

actually drawn by them. The scheme of fixed charges liability based on draws allowed the purchasers of electricity to draw electricity from the Grid at their pleasure with no control. This led to the Grid Frequency to vacillate which cause grid collapse and blackouts in the entire region besides affecting the equipments of all generations, other electricity utilities and also the consumers. This has been a serious prejudice to public interest.

After the constitution of Central Commission under the Electricity Regulatory Commissions Act, 1998, the Government of India referred the matter of introduction of ABT to the Central Commission. The State Electricity Boards including Andhra Pradesh State Electricity Board (the predecessor of the appellants) were part of the Regional and National Task Forces constituted by the Government of India and also participated in the deliberation before the Central Commission. Pursuant to aforesaid consensus reached, the Central Commission considered the matter extensively in its order dated 4.1.2000 which spoke about introduction of ABT in a phased manner. However Commission in view of request of Powergrid/CTU to stagger the implementation of ABT so as to make satisfactory arrangements before implementation issued a schedule. The ABT scheme in respect of Simhadri SPTS thermal station was made applicable w.e.f. 1.12.2005.

The Central Electricity Regulatory Commission (CERC) *suo moto* ordered the application of Availability Based Tariff (ABT) to Simhadri SPTS thermal station of the NTPC with effect from 1.12.2005. On 4.7.2005, the appellant challenged the said order before Appellate Tribunal which was dismissed. Hence present appeal.

The questions which have arisen for consideration in the present appeal are: Whether the application of Availability Based Tariff (ABT) in relation to Unscheduled Interchange (UI) charges, which otherwise is not a component of tariff in terms of Regulation 15 of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004 are beyond the jurisdiction of the CERC; As such the impugned order passed by the Appellate Tribunal for Electricity has completely ignored the fact that the CERC order, which was passed *suo moto* and *ex parte*, is non est and without jurisdiction; Can the ABT as established and provided in the order of the CERC by its order dated 4.1.2000 be implemented under the provisions of Electricity Act, 2003, particularly when there is no provision under the statute that allows the CERC to levy UI Charges; and whether in the present facts and circumstances as regards the Simhadri SPTS thermal station of the

A NTPC which admittedly supplies power to the State Grid and has no connection with the management of the National Grid, the CERC in such circumstances can exercise, particularly when matters relating to the State Grid falls within the role and function of the State Electricity Regulatory Commission.

B Dismissing the appeal and answering the questions raised in the appeal in negative, the Court

C HELD: 1. The Simadhri Station is owned and controlled by the NTPC which is a Government of India undertaking. S.79(1)(a) of the Electricity Act, 2003 contemplates that the Central Commission has jurisdiction over generating companies owned or controlled by the Central Government. In view thereof, the provisions under s.86 cannot be applied for NTPC station. The various sections under the Electricity Act would clearly show beyond any doubt the powers of Central Commission and jurisdiction in regard to the grid, the scheduling and despatch. Under s.79(1)(h) the Central Commission has the power to specify Grid Code. It also provides that the function of the State Commission to specify State Grid Code under s.86(1)(f) should be consistent with the Grid Code specified by the Central Commission and therefore the power of the State Commission is subservient to the power of the Central Commission. Sub-section (1) of s.28 deals with the function of RLDC (Regional Load Despatch Centre) to ensure integrated operation of the power system in the concerned region. The term power system is of wide import. It is not confined to inter State Transmission Lines but extends to even supply lines, distribution, main service lines etc. However, sub-section (3) of s.28 deals with duties of RLDC using the expression within the region or in the region. Obviously it includes both Inter State and Intra State lines and is not restricted to inter State lines. The scheme of the Electricity Act is that RLDC is required to follow the principles, guidelines and methodologies specified by the Central Commission and all persons including the distribution licensees like the appellants are required to follow the directions of RLDC. RLDC can enforce such directions through SLDC. In turn SLDC is required to follow the directions of RLDC. Having regard to the aforesaid mentioned provisions of law the contention that the Central Commission has no jurisdiction to deal with grid discipline in regard to single State beneficiary station, has no merit.

