

**BEFORE THE HIMACHAL PRADESH ELECTRICITY REGULATORY
COMMISSION, SHIMLA**

In the matter of :-

The Himachal Pradesh State Electricity Board Ltd.,
Vidyut Bhawan, Shimla-171004.

...Petitioner

Petition No. 123 of 2011

(Decided on 5.01.2013)

**CORAM
SUBHASH C. NEGI
CHAIRMAN**

Counsels:-

for the petitioner

Sh. Ramesh Chauhan
Authorised Representative

Consumer Representative
(u/s 94(3) of the Electricity
Act, 2003)

Er. P.N. Bhardwaj

ORDER

(Last heard on 30.10.2012 and Orders reserved)

The Himachal Pradesh State Electricity Board Ltd. (hereinafter referred as the “petitioner Board”) has moved this application for seeking amendment in the Himachal Pradesh Electricity Regulatory Commission (Electricity Ombudsman) Regulations, 2004 and Multi Year Tariff Order dated 19.7.2011, to the extent that the emoluments of the Consultants and the Electricity Ombudsman may be met from the Fund of the Himachal Pradesh Electricity Regulatory Commission (hereinafter referred as “the Commission”), created under section 103 of the Electricity Act, 2003 (hereinafter referred as “the Act”).

2. The petitioner Board asserts that the expenses for the office of Electricity Ombudsman and the fees of the Consultants, appointed by the Commission, should be met from the Commission’s Fund as it is regularly

paying fees for tariff determination, licence fees and other fees as specified in the Himachal Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations, 2005 (hereinafter referred as “the Conduct of Business Regulations”). The Multi Year Tariff Order for the Second Control Period (FY-2012 to FY-2014) dated 19.7.2011 has approved Regulatory Expenses to the tune of Rs. 2.00 Crore against the estimated requirement of Rs. 3.05 Crores, which primarily takes care of such expenses, including the licence fee. Further, in the First Annual Performance Review filed for the Second Control Period, the petitioner Board has not taken into consideration the expenses for engagement of Consultants by the Commission and expenses of the office of the Electricity Ombudsman.

3. From this petition following issues emerge for consideration:-
- (I) Whether the salary of the Electricity Ombudsman and its office should be borne by the Commission out of its Fund, set up under section 103 of the Act?
 - (II) Whether the expenses incurred for engagement of the Consultants by the Commission should be charged from/or passed on to the petitioner Board?

4. Before considering the issues, set out in the preceding para, the Commission feels it necessary to delineate the scheme of the relevant provisions contained in the Act, and the rules and regulations framed thereunder. Section 103 of the Electricity Act, 2003 provides for establishment of a Fund for the State Commission and there shall be credited thereto-

- (i) grants and loans by State Government.
- (ii) fees received by the Commission.
- (iii) sums received from other sources as may be decided by the State Government.

The Fund shall be applied for meeting-

- (i) salary, allowances etc. of the Chairperson, Members, Secretary, Officers and other employees of the Commission,
- (ii) expenses of the Commission in discharge of its functions;
- (iii) expenses on objects and for purposes authorized by the Act.

5. The manner of applying the Fund has been prescribed by the State Government in rules made under clause (g) of sub-section (2) of section 180 of the Act. Rule 3 of the Rules (ibid) enlists the purposes for which the expenditure can be met out of the Fund. Clauses (f) and (g) of Rule 3 (ibid) provides for meeting out of the said Fund –

- (i) the expenses of the Commission in discharge of its functions under section 86;
- (ii) the expenses on objects and for purposes authorized by the Act.

6. The Act makes elaborate provisions seeking to safeguard consumers' interest. Every distribution licensee, under sub-section (5) of section 42 of the Act is required to establish a Grievance Redressal Forum for redressal of grievances of consumers. Any consumer who is aggrieved by non-redressal of his grievances under sub-section (5) of section 42 of the Act may make a representation for redressal of his grievances to an authority to be known as Ombudsman to be appointed or designated by the State Commission, under sub-section (6) of section 42 of the Act, read with sub-rule (2) of rule 7 of the Electricity Rules, 2005, framed by the Central Government under section 176 of the Act. Sub-section (7) of section 42 of the Act provides that the Ombudsman shall settle the grievances of the consumers within such time and in such manner as may be specified by the regulations made by the State Commission. This Commission in exercise of its powers vested under the said sub-section (7) of section 42 and section 181 of the Act, has framed the HPERC (Electricity Ombudsman) Regulations, 2004. The existing provisions of sub-regulation (5) of regulation 3 and regulation 6 of the said regulations read as under:-

“(5) The salary, allowances payable to and all other terms and conditions of the appointment of the Electricity Ombudsman will be such as may be determined by the Commission from time to time and shall be paid out of the Fund constituted under section 103 of the Act:

Provided that the remuneration and other allowances payable to the Electricity Ombudsman shall be borne by the distribution licensee in such proportion and in such manner as may be determined by the Commission and shall be allowed as the pass through expense in the Annual Revenue Requirement (ARR) of the distribution licensee.”

