

ASSOCIATION OF INDUSTRIAL ELECTRICITY USERS

A

v.

STATE OF A.P. AND ORS.

MARCH 6, 2002

[B.N. KIRPAL, SHIVARAJ V. PATIL AND
BISHESHWAR PRASAD SINGH, JJ.]

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Andhra Pradesh Electricity Reforms Act, 1998—Sections 11 and 26.

*Regulatory Commission—Established under the Act—Fixation of Tariiff
for Licensees under the Act—Section 26(5)and Section 26(9)—Distinction
between—Explained.*

C

*Classification of Consumers—Industrial and domestic—Taking into
consideration the functions of the Commission and relevant provisions of the
Act for fixation of tarif—Consumers could be categorised as Industrial, Non-
Industrial Agricultural or Domestice consumers.*

D

Constitution of India:

*Article 226—Review Jurisdiction of High Court—Invoking of—Fixing of
tariff and providing for cross subsidy are policy matters—Hence should not
be interfered with unless power exercised is shown to be arbitrary or ex-facie
bad in law.*

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The Electricity Regulatory Commission set up under the Andhra Pradesh Electricity Reforms Act, 1998 had determined tariff for the period 1st April, 2000 to 31st March, 2001. This Order was challenged and the High Court dismissed the Writ Petitions and upheld the tariff as fixed by the Commission. Hence these appeals.

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During the pendency of these appeals, the tariff was replaced and the revised tariff not been challenged because no relief could be granted for the expired period for which tariff was fixed. Thus the appeals have become infructuous. But keeping in view the importance of some of the issues pertaining to interpretation of Section 26 of the Act, this Court considered the matter further.

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A It was contended for the appellants that tariff was required to be fixed in terms of Section 26(7) and 26(9) of the Act and accordingly there cannot be any classification of consumers of electricity and also no undue preference can be given to any consumer of electricity while fixing the tariff.

B Dismissing the appeals, the Court

C HELD: 1.1. There seems to be some overlapping between sub-section (5) and sub-section (9) of Section 26 of the Andhra Pradesh Electricity Reforms Act. But on a careful reading of sub-section (9), it is found that sub-section (9) comes into play only when during the financial year an amendment to the tariff or a new tariff is proposed. Reading sub-section (5) and sub-section (9) together, it appears that annual exercise with regard to the fixation of tariff has to be undertaken under sub-section (5), but if for any reason there is a new tariff which is to be proposed or an amendment is to take place during the financial year, then the procedure set out in sub-section (9) of Section 26 has to be followed. It is for this reason that while under Section 26(5) it is stated that the particulars are to be supplied by the licensee at least three months before the *ensuing financial year*, on the other hand under Section 26(9) the particulars are to be supplied at least three months before the *proposed date of implementation*. By use of the words 'proposed date of implementation' in contradistinction to the use of the words 'ensuing financial year' occurring in sub-section (5), the indication clearly is that sub-section (9) will apply only in case of amendment during a financial year. For normal fixation of tariff with or without modification, the exercise which has to be undertaken is under sub-section (5) of Section 26. [280-F-G-H; 281-A]

F 1.2. Sub-section (9) of Section 26 does state that the tariff which is fixed shall not show undue preference to any consumer of electricity but then the said sub-section itself permits differentiation according to the consumer's load factor or power factor, consumer's total consumption of energy during the specified period, time at which the supply is required or paying capacity of category of consumers and the need for cross-subsidisation or such tariff as is just and reasonable and be such as to promote economic efficiency in the supply and consumption of electricity and the tariff may also be such as to satisfy all other relevant provisions of the Act and the conditions of the relevant licence. This Section has to be read along with Section 11 which sets out the functions of the Commission and, *inter alia*, provides that amongst the functions is power to regulate the tariff and charges payable keeping in view both the interest of the consumer as well as the consideration that the

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supply and distribution cannot be maintained unless the charges for electricity supplied are adequately levied and duly collected. Depending upon the various factors stipulated in Section 26(7), categorisation between industrial and non-industrial, agricultural or domestic consumers can certainly take place.