[Paras 17, 18 and 19] [1073-E, F, G, H; 1074-A, B, D, E]

H 2.1. The application of ABT and imposition of Unscheduled Interchange (UI) charges are essential part of the Functions of the Central Commission under s.79(1)(h) of the Electricity Act, 2003. The maintenance of Grid

discipline envisaged under the Grid Code is regulated by the mechanism of ABT and UI charges. There is no basis for the appellant to contend that unless something is a part of Tariff the Central Commission cannot exercise powers and functions. The ABT and UI charges are commercial mechanism to control the utilities in scheduling, dispatch and drawl and the UI charges are tariff or charges payable for deviations. Thus there is no ambiguity in respect of the jurisdiction of the Central Commission. [Para 22] [1075-D, E, F]

2.2. The circumstances under which the order of the Central Commission was made, the previous orders passed by the Central Commission and the fact that the order challenged by the Appellant was only an order fixing a prospective date for implementation of ABT in the case of generating station supplying to single state and not an order deciding the right or obligations. It is therefore not correct for the appellants to say that the Order was passed ex-parte or *suo moto* in violation of any principles of natural justice or otherwise the order is bad or non est. After the order of the Central Commission was passed, the second respondent and the State Load Dispatch Centre (SLDC) in the State of Andhra Pradesh had deliberated on the steps to be taken for implementation. The SLDC was acting on behalf of the appellants. The appellants and SLDC did not raise any objection or otherwise plead any difficulty in the implementation of the ABT and UI mechanism at the relevant time. Even now, except for pleading hyper-technicalities, the appellants have not shown any legal prejudice they suffer on account of the implementation of ABT for the Simhadri generating station of NTPC. The question of law has been raised mechanically without any factual bearing or implication. [Para 23] [1075-G, H; 1076-A, B, C]

2.3. The Central Commission has the power and function to evolve commercial mechanism such as imposition of UI charges to regulate and discipline. It is well settled that a power to regulate includes within it the power to enforce. [Para 24] [1076-D]

Indu Bhusan v. Rama Sunderi, AIR (1970) SC 228; *K. Ramanathan v. State of Tamil Nadu*, [1985] 2 SCC 116; *V.S. Rice and Oil Mills v. State of Andhra Pradesh*, AIR (1964) SC 1781; *Deepak Theatre, Dhuri v. State of Punjab*, [1992] Supp.1 SCC 684, relied on.

2.4. In the facts and circumstances as alluded, and as per the Scheme of the Electricity Act, 2003, the Central Commission has the plenary power to regulate the Grid, particularly in the context of the Grid being integrated

A and connected across the region comprising of more than one State. The State Grid cannot be isolated and can be seen as independent from the region.

[Para 25] [1076-F]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2104 of 2006.

B From the Final Judgment and Order dated 3.1.2006 passed by the Appellate Tribunal for Electricity New Delhi in Appeal No. 152/2005.

Jaideep Gupta, Sanjay Sen, Rana S. Biswas, Mirdul Chakrawarty, Ruchika Rathi and Sanjay Jain for the Appellants.

C M.G. Ramachandran, K.V. Mohan, K.V. Balakrishnan and Anand K. Ganesan for the Respondents.

The Judgment of the Court was delivered by

D **H.K. SEMA, J.** (1) This appeal is directed against the judgment and order dated 3.1.2006 passed by the Appellate Tribunal for Electricity (Appellate Jurisdiction) in Appeal No.152 of 2005 whereby the Appellate Tribunal dismissed the appeal filed by the appellants.

E (2) The appellants challenged the order of the Central Electricity Regulatory Commission (CERC) dated 4.7.2005 passed in petition No.67/2003 (*suo moto*), whereby the CERC inter alia ordered the application of Availability Based Tariff (ABT) to Simhadri SPTS thermal station of the National Thermal Power Corporation (NTPC) with effect from December 1, 2005.

