

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

**CORAM**

**S.S.Gupta**

**In the matter of:**

Tariff Order dated 29-10-2001 for the determination of Annual Revenue Requirement, Transmission & Bulk Supply Tariff and Distribution & Retail Supply Tariff for the Financial Year 2001-2002

**AND**

**In the matter of:**

**Suo Motu Case No.1/2003**

Contravention of Direction No.7.17 of the Tariff Order dated 29-10-2001 regarding Fixed Assets and Notice under Section 45 of the Electricity Regulatory Commissions Act, 1998 (14 of 1998).

**AND**

**In the matter of:**

**Suo Motu Case No. 2/2003**

Contravention of Direction No.7.24 of the Tariff Order dated 29-10-2001 regarding Marginal Cost Study and Notice under Section 45 of the Electricity Regulatory Commissions Act, 1998 (14 of 1998).

**AND**

**In the matter of:**

**Suo Motu Case No. 3/2003**

Contravention of Direction No.7.27 of the Tariff Order dated 29-10-2001 regarding Compliance with the Guidelines issued by the Commission and Notice under Section 45 of the Electricity Regulatory Commissions Act, 1998 (14 of 1998).

**AND**

**In the matter of:**

**Suo Motu Case No. 4/2003**

Contravention of Direction No.7.8 of the Tariff Order dated 29-10-2001 regarding Financial Restructuring and Notice under Section 45 of the Electricity Regulatory Commissions Act, 1998 (14 of 1998).

**AND**

**In the matter of:**

**Suo Motu Case No. 5/2003**

Contravention of Direction No.7.3 of the Tariff Order dated 29-10-2001 regarding Unbundled Cost and Notice under Section 45 of the Electricity Regulatory Commissions Act, 1998 (14 of 1998).

**AND**

**In the matter of:**

**Suo Motu Case No. 6/2003**

Contravention of Direction No.7.29 of the Tariff Order dated 29-10-2001 regarding Voltage wise data and Notice under Section 45 of the Electricity Regulatory Commissions Act, 1998 (14 of 1998).

**AND**

**In the matter of:**

**Suo Motu Case No. 7/2003**

Contravention of Direction No.7.31 of the Tariff Order dated 29-10-2001 regarding Monitoring of Progress and Notice under Section 45 of the Electricity Regulatory Commissions Act, 1998 (14 of 1998).

HPSEB thro' its Secretary, Shimla

Respondent (All Cases)

**Present:**

	<b>7<sup>th</sup> June, 2003</b>	<b>19<sup>th</sup> July, 2003</b>
<b>Case No. 1/2003:</b> For Respondent Board:	i) Sh. D.D.Sood, Sr. Advocate ii) Sh.Dushyant Dadwal Advocate	Sh. D.D.Sood, Sr.Advocate.
<b>Case No. 2/2003:</b> For Respondent Board:	i) Sh. D.D.Sood, Sr. Advocate ii) Sh.Dushyant Dadwal Advocate	Sh. D.D.Sood, Sr.Advocate.
<b>Case No. 3/2003:</b> For Respondent Board:	i) Sh. D.D.Sood, Sr. Advocate ii) Sh.Dushyant Dadwal Advocate	Sh. D.D.Sood, Sr.Advocate.
<b>Case No. 4/2003:</b> For Respondent Board:	i) Sh. D.D.Sood, Sr. Advocate ii) Sh.Dushyant Dadwal Advocate	Sh. D.D.Sood, Sr.Advocate.
<b>Case No. 5/2003:</b> For Respondent Board:	i) Sh. D.D.Sood, Sr. Advocate ii) Sh.Dushyant Dadwal Advocate	Sh. D.D.Sood, Sr.Advocate.
<b>Case No. 6/2003:</b> For Respondent Board:	i) Sh. D.D.Sood, Sr. Advocate ii) Sh.Dushyant Dadwal Advocate	Sh. D.D.Sood, Sr.Advocate.
<b>Case No. 7/2003:</b> For Respondent Board:	i) Sh. D.D.Sood, Sr. Advocate ii) Sh.Dushyant Dadwal Advocate	Sh. D.D.Sood, Sr.Advocate.
Amicus Curiae	:Shri Rajiv Sharma (All Cases)	None (All Cases)
Consumer Representative:	Sh.P.N.Bhardwaj (U/S 26 of ERC Act) (All Cases)	Sh.P.N.Bhardwaj (U/S 94(3) of EA,2003 Act) (All Cases)

## **ORDER – DIRECTION**

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The matter was last heard on 19<sup>th</sup> July, 2003.

### **1.0 Background:**

The Himachal Pradesh Electricity Regulatory Commission while determining the Annual Revenue Requirement, Transmission & Bulk Supply Tariff and Distribution and Retail Supply Tariff for the financial year 2001-2002 called for objections and suggestions from concerned stakeholders through newspaper publications. Pursuant to the same the Commission heard the Himachal Pradesh State Electricity Board, hereinafter referred to as the “Respondent Board”, the various stakeholders numbering 32 and the consumer representatives in the proceedings before it. It had also appointed Tata Energy Research Institute (TERI), New Delhi as its consultant. The Tariff Order was issued on 29<sup>th</sup> October, 2001. In Chapter 7 of the Tariff Order, the Commission issued 21 directions to the Respondent Board.

### **1.2 Case No: 1/2003(Verification of Assets)**

1.2.1 The Commission under Section 7.17 of Chapter 7 of the Tariff Order dated 29<sup>th</sup> October, 2001 had directed the Respondent 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.

1.2.2 While fixing the tariff, the Commission is to allow 3% return on its net fixed assets. This is to ensure that the utility earns some profit to have funds for the new investments required for the expansion of the power system and also for the replacement of the existing assets. Commission had reasons to believe at the time of issuance of the above said direction that the information provided by the Respondent Board on its various assets was sketchy, insufficient and incomplete.

1.2.3 The Respondent Board under the cover of its letter of September 30, 2002, instead of submitting the report, had prayed that the date of submission of this plan be extended up to March 31, 2003 on the plea that the physical verification of assets in some eight Circles had been completed and the work was in progress in other Circles.

1.2.4 The Commission, in its letter dated 24<sup>th</sup> October, 2002, pointed out that the proposal of Respondent Board was not supported with the status report, work done so far and the plan to ensure that the direction would be complied with by the proposed date and, therefore, directed the Respondent Board that before the request of extension in time was considered, the Respondent Board should submit the status report indicating the date on which the work was awarded to an independent agency, the time period allowed for the completion of the study, the progress made so far and the plan to ensure that the work of conducting physical verification would be completed before 31-3-2003.

1.2.5 The Respondent Board has not so far replied to the observations made by the Commission.

### **1.3 Case No: 2/2003 (Marginal Cost Study)**

1.3.1 The Commission under Section 7.24 of Chapter 7 of the Tariff Order dated 29<sup>th</sup> October, 2001 had directed the Respondent Board to initiate a study to assess the marginal cost and submit the report to the Commission along with the next tariff petition.

1.3.2 The Section 7.32 of the Tariff Order provided that in the directions where the respondent Board was to comply by the next tariff petition and the same was not filed within next six months, the directions should be complied with by 28<sup>th</sup> April, 2002.

1.3.3 The Respondent Board failed to submit the Marginal Cost Study by 28<sup>th</sup> April, 2002.

1.3.4 In Section 7.22 of the Tariff Order the Commission had stipulated as under: -

“The guidelines for “Revenue & 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 Commission on July 31, 2001 the mind of Commission was given as to how it would like to determine the tariffs in future. This paper highlights that there are two broad options to determine the revenue requirement of 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. The use of marginal cost based pricing is consistent with this objective and it provides clear signals to the producers and the consumers on the value of the electricity consumed. In contrast the use of historic cost approach assumes that the future resources are as cheap as in the past. Pricing below the marginal cost results in wasted resources since the cost of producing some units exceeds their value to the consumers. The marginal cost thus provides a good benchmark in measuring the efficiency of the existing tariffs.

1.3.6 The long term, marginal cost study is essential to calculate the long term incremental cost of providing electricity in contrast to the backward approach of historical and sunk costs in ‘cost of supply’ method and is based upon forward looking approach which looks at the future streams of investment in generation, transmission and distribution and the future streams of capacity and energy to be created by such investments.

#### **1.4 Case No: 3/2003 (Compliance with Guidelines issued by the Commission)**

1.4.1 The Commission under section 7.27 of Chapter 7 of the Tariff Order dated 29.10.2001 had pointed out as under: -

“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 guidelines. 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 theft of electricity and (vi) service/miscellaneous charges 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 programme 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 shall also 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."

1.4.2 Section 7.32 of the Tariff Order provided that in the directions where the Respondent Board was to comply by the next tariff petition and the petition was not filed within next six months, the directions should be complied with by 28<sup>th</sup> April, 2002.

1.4.3 The Respondent Board failed to submit the information/plans on the guidelines issued by the Commission by 28<sup>th</sup> April, 2002.

1.4.4 The Service rules and regulations policy, Energy audit programme, Distribution planning policy and Demand Side Management plan are some fundamental sine qua nons of the working of a distribution licensee without which it is not possible to plan, operate and perform economically, efficiently and competitively for sustainable development of the power sector. It would render the very objects and purposes of ERC Act, 1998 totally otiose.

## **1.5 Case No: 4/2003 (Financial Restructuring)**

1.5.1 The Commission in the “Public Hearing” held on September 21, 2001 directed the Respondent Board to commission a study on total financial management of the Board so as to determine an optimal capital structure, including key financial parameters.

1.5.2 The Respondent Board in its affidavit dated October 3, 2001 has undertaken to carry out the above study.

1.5.3 The Commission at the time of “Public Hearing” had not given any specific date for submission of this study; therefore, under Section 7.8 of Chapter 7 of the Tariff Order dated 29<sup>th</sup> October, 2001 the Commission directed the Respondent Board to submit the study by September 30, 2002.

1.5.4 The Respondent Board under the cover of its letter of September 30, 2002, instead of submitting the report, had prayed that the date of submission of this study be extended up to March 31, 2003 on the plea that the main component of financial restructuring related to the equity component of Larji Hydroelectric Project had not been tied up.

1.5.5 The Commission in its letter dated 24<sup>th</sup> October, 2002 pointed out that the proposal of the Respondent Board for extension in time was not supported with the status report, work done so far and the plan to ensure that the direction would be complied with by the proposed date and, therefore, directed the Board that before the request of extension in time was considered, the Respondent Board should submit the status report on the work done during the last one year specifying whether the study



was being undertaken through a consultant or in-house and the plan to ensure that the study would be completed by 31.3.2003. Further, if the work had been assigned to a consultant, the details of the date of award of contract, scope of work and the time fixed for carrying out of study be indicated and in case the study was being carried out in-house, copy of the order constituting the Committee to undertake such study and the mandate given be supplied.

1.5.6 The Respondent Board has not so far replied to the observations made by the Commission.

1.5.7 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.

## **1.6 Case No: 5/2003 (Unbundled Cost)**

1.6.1 The Commission in the “Public Hearing” held on September 21, 2001, directed the Respondent 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. The Commission directed that the next tariff petition must be supported by an accurate and credible database with appropriate MIS.

1.6.2 The Respondent Board in the affidavit dated October 3, 2001 stated that it would not be able to provide this information by the next tariff petition and that it proposed to comply with this direction by March 31, 2003.

1.6.3 The Commission did not accept the plea of the Respondent Board and issued direction under Section 7.3 of Chapter 7 of its Tariff Order dated October 29, 2001 that

this information must be provided by the next tariff petition because of its critical nature.

1.6.4 The Section 7.32 of the Tariff Order provided that in the directions where the Respondent Board was to comply by the next tariff petition and the petition was not filed within next six months, the directions should be complied with by 28<sup>th</sup> April, 2002.

1.6.5 The Respondent Board failed to submit the information on the unbundled costs by 28<sup>th</sup> April, 2002.

1.6.6 The accurate database with unbundled costs and expenditure between the three businesses of generation, transmission and distribution as well as between the various customer classes is the fundamental bottom line data to enable the stakeholders to focus on these costs and expenses and to calculate the cost of supply to various consumer categories accurately. The extent of cross-subsidy between various customer classes also cannot, therefore, be measured precisely. This would be a major handicap for the Commission in determination of tariff in future. It was precisely for this reason that the Respondent Board was asked to furnish the unbundled costs.

## **1.7 Case No: 6/2003 (Voltage wise Data)**

1.7.1 The Commission under Section 7.29 of Chapter 7 of the Tariff Order dated 29<sup>th</sup> October, 2001 had directed the Respondent Board to provide detailed information on voltage wise assets, costs and sales with the next tariff petition so that the extent of subsidy could be measured precisely in the future.

1.7.2 Section 7.32 of the Tariff Order provided that in the directions where the Respondent Board was to comply by the next tariff petition and the petition was not filed within next six months, the directions should be complied with by 28<sup>th</sup> April, 2002.

1.7.3 The Respondent Board neither submitted the information on the voltage wise data nor sought extension in time to comply with the direction by 28<sup>th</sup> April, 2002.

1.7.4 Voltage wise data is the bottom line data required for determination of tariff by the Commission. Without this fundamental data, it is not possible to unbundle the costs of supply in various customer classes and to calculate the cost of supply at various voltage levels. The cost of supply to various consumer categories, therefore, cannot be worked out accurately. The extent of cross-subsidy between various customer classes

also cannot, therefore, be measured precisely. This would be a major handicap for the Commission in determination of tariff in future. It was precisely for this reason that voltage wise data was asked from the Board thro' the above direction.

### **1.8 Case No: 7/2003 (Monitoring of Progress)**

1.8.1 The Commission under Section 7.31 of Chapter 7 of its Tariff Order dated October 29, 2001 had made it clear that it would monitor the progress in complying with the directions issued and had directed the Respondent Board to furnish the information on the milestones required in column 3 of the Annexure (7.1) by December 31, 2001 and the subsequent reports were to be sent every quarter providing information required under column 4,5, 6 and 7; the first report was to be submitted by January 15, 2002.