“6 Secretariat.- (1) The Electricity Ombudsman shall be provided with a Secretariat.

(2) The expenses of the Secretariat shall be paid out of the Fund constituted under section 103 of the Act:

Provided that the expenses of the Secretariat of the Electricity Ombudsman, including all salaries, honorarium and allowances payable to the Electricity Ombudsman and his staff shall be borne by the distribution licensee in such proportion and in such manner as may be determined by the Commission; and shall be allowed as pass through expense in the Annual Revenue Requirement (ARR) of the distribution licensee.”

7. In relation to the appointment of Consultants, sub-section (4) of section 91 of the Act provides that the Commission may appoint Consultants required to assist the Commission in discharge of its functions on such terms and conditions as may be specified by regulations made by it. Regulation 26 of the Conduct of Business Regulations provides that the Commission may at any time, take the assistance of the Consultants/experts, as it may consider necessary and it may, if it considers necessary, direct payment to the Consultants engaged by it of such fees, costs, expenses by such of the parties to the proceedings as the Commission may consider appropriate.

8. This Commission, in exercise of its powers under sub-section (4) of section 91 of the Act, has also framed the HPERC (Appointment of Consultants) Regulations, 2005 and thereunder the Commission in its discretion appoints Consultants, required to assist it in discharge of its functions, for any matter, using such procedure as it may deem fit, having regard to the nature and complexity of the matter.

9. Since the erstwhile Himachal Pradesh State Electricity Board was functioning as an integrated entity, the Commission has been charging the said entire expenses to the Board and thereafter allowing them as pass through expenses in the ARR of the Board.

10. Clause (g) of sub-section (1) of section 86 of the Electricity Act has vested the Commission with powers to levy the fees for the purposes of the Act and pursuant to that power, the Commission has laid down the Fee Schedule annexed to the Conduct of Business Regulations of this Commission. The fees are the main source of the Commission’s Fund. The term “fees” implies the charges for services being rendered. Normally, while

fixing the fees, the authority fixing the fees takes note of all the relevant factors involving the expenses to be incurred for rendering the needed services.

11. With the statutory background as detailed in the preceding paras, the Commission now proceeds to deal with each of the issues involved in this case.

Issue No.I

Whether the salary of the Electricity Ombudsman and its office should be borne by the Commission out of its Fund set up under section 103 of the Act?

12. The expression “in discharge of its function” under section 103 of the Act is limited only to the functions of the Commission under section 86 of the Act whereas the term “on objects” and “for purposes authorised” under section 103 of the Act is wider in amplitude in comparison to the expression “discharge of functions.” The appointment of the Ombudsman is the object and purpose of the Act. No doubt the powers for appointment of the Ombudsman has been conferred upon the Commission under section 42(6) of the Act, yet it has to be interpreted with reference to the purpose and objective of the aforesaid appointment. The redressal of the consumer grievances/complaints basically is the function of the distribution licensee, which is performed through the Grievances Redressal Forum, being the internal organ of the distribution licensee and the Ombudsman only attends to the representations relating to the non-redressal of the complaints/ grievances by the Redressal Forum. In other terms, the office of Ombudsman is designed to function and redress the consumer grievances which is the sole responsibility of the distribution licensee. Thus, it can be safely concluded that the expenses of the Ombudsman and of his office are to be borne by the distribution licensee on the lines of Grievances Redressal Forum.

13. The existing regulations provide for meeting out these expenses from the Commission’s Fund in the first instance and subsequently to recover the same from the distribution licensee out of the provisions made in its ARR..

14. This issue has also been considered in Para 7.13 of the report on “Protection of Consumer Interest” containing recommendation of the Forum

of Regulators (FOR), constituted by the Central Government under section 166(2) of the Act, and the observations made by it reads as under:-

“7.13. Expenses of the office of the Ombudsman should not be met by the distribution licensee, as it might raise the question on the independence of the Ombudsman. The office of Ombudsman should be funded by the SERCs and a separate budgetary allocation could be made in the budget of SERC for this purpose. The SERC may recover such expenses from the licensee directly.”