F (3) This appeal was admitted on 1.5.2006 to be heard on the following questions of law:

G (A) Whether the application of Availability Based Tariff (ABT) in relation to Unscheduled Interchange (UI) charges, which otherwise is not a component of tariff in terms of Regulation 15 of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004 and they are liable to be held as beyond the jurisdiction of the Central Electricity Regulatory Commission (CERC)?

H (B) As such the impugned order passed by the Appellate Tribunal for Electricity has completely ignored the fact that the CERC order, which was passed *suo moto* and *ex parte*, is non est and without

jurisdiction?

A

(C) Can the Availability Based Tariff as established and provided in the order of the CERC by its order dated 4.1.2000 be implemented under the provisions of Electricity Act, 2003, particularly when there is no provision under the statute that allows the CERC to levy Unscheduled Interchange Charges? and

B

(G) whether in the present facts and circumstances as regards the Simhadri SPTS thermal station of the National Thermal Power Corporation (NTPC) which admittedly supplies power to the State Grid and has no connection with the management of the National Grid, can the CERC in such circumstances exercise, particularly when matters relating to the State Grid falls within the role and function of the State Electricity Regulatory Commission?

C

FACTUAL BACKGROUND:

(4) This appeal has a chequered history leading to the passing of the 4th July, 2005 order by CERC. Avoiding prolixity, we may recite few facts.

D

WHAT IS ABT

(5) Before we proceed further, we may at this stage, highlight what is ABT and the purpose of introduction of ABT. ABT was introduced in regard to number of generating stations of NTPC and other Central Sector generating stations under the orders of the CERC. Prior to the introduction of ABT, the fixed charges were payable by the purchasers based on the units of electricity actually drawn by them. The scheme of recovery of fixed charges based on drawl of electricity was not considered appropriate and rationale particularly from the point of view of Grid safety and security. The scheme of fixed charges liability based on drawls allowed the purchasers of electricity to draw electricity from the Grid at their pleasure with no control. This led to the Grid Frequency to vasilate from 48.5 Hz to 51.5 Hz, whereas Grid Frequency was required to be maintained ideally at 50 Hz and at the most, it should be *within* optimum variations. The frequency exceeding the optimum variation was causing grid collapse and blackouts in the entire region besides affecting the equipments of all generations, other electricity utilities and also the consumers. This has been a serious prejudice to public interest.

E

F

G

(6) Before the introduction of ABT scheme it was deliberated at different levels namely, by (a) consultants appointed by the Government of India to

H

A inquire into and make recommendations; (b) National Task Force (NTF) appointed by the Government of India; (c) Regional Task Forces again appointed by the Government of India; and (d) Central Electricity Authority.

B (7) After the constitution of Central Commission under the Electricity Regulatory Commissions Act, 1998 (in short "the Act"), the Government of India referred the matter of introduction of ABT to the Central Commission. The State Electricity Boards including Andhra Pradesh State Electricity Board (the predecessor of the appellants herein) were part of the Regional and National Task Forces constituted by the Government of India and also participated in the deliberation before the Central Commission.

C (8) At the 7th meeting of the National Task Force (NTF) held on 8.11.1996 it was unanimously decided that availability based generation tariff will be adopted and will be applied to all including future IPPs.

D (9) Pursuant to the aforesaid consensus reached, the Central Commission considered the matter extensively in its order dated 4.1.2000 inter alia which are as under:

"3. DISTINCTIVE FEATURES OF ABT

E 3.1 We shall now discuss the distinctive features of the proposed ABT system. In order to understand the need and rationale behind the system, it is necessary to narrate the present problems in grid operation. Some of these as set out by Central Transmission Utility (CTU) in its presentation before the Commission are:

F "(i) Low frequency during peak load hours, with frequency going down to 48.0 - 48.5 Hz for many hours every day.

(ii) High frequency during off peak hours, with frequency going up to 50.5 to 51 Hz for many hours every day.

