Before the Appellate Tribunal for Electricity
Appellate Jurisdiction, New Delhi

Appeal No. 132 of 2006

Dated this 13th day of October 2006

Present : Hon'ble Mr. Justice E Padmanabhan, Judicial Member
Hon'ble Mr. H. L. Bajaj, Technical Member

National Hydroelectric Power Corporation Ltd.
(A Govt. of India Enterprise)
NHPC Complex, Sector-33,
Faridabad – 121 003
(Haryana) …Appellant

Versus

1. H. P. State Electricity Regulatory Commission
Khalini,
Shimla – 171 002 (HP)
(Through its Secretary)

2. H.P. State Electricity Board
Through its Secretary,
Vidyut Bhawan,
Shimla – 171 004 (HP)

3. State of Himachal Pradesh
Through Secretary (Power) to the
Government of Himachal Pradesh,
Shimla – 171 002 (HP) …Respondents

Counsel for the Appellant : Mr. Sachin Datta and Mr. Swetank,
Advocates for NHPC
Mr. A. K. Tewari, Chief I/C (Law), NHPC
Mr. T. K. Mohanty, Chief (Law), NHPC
Mr. Jitendra Kumar DM (Elect.), NHPC

Counsel for the Respondents : Mr. Sanjay Sen and Mr. Vishal Anand,
Advocates for HPERC

J U D G M E N T

1. The appellant National Hydroelectric Power Corporation Ltd., an undertaking of the Government of India, has preferred the present appeal under Section 111 of The Electricity Act 2003 seeking to set aside (i) the order dated 20.7.2005 passed by the first respondent Himachal Pradesh Electricity Regulatory Commission made in case No. 196/2004 and (ii) the show cause notice dated 14.12.2004.

2. Heard Mr. Sachin Datta learned counsel appearing for the appellant and Mr. Sanjay Sen advocate for the first respondent Regulatory Commission. Though the appeal lay in a narrow compass, it is essential to set out the factual matrix. The appellant among other hydroelectric power generating stations has also executed and commissioned 540 MW Chamera I Power Station and 300 MW Chamera II Power Station in the state of Himachal Pradesh. The appellant requires supply of electricity for the execution of the project and to operate auxiliary system of power house dam and switchyard offices, stores, workshop etc. besides the residential colony where the operating staff of power station reside.

3. The appellant has been getting power supply from Himachal Pradesh State Electricity Board since 1994 by a single point connection at Bathri

substation of HPSEB. The appellant has constructed its own distribution system including substation and network of HT/LT line, for the power house and all connected establishment including residential colonies.

4. The appellant is a Generating Company as defined in Section 2 (28) of the Electricity Act 2003 and the Generating Station constructed and operated by the appellant falls within the definition of Section 2 (30) of the said Act. The second respondent is the area Distribution Licensee in terms of Sec. 2 (17). It is not in dispute that the second respondent herein is supplying electricity in bulk to appellant and at the tariff rates notified by the first respondent Commission.

5. The first respondent issued a notice in purported exercise of power under Sec.142 of The Electricity Act 2003 alleging that the appellant has contravened Sec. 12, 14, 64 and 86 of the Act in that the appellant without securing license is transmitting /distributing power nor it is deemed licensee nor it has applied for determination of tariff under sec. 62 of Act. The appellant was called upon to show cause as to why proceedings under sec. 142 of the Act should not be taken and was called upon to attend a hearing on 15.1.2005. The appellant submitted objections, both preliminary and on merits. The commission passed interim order on 15.1.2005 requiring the appellant to apply and secure

distribution license by remitting the annual license fee of Rs. One Lac plus 5 ps for every KWH sent out in the distribution system in the preceding year, while placing reliance on Regulation 48 (1)(b) of the HPERC (Conduct of Business) Regulations 2005. Again the appellant raised further objections in detail on 7.3.2005 while placing reliance on the Electricity (Removal of difficulty) Fourth Order 2005.

6. The commission by order dated 20.7.2005 concluded that the said Removal of Difficulty fourth order will have no application as also the Schedule Bulk Supply (BS) to the supply of power to NHPC colonies at Khaini and Banikhet and directed the appellant to file an application seeking open access for supply to its own colonies.

7. The appellant moved C.W.P No. 810 of 2005 on the file of the Hon'ble High Court of Himachal Pradesh challenging the orders of the said commission on 17.8.2005 and secured orders of stay of the impugned order. However, on 7.6.2006, the writ petition was dismissed while giving liberty to the appellant to approach this Appellate Tribunal under section 111 of The Electricity Act 2003. Thereafter the present appeal has been preferred raising various contentions contending that being a generating station and a generator, it is not at all required to secure a license as concluded by the commission.

8. It is contended on behalf of the appellant that the appellant is a generating company in terms of sec 2 (28) and the entire housing colony for which power is supplied being part of generating station as defined in sec. 2 (30), it would be unnecessary to secure a distribution license as ordered by the commission. The construction placed on (Removal of Difficulty) fourth order 2005 is erroneous and it has been misread. It is also contended that reliance placed on Regulation 48 (1)(b) of the H.P. Electricity Regulatory Commission (Conduct and Business) Regulation is a misdirection and misconception and the regulation has no application to the facts of the case. Even assuming to the contrary, the statutory Removal of Difficulty order will govern the position and the regulation, relied upon shall have no application to the facts of the present case.

