

**Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal nos. 153 of 2011 and Appeal no. 154 of 2011

Dated: 19th July, 2012

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member**

Appeal nos. 153 of 2011

In the matter of:

**U.P. Power Corporation Ltd.
Shakti Bhawan
14, Ashok Marg
Lucknow, 226001 U.P.**

....Appellant

Versus

- 1. M/s. Jagannath Steel Pvt. Ltd.Respondent(s)**
Rajaganj Phoolpur,
Azamgarh – 276 301, U.P.
- 2. U.P. Electricity Regulatory Commission,**
Kisan Mandi Bhawan
Vibhuti Khand, Gomti Nagar
Lucknow, U.P.

Counsel for the Appellant (s) : Mr. Pradeep Misra
Mr. Manoj Kr. Sharma
Mr. Daleep Kumar Dhayani

Counsel for the Respondent (s) : Mr. Sanjay Singh
Mr. Kunal Verma
Mr. Vishal Dixit
Mr. Ashok Kumar Singh
Mr. Ravindra Kr. Singh
Mr. U.C. Tripathi
Mr. Sumit Kumar Sharma

Appeal no. 154 of 2011

In the matter of:

**U.P. Power Corporation Ltd.
Shakti Bhawan
14, Ashok Marg
Lucknow, 226001 U.P.**

....Appellant

Versus

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Mr. Kunal Verma
Mr. Vishal Dixit
Mr. Ashok Kumar Singh
Mr. Ravindra Kr. Singh
Mr. U.C. Tripathi
Mr. Sumit Kumar Sharma

JUDGEMENT

Mr. RAKESH NATH, TECHNICAL MEMBER

The Appeal nos. 153 of 2011 and 154 of 2011 have been filed by UP Power Corporation Ltd. against the orders dated 12.1.2005 and 3.9.2004 respectively passed by the Uttar Pradesh Electricity Regulatory Commission in the matter of tariff and penalty charged by the Appellant from M/s. Jagannath Steel Pvt. Ltd, an industrial consumer.

2. M/s. Jagannath Steel Pvt. Ltd. is the Respondent no.1. The U.P. Electricity Regulatory Commission (“State Commission”) is the Respondent no.2.

3. The brief facts of the case are as under:-
 - 3.1 M/s. Jagannath Steel Pvt. Ltd., the first Respondent herein, is an industrial consumer having an induction furnace with connected load of 1800 kVA. It has been getting supply from the Appellant through an independent feeder since 31.3.1993. The supply is made by a 33 kV independent feeder emanating from 132 kV Shahganj Grid Sub-station.

 - 3.2 The State Commission passed tariff order in respect of retail supply by the Appellant for the FY 2002-03 which came into effect from 09.11.2002. The tariff order indicated rate of charge for large and heavy power (HV-2) as applicable to the consumer category of the Respondent no.1. Separate charges were indicated for consumers getting supply as per Urban

- Schedule and Rural Schedule with unrestricted supply or restricted supply during restricted hours at the option of the consumer. The tariff also had a provision for penalty for consumers not opting for supply during peak hours/restricted hours for violation of restrictions during the restricted hours.
- 3.3 On 03.11.2002, the Respondent no.1 made a request to the Executive Engineer of the Appellant opting for not using supply during the restricted hours and also considering their unit in rural area and to use supply as per the Rural Schedule.
- 3.4 The Executive Engineer by its office memo dt. 13.11.2002 passed an order on the representation of the Respondent no.1 to bill the Respondent no.1 according to its option w.e.f. 15.11.2002. The Executive Engineer through the endorsement of the above order to the Respondent no.1 stated that the Respondent no.1 would not use supply during the restricted hours failing which it would be liable to pay penalty as described in the Rate Schedule.