(iii) Rapid and wide changes in frequency - 1 Hz change in 5 to 10 minutes, for many hours every day.

G (iv) Very frequent grid disturbances, causing tripping of generating stations, interruption of supply to large blocks of consumers, and disintegration of the regional grids."

H These wide frequency fluctuations tend to cause serious damages both at the generation and load ends, which are not perceived, and have never been quantified or evaluated. Experts consider these

fluctuations unacceptable all over the world. In India though the problems have been identified, no progress has been made in bringing them under control. One important reason for this has been the absence of direct incentives or penalties for the individual utilities responsible for the problems. There has also been a general reluctance among all concerned to introduce financial incentives or disincentives.

The CTU has stated that the resolution of these problems requires:

- (i) Maximisation of generation during peak load hours and load curtailment equal to the deficit in generation.
- (ii) Backing down of generation to match the system load reduction during off peak hours, keeping the merit order of generation in view."

WHAT IS UI (UNSCHEDULED INTERCHANGE)

(10) In addition to two charges, a third charge contemplated in the ABT scheme is for the unscheduled interchange of power (UI charges). The UI charges are payable depending upon what is deviated from the schedule and also subject to the grid conditions at that point of time. This element was introduced to bring about the effective discipline in the system. Under this system UI charges will be payable, if:

- (i) a generator generates more than the schedule, thereby increasing the frequency;
- (ii) a generator generates less than the schedule, thereby decreasing the frequency;
- (iii) a beneficiary overdraws power, thereby decreasing the frequency;
- (iv) a beneficiary underdraws power, thereby increasing the frequency."

(11) It is thus clear from the above that UI charges are a commercial mechanism to maintain grid discipline. The UI charges penalises whosoever caused grid indiscipline, whether generator (NTPC) or distributor, is subject to payment of UI charges who are not following the schedule. The UI charges are not payable if the appellants maintain their drawl of electricity consistent with the schedule given by themselves. Therefore, there is no merit in the contention of the appellants that the UI charges are by way of penalty.

(12) The order dated 4.1.2000 passed by the CERC is intended to

A achieve the following:-

- (a) ABT is necessary for Grid discipline.
- (b) ABT is being introduced qua generating stations but is a method to control all players, namely, generator, transmitter, distributors and users.

B

- (c) The concept of ABT was accepted by all concerned including the predecessor of the Appellants herein without any reservation or conditions.

C

- (d) The concept of ABT is not restricted in its application only to generating stations supplying electricity to more than one State. It is applicable equally to a generating stations supplying electricity to one State only.

D

- (e) The Order dated 4.1.2000 does not make any specific exclusion of the generating stations supplying electricity to one State. There is no such observation in the Order dated 4.1.2000. The operative part of the order dated 4.1.2000 which speaks about introduction of ABT in a phased manner for Multiple State beneficiaries generating stations in different region cannot be inferred from the above that the Central Commission had rejected the concept of ABT for single State beneficiary generation stations.

E

(13) However, the Commission in view of the request of Powergrid/CTU to stagger the implementation of ABT so that they would be able to make satisfactory arrangements before implementation, the following schedule for implementation of ABT was issued:

F

Southern Region - 1-4-2000

Eastern Region - 1-6-2000

Northern Region - 1-8-2000

G

Western Region - 1-10-2000

H

(14) The Commission has also decided that all other generating stations owned by the Central Power Sector Utilities which are supplying power to only one beneficiary of the State be brought under the purview of ABT. Simhadri SPTS (2 x 500 MW) was also brought under ABT scheme w.e.f. 1.12.2005. This would show that the ABT scheme was implemented at the

request of Powergrid/CTU so that they would be able to make satisfactory arrangement before the implementation. It is clear that the ABT scheme was implemented in a phased manner. The ABT scheme in respect of Simhadri SPTS was made applicable w.e.f. 1.12.2005. It is therefore not correct to say that Simhadri SPTS was kept out of the purview of the ABT scheme. A