1.8.2 The said report was not submitted by the Respondent Board for the quarter ending September, 2002 in spite of the fact that the Commission vide its letter No. HPERC/AM/ED (TFA) DKG/D (TFA)/2002-7439 dated the 30<sup>th</sup> October, 2002 and No. HPERC/ED (TA) DD (TFA)/2002-111 dated the 6<sup>th</sup> January, 2003 pointed out that the said report had not been submitted and its submission be expedited. The said progress report for quarter ending December 2002 was also overdue at the time of issue of the show cause notice i.e. 15.02.2003

1.8.3 Having issued the directions, the Monitoring of Progress towards compliance of the same and status/action taken on them is an inextricable part of Regulator's role and cannot be overemphasized. Whilst this is inherent power, any denial of the same on the part of the Commission is tantamount to contravention or abetment to contravention of the Act by itself and may render its own directions otiose.

1.9 The Respondent Board has thus knowingly and wilfully defied and contravened the directions in all the above cases Nos. from 1/2003 to 7/2003.

1.10 The Commission was, therefore, left with no alternative but to call upon the Respondent Board through its Secretary to show cause why proceedings under Section 45 of the Electricity Regulatory Commissions Act, 1998, hereinafter referred to as "the 1998 Act" read with Regulation 51 of the Himachal Pradesh Electricity Regulatory

Commission Conduct of Business Regulations, 2001, hereinafter referred to as “the Regulations” be not initiated for contraventions and non-compliance of the directions issued by the Commission as above. Suo motu show cause notices were issued on 15-2-2003 returnable on or before 15-3-2003.

1.11 In all the cases from 1 to 7 of 2003 the Respondent Board has challenged the jurisdictional competence of the Commission in issuing the directions and then issuance of show cause notices. Some legal issues have been raised which formed the sole ground and were taken up as preliminary issues in and being decided by this order. The first hearing took place on 7<sup>th</sup> June, 2003.

## **2.0 Contention of the Respondent Board in all the cases i.e.1- 7/03:**

2.1 The Respondent Board has filed somewhat similar replies in all cases except reply under Para-G. In reply para (A) the contention of the Respondent Board is that the matter regarding ambit of powers conferred upon the Commission and whether this commission had the power to issue directions is subjudice before the Hon’ble High Court of Himachal Pradesh in cases titled HPSEB Vs HPERC and another, being FAO Nos. 489/02 to 494/02, it has been submitted that so long as the matter is not decided by the Hon’ble High Court, no action should be initiated by the Commission in the similar matters under consideration before the Commission. In reply para (B) it has been painstakingly pleaded that the subject matter of notices, which have been issued on account of purported non-compliance, squarely falls under Section 22(2) of the 1998 Act and since no powers under sub-section (2) of Section 22 have been conferred upon the Commission, the Commission could not issue the directions and no show cause notices, therefore, can lie. In reply para (C) the Respondent Board has contended that the powers have been conferred only under sub-section (1) of Section 22 of the 1998 Act which relate to the determination of the tariff and once the tariff has been determined, the Commission becomes functus officio. Section 29 of the 1998 Act prescribes the manner of determination of tariff. Once the tariff has been determined the Commission ceases to have any jurisdiction on the Respondent Board. In reply para (D), while referring to the Objects and Reasons of the 1998 Act, the Board has contended that it has statutory duties and powers to function under the law, rules and regulations. The Commission is not super authority of the Board under the Act and,

therefore, keeping in view the statement of Objects and Reasons of the Act, the Commission has no jurisdiction to issue notices under reference to the Respondent Board. In reply para (E) it has been contended that the Clauses (a), (b) and (c) of Section 22 (1) are with respect to specific functions and Clause (d) of the same subsection is to be read with Clauses (a), (b) and (g). Clause (d) is, therefore, to be read ejusedem generis. In reply para (F) it has been submitted that the Commission is empowered to exercise powers enumerated under Section 22(1) of the Act and not otherwise. The Commission has not considered the fact that the alleged acts and omissions mentioned in the notice under reference do not give power to the Commission to take cognisance as these are not referable to Section 22(1). Similarly, the Commission has not been given powers under Section 22(2) and even if alleged acts and omissions are established, the Commission has no power to proceed against the Respondent Board for alleged acts and omissions in absence of power under Section 22(2). The Board has contended that the jurisdictional facts so as attract Section 22(1) are completely lacking in the instant case. Therefore, the Commission has no jurisdiction to proceed against the Respondent Board on the basis of notice.

2.2 The gist of replies filed by the Respondent Board in Para (G) in cases 1 to 7/2003 is reproduced below: -

2.3 Case No: 1/2003

No power is vested in the Commission to issue any notice for the non compliance of direction covered in Clause 7.1 as this function is specifically covered under Section 22(2)(m) and the purported direction can at best be treated in nature of guidelines and cannot be treated as mandatory direction having statutory force attracting penal consequences. Further, the information on it has been submitted to the Commission from time to time. The Board had also prayed for extension in time for submission of the information, which was not allowed without communicating any reasons.

2.4 Case No: 2/2003

No power is vested in the Commission to issue any notice for the non compliance of direction covered in Clause 7.24 as this function is specifically covered under Section 22(2)(a), (f) & (h) and the purported direction can at best be treated in nature of guidelines and cannot be treated as mandatory direction having statutory force attracting penal consequences. Further, it has already been brought to the notice of the

Commission that bids for consultancy services to take up marginal cost study have been called and were being evaluated.

2.5 Case No: 3/2003

No power is vested in the Commission to issue any notice for the non compliance of direction covered in Clause 7.27 as this function is specifically covered under Section 22(2)(e), (f), (k) & (l) and the purported direction can at best be treated in nature of guidelines and cannot be treated as mandatory direction having statutory force attracting penal consequences. Further it has already been brought to the notice of the Commission that bids for consultancy services to take up marginal cost study have been called and were being evaluated.

2.6 Case No: 4/2003

No power is vested in the Commission to issue any notice for the non compliance of direction covered in Clause 7.8 as this function is specifically covered under Section 22(2)(m) & (l) and the purported direction can at best be treated in nature of guidelines and cannot be treated as mandatory direction having statutory force attracting penal consequences. Further it has already been brought to the notice of the Commission that bids for consultancy services to conduct the study have been called and were being evaluated.

2.7 Case No: 5/2003

No power is vested in the Commission to issue any notice for the non compliance of direction covered in Clause 7.3 as this function is specifically covered under Section 22(2)(c), (k) & (l) and the purported direction can at best be treated in nature of guidelines and cannot be treated as mandatory direction having statutory force attracting penal consequences. Further information under this guideline for the period 4/2001 to 1/2002 have already been sent to Commission vide letter No. HPSEB/CE(Comm.)/SERC-1/2002-2040 dated 20.3.2002.

2.8 Case No: 6/2003

No power is vested in the Commission to issue any notice for the non compliance of direction covered in Clause 7.29 as this function is specifically covered under Section 22(2)(e), (f), (h), (l) & (m) and the purported direction can at best be

treated in nature of guidelines and cannot be treated as mandatory direction having statutory force attracting penal consequences. Further it has been indicated that the study is under progress.

#### 2.9 Case No: 7/2003

In the absence of powers under Section 22(2), the Commission has no power to give any direction, fix milestones, benchmarks etc. The Commission has usurped the power of the Board while fixing milestones etc., which power, in fact and substance, is not vested in the Commission in law. The regulations, guidelines, orders referred in para 1.4 of the Tariff Order can be issued to discharge functions under section 22(1). Any regulations, guidelines, order issued, beyond the scope of Section 22(1) but otherwise within the scope of Section 22(2), is without jurisdiction, premature to the extent such regulation, guideline, order covers the field enumerated in Section 22(2). To this extent directions given by the Commission in the Tariff Order are without jurisdiction and alleged non-compliance of such directions by the respondent has no consequences and Commission cannot take cognisance of such directions. Further the specific powers are enumerated under Section 22(2) (g), (h) & (k).

2.10 In reply para (H) giving reference of various Sections of Indian Electricity Act, 1910, hereinafter referred to as “the 1910 Act” and the Electricity (Supply) Act, 1948, hereinafter referred to as “the 1948 Act”, it has been contended that the Respondent Board and the Commission are required to discharge the functions within the limits assigned to them in law and the Commission has exceeded its limit in issuing notices under reference to the Respondent Board. In reply para (I) the Respondent Board submits that the directions issued by the Commission are incapable of compliance overnight because huge expenditure is involved for complying with such directions. In reply para (K) the Respondent Board has sought protection to the actions of the Respondent Board taken in good faith. In reply para-(L) the Respondent submits that it was incumbent upon the Commission to seek direction from the State Government under Section 39 of the 1998 Act whether the Respondent Board has disobeyed any lawful direction. Reply para (M) alleges the encroachment on Section 22(2) by the Commission. In reply paras (N) & (O) vagueness on material particulars and prejudgement and predetermination have been attributed to the notices besides reserving right to reply on merit later on. It has been prayed that the notices be

withdrawn and discharged, being without jurisdiction. Reply paras (P) & (Q) submit that there was no material before the Commission to rebut the presumption available to the Board regarding genuineness and correctness of the official work done by it.

### **3.0 Points At Issue:**

3.1 Arising out of the above contentions, the Commission posed the following points for consideration and called upon the learned Counsel for the Respondent Board, Consumer Representative authorised to represent the interest of the consumes under Section 26 of the 1998 Act and the Amicus Curiae to address arguments on specific points, so raised, in their own manner and answer them in clear and unambiguous terms: -

- i) Is there any direct or indirect legal prohibition against the Commission for taking the impugned action in view of the specific provisions contained in Sections 22(1), 27, 39, 45, 47, 49 & 52 of the ERC Act?
- ii) Why did the HPSEB file the petitions before the commission if it had the slightest doubt as to the jurisdiction of the Commission?
- iii) Why the pleas now being taken in the reply were not/could not be urged during the course of proceedings in the matter of issuance of directions at the time of determination of Tariff in Oct., 2001?
- iv) Is it permissible to the HPSEB to say that it would accept the Tariff Order in part relating to its rights only and not accept its other part in regard to its obligations and terms and conditions on which the determination was made?
- v) Whether the two directions contained in Part I of the Chapter 7 of the Tariff Order being based on the own undertaking of the HPSEB through the affidavits can be ignored by the respondent/objector?
- vi) Why were the remedies available under Section 12(f) and Section 27 of the ERC Act not availed at the time, in case the HPSEB sincerely felt that the Tariff Order together with the directions or terms and conditions therein was not capable of implementation and was arbitrary?



vii) Can the Commission once having issued the Tariff Order withdraw it and can the HPSEB disobey it? What is the alternative left now?

viii) What is the vagueness in the notice, which renders it incapable of proper and effective reply and on what basis, the pre-judgement and pre-determination is attributable to the show cause notice? Were the HPSEB's own affidavits, undertakings and acquiescence of the Tariff Order not the material enough before the Commission for making a prima facie case against the respondent/objector?

ix) Is the overriding effect, as contained in Section 52, only with respect to Section 22(1) of the ERC Act or to the entire Act save as provided under Section 49?

x) Are not the terms and conditions for fixation of tariff as contained in CBR Clause 27(xviii) adequate to cover the directions also? They have become part of the Act. Is the tariff determination not the main function of the Regulatory Commission in terms of Section 22(1) and 29(2) of the ERC Act?

xi) Is not the improvement of the financial health of the State Electricity Board, the single most important essence of the objects and reasons of the Act and is not the Regulatory Commission constituted to regulate the working of the SEB to achieve the objects and purposes of the Act in this direction?

#### **4.0 Defence Arguments:**

4.1 Shri D.D.Sood, the learned Senior Counsel for the Respondent Board addressed the arguments on all the above eleven points at issue as above. He pleaded that six appeals challenging specific orders were pending before the Hon'ble High Court and the judicial propriety required that the matter should not be proceeded with in parallel before any other Tribunal. He cited some judgements of the Hon'ble Supreme Court and while relying upon his arguments addressed earlier in case Nos. 21 to 27/2002, 77 to 83/2002, 84 to 90/2002, 91 to 97/2002, 100 to 106/2002 and 107 to 113/2002, under appeal before the Hon'ble High Court.

4.2 The Commission overruled the objection of the learned senior Counsel on the question of proceeding with the case while similar cases were under appeal before the Hon'ble High Court with regard to the jurisdictional aspect of the Commission on the ground that there was no stay granted by the Hon'ble High Court on the exercise of functions conferred upon the Commission under sub-section (1) of Section 22 of the 1998 Act. The relevance of the three judgements cited by the learned senior Counsel was objected to by the learned Amicus Curiae by saying that these apply only to the government departments and not to the courts or the quasi judicial tribunals. The learned senior Counsel repeated and reiterated most of what he had argued in the Case Nos. 21 to 27/202, 77 to 83/2002, 84 to 90/2002, 91 to 97/2002, 100 to 106/2002, and 107 to 113/2002.

4.3 For ease of reference, the arguments addressed and the contentions raised by the Learned Senior Counsel Sh.D.D.Sood in the above matters on June 17, 2002 are recapitulated hereunder:-

“Shri D. D. Sood, Ld. Counsel for Kr. Shamsheer Singh and Shri K. S. Narang drew attention of the Commission to a ‘public interest litigation’ (CMP/757/ 2002) having been filed by one Shri Arvind Sharma, son of Shri Des Raj, Advocate of Lower Bazar, Shimla challenging the appointment of Chairman of HPERC in support of his contention that the Commission might consider deferring the hearings in all the show-cause cases until after the decision of the Hon'ble High Court and cited the judgement reported in AIR SC 1962 Page 1622/1680. He was asked to file a copy of the said judgement of the Hon'ble Supreme Court for proper appreciation in the context, facts and the circumstances of the case. Nevertheless, the Commission ruled that the proceedings may continue.

The Ld. Counsel went on to state that the Govt. of Himachal Pradesh had established the H.P. Electricity Regulatory Commission vide notification dated 14-06-2001 and the functions under Section 21(1) of the Act alone had been conferred upon the Commission. He then read Section 22 of the ERC Act which is reproduced below:

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“22. Functions of 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.