- 3.5 When the above matter came to the knowledge of higher authorities an enquiry was conducted by the Dy. General Manager of the Distribution circle, Azamgarh. The Dy. General Manager of the Appellant by its order dated 3.11.2003 held that it was not correct on the part of the Executive Engineer to allow rebate for rural schedule to the Respondent no.1 as it was getting supply through a 33 kV independent feeder and directed for recovery of rebate given by the Executive Engineer to the Respondent no.1.
- 3.6 Against the above order dated 3.11.2003 of the Dy. General Manager of the Appellant, the Respondent no.1 filed an application before the State Commission.
- 3.7 The State Commission passed an order on 3.9.2004 directing the Appellant to charge the Respondent no.1 at rates as applicable for rural schedule with restricted supply. The State Commission also directed the Appellant to revise the billing for the period of dispute and adjust the payments made by the

- consumer, if any, and also levy the penalty on account of peak hour/restricted hour violation as per tariff schedule.
- 3.8 The Appellant filed an appeal against the State Commission's order dated 3.9.2004 before the Lucknow bench of Allahabad High Court.
- 3.9 In the meantime the Respondent no.1 filed applications on 8.10.2004, 11.10.2004 and 19.10.2004 before the State Commission regarding resumption of electricity for at least 14 hours a day as per rural schedule, review/modification of the State Commission's order dated 3.9.2004 and quashing of penalty bill for the period 15.11.2002 to 30.8.2002 raised by the Appellant on 29.9.2004 for violations during the restricted hours.
- 3.10 The State Commission by order dated 12.1.2005 did not deem fit to review its earlier order but also directed the Appellant to review the penalty bill raised by them on the Respondent no.1 in pursuance of the order dated 3.9.2004.

3.11 Against the order dated 12.1.2005 also the Appellant filed an Appeal before the High Court.

3.12 During the pendency of the above Appeals against the orders dated 03.09.2004 and 12.01.2005, an application was moved by the Appellant before the High Court to withdraw the Appeals with liberty to file the same before this Tribunal. The High Court allowed the applications and dismissed the Appeals as withdrawn.

3.13 Subsequently, the Appellant has filed these Appeals in Appeal no.154 of 2011 against the State Commission's order dated 03.09.2004 and in Appeal no. 153 of 2011 against the order dated 12.01.2005.

3.14 As the issue in both these Appeals are connected to the same dispute, a common judgment is being rendered.

4. Ld. Counsel for the Appellant raising the issue of maintainability of the application filed by Respondent no. 1 before the State Commission has submitted that the State Commission had no jurisdiction to decide the billing dispute involving a consumer under the provisions of the Electricity Act, 2003 as also under UP Electricity Reforms Act, 1999 or under the UP Electricity Supply Code, 2002. He further stated that under the Supply Code, 2002 the Appeal against the decision of Executive Engineer or Dy. General Manager will lie before the Appellate Committee but the Respondent no.1 had not filed any Appeal against the order dated 03.11.2003 passed by the DGM before the Appellant Committee and hence the complaint before the State Commission was not maintainable. He also relied on the findings of the Supreme Court in 2007(8) SCC 381 in the matter between Maharashtra Electricity Regulatory Commission Vs. Reliance Energy Ltd. and Ors. and various judgment of this Tribunal in Appeal nos. 57 of 2006, 165 of 2005 and 42 of 2006 to the effect that the consumer disputes could be decided only by the proper forum under Section 42(5) of the Electricity Act, 2003 and not by the State Commissions.

5. On merits, the Ld. Counsel for the Appellant has argued that the supply to Respondent no.1 was through an independent feeder as load to arc/induction furnace/re-rolling mills could be made only through independent feeder to ensure the supply of power for 20 hours a day as per Government Order no. 3671 dated 17.10.1995. He also contended that the tariff order had given option to the consumers who are getting supply with urban schedule or rural schedule to opt for unrestricted supply or restricted supply; a consumer who is getting electricity through urban schedule could not have opted for rural schedule; the State Commission in its review order dated 12.01.2005 while not agreeing to review the impugned order dated 03.09.2004 has wrongly directed the Appellant to review the penalty imposed as per its earlier order and that when the review was not allowed, a direction could not be given for review of penalty.

