductory part of the notification of the Uttaranchal (Uttar Pradesh Electricity

Reforms Act) Adaptation & Modification Order by saying “*And whereas the Uttar Pradesh Electricity Reforms Act 1999 is in force in the State of Uttaranchal....*” Similarly The Electricity (Supply) Act 1948 was also in force in the new State to the extent it applied to Uttar Pradesh. Since Section 43-A(2) on the appointed day had been omitted for Uttar Pradesh, by virtue of section 86, it was not applicable to the new State of Uttaranchal.

13. Pursuant to the power given by section 87 of the Re-organisation Act the State of Uttaranchal passed the Uttaranchal (UP Electricity Reforms Act) Adaptation and Modification order 2001 (referred to as the Act in the order) and hereinafter referred to as the Adaptation and Modification Act, which came into force on 01.01.02. This Adaptation and Modification Act is not a single paragraph order saying that the UP Electricity Reforms Act would apply to the State of Uttaranchal wholly or partly. This Adaptation and Modification Act is a new Act with all the provisions of the UP Electricity Reforms Act and as such all the provision of this Act has to take effect from the date on which it came into force. The Adaptation and Modification Act vide Section 3 makes provisions for establishment of Uttaranchal Electricity Regulatory Commission. Vide Section 10 of the Adaptation and Modification Act, Uttaranchal Electricity Regulatory Commission has been assigned the function of determining the tariff, wholesale, bulk, grid or retail. The Adaptation and Modification Act also made provisions regarding

applicability of Indian Electricity Act 1910 and the Electricity (Supply) Act 1948 in Chapter 14 of this Act with the sub heading “Effect on Existing Central Law”.

14. Section 54(1) of the order gave over riding effect to the provisions of the Adaptation & Modification Act and Section 54(3) prescribed that upon establishment of the Commission the provisions of the Indian Electricity Act 1910 and Electricity (Supply) Act 1948, so far as the State of Uttaranchal is concerned, be read subject to the modifications and reservations provided in the sub-section. Section 54(1) and clause (vi) of 54 (3) which are relevant for the present purpose is as under:

*54.(1) Except as provided in section 55, the provisions of this Act, notwithstanding that the same are inconsistent with or contrary to the provisions of the Indian Electricity Act, 1910, or the Electricity (Supply) Act, 1948 shall prevail in the manner and to the extent provided in sub-section(3).*

*(2) ...*

*54(3) Subject to sub-sections (1) and (2), upon the establishment of the Commission, the provisions of the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948 shall, in so far as this State is concerned, be read*

*subject to the modifications, and reservations provided in this Act including the following:-*

*i) .....*

*ii) ....*

*iii) ....*

*(a) .....*

*(b) .....*

*(c) .....*

*iv) .....*

*v) .....*

*vi) In respect of matters provided in sections 5 to 15, 16, 17, 18, 9, 20, 23 to 26, 37, 40 to 43, 44, 45 to 54, 56 to 69, 72, 75 and 76 to 83 of the Electricity (Supply) Act, 1948, to the extent this Act has made specific provisions, provisions of the Electricity (Supply) Act, 1948, shall not apply in the State.*

*vii) .....*

*viii) ....*

*ix) ....*

*x)*

15. Thus this Adaptation and Modification Act takes notice of the Electricity Supply Act 1948 and repeals some of the provisions of

the Electricity Supply Act 1948. However, Section 43-A is not mentioned in clause (vi), extracted above, and therefore by virtue of the Adaptation and Modification Act Section 43-A came to be applied to the State of Uttaranchal. Since the Adaptation and Modification Act was brought into force on 01.01.2002, Section 43-A of the Electricity Supply Act 1948 again came to be applied to the State of Uttaranchal on 01.01.2002.

16. There is no escape from this conclusion because if the Adaptation and Modification Act did not intend not to bring in section 43-A again into the State of Uttaranchal it could have included 43-A in clause (vi) or could have made a specific provision indicating that 43-A stood repealed for the State of Uttaranchal. One may argue that Section 43A(2) stood repealed when Uttaranchal was carved out of the earlier State of Uttar Pradesh and so it was not necessary to be mentioned again in Section 54(3)(vi) of the Adaptation & Modification Act. But by the same logic the subsection need not have again mentioned all the other sections of the Electricity (Supply) Act 1948 which had already been repealed by the earlier notification for the State of Uttar Pradesh. The only interpretation that can be drawn from this is that section 43A(2) was not omitted from the State of Uttaranchal when the Adaptation & Modification Act came into force and it then revived in the new State. It appears that the Government of Uttaranchal while notifying the Adaptation and Modification Act also understood the



situation to be the same. So did the Central Government. The Central Government eventually vide a notification dated 21.02.2003 exercised its power given by Section 51 of the Central Act and repealed/omitted Section 43-A(2) for the State of Uttaranchal. The notification is given below:

**“GOVERNMENT OF INDIA  
MINISTRY OF POWER**

*New Delhi, the 21<sup>st</sup> February, 2003*

**NOTIFICATION**

*S.O. ... In exercise of the powers conferred by section 51 of the Electricity Regulatory Commissions Act, 1998 (14 of 1998), the Central Government hereby appoints with effect from the date of publication of this notification, as the date on which sub-section (2) of section 43A of the Electricity (Supply) Act, 1948 (54 of 1948) shall be omitted in respect of the States of Gujarat, Maharashtra, Rajasthan, Uttaranchal and Kerala.*

*( Ajay Shankar )  
Joint Secretary to the Government of India  
F. No. 25/24/98-R&R”*

17. In view of the above, we answer the query raised by the Honorable Supreme Court in its order dated 23.08.2007. Section 43-A(2) of Electricity (Supply) Act 1948 stood omitted for the State of Uttar Pradesh on 11.09.2000 and the omission of 43-A(2) continued for the new State of Uttaranchal when the State was formed on 09.11.2000 till the same was revived by the Uttaranchal (UP Electricity Reforms Act 1999) Adaptation and Modification order promulgated on 01.01.2002. 43A(2) of the Electricity Supply Act remained in force from 01.01.2002 till it was again omitted by notification of Central Government dated 21.02.2003. The period in respect of which the Hon'ble Supreme Court has raised the query can be divided in two parts : (1) From the date of the Re-organisation Act viz. 25.08.2000 till the Adaptation & Modifications Act i.e. 01.01.2002 and (2) from the date of the Adaptation & Modification Act till the constitution of the Uttaranchal Electricity Regulatory Commission viz. 05.09.2002. In the first period, Section 43A(2) did not apply to the State of Uttaranchal but in the second period it did apply to that State.

18. It may be added for further clarification that even beyond the second period, mentioned in Para 17 above, i.e. after 05.09.2002 Section 43A(2) of the Electricity Supply Act continued in force till it was omitted on 21.02.2003 by the notification of the Central Government.

19. Certified copy of this judgment be sent to the Registrar General, Supreme Court of India to be placed before the Hon'ble Supreme Court.

Pronounced in open court on this day of **30<sup>th</sup> October 2007**.

**( Justice Manju Goel )**  
**Judicial Member**

**( H. L. Bajaj )**  
**Technical Member**

The End