(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) to aid and advise the State Government, in matters concerning electricity generation, transmission, distribution and supply in the State;
- (c) to regulate the operation of the power system within the State;
- (d) to issue licences for transmission, bulk supply, distribution or supply of electricity and determine the conditions to be included in the licences;
- (e) to regulate the working of the licensees and other persons authorised 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 utilisation 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;
- (h) to promote competitiveness and make avenues for participation of private sector in the electricity industry in the State, and also to ensure a fair deal to the customers;
- (i) to lay down and enforce safety standards;
- (j) to aid and advise the State Government in the formulation of the State power policy;
- (k) to collect and record information concerning the generation, transmission, distribution and utilisation of electricity;
- (l) to collect and publish data and forecasts on the demand for, and use of electricity in the State and to require the licences to collect and publish such data;
- (m) to regulate the assets, properties and interest in properties concerning or related to the electricity industry in the State including the conditions governing entry into, and exit from, the electricity industry in the such manner as to safeguard the public interest;
- (n) to adjudicate upon the disputes and differences between the licensees and utilities and to refer the matter for arbitration;
- (o) to coordinate with environmental regulatory agencies and to evolve policies and procedures for appropriate environmental regulation of the electricity sector and utilities in the State; and
- (p) to aid and advise the State Government on any other matter referred to the State Commission by such Government;

(3) The State Commission shall exercise its functions in conformity with the national power plan.”

He argued that the functions under Section 22 (1) were general in nature and empowered the Commission only with the determination of tariff as in sub sections 1(a) and 1(b) and the power purchase and procurement process as in sub section 1(c). The powers to regulate were covered only in Section 22 (2). Unless powers under Section 22 (2) are also assigned by notification by the State Government, the Commission could not exercise the powers of issuing directions contained in Chapter 7 of the Tariff Order. The directions issued in Chapter 7 of the Tariff Order were tantamount to day-to-day monitoring of the functions of the Board. If due to non-compliance of the directions issued by the Commission, the Board suffered loss, it was for the State Government to take action. Section 39 gave the power to the State Government to issue policy directions to the Commission and if the Commission felt that the Board was not complying with the directions given in the tariff order, it could advise the State Government to issue directions to the Board to do so. The provisions of Section 45 were attracted only if the Commission had the powers to issue directions under Section 22 (2). He argued that because there was nothing specific in Section 22 (1), which gave the powers of issuing the directions, it did not lie within the jurisdiction of the Commission, therefore, to issue directions as in Chapter-7 of the Tariff Order dated October 29, 2001. The Commission had only the powers to determine the tariff for electricity, wholesale, bulk, grid or retail, as the case may be, in the manner provided in section 29 as given in sub section (1) (a) or to determine the tariff payable for the use of the transmission facilities in the manner provided in Section 29 as per sub section (1) (b). He went on to say that the Commission had only the powers of determination of the tariff but could not enforce the tariff as may be determined by it and if at all the Commission felt that certain factors which had influenced its judgement in arriving at and determining the tariff it could send suggestions to the State Government and ask the State Government to issue the same as policy directions under Section 78A of the Electricity Supply Act, 1948. It could, therefore, advise the State Government but not the Electricity Board. The Id. Counsel then went on to read Section 29 of ERC Act and emphatically reiterated that the Commission had only the powers of determination of the tariff but not the powers of implementation of the tariff so determined by it or the consequences arising out of the non-implementation thereof.

The Ld. Counsel in his oral arguments stressed that the functions under Section 22(1)(a) were general in nature, which empowered the Commission with the determination of tariff, and power purchase and procurement process whereas the power to regulate were covered under Section 22 (2). The directions as contained in the Tariff Order could only have been issued, had the Commission been vested with the powers under Section 22 (2). The Commission could not enlarge its jurisdiction to include the functions under Section 22 (2) of the Act.

The Id. Counsel further stated that for the determination of tariff, the Commission is to be guided by Section 29 of the ERC Act, 1998. He read out the provisions of Section 29 which is reproduced as follows: -

“29. Determination of tariff by State Commission: -

(1) Notwithstanding anything contained in any other law, the tariff for intra-State transmission of electricity and the tariff for supply of electricity, grid, wholesale, bulk or retail, as the case may be, in a State (hereinafter referred to as the “tariff”), shall be subject to the provisions of this Act and the tariff shall be determined by the State Commission of that State in accordance with the provisions of this Act.

(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 application provided in sections 46, 57 and 57A of the Electricity (Supply) Act, 1948 (54 of 1948) and Schedule VI 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) The State Commission, while determining the tariff under this Act, shall not show undue preference to any consumer of electricity, but may differentiate according to the consumer's load factor, power factor, total consumption of energy during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required.

(4) The holder of each licence and other persons including the Board or its successor body authorised 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 tariffs to collect those revenues.

(5) If the State Government requires the grant of any subsidy to any consumer or class of consumers in the tariff determined by the State Commission under this section, the State Government shall pay the amount to compensate the person affected by the grant of subsidy in the manner the State Commission may direct, as a condition for licence or any other person concerned to implement the subsidy provided for by the State Government.

(6) Notwithstanding anything contained in Sections 57A and 57B of the Electricity (Supply) Act, 1948 (54 of 1948) no rating committee shall be constituted after the date of commencement of this Act and the Commission

shall secure that the licensees comply with the provisions of their licence regarding the charges for the sale of electricity both wholesale and retail and for connections and use of their assets or systems in accordance with the provisions of this Act”

The Id. Counsel read out Section 18 Chapter-IV of Electricity (Supply) Act, 1948 “Powers and Duties of State Electricity Board and Generating Companies” which are reproduced as under:

“18. General duties of the Board: -

Subject to the provisions of this Act, the Board shall be charged with the following general duties, namely:

- (a) to arrange, in coordination with the Generating Company or Generating Companies, if any, operating in the State, for the supply of electricity that may be required within the State and for the transmission and distribution of the same in the most efficient and economical manner with particular reference to those areas which are not for the time being supplied or adequately supplied with electricity;
- (b) to supply electricity as soon as practicable to a licensee or other person requiring such supply if the Board is competent under this Act so to do;
- (c) to exercise such control in relation to the generation, distribution and utilisation of electricity within the State as is provided for by or under this Act;
- (d) to collect data on the demand for, and the use of, electricity and to formulate perspective plans in coordination with the Generating Company or Generating Companies, if any, operating in the State for the generation, transmission and supply of electricity within the State;
- (e) to prepare and carry out schemes for transmission, distribution and generally for promoting the use of electricity within the State; and



- (f) to operate the generating stations under its control in coordination with the Generating Companies, if any, operating in the State and with the Government or any other Board or agency having control over a power system.

The Id. Counsel inferred that the HPSEB had the powers and duties as assigned in Section 18 of ES Act, 1948 and the State Regulatory Commission under Section 22(1) of ERC Act, 1998. Nowhere had the HPSEB been subordinated to the Regulatory Commission, each one had its own job to do. He summed up by taking the following position vis-à-vis the points at issue posed for consideration:

Point Issue: (i) Is there any direct or indirect legal prohibition against the Commission for taking the impugned action in view of the specific provisions contained in Sections 22(1), 27, 39, 45, 47, 49 & 52 of the ERC Act?

Section 22 (1). The Commission had powers only of determination of the tariff and not the powers to punish. It had no regulatory control over the Electricity Board with regard to powers under sub section (d) of Section 22(1) i.e. to promote competition, efficiency and economy in the activities of the electricity industry to achieve the objects and purposes of this Act. The provisions have to be read with sub sections (a), (b) and (c). The powers under Section 22 (1) are of general nature whereas those of 22(2) are of specific nature and unless the powers are delegated under Section 22(2) the Commission had no jurisdiction to issue any direction of whatsoever nature. Particular reference was made to Section 22(2)(g) i.e. “to set standards for the electricity industry in the State including standards relating to quality, continuity and reliability of service” which was of specific nature and directions could be issued only if powers had been delegated under Section 22 (2) (g). In that view, there was a legal prohibition against the Commission for taking the impugned action. The Commission could bring about the enforcement of its Tariff Order only through suggestions and not by fine. To a query from the Commission whether the Commission could take over the management of the Board, had the powers been delegated under Section 22 (2), the Id. Counsel said it could not.

Section 27: The Board has not agitated the determination of the tariff and, therefore, it did not go for any appeal against the Tariff Order to the High Court.

It was only questioning the issue of directions as in Chapter 7 of the Tariff Order dated October 29, 2001. To that extent there was legal prohibition against the Commission for taking the impugned action.

Section 39: The Commission could send its recommendations to the State Government with request to issuing the same as directions under Section 78A of the Electricity (Supply) Act, 1948 to the Electricity Board if it so desired. The Commission could not give directions to the HPSEB. In that manner of speaking there was legal prohibition against the Commission for taking the impugned action.

Section 45: This Section is invoked only if there is a contravention of the tariff rates i.e. over-charge or undercharge. Since the Commission had not been delegated powers under Section 22 (2), it could not give directions to the Board and thus served as a legal prohibition against the Commission for taking the impugned action.

Section 47: This section was not applicable.

Section 49: This section was not applicable.

Section 52: The Id. Counsel argued that the overriding effect given in section 52 of the ERC Act, 1998 is only with respect to the functions as conferred upon the Commission under Section 22 (1). The Id. Counsel referred to the protection to the persons acting under the Electricity (Supply) Act, 1948 in Section 82 that no suit, prosecution or other legal proceeding would lie against any member or officer or other employee of the Board for anything which was in good faith done or intended to be done under this Act. No penal consequences could ensue on account of any affidavit or undertaking given by HPSEB during the course of hearings on the tariff provisions. He also argued that they would not be in any case relevant.

Point Issue (ii) Why did the HPSEB file the petitions before the Commission if it was so sure about the non-jurisdiction of the Commission?

The Ld. Counsel said that jurisdiction of the Commission with regard to the determination of tariff was not in dispute. The HPSEB had approached the Commission for determination of tariff which matter was indeed in the jurisdiction of the Commission.

To a query from the Commission whether the function could be split and divided between determination, implementation and consequences arising out of non-implementation, the Ld. Counsel replied that whilst the determination was within the jurisdiction of the Commission, implementation was not. It was with the Board. The Act did not give any power to the Commission in respect of implementation of the tariff. The Commission could not take over this function of the Board.

Point Issue (iii) Why the pleas now being taken in the reply were not/could not be urged during the course of proceedings in the matter of determination of Tariff?

Ld. Counsel argued that the Board had come to the Commission for tariff determination and not for punishment. It could not have raised the contention with regard to non-applicability of Section 45 at the time of filing of petition.

Point Issue (iv) Is it permissible to the HPSEB to say that it would accept the Tariff Order in part relating to its rights only and not accept its other part in regard to its obligations?

Ld. Counsel argued that the Board had accepted the Tariff Order whereas the directions were policy matters of the Board.

Point Issue (v) Whether the directions contained in Part 1 of the Chapter 7 of the Tariff Order being based on the own undertaking of the HPSEB through the affidavits can be ignored by the respondents/objectors?

The Ld. Counsel argued that the affidavits/undertakings given by the Board during the proceedings on tariff determination were to facilitate the Commission in the fixation of tariff and if the Commission felt that any affidavit was incorrect, it had every right to slash the tariff.

He proceeded on to say that the Board was not aware if any consumer had been overcharged vis-à-vis the tariff so determined by the Commission. The implementation of the directions given by the Commission in Chapter 7 of the Tariff Order required lot of funds and the Commission had ignored this fact while passing the directions.

To a point raised from the Commission that the Commission had asked HPSEB to only submit the plans and studies which did not require much funds, the Id. Counsel said he was not discussing the merits. To another query from the Commission as to what to do where the Commission had allowed higher revenue over what had been asked for by the Board as in para 5.15 of the Tariff Order and as in para 4 of Annexure 5.2 (Schedule of General and Service Charges) of the Tariff Order to the extent of Rs.3.60 crore for replacement of dead stop/defective meters after Marchtop/defective meters after Marchted that the loss was to the Board only and if the Commission felt that the Board had not taken action to replace the meters despite the higher meter rent allowed by the Commission, the Commission could reduce the rental thereof.

Point Issue (vi) Why were the remedies available under Section 12 (f) and Section 27 of the ERC Act not availed in case the HPSEB sincerely felt that the Tariff Order was not capable of implementation and was arbitrary?

The Id. Counsel stated that the Board was implementing the Tariff Order and the same was not in dispute. What was in dispute were the directions.

To another query if sub section (d) of Section 22 (1) did not apply to implementation of tariff in efficient and economical manner the Id. Counsel said that the provision of Section 22 (1)(d) was by way of suggestion only as the implementation of this had specifically been provided in clauses (c) (g) and (h) of sub section 22 (2). The time to take action for non-compliance of the directions would be at the time of determination of tariff as and when the Board files the next petition.

Point Issue (vii) Can the Commission once having issued the Tariff Order withdraw it and can the HPSEB disobey it? What is the alternative left now?

The Id. Counsel argued that the Board was obeying the Tariff Order in respect of rates.

Point Issue (viii) What is the vagueness in the notice which renders it incapable of proper and effective reply? How is the show-cause notice devoid of prima facie case and on what basis the pre-judgement and pre-determination is attributable to the show cause notice? Were the HPSEB's own affidavits, undertakings and acquiescence of the Tariff Order not the material enough before the Commission for making a prima facie case against the respondents/objectors?

The Id. Counsel said that the notices issued by the Commission were vague in that they did not contain any statement of charges.

The Id. Counsel concluded by saying that the HPSEB was not questioning the Tariff Order insofar as the rates were concerned; it was only questioning the jurisdiction of the Commission in issuing the directions contained in Chapter 7 of the Tariff Order while admitting that the directions so given by the Commission were good aimed at giving a better deal to the consumers of the State”.