[281-C-D-E]

2. Judicial Review in a matter with regard to fixation of tariff has not to be as that of an appellate authority in exercise of its jurisdiction under Article 226 of the Constitution. All that the High Court has to be satisfied is that the Commission has followed the proper procedure and normally the Court will not interfere. Fixing a tariff and providing for cross-subsidy is essentially a matter of policy and normally a Court would refrain from interfering with a policy decision unless the power exercised is arbitrary or ex facie bad in law. [281-G-H; 282-A]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2689 of 2001.

From the Judgment and Order dated 16.10.2000 of the Andhra Pradesh High Court in W.P. No. 10245 of 2000.

WITH

C.A. Nos. 2714/2001 and C.A. No. 296/2002.

Ms. K. Amareswari, Ashok Grover, Shanti Bhushan, V.R. Reddy, K. Gopal Choudhary, Ms. Mamta Choudhary, P. Niroop, Pavan Kumar, D. Ramakrishna Reddy, D. Bharathi Reedy, T.V. Ratnam, Ms. R. Madhavi Latha, K. Subba Rao, Ms. Anupama Grover, Rakesh Kumar Sharma, M.G. Ramachandran, K.V. Balakrishnan, K.V. Mohan and R. Chandrashkhar Reddy for the appearing parties.

The Judgment of the Court was delivered by

KIRPAL, J. With a view to provide for the constitution of an Electricity Regulatory Commission, restructuring of the electricity industry, rationalisation of the generation, transmission, distribution and supply of electricity avenues for participation of private sector in the electricity industry and generally for taking measures conducive to the development and management of the electricity industry in an efficient, economic and competitive manner and for matters connected therewith or incidental thereto, the Andhra Pradesh

A Electricity Reforms Act, 1998 (hereinafter referred to as “the Act”) was promulgated by the State. After it received the assent of the President, by Notification dated 27th January, 1999, it came into force with effect from 1st February, 1999.

B The present dispute arises in connection with fixation of the tariff by the Regulatory Commission which has been constituted under the said Act. The tariff which was impugned by the appellants herein was in respect of the year 1st April, 2000 to 31st March, 2001. This tariff was fixed by a decision of the Regulatory Commission dated 27th May, 2000. In the said order determining the tariff, various contentions which had been raised by the
C licensees and the other interested parties, including the appellants, were considered.

The said order dated 27th May, 2000, was challenged by a number of writ petitions filed in the High Court of Andhra Pradesh at Hyderabad. By an elaborate judgment of the Division Bench of the High Court dated 16th
D October, 2000, the writ petitions were dismissed and the tariff which was fixed by the order dated 27th May, 2000 followed by a notification under Section 26 (6) of the Act was upheld.

E During the pendency of these appeals, with the passage of time, the tariff for the year which was impugned no longer survives and it has been replaced by tariff for the year 1st April, 2001 to 31st March, 2002. It is a common ground that there has been no challenge to the tariff for the current year. In a sense, therefore, these appeals have become infructuous because no effective relief can be granted as the period for which the tariff was fixed has already expired. Be that as it may, as some issues are likely to arise in the
F future pertaining to the interpretation of Section 26 of the Act which deals with the fixation of tariffs, we have heard the learned counsel for the parties at great length.

G It has been contended on behalf of the appellants that on a correct interpretation of Section 26 of the Act, the tariff was required to be fixed by complying with the provisions of sub-section (9) and further the tariff must necessarily comply with the parameters prescribed in sub-section (7) of Section 26. It is further the case of the appellants that according to the said Section no undue preference can be shown to any consumer of electricity and there can be no classification of consumers according to the purpose for which the
H electricity is used. It has also been contended, in this regard, that the tariff

which was fixed indicates that the cost of supply of electricity to the industry was much lower than the cost of supply to some of the other consumers like domestic consumers, but by charging more per unit from the industry *vis-a-vis* the domestic consumers undue preference has been shown and that is not permissible.

Section 26 reads as follows:

“26(1) The holder of each licence granted under this Act shall observe the methodologies and procedures specified by the Commission from time to time in calculating the expected revenue from charges which it is permitted to recover pursuant to the terms of its licence and in designing tariffs to collect those revenues.