9. Per contra Mr. Sanjay Sen learned counsel appearing for the contesting first respondent contended that the appeal be allowed and remanded to the commission with a direction to exercise the power under the Regulation, which provides for Removal of Difficulties besides contending that various contentions advanced by the appellant are untenable and devoid of merits.

10. In this appeal, the following points arise for consideration:

(A) Whether appellant is required to apply and secure distribution license and/or apply for open access as directed by the first respondent commission?

(B) Whether construction placed on the Electricity (Removal of Difficulty) Fourth order 2005 by the commission is sustainable?

(C) To what relief the appellant is entitled to in this appeal?

11. The points (A) and (B) could be considered together conveniently, conceedingly the appellant is a " generating company" as defined in sec. 2 (28); the appellant generate power as defined Sec. 2 (29) and the appellant has established and is operating a "generating station" as defined in Sec. 2(30) of The Electricity Act. The further admitted fact being the appellant is not engaged in distribution of power as a distribution licensee, but it supplies power to houses of the operating staff employed in its "generating station".

12. The contesting respondent placed heavy reliance on Regulation 48 (1)(b) of Himachal Pradesh Electricity Regulatory Commission (Conduct of Business) in treating the appellant as a deemed licensee. Regulations 48(1)(b) reads thus:

" 48. Deemed grant of the licence: (1) Until otherwise directed by the Commission, the following classes of persons engaged in the

supply of electricity in the State of Himachal Pradesh shall be deemed to have applied for and granted the Category II- Licence for the purpose contained herein and subject to the fulfillment of the conditions contained in sub-regulation (2)-

(a) xx xx xx

(b) Persons who supply electricity to the residential colonies as a part of their activity of maintaining such colonies for use and occupation of their employees and/or for use and occupation of persons providing facilities and services to the employees, where such person procures electricity from any licensee or from any other source approved by the Commission and distributes the electricity within the residential colonies on no-profit motive basis;"

xx xx xx

13. On the premise that the appellant is a deemed licensee, further direction has been issued by the Regulator in terms of Regulation 48(2) to (5). The said regulations have been framed on 1.1.2005 in exercise of power conferred under Sec. 181 read with Sec. 86 (1) and 92 of The Electricity Act 2003. The learned counsel appearing for the contesting respondent while placing reliance on Regulation 71, pointed out that the appellant may be directed to go before the Regulatory Commission for relaxation or to dispense with the requirements of Regulation 48(1) (b) etc.

14. We could appreciate the anxiety on the part of the contesting respondent - commission in seeking to enforce the provisions of The Electricity Act 2003 and the Regulations framed there under, however, we are bound to

take a different view in view of the Electricity Removal of Difficulty fourth order published on 8th June, 2005 in exercise of power conferred under Sec. 183 of The Electricity Act 2003. The said Removal of Difficulty order has been issued to relieve the generating company like the appellant from the requirement of license for supplying power to the housing colonies or townships, housing the operating staff of the generating station by the generating company. The very Removal of Difficulty fourth order has been issued with a purpose and object of the relieving the generator from the requirement of distribution license to distribute power to its Housing Colony housing its operating staff.

15. The operative clause of the said fourth order reads thus:

> *2.* ***Supply of electricity by the generating companies to the housing colonies of its operating staff****:- The supply of electricity by a generating company to the housing colonies of, or townships housing, the operating staff of its generating station will be deemed to be an integral part of its activity of generating electricity and the generating company shall not required to obtain licence under this Act for such supply of electricity."*

16. In terms of the said provision, supply of electricity by a generating company to the housing colonies of the operating staff of its generating station, is deemed to be an integral part of the activity of generating electricity and such generating company shall not be required to obtain license under The Electricity Act 2003 for such

supply of electricity. The said Removal of Difficulty order issued in exercise of Section 183 of The Electricity Act 2003 constitute part of the statute book of The Electricity Act 2003 and it has all the efficacy and force of the legislative enactment.

17. By the said order a legal fiction has been created and it has to be given full amplitude and taken to its logical end. The said order being part of the legislative enactment, viz. Electricity Act 2003, the regulations framed by the first respondent even assuming requires a license or secure open access has to give way to the said Removal of Difficulty order.

18. Sec. 2 of the Removal of Difficulty order makes no difference whether the power so distributed by the generator to the housing colony originate from its own the generating station or from any other source as an arrangement or as an alternate source or such contingency is required depending upon the vagaries and location of the hydel generation. It is the Section 2 of the removal of difficulty order prevails as against the Regulations framed by the first respondent regulator. The housing colony is located depending upon location of the hydel generating plant, yet it is for the operating staff. The expression vicinity appearing in the object clause of the Removal of Difficulty order has to be given wide and full meaning as the location

of the housing colony with reference to generating station may depend upon various factors and natural phenomena.