4.4 He did not have much to say on points (ix), (x) and (xi).

#### **4.5 Contention of the Consumer Representative:**

4.5.1 Shri D.D.Sood, learned counsel for Respondent Board objected to the appearance of Consumer Representative on the ground that he could not participate in the penalty proceedings. The Commission overruled the objection on the ground that the consumer representative is an inevitable and inescapable statutory requirement under Section 26 of the 1998 Act and must participate in all the proceedings before the Commission.

4.5.2 Shri P.N.Bhardwaj, authorised by the Commission to represent the interest of the consumers as mandated under Section 26 of the 1998 Act, countered the arguments

of the learned counsel for Respondent Board by submitting that the issue of jurisdiction had been convincingly and comprehensively dealt with and answered by way of laying down the law in the case of WBERC Vs CESC Ltd. reported in AIR JT 2002(7)SC 578. He contended that the directions issued by the Commission in question relate to: -

- i) 7.3 – Unbundled cost;
- ii) 7.8 –Financial restructuring;
- iii) 7.17 – Fixed Assets;
- iv) 7.24 – Marginal Cost Studies
- v) 7.27 – Compliance with the Guidelines issued by the Commission;
- vi) 7.29 – Voltagewise Data; and
- vii)7.31 – Monitoring of Progress.

4.5.3 The directions are aimed at bringing about an overall improvement in the functioning of the Respondent Board so that the benefits of efficiency gains are passed over to the consumers. He contended that there was no point in constituting the Electricity Regulatory Commission if the objectives and purposes of the Act were not to be fulfilled through it. The learned Consumer Representative objected to the non-filing of petition for Annual Revenue Requirements for the financial year 2002-03 and feared that the entire deficit of that fiscal year will have to be passed through to the consumers in subsequent tariff orders for no fault of theirs. In conclusion he submitted that the directions issued by the Commission are in harmony with the provisions of the Act and aimed at bringing in some semblance of order in performance of the Board on lines of Commission's directions in the tariff order and, therefore, the Respondent Board cannot be permitted to accept a part of the order which suits it and reject the directions which do not suit it on the ground that the Commission has no authority to issue the same. By taking the shelter behind the stay granted by the Hon'ble High Court the Respondent Board is only stalling the process of reforms. The compliance with these directions is imperative to achieve the objects and purposes of the Act.

#### **4.6 Assistance of Learned Amicus Curiae:**

4.6.1 Shri Rajiv Sharma, the Senior Advocate was appointed by the Commission as impartial Advisor to the Commission to assist it in understanding the subtle nuances of law. He submitted that there is a standard of looking through the narrow peep of purpose and object to be achieved by the particular enactment which in nutshell is reflected through the statement of objects and reasons and, therefore, commenced his

arguments by referring to the objects and reasons of Act and the salient features of the Electricity Regulatory Commissions Ordinance, 1998 with particular reference to para 4(d) which states the aims of the Ordinance (replaced by the 1998 Act) as improving the financial health of the State Electricity Boards which are loosing heavily on account of irrational tariff and lack of budgetary support from the State Government as a result of which the State Electricity Boards have become incapable of even proper maintenance, leave alone purposive investment. The legislature in its wisdom had come to a definite conclusion that there was something definitely wrong with the functioning of the Boards. The pulse has been rightly touched by the legislature and its diagnosis was that they are loosing heavily on account of irrational tariff and lack of budgetary support. The lack of credit worthiness of the Boards had been a deterrent in attracting the investment both from the public and the private sectors. Separate roles have been assigned for the State Commissions. He referred to sub-section (1) of Section 22 of the 1998 Act to argue that the functions under this sub-section were mandatory and imperative. Clause (d) of the said sub-section “to promote competition, efficiency and economy in the activities of the electricity industry” was intended to achieve the objects and purposes of this Act. Clause 29 lays down the guidelines for determination by regulations, the terms and conditions for the fixation of tariff. He submitted that Clause (c) of sub-section 22(1) was important regulatory function to regulate power purchase and procurement processes 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. He submitted that the notices issued by the Commission are covered under the parameters laid down under Section 22(1), sub-clauses (a) to (d) which are specific and if they were not so, the very objects & purposes of enactment would be defeated and the mandatory provisions rendered totally otiose. Per contra, referring to the arguments of the Defence Counsel he argued that sub-section (2) of Section 22 was not at all attracted in these cases of contraventions. He pleaded that the Board cannot be permitted under any circumstances to rely upon sub-section (2) of Section 22 and if they are doing so, it is a strange figment of imagination. The Board has failed to point out in what manner sub-section (2) is attracted. The Board had, on its own, come before the commission with the tariff petition on the presumption and at that time they were rightly and properly advised, that the Commission is the only competent authority for determination of

tariff. They have participated in the deliberations. Public hearings have been held and after taking advantage of the tariff order which was passed in 2001-02 they cannot wriggle out now of the obligations while enjoying the privileges of that order. The order cannot be bifurcated. "It is like saying that if it suits me it is valid in law but if you are asking me to perform certain duties then I am not bound by it." He submitted that the order and the directions have to be read in whole and cannot be permitted to be segregated. This order has been passed strictly in conformity with the 1998 Act. No such plea on jurisdiction was raised at the time when the tariff order was passed. He referred to the judgement of Hon'ble Supreme Court in the WBERC Vs CESC reported in AIR 2002, Vol. SCC 715 wherein the Hon'ble Supreme Court has laid down that the Commission and the Commission alone is the sole authority for determination of the tariff. Based upon the interplay of the Sections 22 (1) (a) to (d), Sections 29(2) to (6), 30 and 42, the order passed by the Commission is within the jurisdiction vested in it by virtue of the provision of the 1998 Act. The proceedings before the Commission are akin to judicial proceedings. Referring to the arguments of the Learned Counsel for the Respondent Board, he submitted that the equation of the Commission with the Board was unfortunate. While the Board was the creation of the 1948 Act, the State Electricity Regulatory Commission has been assigned the role of adjudicator more particularly with regard to the determination of tariff as per the functions assigned to it under Section 22. The Board was not ready and willing to act upon the said directions and improve its functions. There are heavy losses and mal-administration. The Commission has been constituted to supervise the working of the Board to make it more efficient and the directions have been issued in the tariff order precisely for achieving that. Referring to the authority cited by the learned Counsel for the Board, he clarified that in this particular case the dispute was between the Chief Conservator of Forests and the Revenue Authorities of the State of Andhra Pradesh in Civil Appeal No. 8580 of 1994 with Nos. 9097 of 1995 decided on 18-2-2003 reported in 2003 (3) SC – 472 Para-14, 15 - Pages 481 and 482, the extract of which is given herebelow:

"Filing of a writ petition by one department against the other by invoking the extraordinary jurisdiction of the High Court is not only against the propriety and polity as it smacks of indiscipline but is also contrary to the basic concept of law which requires that for suing or being sued, there must be either a natural or a juristic person. The States/Union of India must evolve a mechanism to set at



rest all interdepartmental controversies at the level of the Government and such matters should not be carried to a court of law for resolution of the controversy.”

4.6.2 This judgement was not at all relevant to the present case. Here the matter was not of a dispute between two Government Departments or between Ministry and PSUs and between PSUs themselves. Matter before the Commission was not a dispute but factum of contravention and non-compliance of the order of a quasi-judicial body for which, penal proceedings had been initiated by it under the Act. Responding to the objection raised by the learned Counsel for the respondent Board that since Hon’ble High Court was seized of the matter, the matter here be not heard, he submitted that in these matters the matter had not attained finality. The Hon’ble High Court in its wisdom had stayed the operation of the order of the Commission. There is no such order or injunction that such like or similar matters may also be stayed. If in future, the Hon’ble High Court vacates the stay order and the proceedings in the Commission are stayed, the statutory functions required to be discharged by this Commission shall come to a standstill. Such is not the intention of the legislature to create a statutory crisis. The matter is required to be proceeded if not stayed by the specific order by the higher authority. Referring to the Supreme Court order in PSEB Vs National Power Thermal Corporation Ltd & others in civil appeals Nos. 7082 - 7084 of 2001 decided on 10-10-2001 reported in {(2001) Vol. 9 SCC Page 545}:

“A. Electricity – Electricity Regulatory Commissions Act, 1998 – Ss.16 and 13(e) – Appellate jurisdiction of High Court under S. 16 – Scope – If extends to stay the operation of the Commission’s order – Question discussed but conclusive opinion not expressed – High Court’s order staying the operation of the Commission’s report containing the norms for tariff, on facts would make the report nugatory – Hence set aside – Appellate Authority – Powers of

B. Electricity – Electricity Regulatory Commissions Act, 1998 – Ss.13 (e), 38(1) and 16 – Central Commission’s order dt. 21-12-2000 fixing norms for tariff for hydro-generation and inter-State transmission – Whether ex facie illegal – Held, would have to be dealt with at the time of final hearing and not at the stage of the present appeal against High Court’s interim order staying the operation of the said order of the Commission.”

4.6.3 The learned Amicus Curiae submitted that somewhat similar questions came before the Full Bench of the Hon'ble Supreme Court in the case of WBERC Vs. CESC case with regard to whether the High Court is the appropriate appellate authority or it has to be some authority with the expertise because the issues in the order are technical in nature. Hon'ble Supreme Court ruled that the High Court or the Judges of the Supreme Court are handicapped in understanding the real technical issues. He referred to the paragraph 95 of the aforesaid judgement which starts with the heading "Effective Appellate Forum". He submitted that the Commission constituted under Section 17 of the Act would determine the tariff and would involve very highly technical procedure requiring working knowledge of law, engineering, finances, commercial, economics and the management. The role of the lawyer stops with the knowledge of law. He is not conversant with the engineering, finance, commerce and management. The Supreme Court had recommended that the appellate powers against the State commissions on orders under the 1998 Act should be conferred either upon the Central Electricity Regulatory Commission or some similar body. He quoted a few lines of para-52 of the Supreme Court judgement to bring home the point that there is no inconsistency with respect to the provisions of the 1948 Act and if there is any inconsistency or ambiguity, the 1998 Act being the special Act would override the general Act and if both the Acts can be taken as special Acts the later Act would prevail over the earlier Act. He also referred to the following lines from para-55,

"It is seen that sections 22 and 29 of the 1998 Act are special laws and the 1948 Act is only a general law in regard to determination of tariff. Consequently, because of the accepted principle in law that a general law yields to a special law, provisions of the 1998 Act must prevail."

4.6.4 He argued that in view of the above observations of the Hon'ble Supreme Court there was no inconsistency or ambiguity. The 1998 Act, being the special law, would override the general Act of 1948 and even if both the Acts were taken as special Acts, then also the provisions of the later Act of 1998 would prevail over the earlier Act of 1948. He further quoted following lines from para-51 of the aforesaid judgement to make the point that the Commission was the sole authority to determine the tariff.

"Collective reading of these Sections namely 22, 29 and 30, in our opinion, leaves no room for doubt that under the 1998 Act, it is the commission and the commission alone which is authorised to determine the tariff and in our opinion the state commission in this case rightly understood its statutory obligation."

4.6.5 Finally the Amicus Curiae provided the answers in his own manner to the various points at issue.

- i) No.
- ii) By filing the petition the Respondent Board had acquiesced to the jurisdiction of the Commission and cannot now wriggle out of its obligation while enjoying the privileges of the tariff order.
- iii) The Respondent Board has not been able to reply to this query.
- iv) The acceptance of the order cannot be only in respect of its advantages and not the obligations. It was estopped from raising any question of the jurisdiction at this stage after having availed all the remedies;
- v) The Respondent Board attracts penal provisions of Section 193 of IPC(45 of 1860) for filing false affidavits.
- vi) The Respondent Board has not been able to give any satisfactory reply to this query.
- vii) No. The order is conclusive for following the due process and the due procedure in the judicial proceedings and must be implemented ruthlessly;
- viii) No one can find fault with the notices;
- ix) The overriding effect is with respect to the entire Act save as provided under Section 49;
- x) Yes;  
and
- xi) Yes.

4.7 The matter was first heard on 7<sup>th</sup> June, 2003 and the order reserved. In the meantime, the Electricity Act, 2003, hereinafter referred to as “the 2003 Act”, came into force on the 10<sup>th</sup> June, 2003 before the order had been announced. The Commission was of the view that in accordance with the principles of natural justice another opportunity should be provided to the Respondent Board to be heard on the impact and effect of this Act on the above cases. Notices were accordingly issued for hearing on July 19, 2003. The matter was heard on 19-7-2003 for assessing the impact and effect of the 2003 Act when Respondent Board was represented by Shri D.D.Sood, Sr. Advocate. Shri P.N.Bhardwaj appeared as Consumer Representative under Section 94(3) of the 2003 Act.

4.8 It is to be noted that the circumstances of these cases are truly exceptional, extraordinary and unique. The entire legislation on electricity has been rewritten and

the implications and the impact of the new enactment would take time for proper understanding, comprehension and application even on the part of the Commission. Delay in pronouncement of the order was indeed inevitable.

#### **4.9 Supplementary Contentions of the Respondent Board:**

4.9.1 The learned Senior Counsel for the Respondent Board referred to sub-section (1)(a) to (k), 2(i) to (iv) of Sections 86 with emphasis on Clause (f) of former and (1) of later, 61(a) to (i), 62,63, 64 and 65 of the 2003 Act as well as Section 142, repeal and saving in sub-sections (1) and (2)(a) of Section 185 of the 2003 Act. He conceded that under the 2003 Act, the Commission had the jurisdiction and the powers to issue directions. The correspondence and the consistency in the saving provision contained in sub-section (2)(a) of Section 185 could be traced to the above Sections referred by him.

4.9.2 The learned senior Counsel further contended that there was no deliberate lapse on the part of the Respondent Board in complying with the directions issued by the Commission in the Tariff Order. It was further submitted that the information from time to time has been furnished to the Commission in which it has been brought to its notice that the working of physical verification in 8 Circles of the Respondent Board had been completed and in other Circles it was in progress. The Respondent Board had prayed for extension of time which was not allowed by the Commission.