A separate budgetary allocation has to be made in the budget of the Commission for this purpose as recommended by the FOR.

15. The FOR in the Model Regulations has made the following provisions:-

“All expenses of the Ombudsman’s office including that of the Secretariat shall be borne by the Commission which can recover such expenses from the licensees in proportion to their latest approved net ARR. At the start of every quarter, the Commission shall present an estimated bill of expenses to each licensee. The licensee shall make the payment to the Commission within 15 days of the receipt of such a bill. The actual expense shall be adjusted while approving the ARR of the licensee and the licensee shall be allowed to recover such actual expense as pass through in the determination of tariffs”.

16. Conjoint reading of the observations of FOR as reproduced at para 14 and Model Regulations approved by FOR as reproduced at para 15 above leads to the conclusion that-

- (a) the licensee should not directly pay from its revenue, the expenses of Ombudsman because it may impact upon independence of the institution of Ombudsman;
- (b) the State commission will make a separate budgetary provision/allocation for such expenses in its budget and accordingly meet such expenses
- (c) these expenses will be provided separately in the ARR of the licensee and Commission will recover these expenses out of such ARR.

FOR regulations and its observations are clear that Commission will bear the expenses from separate budget head so provided and it will be recovered from licensee from ARR specifically provided for this purpose. However, the model FOR regulations do not make any mention of Commission’s Fund. Obvious reasons are that the Fund may not be constituted

at the time Ombudsman is appointed in all cases. Also only the fees received by the Commission can go into Fund and no other recoveries or receipts except the sources decided by the State government (not by State Commission).

17. In relation to the decision of the FOR for a separate budgetary allocation in the budget of the State Regulatory Commission and recovery of such expenses from the licensee, it would be apt to state that such provision will not be in conformity with the provisions of the Act in situations where the State governments have already established SERC Fund. Sub-section (1) of section 103 of the Act provides for crediting to the Commission's Fund only the State Government grants, fees recovered by the Commission and the sums received from other sources as may be decided by the State Government. There is no any other such source from which the money could be credited to the Fund. The sums recovered on account of the salary and allowances payable to the Ombudsman and his office cannot be termed as "Fee" to be charged from the licensee. Also once Fund is established, Commission is not expected to operate a separate account outside Fund.

18. In view of the provisions of the Act under Section 42 and Section 103 and the observations and Model Regulations for Ombudsman made by the Forum of Regulators and the other aspects discussed in the preceding paras, the Commission holds that the institution of Ombudsman is an internal organ of the distribution Licensee for dispute resolution under Section 42 of the Act for which provision of expenses to be borne by Licensee should be made in the ARR which will be pass through tariff. To give independence in functioning, instead of the licensee paying directly to Ombudsman it should be paid by the Commission in such a manner that such expenses recovered from licensee does not go in to the Fund of the Commission because it is not legitimate receipt in the Fund, as this receipt not being Fees. Accordingly, necessary amendment shall be carried out by Commission to align the regulations in accordance with provisions of Section 103 read with Section 42 of the Act.

19. The Hon'ble APTEL in paras 41, 47 and 49 of its decision dated 11.11.2011 rendered in Suo-Motu Revision OP No. 1 of 2011, putting reliance on the verdicts of the Supreme Court given in **Power Trading Corporation**

V/s CERC 2010 4 SCC 603 ELR (SC) 269 and Uttar Pradesh Power Corporation Ltd V/s NTPC reported as (2009) 6 SCC 235, has held that it is well settled principle of law that a Subordinate Legislation validity made becomes a part of the Act and should be read as such. A regulation under section 178 is in the nature of a subordinate Legislation. Thus the regulations framed by HPERC are binding as delegated legislation on the Commission and as such it is obliged to exercise the powers in accordance with its regulations until amended or repealed. Therefore, Commission holds that during the financial year 2012-13, expenses of Ombudsman and its office will be regulated as per the provisions of the existing regulations and the provisions made in the ARR. Commission shall make necessary charges in the regulations to be applied from next financial year.

Issue No. II

Whether the expenses incurred for engagement of Consultants by the Commission should be charged/passed on to the petitioner HPSEB Ltd?