19. The power to make Regulations is conferred by Section 181 of The Act on the State Commission. Such delegated delegation to frame Regulation shall be consistent with the Act and shall not be inconsistent with the provisions Act, which includes the removal of difficulty order issued under Section 183 of The Act.

20. It is settled law that the legislature is competent to create a legal fiction, in other words, to enact a deeming Provision for the purpose of assuming existence of a fact which does not really exist (See J. K. Cotton Spinning Mills Ltd. Vs. u.I. AIR 1988 SC. 191 at 202. Even a delegatee rule making authority could very well provide for such fiction) In interpreting legal fiction, it is to be ascertained for what purpose the fiction is created and after ascertaining the purpose and object, the Court is to assume all those facts and consequences which are incidental or inevitable corollaries to give effect to the fiction. After ascertaining the purpose, full effect must be given to the statutory fiction and it shall be carried to its logical conclusion and to that end it would be proper and even necessary to assume all those facts on which alone the fiction can operate, yet it has to be confined for the purpose for which it is created. In American Home Products Vs. Mac-Laboratories reported 1986 (I) SCC. 465 at P. 501 after analyzing the entire case law it has been held thus by the Supreme Court:

"56. In a celebrated passage Lord Asquith of Bishopstone in East End Dwellings Co. Ltd. v. Finsbury Borough Council said (at page 132):

If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it.

57. In the State of Bomaby v. Pandurang Vinayak Chaphalkar this Court held (at page 778) while approving the above passage of Lord Asquith :

When a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to and full effect must be given to the statutory fiction and it should be carried to its logical conclusion.

58. The purposes for which the said fiction has been enacted are set out in Section 48(2). These purposes are the purposes of Section 46 or for any other purpose for which such use is material under the 1958 Act or any other law. To confine the purpose only to a part of Section 46 would be to substantially cut down the operation of the legal fiction. The purpose for which the legal fiction is to be resorted to is to deem the permitted use of a trade mark, which means the use of the trade mark by a registered user thereof, to be the use by the proprietor of that trade mark. Having regard to the purposes for which the fiction in Section 48(2) was created and the persons

between whom it is to be resorted to, namely, the proprietor of the trade mark and the registered user thereof, and giving to such fiction its full effect and carrying it to its logical conclusion, no other interpretation can be placed upon the relevant portions of Section 1891) and of clause (a) of Section 46(1) than the one which we have given."

In Tandon Vs. ADM, (1995) 1 SCC 537,: it has been held thus:
"When a statute creates a legal fiction saying that something shall be deemed to have been done which in fact and truth has not been done, the court has to examine and ascertain as to for what purpose and between what persons such a statutory fiction is to be resorted to. Thereafter full effect has to be given to such statutory fiction and it has to be carried to its logical conclusion."

21. On a consideration of the provisions of The Electricity Act 2003, the removal difficulty fourth the order and the Regulations relied upon by the learned counsel for the Commission, we are of the considered view that the housing colony being part of generating station, no license is required for distribution of power by the appellant, a generator to its housing colony providing housing to the operating staff.

The object of the order is clear from the preamble of the order, which reads thus :

" And whereas 'generating station' has been defined in sub-section (30) of the section 2 of the Act as any station for generating electricity, including any building and plant with step-up

transformer, switchyard, switchgear, cables or other appurtenant equipment, if any used for that purpose and the site thereof, a site intended to be used for a generating station, and any building used for housing the operating staff of a generating station, and where electricity is generated by water-power, includes penstocks, head and tail works, main and regulating reservoirs, dams and other hydraulic works, but does not in any case include any sub-station; And whereas no licence is required for a generating company to establish, operate and maintain a generating station as per the provisions of the section 7 of the Act; and whereas providing the housing to the operating staff of a generating station in the vicinity of the generating station is essential for operation and maintenance of the generating station and forms an integral part of the generation station; and whereas difficulties have arisen regarding the requirement of licence for supplying power to the housing colonies or townships housing the operating staff of the generating station by the generating companies;

22. In the circumstances we are bound to give effect to The Electricity (Removal of difficulty) fourth order 2005 and it shall be taken to its logical end, which ipso facto means no license is required for the appellant to supply power to the Housing colony, where the operating staff of generating station are housed as such Housing colony is part of the generating station.

23. In the circumstances, on point (A), we hold that it is not required for the appellant to apply and secure distribution license nor it is required to

seek for open access as directed by the first respondent, Regulatory Commission. On point (B) we hold that the interpretation placed by the Commission on the Electricity (Removal of Difficulty) Fourth order 2005 by the Commission cannot be sustained. On point (C), we hold that no license is required for the appellant to supply power to the Housing colony, where its operating staff resides, nor the appellant could be deemed to be a licensee under the Regulation nor it is required to seek open access as directed by the Commission.

24. In the result, the appeal is allowed and the impugned order of Commission is set aside. The parties shall bear their respective costs in this appeal.

Pronounced in open court on this 13th day October, 2006.

(Mr. H.L. Bajaj)
Technical Member

(Mr. Justice E. Padmanabhan)
Judicial Member