4.9.3 The learned senior Counsel for Respondent Board submitted that the tenders which had been invited by the Board for carrying out some of the studies had now been opened and were being processed.

#### **4.10 Supplementary Contentions of Consumer Representative:**

The Consumer Representative referred to sub-sections (1)(a) to (i) and (2)(i) of Section 86 and sub-section (c) of Section 61 which laid irrevocable stress on competition, efficiency and economy and its correspondence to sub-section (1)(d) of Section 22 of the repealed 1998 Act.

#### **4.11 Constitution & Legal History**

Before proceeding to examine the submissions, it should do good to give hereunder the constitutional provisions and the history of legislation relating to the Indian Power Sector:

#### 4.11.1 Constitutional Provisions

(a) Article 1 (1) of the Constitution of India declares that India shall be a Union of States. A federal system of governance requires the distribution of powers between the Centre and the States. In the Indian context, Articles 245 to 255 of the Constitution deal with the distribution of Legislative Powers.

(b) Under the federal structure of governance in India, the legislative powers of the Centre and the States have been demarcated. Schedule VII of the Constitution of India contains the three Lists and the Parliament and the State Legislatures have the power to make laws on the subject matters contained in List I (Union List) and List II (State List) respectively. List III (Concurrent List), however, confers powers of legislation with respect to listed subject matters on both the Centre and the States.

(c) Under Entry 38, List I, both the Parliament and the State Legislatures have been empowered to make laws on the subject of "Electricity". The Constitution has, however, given supremacy to Central Legislation, meaning thereby that if there is a direct conflict or inconsistency between a Central Act and the provisions of a State Legislation, then the law made by the Parliament shall prevail and the inconsistent provisions of the State Legislation shall be void. However, if the aforesaid provision has received Presidential Assent, the State legislation can operate within the State. Despite such Presidential Assent, according to the Proviso to Article 254 (2) of the Constitution of India, a provision of the State legislation would not sustain if it is repealed, modified or amended by a subsequent Central Enactment.

#### 4.11.2. Legislative Context

(a) The first legislation on this subject was the Electricity Act, 1887 which provided for the protection of person and property from any risk or injury consequent to the supply and use of electricity. This Act was, however, repealed by the Indian Electricity Act, 1903 which was replaced in 1910 by the major amending Act. The Indian Electricity Act, 1910 provided a basic legal framework for the electricity supply industry. Though the Act brought into effect certain important changes (such as grant of licenses for bulk supply and provision for purchase of electrical undertakings by the State), the excessive discretion vested in the hands of those who administered the law and the fact

that the Act merely amended the law related to the supply and use of electricity, highlighted the need for a exhaustive code on this subject.

(b) Where the Indian Electricity Act, 1910 dealt with the supply and use of electricity as well as the rights and obligations of the licensees, the subsequent enactment, the Electrical (Supply) Act, 1948 dealt with the Statutory powers and functions of the Central Electrical Authority, the State Electricity Boards (“SEBs) and Generating Companies. One of the fundamental reasons for its enactment was the extension of the process of electrification to rural and semi-urban areas. The 1956 amendment to this Act saw an increase in the role of the State Government. The State Government now had supervisory control over the SEBs that led to huge losses in their operation and widening of the gap between the demand and supply of electricity.

(c) Although subsequent amendments were made to the Electricity (Supply) Act, 1948, it was the Electricity Regulatory Commissions Act in 1998 which sought to distance the government from the functioning of the SEBs. Under the Act, independent regulatory bodies were created at the Central and the State level, that is the Central Electricity Regulatory Commission and the State Electricity Regulatory commissions respectively. The main objects of this Act were rationalization of electricity tariff, transparency in policy formulations, promotion of efficient and environmentally benign policies as well as greater involvement of the private sector.

(d) On June 10, 2003, the Electricity Act, 2003 was enacted. This Act seeks to usher in the “second generation reforms’ in the power sector (the first being brought in by the Electricity Regulatory Commissions Act, 1998). The Act repeals all previous Central laws in Electricity i.e. The Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998. The Act seeks to establish a more competitive market in the Indian Electricity sector through the removal of a number of restrictive barriers. Apart from the steps taken to de-license the industry, the Act also takes into consideration social interests. Various provisions exist for the protection of consumer interests such as creation of Consumer Redressal Forums and Ombudsman, and creation of policies consistent with the environment friendly objective of the Act.

**4.11.3 Establishment of HPERC and Application of the Act:** The State Government of Himachal Pradesh established the Himachal Pradesh Electricity Regulatory Commission vide its notification dated 30-12-2000 and the commission started functioning w.e.f. 6-1-2001 with the entering into the office of ‘the One Member Commission’.

The preamble of the 1998 Act describes the object of legislation as;

“an Act to provide for the establishment of a Central Electricity Regulatory Commission and State Electricity Regulatory Commissions, rationalization of electricity tariff, transparent policies regarding subsidies, promotion of efficient and environmentally benign policies and for matters connected therewith or incidental thereto.”

The preamble of the 2003 Act describes the object of the legislation as;

“an Act to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalisation of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto.”

**4.11.4 Relevant provisions of the 1998 and 2003 Acts:** In order to avoid repetition, the relevant provisions of the various enactments relating to the power sector have been extracted from the WBERC case as reported in paras **10 to 22** of the above said judgement and reproduced hereunder:

“10. The Indian Electricity Act, 1910 (the 1910 Act), was enacted with a view to make an improvement on the then existing legislation controlling the generation, transmission and supply of electricity in this country. Out of the various provisions of this Act, we need only refer to clause II of the schedule to the 1910 Act, which read with section 3(2)(f) of this Act, makes it obligatory for a licensee to follow the procedure as to the audit of the licensee’s accounts which, *inter alia*, requires the same to be audited by such persons as the state government may appoint or approve in that behalf. Thus the 1910 Act has

made the auditing of the accounts of a licensee a statutory requirement. This statutory requirement continues to operate in spite of subsequent enactments.

11. By the introduction of the 1948 Act, the legislature has sought to rationalise the provisions pertaining to supply of electricity and to take measures conducive to electrical development. While enacting the same, the legislature was of the opinion that within the framework of 1910 Act, it was not possible to have a coordinated development of electricity in India on a regional basis. Hence, it was necessary that the appropriate government should be vested with the necessary legislative powers, to link together the supply and transmission of electricity to various parts of the country, by introducing a system known as the “grid system”. With this view the 1948 Act in section 57 mandated that the provisions of Schedule VI shall be deemed to be incorporated in the licence of every licensee subject to the exception provided therein. Section 57 A has provided for the constitution of a “rating committee” to oversee the procedure adopted by the licensee while fixing the tariff. Schedule VI to the 1948 Act lays down the principles to be followed in fixing the electricity tariff so far as the licensee is concerned. It is to be noticed herein that the said schedule provides for self-assessment of the tariff by the licensee himself, following the principles laid down in the said schedule. These are the principal sections on the 1948 Act which have a bearing on the question of fixation of tariff by the licensee.

12. By the introduction of the 1998 Act, the parliament brought about some important changes from that which was provided in the 1948 Act. It is seen from the statement of objects and reasons of the 1998 Act that the parliament noticed that there was lack of a rational retail tariff. It also noticed that among other defects there were high level cross subsidies, lack of power planning and operation, inadequate capacity, neglect of the consumer, limited involvement of the private sector’s skill and resources and the absence of an independent regulatory authority.

13. Section 3 of the Act 1998 provides for the establishment and incorporation of a Central Electricity Regulatory Commission, while Section 17 of the said Act provides for a similar commission for the state. This Section provides that the state commission should consist of not more than 3 members including the



chairperson. It also provides that the chairperson and the members of the state commission, among other things, shall be persons who have adequate knowledge of, and capacity in dealing with problems relating to engineering, finance, commerce, economics, law or management. These members of the state commissions are to be selected by a selection committee constituted by the state government under Section 18 of this Act. The members of the said selection committee consists of, a person who has been a judge of the High court, the chief secretary of the state concerned and the chairperson or a member of the central electricity regulatory authority. The said section also fixes a time schedule by which the vacancy in the office of the state commission should be filled up. Section 19 of this Act provides for term of office and service conditions of the members of the state commission, while Section 20 provides for a special procedure for the removal of members of the state commission which will have to be done by the government on the ground of proved misbehaviour, after the High Court on reference being made to it by the governor, has reported that the member concerned ought to be removed on such ground of proved misbehaviour. The qualification of the members of the state commission as required under the Act, as also the method of their appointment and conditions of their service, including the protection given to them in reference to their removal and disqualifications from holding subsequent office, clearly shows that the state commission under the Act is constituted as a high power expert committee with autonomous authority and is expected to function independently.

14. Section 22 of the Act enumerates the functions of the commission. The most important function to be noticed in this section, at least so far as these appeals are concerned, is the power of the commission to determine the tariff for electricity, be it wholesale, bulk, grid or retail. This determination of tariff under the Act will have to be made in the manner provided in Section 29 of the said Act. Section 22(1) (d) obligates the commissions to promote competition, efficiency and economy in the activities of the electricity industries to achieve the objects and purposes of this Act.

15. Section 26 empowers the commission to authorise any person as it deems fit to represent the interest of the consumer in all the proceedings before it.

16. Section 27 of the 1998 Act provides for an appeal to the High Court, by any person aggrieved by any decision or order of the state commission. It lays down that no appeal or revision would lie to any other court.

17. Section 29 provides for determination of the tariff by the state commission. Since the interpretation of this section is a major bone of contention between the parties in these appeals, it is necessary for us to reproduce the same in its entirety.

“29. Determination of tariff by state commissions, -

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It is to be seen that this section provides for the methodology to be followed by the commission in determination of the tariff.

18. Section 37 of the Act requires the commission to ensure transparency while exercising their powers and discharge of their functions.

19. Section 49 of the Act gives overriding effect over this Act to only two other enactments, namely, the Consumer Protection Act, 1986 and the Atomic Energy Act, 1962, while Section 52 gives overriding effect to the provisions of the 1998 Act, notwithstanding anything inconsistent therewith, in any enactment other than this Act.

20. Section 57 empowers the state government to make rules which will have to be notified in the official gazette.

21. Section 58 empowers the commission to make regulations, which also have to be notified in the official gazette and the regulations have to be consistent

with the Act and the rules. Sub-section (2) of Section 58 in clause (d), specifically provides that the commission is empowered to make regulations, providing for the manner in which charges for energy may be determined under sub-section (2) of Section 29.

22. Section 59 obligates that the rules and regulations made under this Act have to be placed before the houses of the legislature. It is not in dispute that the rules framed by the state of West Bengal, as also the regulations framed by the state commission have been placed before the legislature as required under Section 59 of the Act.”

4.11.5 The State of Himachal Pradesh has not exercised its power under Section 57 and not made any Rules as such. However, in exercise of the powers under Section 58 of the 1998 Act, the Commission has framed Regulations. Regulations 9 to 25 provide for the manner in which the Commission would regulate the proceedings before the Commission. Regulation 27 deals with the tariff notable being 27(xviii) which requires the Respondent Board to submit periodical returns as may be prescribed containing operational and cost data to enable the Commission to monitor the implementation of its order and reassess the basis on which the tariff was approved.

4.12 Having extracted the legal provisions upto the 1998 Act we shall now proceed to give hereunder the relevant provisions of the 2003 Act which has come into force on 10-6-2003:

**4.12.1 Statement of Objects and Reasons: para 3, para 4,**

3. With the policy of encouraging private sector participation in generation, transmission and distribution and the objective of distancing the regulatory responsibilities from the Government to the Regulatory Commissions, the need for harmonising and rationalising the provisions in the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commission Act, 1998 in a new self-contained comprehensive legislation arose. Accordingly it became necessary to enact a new legislation for regulating the electricity supply industry in the country, which would replace the existing

laws, preserve its core features other than those relating to the mandatory existence of the State Electricity board and the responsibilities of the State Government and the State Electricity Board with respect to regulating licensees. There is also need to provide for newer concepts like power trading and open access. There is also need to obviate the requirement of each State Government to pass its own Reforms Act. The Bill has progressive features and endeavours to strike the right balance given the current realities of the power sector in India. It gives the State enough flexibility to develop their power sector in the manner they consider appropriate. The Electricity Bill, 2001 has been finalised after extensive discussion and consultations with the States and all other stake holders and experts.

4. The main features of the Bill are as follows:-

- (i) Generation is being delicensed and captive generation is being freely permitted. Hydro Projects would, however, need approval of the State Government and clearance from the Central Electricity Authority which would go into the issues of dam Safety and optimal utilisation of water resources.
- (ii) There would be a Transmission Utility at the Central as well as State level, which would be a Government company and have the responsibility of ensuring that the transmission network is developed in a planned and coordinated manner to meet the requirements of the sector. The load despatch function could be kept with the Transmission Utility or separated. In the case of separation the load despatch function would have to remain with a State Government organisation/company.
- (iii) There is provision for private transmission licensees.
- (iv) There would be open access in transmission from the outset with provision for surcharge for taking care of current level of cross subsidy with the surcharge being gradually phased out.

- (v) Distribution licensees would be free to undertake generation and generating companies would be free to take up distribution licensees.
- (vi) The State Electricity Regulatory Commissions may permit open access in distribution in phases with surcharge for-
  - (a) current level of cross subsidy to be gradually phased out along with cross subsidies; and
  - (b) obligation to supply.
- (vii) For rural and remote areas stand alone systems for generation and distribution would be permitted.
- (viii) For rural areas decentralised management of distribution through Panchayats, Users Associations, Cooperatives or Franchisees would be permitted.
- (ix) Trading as a distinct activity is being recognised with the safeguard of the Regulatory Commissions being authorised to fix ceilings on trading margins, if necessary.
- (x) Where there is direct commercial relationship between a consumer and a generating company or a trader the price of power would not be regulated and only the transmission and wheeling charges with surcharge would be regulated.
- (xi) There is provision for a transfer scheme by which company/ companies can be created by the State Government from the State Electricity Boards. The State Governments have the option of continuing with the State Electricity Boards which under the new scheme of things would be a distribution licensee and the

State Transmission Utility which would also be owning generation assets. The service conditions of the employees would be as a result of restructuring not be inferior.