(2) The Commission shall subject to the provisions of sub-section (3) be entitled to prescribe the terms and conditions for the determination of the licensee's revenue and tariffs by regulations duly published in the Official Gazette and in such other manner as the Commission considers appropriate:

Provided that in doing so the Commission shall be bound by the following parameters:

(a) the financial principles and their applications provided in the Sixth Schedule to the Electricity (Supply) Act, 1948 read with Sections 57 and 57-A of the said Act;

(b) the factors which would encourage efficiency, economic use of the resources, good performance, optimum investments performance of licence conditions and other matters which the Commission considers appropriate keeping in view the salient objects and purpose of the provisions of this Act; and

(c) the interest of the consumers,

(3) Where the Commission, departs from factors specified in the Sixth Schedule of the Electricity (Supply) Act, 1948 while determining the licensees' revenues and tariffs, it shall record the reasons thereafter in writing:

(4) Any methodology or procedure specified by the Commission

A under sub-sections (1), (2) and (3) above shall be to ensure that the objectives and purposes of the Act are duly achieved.

B (5) Every licensee shall provide to the Commission in a format as specified by the Commission at least 3 months before the ensuing financial year full details of its calculation for that financial year of the expected aggregate revenue from charges which it believes it is permitted to recover pursuant to the terms of its licence and thereafter it shall furnish such further information as the Commission may reasonably require to assess the licensee's calculation. Within 90 days of the date on which the licensee has furnished all the information that the Commission requires, the Commission shall notify the licensee either.--

C (a) that it accepts the licensee's tariff proposals and revenue calculations, or

D (b) that it does not consider the licensee's tariff proposals and revenue calculations to be in accordance with the methodology or procedure in its licence, and such notice to the licensee shall,--

E (i) specify fully the reasons why the Commission considers that the licensee's calculations does not comply with the methodology or procedures specified in its licence or is in any way incorrect, and

(ii) propose a modification or an alternative calculation of the expected revenue from charge, which the licensee shall accept.

F (6) Each holder of a supply licence shall publish in the daily newspaper having circulation in the area of supply and make available to the public on request the tariff or tariffs for the supply of electricity within its licensed area and such tariff or tariffs shall take effect only after seven days from the date of such publication.

G (7) Any tariff implemented under this section,--

H (a) shall not show undue preference to any consumer of electricity, but may differentiate according to the consumer's load factor or power factor, the consumer's total consumption of energy during any specified period, or the time at which supply is required; or paying capacity of category of consumers and need for cross-subsidisation;

(b) shall be just and reasonable and be such as to promote economic efficiency in the supply and consumption of electricity; and

(c) shall satisfy all other relevant provisions of this Act and the conditions of the relevant licence.

(8) The Commission also shall endeavour to fix tariff in such a manner that, as far as possible, similarly placed consumers in different areas pay similar tariff.

(9) No tariff or part of any tariff required by sub-section (6) may be amended more frequently than once in any financial year ordinarily except in respect of any changes expressly permitted under the terms of any fuel surcharge formula prescribed by regulations. At least three months before the proposed date for implementation of any tariff or an amendment to a tariff the licensee shall provide details of the proposed tariff or amendment to a tariff to the Commission, together with such further information as the Commission may require to determine whether the tariff or amended tariff would satisfy the provisions of sub-section (7). If the Commission considers that the proposed tariff or amended tariff of a licensee does not satisfy any of the provisions of sub-section (7), it shall, within 60 days of receipt of all the information which it required, and after consultation with the Commission Advisory Committee and the licensee, notify the licensee that the proposed tariff or amended tariff is unacceptable to the Commission and it shall provide to the licensee an alternative tariff or amended tariff which shall be implemented by the licensee. The licensee shall not amend any tariff unless the amendment has been approved by the Commission.

(10) Notwithstanding anything contained in sections 57-A and 57-B of the Electricity (Supply) Act, 1948, no Rating Committee shall be constituted after the date of this enactment and the Commission shall secure that licensees comply with the provisions of their licenses regarding their charges for the sale of electricity (both wholesale and retail) and for the connection to and use of their assets or systems in accordance with the provisions of this Act.

Explanation :-

In this section, -

A (a) “the expected revenue from charges” means the total revenue which a licensee is expected to recover from charges for the level of forecast supply used in the determination under sub-section (5) above in any financial year in respect of goods or services supplied to customers pursuant to a licensed activity ; and

B (b) “tariff” means a schedule of standard prices or charges for specified services which are applicable to all such specified services provided to the type or types of customers specified in the tariff notification.”