(15) The principal contention of the counsel for the appellants is founded on two grounds, (1) that the CERC did not have the jurisdiction to introduce ABT for generating stations supplying power within the State of Andhra Pradesh and (2) the CERC has failed to provide an opportunity of hearing to the appellants whose interests have been adversely affected by the impugned order. B C

(16) It is submitted that the order dated 4.7.2005 passed by the Commission in discharge of its power under Section 79(1)(a) of the Electricity Act, 2003 cannot be justified. It is further argued under Section 79(1)(c) the Central Commission can only regulate inter-State transmission of electricity. It is argued that Section 86(1)(c) of the Act confers the power of jurisdiction of facilitating intra-State transmission upon the State Regulatory Commission. It is also argued that the UI charges in respect of Simhadri could have only been imposed by the State Regulatory Commission, after due consultation with all other generators in the State and the transmission utility who has the responsibility to maintain the grid. D E

(17) In our view, the aforesaid contention is thoroughly misconceived. Simhadri Station is owned and controlled by the NTPC which is a Government of India undertaking. Section 79(1)(a) of the Act contemplates that the Central Commission has jurisdiction over generating companies owned or controlled by the Central Government. In view thereof, the provisions under Section 86 cannot be applied for NTPC station. The various sections under the Electricity Act would clearly show beyond any doubt the powers of Central Commission and jurisdiction in regard to the grid, the scheduling and despatch. Under Section 79(1)(h) the Central Commission has the power to specify Grid Code. It also provides that the function of the State Commission to specify State Grid Code under Section 86(1)(f) should be consistent with the Grid Code specified by the Central Commission and therefore the power of the State Commission is subservient to the power of the Central Commission. Section 2 (32) defines Grid as inter connected transmission lines. The expression used inter connected has a significant meaning. Sub-section (1) of Section 28 deals with the function of RLDC (Regional Load Despatch Centre) to ensure H

- A integrated operation of the power system in the concerned region. The term power system is of wide import. It is not confined to inter State Transmission Lines but extends to even supply lines, distribution, main service lines etc. However, sub-section (3) of Section 28 deals with duties of RLDC using the expression "within the region" or "in the region". Obviously it includes both 'Inter State and 'Intra State' lines and is not restricted to inter State lines.
- B Section 29 of the Act empowers the RLDC to give directions and exercise such supervision and control to any person for ensuring stability of grid operation. It also provides that the State Load Desptach Centre shall duly enforce such directions. Sub-section (3) of Section 33 of the Act provides that the State Load Desptach Centre shall comply with the directions of the
- C Regional Load Desptach Centre.

(18) A fascicule reading of the above provisions would clearly show that the scheme of the Electricity Act is that RLDC is required to follow the principles, guidelines and methodologies specified by the Central Commission and all persons including the distribution licensees like the appellants herein

D are required to follow the directions of RLDC. RLDC can enforce such directions through SLDC. In turn SLDC is required to follow the directions of RLDC.

- (19) Having regard the aforesaid mentioned provisions of law the contention that the Central Commission has no jurisdiction to deal with grid discipline in regard to single State beneficiary station, in our view, has no merit. As already noticed ABT is to ensure discipline in the integrated system. Further ABT is being introduced stationwise and it is the Central Commission alone who has the jurisdiction particularly, in regard to generating stations of NTPC, which is a Central Government, owned and controlled generating company.
- E