- (xii) An Appellate Tribunal has been created for disposal of appeals against the decision of the CERC and State Electricity Regulatory Commissions so that there is speedy disposal of such matters. The State Electricity Regulatory Commission is a mandatory requirement.
- (xiii) Provisions relating to theft of electricity have a revenue focus.

4.12.2 Section 14 of the Act requires the Appropriate Commission to grant licence to any person -

- to transmit electricity as a transmission licensee; or
- to distribute electricity as a distribution licensee; or
- to undertake trading in electricity as an electricity trader, in any area which may be specified in the licence:

Provided that the Board engaged in the business of transmission or supply of electricity under the provisions of the repealed laws shall be deemed to be a licensee under this Act for a maximum period of one year and thereafter the provisions of this Act shall apply to such business.

4.12.3 Section 23 of the Act empowers the Commission to provide for regulating supply, distribution, consumption or use thereof by issuing directions to the licensees.

4.12.4 Section 61 of the Act deals with the terms and conditions for the determination of tariff, and in doing so, the Commission is to be guided by the following, namely:-

- (a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;

- (b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;
- (c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;
- (d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;
- (e) the principles rewarding efficiency in performance;
- (f) multi year tariff principles;
- (g) that the tariff progressively reflects the cost of supply of electricity, and also reduces and eliminates cross-subsidies within the period to be specified by the Appropriate Commission;
- (h) the promotion of co-generation and generation of electricity from renewable sources of energy;
- (i) the National Electricity Policy and tariff policy:

Provided that the terms and conditions for determination of tariff under the Electricity (Supply) Act, 1948, the Electricity Regulatory Commission Act, 1998, and the enactments specified in the schedule as they stood immediately before the appointed day shall continue to apply for a period of one year or until the terms and conditions for tariff are specified under this section, whichever is earlier.

4.12.5 Section 62 of the Act requires the Appropriate Commission to determine the tariff in accordance with the provisions of this Act for-

supply of electricity by a generating company to a distribution licensee, transmissions of electricity, wheeling of electricity and retail sale of electricity.

Sub-section 5 of this Section empowers the Commission to require the licensee or a generating company to comply with the procedure as may be specified for calculating the expected revenues from the tariff and charges which he or it is permitted to recover.

Sub-section 6 of the same Section stipulates that if any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge

along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee.

4.12.6 Section 64 of the Act lays down the Procedure for tariff order and its sub-section 3 requires the State Commission to issue a tariff order accepting the application with such modifications or such conditions as may be specified in that order, within one hundred and twenty days from receipt of an application and after considering all suggestions and objections received from the public.

4.12.7 Section 65 of the Act provides for Subsidy by State Government.

4.12.8 Section 82 of the Act provides that the State Electricity Regulatory Commission, established by a State Government under section 17 of the Electricity Regulatory Commissions Act, 1998 and functioning as such immediately before the appointed date shall be the State Commission for the purposes of this Act and the Chairperson, Members, Secretary, and other officers and other employees thereof shall continue to hold office, on the same terms and conditions on which they were appointed under those Acts.

4.12.9 Section 86 of the Act stipulates the Functions of State Commission as under:

- determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State;
- regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;
- facilitate intra-state transmission and wheeling of electricity;



- issue licences to persons seeking to act as transmission licensees, distribution licensees and electricity traders with respect to their operations within the State;
- promote cogeneration and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licence;
- adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration;
- levy fee for the purposes of this Act;
- specify State Grid Code consistent with the Grid Code specified under clause (h) of sub-section (1) of section 79;
- specify or enforce standards with respect to quality, continuity and reliability of service by licensees;
- fix the trading margin in the intra-State trading of electricity, if considered, necessary; and
- discharge such other functions as may be assigned to it under this Act.

Sub-section (2) of this Section mandates the State Commission to advise the State Government on all or any of the following matters, namely: -

- (i) promotion of competition, efficiency and economy in activities of the electricity industry;
- (ii) promotion of investment in electricity industry;

- (iii) reorganization and restructuring of electricity industry in the State;
- (iv) matters concerning generation, transmission, distribution and trading of electricity or any other matter referred to the State Commission by that Government.

Sub-section 3 of this Section further requires the Commission to ensure transparency while exercising its powers and discharging its functions.

Sub-section 4 of the same Section stipulates that in discharge of its functions the State Commission shall be guided by the National Electricity Policy, National Electricity Plan and tariff policy published under sub-section (2) of section 3.

4.12.10 Section 94 provides that the Commission shall, for the purposes of any inquiry or proceedings under this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 in respect of the following matters, namely: -

- summoning and enforcing the attendance of any person and examining him on oath;
- discovery and production of any document or other material object producible as evidence;
- receiving evidence on affidavits;
- requisitioning of any public record;
- issuing commission for the examination of witnesses;
- reviewing its decisions, directions and orders;
- any other matter which may be prescribed.

Sub-section 2 of this Section provides that the Commission shall have the powers to pass such interim order in any proceeding, hearing or matter before the Appropriate Commission, as that Commission may consider appropriate.

Sub-section 3 of Section 94 provides that the Commission may authorise any person, as it deems fit, to represent the interest of the consumers in the proceedings before it.

4.12.11 Section 129 of the Act empowers the Commission to secure compliance for conditions or provisions of the licence.

4.12.12 Section 142 of the Act is identical to Section 45 of 1998 Act.

4.12.13 Language of Section 149 of the Act is identical to that of Section 47 of 1998 Act.

4.12.14 Section 172 of the Act has transitional provisions where -

- a State Electricity Board constituted under the repealed laws shall be deemed to be the State Transmission Utility and a licensee under the provisions of this Act for a period of one year from the appointed date or such earlier date as the State Government may notify, and shall perform the duties and functions of the State Transmission Utility and a licensee in accordance with the provisions of this Act and rules and regulations made there under:

Provided that the State Government may, by notification, authorise the State Electricity Board to continue to function as the State Transmission Utility or a licensee for such further period beyond the said period of one year as may be mutually decided by the Central Government and the State Government.

4.12.15 Section 174 of the Act gives overriding effect over all other enactments save as otherwise provided in section 173 i.e. Consumer Protection Act, 1986, Atomic Energy Act, 1962 and the Railways Act, 1989.

4.12.16 Sub-Section 1 of Section 185 of the Act repeals the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998.

Sub-section (2)(a) of this Section saves:

- anything done or any action taken or purported to have been done or taken including any rule, notification, inspection, order or notice made or issued or any appointment, confirmation or declaration made or any licence, permission, authorisation or exemption granted or any document or instrument executed or any direction given under the repealed laws shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act.

4.12.17 The legislative context shall be incomplete without reference to the law laid down by the Hon'ble Supreme Court in the WBERC case which is the magna carte judgement in the history of regulatory jurisprudence in a similar case:

“51. For deciding this question we will have to first notice the objects and reasons of enacting the 1998 Act. A perusal of the same shows that the parliament felt that in spite of the existing enactments, it was necessary to bring about a new law which would facilitate the implementation of reforms contemplated by it, which reforms pertained to fundamental issues facing the power sector, namely, lack of rational retail tariff, high level of cross subsidies, poor planning and operation, inadequate capacity, neglect of consumer, limited involvement of private sector's skills and resources and the absence of an independent regulatory authority. The view of the Administrative Staff College of India (ASCI) which strongly recommended the creation of an independent electricity regulatory commission both at the centre and the state are also noticed. It is with the above object, an ordinance was promulgated on 25<sup>th</sup> April, 1998 which later came to be replaced by the 1998 Act. We also notice that while promulgating the said ordinance it was mentioned that one of the salient features of establishing the central and state electricity commissions was to determine the tariff for electricity wholesale, bulk, grid and retail, apart from determining the tariff payable for use of the transmission facilities. Therefore, it is to be seen that in spite of the fact that the 1948 Act was in existence, the

parliament thought that it was necessary to constitute a regulatory authority both at the centre and the state which was to be an autonomous independent body. We have earlier noticed the composition of this body and the statutory provisions made in the Act to protect the autonomy of this commission. Therefore, from the objects and statements of this Act, as also from the provisions of this Act, it is clear that this is an enactment specially to provide for a procedure for determining the tariff for electricity, as also to confer the power of determination of tariff on an expert body like the commission. In this regard we take note of section 22(1)(a) of the 1998 Act, which in specific terms lays down that the commission shall discharge the function of determining the tariff for electricity in the manner provided in section 29. A plain reading of this section leaves no room for doubt that so far as the state commission is concerned, the Act has solely entrusted the responsibility of determining the tariff to it. Section 29 firstly requires the Commission to determine the tariff in accordance with the provisions of that Act. It then requires the commission to frame regulations providing for the terms and conditions for fixation of tariff. In exercise of this latter power of framing the regulations, the commission is mandated to be guided by the factors mentioned in clauses (a) to (g) of sub-section (2) of section 29. Thereafter, sub-section (3) of section 29 mandates the state commission not to show any undue preference while determining the tariff to any consumer of electricity subject, of course, to the exceptions found in the said sub-section. Sub section (4) mandates the holder of a licence or other person to distribute or supply electricity, by observing the methodologies and procedures specified by the state commission from time to time while supplying electricity and in collecting the revenue. Sub section (5) of that section provides if the state government wants any subsidy to be given to any class of consumers in the tariff determined by the commission, then the state government is obligated to pay such subsidy in the manner in which the state commission may direct. Sub section (6) lays down that notwithstanding anything contained in section 57 A and B of the 1948 Act no rating committee shall be constituted after the date of commencement of the 1998 Act, which is a natural consequence of the creation of the commission. It also further lays down that the commission should ensure that the licensees comply with the provisions of their licences, regarding the charges for sale of electricity in accordance with

the provisions of the 1998 Act. Section 30 of the 1998 Act provides that if the commission wants to depart from the factors specified in clauses (a) to (d) of section 28 or (a) to (f) of sub section (2) of section 29, the commission shall record reasons for such departure in writing. A collective reading of these sections namely 22, 29 and 30, in our opinion, leaves no room for doubt that under the 1998 Act, it is the commission and the commission alone which is authorised to determine the tariff and in our opinion the state commission in this case rightly understood its statutory obligation. ....”

“57. Having carefully considered the provisions of the Act as also the arguments advanced in this regard, we are of the opinion that under the 1998 Act, it is the commission concerned and in the instant case the state commission of West Bengal, which is the sole authority to determine the tariff, of course, as per the procedure in the said Act.

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A collective reading of sections namely 22, 29 and 30, in our opinion, leaves no room for doubt that under the 1998 Act, it is the commission and the commission alone which is authorised to determine the tariff and in our opinion the state commission in this case rightly understood its statutory obligation.

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It is seen that Section 22 and 29 of the 1998 Act are special laws and the 1948 Act is only a general law in regard to determination of tariff. Consequently, because of the accepted principle in law that a general law yields to special law, the provision of the 1998 Act must prevail (Para 55).

Under the 1998 Act, it is the commission concerned and in the instant case the state commission of West Bengal, which is the sole authority to determine the tariff, of course as per the procedure in the said Act. (Para 57).

4.12.18 In continuity it shall be pertinent to reproduce “Regulations” sub clause (ii), (iv), (v), (vi), (vii), (ix), (x), (xi), (xii), (xiii), (xiv) (xv), (xvi) and (xviii) of Regulation 27.

“27. Application of tariff regulations:

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- (ii) Neither the Board nor the utilities for transmission (intra-state transmission), distribution and supply of power shall charge any tariff without prior approval of the Commission.

Provided that the existing tariff being charged by generating companies shall continue to be charged after the date of effect of these regulations for such period as may be specified by a notification without prejudice to the powers of the Commission to take up any matter relating to tariff falling within the scope of section 22 of the Act.

- (iv) The Commission may from time to time, lay down guidelines for calculating the expected revenue from the permissible charges, and revenue and tariff filing.
- (v) Without prejudice to the generality of the powers of the Commission in determining the tariff of generation, transmission and distribution utilities, the Commission may keep in view while determining the tariff factors such as:
  - (a) the need to link tariff adjustments in the productivity of capital employed, manpower resources and improvements in efficiency of capital & resources as to safeguard the interests of the consumers;
  - (b) the need to rationalise tariffs on the basis of bench marked and performance based cost of generation, transmission and distribution;
  - (c) unbundling of such costs to enable rational allocation of costs;

- (d) the need to transparently provide the appropriate incentives in a non-discriminatory manner, for a continuous enhancement in the efficiency of generation, transmission and distribution and up-gradation in the levels of service;
  - (e) the simulation of competitive conditions where markets do not exist and the progressive introduction of competitive conditions;
  - (f) the least cost adoption of environmental standards;
  - (g) the need for healthy growth of the industry;
- 
- (vi) All petitions for approval of generating, transmission or distribution tariff or revision thereof shall be made strictly in accordance with the guidelines for revenue and tariff filing laid down by the Commission and shall also be in conformity with the requirements relating to petitions as prescribed in Chapter II.
  - (vii) The Commission may at anytime frame separate Regulations, through notifications, for fixation of tariff in accordance with the guidelines under section 29(2) of the Act.
  - (viii) The Commission may work out appropriate incentive schemes for improved performance in generation, transmission and distribution utilities, which shall be notified from time to time.
  - (x) The Commission may approve differential tariff linked to factors like time of day Meeting (TOD) and payment terms with built in incentives for timely payment of bills.
  - (xi) Board/Utilities shall submit tariff proposals in the form of petition based on the terms and conditions, provided in these Regulations. Such



proposals should be submitted to the Commission at least three months before the date from which tariff is proposed to be enforced.