6. Per Contra, the Respondent no.1 has raised its objection to the maintainability of the Appeals before this Tribunal. According to the Respondent no.1, the Parliament has given right to Appeal

under Section 111 of the Electricity Act 2003 before the Appellate Tribunal only if a person is aggrieved by the order made under this Act or an order of the Appropriate Commission made under this Act; however, if the order had not been passed under the Electricity Act, 2003, then no Appeal could be filed before this Tribunal, under Section 111 of the 2003 Act; in the present case the tariff order was passed for the FY 2002-03 under the Reforms Act, 1999; the State Commission framed the Supply Code 2005 under the Electricity Act, 2005 only on 18.02.2005 thus, the present dispute was raised before the State Commission under the Reforms Act, 1999 which could be challenged only before the High Court and that merely because the High Court has given liberty to the Appellant to file the Appeals before this Tribunal it would not make these Appeals maintainable.

7. On merits, the Respondent no.1 has submitted that the tariff order for the FY 2002-03 provided for an option to the consumer to get supply as per location of the unit through independent feeder; in the present case the unit of the

Respondent no. 1 is located in rural area hence it opted for supply as per rural rate schedule and that therefore, it is entitled for tariff applicable for rural schedule.

8. It is further submitted by the Respondent no.1 that it has never used the supply for more than 15% of contracted load during the peak hour/restricted hour from 6 p.m. to 10 p.m.; therefore, no penalty can be imposed for violation of peak hour/restricted hour; as such the Appellant has erred in imposing penalty for using power supply more than rural supply schedule during the hours other than peak hours of 6 pm to 10 pm and that in those circumstances the State Commission in its order dated 12.01.2005 has given correct meaning of the peak/restricted hour restriction.

9. We have heard both the Ld. Counsel for the Appellant as well as the Ld. Counsel for the Respondent no.1 who argued the matter at length. In the light of the rival contentions urged by both the parties, the following questions would arise for our consideration.

- i) Whether the Appeal against the order of the State Commission in the matter dealing with the tariff order issued prior to the enactment of the Electricity Act, 2003 would lie in this Tribunal?
- ii) Whether the State Commission was correct in adjudicating in billing dispute between the Respondent no.1, a consumer, and the distribution licensee after enactment of the Electricity Act, 2003?
- iii) Whether the State Commission was correct in deciding that the Respondent no.1 was entitled to tariff applicable to rural supply schedule even though it was getting supply through a dedicated 33 kV feeder from a grid sub-station?
- iv) Whether the State Commission is proper in holding in the Review Order that the penalty for using power supply in excess of rural supply schedule was not applicable to the Respondent no.1 and the restriction would be applicable only during the peak hours even after having disallowed the Review Petition?

10. Let us take up the first issue regarding maintainability of the Appeal in this Tribunal.

10.1 According to Ld. Counsel for the Respondent no.1, since the impugned order had been passed under the State's Reforms Act, 1999 and not under the Electricity Act 2003, the Appeal against the same could not be filed before this Tribunal.

10.2 According to Ld. Counsel for the Appellant, the State Commission on enforcement of the Electricity Act, 2003 on 10.6.2003 was deemed to be the Commission as per the provisions of the Act and the Appeal against any order passed by the State Commission would lie in the Appellate Tribunal under Section 111 of the Act.

10.3 According to first proviso to Section 82(1) of the 2003 Act, the State Commission established by a State Government under the Electricity Regulatory Commissions Act, 1998 and the State Reforms Act as specified in the schedule, and functioning as

such immediately before the appointed date i.e. 10.6.2003 shall be deemed to be the State Commission under the 2003 Act. Thus, the UP Electricity Regulatory Commission which was functioning prior to the enactment of the 2003 Act became the State Commission for the purpose of the 2003 Act from 10.06.2003 onward.

10.4 In the present case, the Respondent no.1 filed the petition before the State Commission on 12.12.2003 against the order of the Dy. General Manager of the Appellant dated 03.11.2003. Both these events have occurred after the enactment of the 2003 Act. The State Commission existing prior to the enactment of the 2003 Act would become functional as the State Commission under the 2003 Act. Even though, the dispute related to application of tariff order for the FY 2002-03 dated 22.10.2002, passed before the enactment of the 2003 Act, the cause of action in the present case arose only on 03.11.2003 when the order of the Dy. General Manager was passed. The State Commission passed the impugned order on 03.09.2004.