C A reading of sub-section (2) indicates that in the determination of the tariff, the financial principles provided in the Sixth Schedule to the Electricity (Supply) Act, 1948 are applicable unless for reasons recorded in writing, as contemplated by Section 26(3), the Commission departs from the factors specified in the said Sixth Schedule. Sub-section (5) of Section 26 requires every licensee to provide to the Commission at least three months before the ensuing financial year details of its calculation with regard to the expected aggregate revenue from the charges which it believes it is entitled to realise. The Commission is entitled to ask for further particulars and when the data have been supplied the Commission is required within 90 days either to accept the licensee’s tariff proposals and revenue calculations or it may proceed under Section 26(5)(b) and, *inter alia*, propose a modification or an alternative calculation of the expected revenue from the charges which the licensee shall accept.

E The determination of the Commission either under Section 26(5)(a) or 26(5)(b) is then to be notified under Section 26(6) and seven days after the said publication the tariff so notified is to take effect.

F There is no doubt that sub-section (9) of Section 26 is unhappily worded. There does appear, at first blush, some overlapping between sub-section (5) and sub-section (9), but on a careful reading of sub-section (9), we agree with the contention of Shri Shanti Bhushan that sub-section (9) comes into play only when during the financial year an amendment to the tariff or a new tariff is proposed. Reading sub-section (5) and sub-section (9) together, it appears to us that the annual exercise with regard to the fixation of tariff has to be undertaken under sub-section (5), but if for any reasons there is a new tariff which is to be proposed or an amendment is to take place during the financial year, then the procedure set out in sub-section (9) of Section 26 has to be followed. It is for this reason that while under Section 26(5) it is stated

that the particulars are to be supplied by the licensee at least three months before the ensuing financial year, on the other hand under Section 26(9) the particulars are to be supplied at least three months before the proposed date of implementation. By use of the words 'proposed date of implementation' in contra-distinction to the use of the words 'ensuing financial year' occurring in sub-section (5), the indication clearly is that sub-section (9) will apply only in a case of amendment during a financial year. For normal fixation of tariff with or without modification, the exercise which has to be undertaken is under sub-section (5) of Section 26.

We are also unable to agree with the learned counsel for the appellants that the Act does not envisage classification of consumers according to the purpose for which the electricity is used. Sub-section (9) of Section 26 does state that the tariff which is fixed shall not show undue preference to any consumer of electricity but then the said sub-section itself permits differentiation according to the consumer's load factor or power factor, consumer's total consumption of energy during the specified period, time at which the supply is required or paying capacity of category of consumers and the need for cross-subsidisation of such tariff as is just and reasonable and be such as to promote economic efficiency in the supply and consumption of electricity and the tariff may also be such as to satisfy all other relevant provisions of the Act and the conditions of the relevant licence. This Section has to be read along with Section 11 which sets out the functions of the Commission and, *inter alia*, provides that amongst the functions is power to regulate the tariff and charges payable keeping in view both the interest of the consumer as well as the consideration that the supply and distribution cannot be maintained unless the charges for electricity supplied are adequately levied and duly collected. Depending upon the various factors stipulated in Section 26(7), categorisation between industrial and non-industrial, agricultural or domestic consumers can certainly take place. This is precisely what has been done in the present cases. The High Court has at length considered all aspects of the cases and has examined in detail the exercise which was undertaken by the Commission in fixing the tariff and, in our opinion, the view expressed by the High Court calls for no interference.

We also agree with the High Court that the judicial review in a matter with regard to fixation of tariff has not to be as that of an appellate authority in exercise of its jurisdiction under Article 226 of the Constitution. All that the High Court has to be satisfied is that the Commission has followed the proper procedure and unless it can be demonstrated that its decision is on the

A face of it arbitrary or illegal or contrary to the Act, the Court will not interfere. Fixing a tariff and providing for cross-subsidy is essentially a matter of policy and normally a court would refrain from interfering with a policy decision unless the power exercised is arbitrary or *ex facie* bad in law.

B For the aforesaid reasons, we do not find any reason to differ from the view taken by the High Court. We, accordingly, dismiss these appeals with costs.

S.K.S.

Appeals dismissed.