- (xii) The Commission shall invite objections/suggestions on the tariff proposals from the interested stakeholders and this shall be followed by grant of public hearings as may be deemed fit.
- (xiii) The Commission may get the books and records of the Board/Utilities concerned, examined by the officers and/or by consultants, as and when necessary. The report of the officers/consultants shall be made available to the parties concerned and they shall be given opportunity to react on the report in the manner as prescribed in clause 26(iv) of these Regulations.
- (xiv) The Commission may require the Board/Utilities to give such other information, particulars and documents as considered appropriate to enable the Commission to assess Board's/Utility's calculations.
- (xv) The Board/Utilities concerned shall publish the tariff as decided by the Commission, in the manner as may be provided in the order.
- (xvi) Board/Utility found to be charging a tariff different from the one decided by the Commission shall be deemed to have not complied with the directions of the Commission and shall be liable to penalties under section 45 of the Act without prejudice to any other penalty to which it may be liable under any other Act. Any excess charges of tariff by Board/Utility in any year shall be dealt with as per the directions of the Commission.
- (xviii) The Board/Utility shall submit periodic returns, as may be prescribed, containing operational and cost data to enable the Commission to monitor the implementation of its order and reassess the basis on which tariff was approved.

#### **4.13 Discussion:**

##### 4.13.1 Point Issue (i)

The essence of statement of objects and reasons of 1998 Act is the necessity of independent regulatory authority in order to implement significant reforms by focussing on the fundamental issues facing the power sector, namely the lack of rational retail tariffs, the high level of cross-subsidies, poor planning and operation, inadequate capacity, the neglect of the consumer, the limited involvement of private sector skills and resources and the absence of an independent regulatory authority. This focus arises out of fast deteriorating financial position of the State Electricity Board. Creation of independent regulatory Commissions was identified as a step in the direction of sustainable development in the power sector and viable State Electricity Board. Clause (d) of para-4 sets aims for State Electricity Regulatory Commission for improving financial health of the State Electricity Boards which are loosing heavily on account of irrational tariff and lack of budgetary support from the State Government as a result of which SEBs have become incapable of even maintenance, leave alone purposive investment. Lack of creditworthiness of SEBs has been cited as a deterrent in attracting investment both from the public and private sectors.

Clause (d) of para-4 of the “INTRODUCTION” to the ERC Act, 1998 setting out the aim of improving financial health of the SEBs, therefore, stands out as the singular essence of objects and reasons of the ERC Act. Financial health of the SEBs cannot be improved merely by determination of tariff and leaving the implementation of related directions or the compliance thereof to the Electricity Board. Again the improvement in the financial health of the SEBs cannot be brought about merely by giving additional revenue to the Board and not monitoring and controlling the performance and the costs. The annual revenue requirement is function of the income and the expenditure and whilst the Commission through the tariffs can give additional revenue to the Board, its fiscal management has to be prudent enough to contain the expenditure strictly as allowed by the Commission. The main functions of the SERCs given in clause(c) of para-4 of the ordinance were later replaced by functions under Section 22 (1) of the ERC Act which were the mandatory and the main functions. Subsequently as and when the State Government so notified, other regulatory functions could also be

assigned to SERCs. It would be improper to refer to functions under sub-section (1) of Section 22 as non-regulatory and those under sub-section (2) as regulatory as contended by the Ld. Counsel. All the functions under both the sub-sections are regulatory in the strictest sense of law. The Act is called Regulatory Commissions Act and the Commissions are mandated to regulate the working of the utilities. The words “other regulatory functions” above clearly mean that under sub-section (2) the functions are “other regulatory functions whereas those in sub-section (1) are main regulatory functions. Clause (c) of para-4 of the ordinance refers to these functions as main functions while Section 22 (1) of the ERC Act makes these as mandatory functions. There is nothing to define these as “general functions” or the “specific functions”. The intention of the legislature in keeping regulatory functions in two sub sections was clearly in their nature as mandatory and non-mandatory in carrying out the objects and the purposes of the Act. The inescapable intention of this would seem that even without powers under section 22 (2) of the ERC Act, the SERCs should be able to bring about a turn around and the improvement in the financial health of the SEBs, being the main aim which cannot be done merely by determination of the tariffs with no control over its implementation or compliance of the attendant and related directives.

The thrust of defence arguments was centred on single theme of functions conferred under Sections 22 (1) and 22(2) and everything else followed by way of linking them ultimately to Sections 27, 39, 45, 47, 49 and 52 of the ERC Act. The Commission has gone over Section 22 several times in trying to even read in between the lines to find out inclusivity of one in the other and finds that sub sections (1) and (2) are mutually exclusive and the ejusedem generis rule is not applicable here. The very language of the two sub-sections and the objectives intended to be achieved thro’ them negate any intention of the legislature to attract the rule of ejusedem generis. The judgement referred to in SC AIR 1972 page 1863 paras 9 and 15 referred to by the Ld. Counsel for Respondent Board does not appear to be relevant in the present context and is not of any avail to the respondent. Sub section (1) of Section 22 starts with the words “subject to the provision of Chapter-III the State Commission shall discharge the following functions, namely”; sub section (2) starts with the words “subject to the provision of Chapter-III and without prejudice to the provisions of sub section (1)”. Both the sub sections are subject to Chapter-III and not to each other. Both the sub-

sections are, therefore, non-obstante provisions save as provided in Chapter III of the Act. Clauses (a) to (p) of sub section (2) nowhere encroach upon Clauses (a) to (d) of sub section (1) of Section 22. The only difference between the two sub sections is that the powers under sub section (1) are mandatory whereas those in sub section (2) are non-mandatory and optional for the State Govt. to confer or not to confer. In any case it is obligatory on the part of the State Commission to discharge the functions under sub section (1) of Section 22. Clause (d) of sub section (1) may be construed strictly in relation to the functions under Clauses (a), (b) and (c) of sub section (1) if not in relation to clauses (a) to (p) of sub section (2). In that view, the functions to promote competition, efficiency and economy in the activities of the electricity industry to achieve the objects and purposes of this Act have to be construed strictly in relation to determination of tariff in clauses (a) and (b) and to regulate power purchase and procurement process of the transmission utilities, etc. as in clause (c) of sub section (1). As long as clause (d) is used in relation to clauses (a), (b) and (c) the construction and construal should be perfectly harmonious. Nowhere between clauses (a) to (p) of sub section (2) nor in clauses (a) to (d) of sub section (1) has the power to issue directions, been specifically or directly enumerated. The powers to give direction under the Act, Rules or Regulations made thereunder are evident in Regulation 27 (xviii) as well as essentially attendant to the very definition of the term “Regulation”. Further Section 45 of the 1998 Act empowers the Commission to impose fine for contravention of its directions. If the contention of the learned senior Counsel for Respondent Board that the Commission cannot issue directions without powers under sub-section (2) of Section 22 is accepted, it would render the provision of Section 45 totally redundant and otiose. The functions of determination of tariff and to promote competition, efficiency and economy in relation to the determination of tariff for electricity as in clauses (a) and (d) of sub section (1) have to be read together. The dictionary meaning of the word ‘determination’ is (1) quality of being determined (2) the settlement of a dispute by the authoritative decision of a judge” (3) judicial decision or sentence. The determination of tariff is an all-inclusive term for determination, implementation and compliance. It cannot be split into subjective expediency. Any other interpretation would conflict with Section 45 of the ERC Act which is reproduced as under:

“45. Punishment for non-compliance of directions given by a Commission.

(1) In case any complaint is filed before the Commission by any person or if the Commission is satisfied that any person has contravened any directions issued by the Commission under this Act, rules or regulations made there under, the Commission may after giving such person an opportunity of being heard in the matter, by order in writing, direct that without prejudice to any other penalty to which he may be liable under this Act, such person shall pay, by way of penalty, which shall not exceed rupees one lakh for each contravention and in case of a continuing failure with an additional penalty which may extend to rupees six thousand for every day during which the failure continues after contravention of the first such direction.

(2) Any amount payable under this section, if not paid, may be recovered as if it were an arrear of land revenue.”

The provision is very clear and unambiguous. It does not specifically inhibit or prohibit the punishment for non-compliance of the related directions issued by the Commission while exercising particular functions of the Commission. It does not subject the contravention of the ‘directions’ issued only to sub section (2) of Section 22 for punishment. Directions are directions and the words “any directions issued by the Commission under this Act, rules or regulations made there under” in section 45 of the 1998 Act, a priori, confer the power to issue directions upon the Commission. With respect to the learned senior Counsel, the Commission is unable to accept his contention of the Commission spinning into the state of *functus officio* after issue of tariff order for the same reasons.

The various provisions of Section 22 (2) of the ERC Act have been reproduced under main heading. “4.0 DEFENCE ARGUMENTS”, wherein it has been mentioned that to another query from the Commission as to what to do where the Commission had allowed higher revenue over what had been asked for by the Board as in para 5.15 of the Tariff Order and as in para 4 of Annexure 5.2 (Schedule of General and Service Charges) of the Tariff Order to the extent of Rs.3.60 Crores for replacement of dead stop/defective meters after March 31, 2002, the Id. Counsel had argued that the loss is to the Board only and if the Commission felt that the Board has not taken action to replace meters despite the higher meter rent allowed by the Commission, the Commission could reduce the rental thereof. With respect to the learned Senior

Counsel, such submission contradicts the Id. Counsel's own earlier argument that the Commission had no powers to enforce the implementation and compliance of the tariff order.

The Commission has heard the arguments of the Id. Counsel with attention but remains totally unconvinced with his attempt to link the Commission's powers to give directions only in respect of functions under Section 22(2) which had not been conferred upon it.

The primary function of the Regulatory Commission while determining the tariff is to balance the interests of the utility and stakeholders including consumers so as to ensure that the utility gets fair return on its investment and the consumers are provided electricity at an adequate and improved level of efficiency. The Section 22(1)(a) stipulates that the State Commission shall determine the tariff for electricity, wholesale, bulk, or retail as the case may be in the manner provided in Section 29. The various provisions of Section 29 have been reproduced under main heading LEGISLATIVE CONTEXT as well as DEFENCE ARGUMENTS. Section 29(2)(b) of the Act provides that while determining the tariff, the State Commission shall be guided, in the case of the Board by the principles in section 59 of the Electricity (Supply) Act, 1948. The Section 59 (1) of the Electricity (Supply) Act, 1948 provides as under: -

**“59. General Principles for Board's finance.-** (1) The Board shall, after taking credit for any subvention from the State Government under Sec. 63, carry on its operations under this Act and adjust its tariffs so as to ensure that the total revenues in any year of account shall, after meeting, all expenses properly chargeable to revenues, including operating, maintenance and management expenses, taxes (if any) on income and profits, depreciation and interest payable on all debentures, bonds and loans, leave such surplus as is not less than three per cent, or such higher percentage, as the State Government may, by notification in the Official Gazette, specify in this behalf, of the value of the fixed assets of the Board in service at the beginning of such year.

Explanation:-For the purposes of this sub-section, “ value of the fixed assets of the Board in service at the beginning of the year” means the original cost of such fixed assets as reduced by the aggregate of the cumulative depreciation in

respect of such assets calculated in accordance with the provisions of the Act and consumers "contributions for service lines.

The Electricity Board which is a natural monopoly for transmission and distribution of electricity, in the absence of competition, has a tendency to set prices without providing commensurate value for money. Further the absence of competition leads to operational inefficiencies, poor quality of service and inefficient allocation of resources. This leads to high cost and ultimately the consumer has to pay a high price.

While determining the tariff, the prudence and efficiency of cost is major regulatory concern. The costs can be made high through inefficient use of capital, inefficiencies in production and delivery and unnecessary spending on non-related activities. Thus the various costs indicated in the tariff petition are to be examined by the Commission and only such costs, as are found to be prudent, can be passed through.

Section 59(1) of the 1948 Act, clearly provides that the Board has to carry on its operations in such a manner so as to ensure that the total revenue in any year of account shall, after meeting all expenses properly chargeable to revenues, including operating, maintenance and management expenses, taxes (if any) on income and profits, depreciation and interest payable on all debentures, bonds and loans, leave such surplus as is not less than 3% of the value of the fixed assets of the Board in service at the beginning of the year. It is, therefore, imperative for the Commission that before allowing 3% surplus on the net fixed assets the various elements, which go in for the determination of the tariff, are based upon the actual data so that the consumers do not have to bear extra costs. Section 29(2)(c)(d)(e)&(f) of the 1998 Act states that the tariff progressively reflect the cost of supply of electricity at an adequate and improving level of efficiency, the factors which would encourage efficiency, economical use of the resources, good performance, optimum investment and other matters; the interest of the consumers are safe-guarded and the electricity generation, transmission, distribution and supply are conducted on commercial principles. While determining the tariff for the year 2001-02, the Commission correctly followed these principles and issued various directions as contained in Chapter-7 of its Tariff Order based on the provisions of Section 29(2) and also on the basis of the objections/suggestions received from the various stake-holders on the petitions filed by the Board. It is thus apparent that the

Commission has inherent powers to issue directions while determining the tariff in view of the provisions of Sections 22 (1), 29 and 45 of the 1998 Act.

There is no prohibition under Section 27. It is one order and when the Board accepts the tariff it is certainly bound by the Tariff Order in whole and full and not in halves quarters or parts. The directions given in Chapter 7 of the tariff order are inseparable and inextricable part of the order. It has acquiesced to and accepted the order including the directions, some of which were issued with the express consent and undertaking of the Respondent Board. It had neither filed the review petition before the Commission nor the appeal before the High Court against the Tariff Order of the Commission. It is estopped on this ground alone from agitating at this point of time. The Commission has already ruled against any reasonable nexus between Section 22 (2) and the powers to give directions under the Act, rules or regulations made there under.

Section 39: It refers to the powers of State Government to give directions in the matter of policy involving public interest. The contention of the Id. Counsel that the directions issued by the Commission should have gone to the Government as recommendations/suggestions for further issuing the same to HPSEB under Section 78(a) of the 1948 Act is an absurdity not tenable in law in the light of view taken in the foregoing.