F *ALLEGATION OF VIOLATION OF NATURAL JUSTICE*

- (20) Counsel for the appellants alleged that the order dated 4.7.2005 has been passed by the Central Commission (*suo moto*) without hearing the parties concerned, thereby the interests of the appellants have been adversely affected, by the impugned order. In our view, this contention is wholly misconceived. As mentioned earlier, the Commission after consultation with various agents and after threadbare discussion, a decision was taken by the Commission on 4.1.2000 to introduce ABT scheme. The order dated 4.1.2000 was passed after hearing all parties concerned including the predecessor (State of Andhra Pradesh) of the appellants herein. The appellants step into
- G the shoes of the State of Andhra Pradesh. A policy decision for the
- H

introduction of the ABT Scheme was taken on 4.1.2000 after consultation and threadbare discussion and after considering all pros and cons of the scheme. The so called *suo moto* order passed by the Central Commission by order dated 4.7.2005 is only the implementation of the ABT in regard to all generating stations of Central Public Sector supplying electricity to one State which was only the implementation of the decision taken by order dated 4.1.2000. No grievance has been raised by any generating stations including that of State of Andhra Pradesh, the predecessor of the appellants herein to the decision taken on 4.1.2000. Having accepted the policy decision taken on 4.1.2000, without any demur, they are not now permitted to say that the implementation of the scheme without hearing them is in violation of principles of natural justice.

(21) For the reasons aforesaid, we answer all the questions raised in this appeal in the negative as hereunder:-

Question (A)

(22) The application of Availability Based Tariff and imposition of Unscheduled Interchange (UI) charges are essential part of the Functions of the Central Commission under Section 79(1)(h) of the Electricity Act, 2003 which reads "to specify Grid Code having regard to the Grid Standards", and Sub-section (2) of Section 28 read with Section 178(2)(g) dealing with the Central Commission's powers to frame Grid Code. The maintenance of Grid discipline envisaged under the Grid Code is regulated by the mechanism of ABT and UI charges. There is no basis for the appellant to contend that unless something is a part of Tariff the Central Commission cannot exercise powers and functions. The ABT and UI charges are commercial mechanism to control the utilities in scheduling, dispatch and drawl and the UI charges are tariff or charges payable for deviations. In the facts and circumstances mentioned above the legal position is clear and there is no ambiguity in respect of the jurisdiction of the Central Commission.

Question (B)

(23) The circumstances under which the order of the Central Commission was made, the previous orders passed by the Central Commission and the fact that the order challenged by the Appellant was only an order fixing a prospective date for implementation of ABT in the case of *generating station* supplying to single state and not an order deciding the right or obligations. It is therefore not correct for the appellants to say that the Order was passed

- A ex-parte or *suo moto* in violation of any principles of natural justice or otherwise the order is bad or *non est*. As mentioned above after the order of the Central Commission was passed, the second respondent and the State Load Dispatch Centre (SLDC) in the State of Andhra Pradesh had deliberated on the steps to be taken for implementation. The SLDC was acting on behalf of the appellants. The appellants and SLDC did not raise any objection or otherwise plead any difficulty in the implementation of the ABT and UI mechanism at the relevant time. Even now, except for pleading hyper-technicalities, the appellants have not shown any legal prejudice they suffer on account of the implementation of ABT for the Simhadri generating station of NTPC. The question of law has been raised mechanically without any
- C factual bearing or implication.

Question (C)

- (24) As already noticed, the Central Commission has the power and function to evolve commercial mechanism such as imposition of UI charges to regulate and discipline. It is well settled that a power to regulate includes within it the power to enforce. See *Indu Bhusan v. Rama Sunderi*, AIR (1970) SC 228, *K. Ramanathan v. State of Tamil Nadu*, [1985] 2 SCC 116, *V.S. Rice and Oil Mills v. State of Andhra Pradesh*, AIR (1964) SC 1781 and *Deepak Theatre, Dhuri v. State of Punjab*, [1992] Supp. 1 SCC 684.
- D

E *Question (G)*

- (25) In the facts and circumstances as alluded, and as per the Scheme of the Electricity Act, 2003 mentioned above, the Central Commission has the plenary power to regulate the Grid, particularly in the context of the Grid being integrated and connected across the region comprising of more than one State. The State Grid cannot be isolated and can be seen as independent from the region.
- F

(26) In the view that we have taken there is no merit in this appeal and it is accordingly dismissed. No costs.

G D.G.

Appeal dismissed