20. This Commission in exercise of its powers under sub-section (4) of section 91 of Act has framed the HPERC (Appointment of Consultants) Regulations, 2005, under which the Commission in its discretion appoints Consultants, required to assist it in discharge of its functions, for any matter, using such procedure as it may deem fit, having regard to the nature and complexity of the matter. Regulation 26 of the Conduct of Business Regulations provides that the Commission may at any time take the assistance of the Consultants/experts,, as it may consider necessary and may direct the payment to the Consultants engaged by it of such fees, costs, expenses by such parties to the proceedings as the Commission may consider appropriate, of course after taking into consideration the quantum of work involved and the fees paid and the benefit derived by the concerned party. Since the erstwhile HPSEB was functioning in bundled capacity, the Commission has been crediting the said expenses to the Board and thereafter allowing it as pass through expenses in the ARR of the Board.

21. The HPSEB Ltd contends that since the Commission charges fees for tariff fixation and for the services being rendered by it, it is not justifiable that the fees of the Consultants engaged by the Commission should be charged

from/ passed on to the HPSEB Ltd. The term “fees” implies the charges for services being rendered. Normally, while fixing the fees, the authority fixing the fees takes note of all the relevant factors involving the expenses to be incurred for rendering the needed services. Clause (g) of sub-section (1) of section 86 of the Electricity Act, 2003 has vested the Commission powers to levy the fees for the purposes of the Act and in pursuant to that power, the Commission has laid down the Fee Schedule annexed to the Conduct of Business Regulations of this Commission.

22. So far as the crediting of expenses incurred for engagement of the Consultants is concerned, the matter needs to be considered with reference to the purposes for which the Consultants are engaged. Broadly speaking the Commission engages the Consultants -

- (a) as a technical support measure, for tariff determination;
- (b) as assistance in disposal of its other functions such as framing of regulations, conduct of studies and data collection etc. for discharge of its various functions as enlisted under section 86 of the Act;
- (c) for conduct of technical feasibility studies/ general studies for facilitating and smooth functioning of the licenses or for the benefit of consumers at large.

23. The contention of the petitioner Board that the fees/ remuneration paid to the Consultants for rendering the technical support to the Commission in determination of tariff should not be charged from the Board, in addition to the fees, specified by the Commission, for rendering such services, has the force and merit and therefore, Commission holds all such expenses shall be borne by Commission out of its Fund.

24. Similarly the expenses in relation to the second category of the Consultants, purely appointed by the Commission for facilitating the performance of its general functions, for which no fees are prescribed, should also be borne by the Commission out of its own Fund under section 103(2)(b) of the Act.

25. So far as the remaining category of Consultants in category(c) above are concerned, the expenses incurred in relation thereto can be passed on to the

beneficiaries, in proportion to the benefits to be derived by them by making suitable provisions in the regulations.

26. Commission accordingly holds that from 2013-14 onwards expenses on Consultants engaged by the Commission shall be borne from Commission's Fund except where specific provisions in the Regulation of the commission lays down costs to be borne by the concerned beneficiary or stake holders. However, Commission had been providing for such expenses under the ARR of the licensee and recovering as such in the past and if similar provisions are available in the ARR of 2012-13, Commission shall recover pending past expenses of institutional consultants under category(c) other than those engaged for tariff determination and regulations etc. i.e. categories (a) and (b) under para 22 above.

27. Conclusions:

I. The redressal of the consumer grievances/complaints basically is the function of the distribution licensee, which is performed through the Grievances Redressal Forum, being the internal organ of the distribution licensee and the Ombudsman attends to the representations relating to the non-redressal of the complaints/grievances by the Redressal Forum. Thus Ombudsman is designed to function to redress the consumer grievances which is the sole responsibility of the distribution licensee. Therefore, the expenses of the Ombudsman and of his office are to be borne by the distribution licensee. In order to ensure independence in functioning, the payment of such expenses shall be done through SERC. Since such expenses cannot be recovered as fees, any receipt from licensee for this purpose cannot be credited to the Commission's Fund as per Section 103 of the Act. Commission will accordingly make suitable provisions in the regulations by 31.3.2012 and pending such amendments in regulations existing provisions of the regulation shall continue.

II. Regarding the expenses of the Consultants engaged by the Commission for assisting in discharge of its functions, such expenses shall be borne by the Commission out of its Fund, unless there are specific provisions in the regulations for recovery from the licensee or other beneficiaries. However, if there are any provisions for reimbursement of expenses of

institutional consultants in the ARR for 2012-13, these shall be reimbursed to the Commission by the licensee.

The petitioner is disposed of accordingly.

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(Subhash C. Negi)
Chairman

Shimla
5.01.2013