Section 22 (1), Section 29 and Section 45 if read together should lead to the only conclusion that the determination of tariff under Section 22 (1) shall be done by determination of terms and conditions for fixation of tariff thro' regulations and the guidelines laid down in Section 29 and non-implementation or non-compliance of the directions shall be dealt with under Section 44 and Section 45. Issuance of directions by way of directions per se, the guidelines and the regulations is indisputable and inescapable requirement for achieving the objects & purposes of the Act.

Section 43: The Id. Counsel also raised the additional Section 43 of 1998 Act to the protection of action taken in good faith by the respondents who were first officers of the State Government and then the members or Chairman of the HPSEB. Section 43 is reproduced hereunder: -



“43. Protection of action taken in good faith.

No suit, prosecution or other legal proceedings shall lie against the Central or State Government or the Central or State Commission or any officer of Central or State Government or any Members, officer or other employees of the Central or State Commission for anything which is in good faith done or intended to be done under this Act or the rules or regulations made there under.”

Section 47 is an enabling provision and does not dilute Commission’s jurisdiction for taking impugned action. The Section is reproduced below:

“47. Offences by companies: -

(1) Where an offence under this Act has been committed by company, every person who at the time, the offence was committed was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act if he proves that the offence was committed without his knowledge or that he has exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Explanation: - For the purposes of this section,

(a)“company” means any body corporate and includes a firm or other association of individuals; and

(b)“director”, in relation to a firm, means a partner in the firm. ”

The HP State Electricity Board is a company as per the explanation given in the foot note of Section 47 being a body corporate under Section 12 of the 1948 Act. The Chairman and the Members of the Board are responsible for carrying out the affairs of the Board and it cannot be said that the contravention of the directions of the Commission is not attributable to the neglect on the part of the concerned Member of the Board. Further there is a collective and collegiate responsibility of all the respondents for any action taken or intended to be taken in the Board. It was expected of the concerned Member to initiate expeditious action on the directions of the Commission and the Board collectively was expected to take expeditious decisions and all necessary steps for implementing the directions in the time allowed by the Commission.

Section 49: No inconsistency was pointed out by the Id. Counsel vis-à-vis this Section.

Section 52: The provision of 1998 Act have been given overriding effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act save as otherwise provided in Section 49.

Contention made in Para (K) of the reply seeks protection. It is evidently clear that the protection is available for anything which is in good faith done or intended to be done under 1998 Act or the rules or regulations made there under. It cannot be said in favour of the respondent Board that it was acting in good faith while contravening the directions issued by the Commission under the 1998 Act, rules or regulations made there under. In any case the protection is available to only such Government officers who are acting or intend to act under the 1998 Act.

Respondents Board enjoys the protection under Section 82 of 1948 Act but for anything which is in good faith done or intended to be done under this Act. Can the

immunity be claimed for acts done not in good faith? The respondent Board certainly cannot claim protection for acts not done in good faith under 1948 Act anyway.

The point issue No. (i) posed by the Commission whether there is any direct or indirect legal prohibition against the Commission for taking the impugned action in view of specific provisions contained in Sections 22 (1) 27, 39, 45, 47, 49 and 52 is settled against the respondent Board after its principal contention with regard to any reasonable nexus between Section 22 (1) and powers to give directions fails.

4.13.2 By filing the petition the Respondent Board had acquiesced to the jurisdiction of the Commission and cannot now wriggle out of its obligation while enjoying the privileges of the tariff order. Point Issue (ii) also is decided against the Respondent Board after decision on Point Issue (i) and the discussion in the foregoing.

4.13.3 Point Issues (iii) to (vii): These points also go against the Respondent Board after the effort of Id. Counsel to segregate the powers to give directions from powers of determination and power of punishment in Section 22 (1), Section 29 and Section 45 of the 1998 Act fails. The contention made in para (I) of the reply that the Commission's Order dated October 29, 2001 is incapable of compliance overnight for want of funds is not borne out of facts. Most of the plans and studies required in the directions issued by the Commission do not require any funds at all. They, of course, require some seriousness, dedication, application of mind and due diligence which should not have been difficult considering that the Board has on its rolls, hundreds of engineers, administrators and accounts professionals besides the Members who are supposed to be men of eminence in their respective fields as stipulated in sub-sections (2), (4) and (5) of Section 5 of the 1948 Act reproduced here below:

“(2) The Board shall consist of no less than three and not more than seven members appointed by the State Government.

(4) Of the members-

(a) one shall be a person who has experience of, and has shown capacity in, commercial matters and administration;

- (b) one shall be an electrical engineer with wide experience; and
  - (c) one shall be a person who has experience of accounting the financial matters in a public utility undertaking, preferably an electricity supply undertaking.
- (5) One of the members possessing any of the qualifications specified in sub-section (4) shall be appointed by the State Government to be the Chairman of the Board.”

Again nothing prevented the Board from outsourcing the plans and the studies, should it have discovered that it had no skills for any particular field. To a point raised from the Commission that the Commission had asked HPSEB to only submit the plans and studies which did not require any investment, the Id. Counsel Shri D. D. Sood's argument earlier in similar cases on June 17, 2002 that he was not discussing the merit was evasive. Interestingly the Respondent Board in the instant case has neither discussed nor argued the cases on merits.

4.13.4 Point issue (viii) The language of show cause notices was constructed in all modesty as per known practice of drafting of show cause notice. The HPSEB's own affidavits, undertakings and acquiescence of the Tariff Order are sufficient material before the Commission for making a prima facie case against it. The notices clearly disclosed the nature of contraventions and the prima facie cause and when read with the related correspondence on the subject, left no doubt whatsoever as to the nature of contravention. The directions are given in Chapter-7 of the Tariff Order, which are self-speaking. The directions have not been complied within the stipulated time which clearly establish a prima facie cause. The Commission was satisfied with the prima facie cause having arisen against the respondent Board. The allegation of pre-judgement and pre-determination owing to the construction of language of the show cause notices is not tenable and is, therefore, rejected.

There is no vagueness in the notice as already discussed above. The notice is not vague at all and nothing of the kind has been brought forth by the respondent Board despite specific query on the issue. Point Issue (viii), therefore, is decided against the Respondent Board.

4.13.5 Point Issue (ix): The following lines from para 55 of the Supreme Court judgement in the WBERC case are relevant to the cases: “it is seen that Sections 22 and 29 of the 1998 Act are special laws and the 1948 Act is only a general law in regard to the determination of tariff. Consequently because of the accepted principles of law for general law yields to a special law, provisions of the 1998 Act must prevail.”

The 1998 Act being the special law and the 1948 Act a general law in regard to determination of tariff, the 1998 Act shall have overriding effect over the 1948 Act notwithstanding anything inconsistent therewith contained in any enactment other than this Act save as otherwise provided in Section 49 i.e. the Consumer Protection Act, 1986 and the Atomic Energy Act, 1962. This issue also goes against the Respondent Board.

4.13.6 Point Issue (x): As per the Supreme Court judgement in WBERC case the Regulations framed by the Commission bear the authority of subordinate legislation., The Regulation 27 (xviii) of the Tariff Regulations in Chapter 4 of the Regulations vests the powers in the Commission to monitor and implement its orders and reassess the basis on which the tariff order was approved. Regulation 27(xviii) is reproduced as under:

“(xviii)The Board/Utility shall submit periodic returns, as may be prescribed, containing operational and cost data to enable the Commission to monitor the implementation of its order and reassess the basis on which tariff was approved.”

By virtue of Regulation 27(v) the Commission is mandated to keep in view the following factors while determining the tariff order:

- a) the need to link tariff adjustments in the productivity of capital employed, manpower resources and improvements in efficiency of capital and resources as to safeguard the interests of the consumers;
- b) the need to rationalise tariffs on the basis of bench marked and performance based cost of generation, transmission and distribution;
- c) unbundling of such costs to enable rational allocation of costs;

- d) the need to transparently provide the appropriate incentives in a non-discriminatory manner, for a continuous enhancement in the efficiency of generation, transmission and distribution and up-gradation in the levels of service;
- e) the simulation of competitive conditions where markets do not exist and the progressive introduction of competitive conditions;
- f) the least cost adoption of environmental standards; and
- g) the need for healthy growth of the industry.

The directions have to be viewed as integral part of the tariff order in order to achieve the objects and purposes of the Act as per Clause (d) of Section 22 (1) and the tariff factors under Regulation 27(v) (a) to (g) and 27(xviii) of the HPERC Conduct of Business Regulations, 2001. Point Issue (x), therefore, is decided against the Respondent Board.

4.13.7 Point Issue (xi): There cannot be any two views on this. The objects and purposes of the Act are absolutely clear, unambiguous and irrevocably unmistakable about it. This issue is also decided against the Respondent Board.

4.14 The learned Senior Counsel for respondent Board has conceded that under the 2003 Act the Commission has jurisdiction and powers to issue directions.

4.15 All the points at issue from (i) to (xi) are finally decided against the Respondent Board.

4.16 In the earlier 10 contraventions, for which orders were issued on August 17, 2002, even though the show cause notices had been issued to the Chairman and the Members of the Board besides its Secretary, the Commission felt that the Board does not enjoy the total independence in working and had to look to the Government for everything. The working in the Electricity Board together with its bureaucratic rigidities and red tape are the transplant of the government working where the decision making is reduced to tortuous and safe decision making. The Commission had observed that the respondent Board shall have to make serious and coordinated efforts to breakaway from such working culture and system and sooner the better. The Commission had further observed that the Board shall have to get used to and accept the existence of the Electricity Regulatory Commission and submit to its

rightful and legal directions instead of using the legal processes to subvert the real objects and gains flowing out of such direction. The Commission had further observed as under:

“The right to use the legal processes is fundamental but must not be used for stalling the reforms. It could erode the Board’s long-term viability and instead prove fatal to its very existence. The spirit behind the creation of Regulatory Commission must be respected and it should be taken seriously as a friend, guide, facilitator and above all a watchdog over the power sector. After all, the Regulator and the Utility have common good of the power sector, financial viability of the Board and the consumer at the bottom of their hearts. The Board must recognise the opportunities arising from and the inevitability of the reform measures, which could indeed revitalise the utility”.

“The Commission has absolutely no doubt whatsoever, that the directions given in the Tariff Order were aimed at making HPSEB a truly efficient, responsive and dynamic organisation. The fact that instead of complying with the directions they were questioned futilely is a sad commentary on how well meaning directions of the Commission could be subverted and hijacked to nothingness and nowhere and how the importance and urgency of the said directions could be torn to shreds on the bugbear of individual egos, denial of the stark realities, and resistance to change and adaptation to new Regulatory paradigm”.

#### **4.17 Check of consistency and correspondence:**

4.17.1 The Tariff Order dated 29-10-2001, the directions given in Chapter 7 thereof, and the show cause notice issued under Section 45 of the 1998 Act for contravention of these directions are saved under Clause (a) of Section 185 (2) of the 2003 Act. The correspondence of Sections 29(1) of the 1998 Act can be found in Sections 86, 61, 62, 64 and 65 of the 2003 Act. The terms and conditions for the determination of tariff as laid down in the Regulations and in the HPERC Guidelines for Revenue and Tariff Filing shall continue to apply for a period of one year or until the terms and conditions for tariff are specified under Section 61 of the 2003 Act as per transitional provision in this Section. The Electricity Board has become a deemed licensee from 10-6-2003. Section 23 has the provisions for issuing directions to the licensees. Similarly Section 129 of the 2003 Act gives powers to the Commission to issue such directions as may be

necessary for the purposes of securing compliance. Correspondence of Section 45 of the 1998 Act can be found in Section 142 of the 2003 Act. Similarly Section 149 of the 2003 Act is identically correspondent to Section 47 of 1998 Act. Section 174 gives overriding effect to the 2003 Act save as otherwise provided in Section 173 i.e. the Consumer Protection Act, 1986 (68 of 1986) or the Atomic Energy Act, 1962 (33 of 1962) or the Railways Act, 1989 (24 of 1989). Section 185 (1) repeals 1910, 1948 and 1998 Acts and saves amongst other matters, the reserved orders also. The central theme of the written pleadings and the oral submissions and arguments in building linkages ultimately to sub section (2) of Section 22 of 1998 Act has now been blown up in the 2003 Act thus rendering most, of the defence arguments completely irrelevant.

#### **4.18 Conclusion:**

4.18.1 The discussion in the foregoing paras conclusively and comprehensively settles the eleven points at issue solidly against the respondent. The Commission is convinced beyond a reasonable doubt that there is no direct or indirect legal prohibition and is in no doubt whatsoever, as to its jurisdiction in taking action against the respondent Board under Section 142 of the 2003 Act.

4.18.2 On the basis of the discussion in the foregoing, cumulative consideration of the aforesaid provisions of the law and for the reasons assigned, it is abundantly clear that the respondent Board has wilfully contravened the above directions of the Tariff Order issued by the Commission vide its order dated 29-10-2001 by not complying with them by the prescribed dates.

4.18.3 Now, therefore, it is ordered that without prejudice to any other penalty to which it may be liable under the 2003 Act, the respondent Board is liable for imposition of appropriate penalties under Section 142 of the 2003 Act for the contravention of various directions in the above cases.

4.18.4 There is recurrent cause of action by continuing the non-compliance and contravention of almost every important direction of the commission. The Board is showing no sign of improvement and no sign of obedience and compliance with the orders of the Commission. On the contrary, there is blatant defiance tantamount almost to contempt one after the other of the Commission's orders and directions.



4.18.5 However, before the appropriate penalties are imposed, in terms of Section 142 of 2003 Act and Regulation 51(iii) of HPERC Conduct of Business Regulations 2001, keeping in view the principles of natural justice, the Commission, would like to afford an opportunity to the Board of being heard. The Chairman and the concerned Members of the Board, should they so desire, may also make representation personally on the next date of hearing.

4.18.6 Three Copies of this order be forwarded to Secretary of the Respondent Board to inform the Chairman and the concerned Members accordingly. Secretary of the Board shall appear personally before this Commission for further hearing on 15<sup>th</sup> November, 2003 failing which matter shall be decided ex-parte.

It is so ordered.

Dated: Shimla: October 18, 2003.

**(S.S.Gupta)**  
**Chairman**