10.5 According to the Appellant, the Appellant had to challenge the impugned order dated 03.09.2004 before the High Court since at that time the Appellate Tribunal was not constituted under 2003 Act. It is noticed, Respondent no.1 subsequently filed the application for modification of the order and accordingly, the State Commission passed the order dated 12.01.2005 modifying its earlier order dated 03.09.2004. Even during that period, the Tribunal was not functional and hence Appeal against the order dated 12.01.2005 was filed by the Appellant before the High Court.

10.6 Having realized that the Appeals would be maintainable only before the Tribunal, which began to function in May, 2009, the Appellant filed an application before the High Court for withdrawal of the Appeals with liberty to file the Appeals before this Tribunal and after getting the liberty, these Appeals have been filed.

10.7 It is true that the petition was filed by the Respondent no.1 before the State Commission on 12.12.2003 under the provisions of the Supply Code, 2002, issued prior to the enactment of the 2003 Act. However, the cause of action arose after the enactment of the 2003 Act and the petition was filed, heard and decided by the State Commission on 3.9.2004 i.e. after the enactment of the 2003 Act.

10.8 The U.P. Electricity Reforms Act, 1999 forms part of the schedule of the 2003 Act and has been saved and its provisions not inconsistent with the provisions of the 2003 Act shall apply as per Section 185(3) of the 2003 Act. According to Ld. Counsel for the Respondent no.1, the order passed by the State Commission under the Reforms Act, 1999 even after the enactment of the 2003 Act could not be challenged before the Tribunal. This contention, in our opinion, is not tenable for the following reasons.

10.9. Firstly, the statement of object and reasons of the 2003 Act indicates that the Appellate Tribunal has been created for

disposal of Appeals against the decision of the Central and State Electricity Regulatory Commissions so that there is speedy disposal of such matters.

10.10 Secondly, the cause of action i.e. filing of the petition by the Respondent no.1 before the State Commission and the passing of order by the State Commission arose only after the enactment of the 2003 Act. The State Commission which was the deemed Commission under the first proviso to Section 82(1) for the purpose of the 2003 Act heard and decided the matter after the enactment of the 2003 Act. Therefore, the impugned orders are appealable under Section 111 of the 2003 Act before the Appellate Tribunal.

10.11 Thirdly, the Appeals against the impugned orders of the State Commission were pending before the High Court and the issues had not been decided.

10.12 Fourthly, Section 36 of the Reforms Act, 1999 providing for Appeal against the order of the Commission in the High Court

being inconsistent with the provisions of the 2003 Act after constitution of the Appellate Tribunal is not applicable.

10.13 Ld. Counsel for the Respondent no.1 has referred to the findings in the following cases to press its point on maintainability.

- a) (2008) 13 SCC 414 in the matter of Grid Corporation of Orissa Vs. Gajendra Haldia
- b) (2009) 7 SCC 384 in the matter of West Bengal Electricity Regulatory Commission Vs. Gajendra Haldia
- (c) (2010) AIR SC 133 in the matter of G.V. Sreeram Reddy Vs. Returning Officer
- (d) (2010) AIR SC 3607 in the matter Nahal Chand Laloochand Pvt Ltd Vs. Panchali Cooperative Housing Society Ltd.

(e) (2010) AIR SC 3342 in the matter of Bhakra Beas Management Board Vs. Krishna Kumar Vij & Anr.

(f) (2010) AIR 2001 in the matter of Chattisgarh Electricity Board Vs. Central Electricity Authority.

10.14 In our opinion the above cases are not relevant to the present case. In cases (a) & (b) referred to above, the Hon'ble Supreme Court held that the Appeal filed by the Respondent no.1 was not maintainable before the Tribunal as the Respondent no.1 did not have the locus standi. In the present case the Appellant is a person aggrieved by the order of the State Commission which has not been denied by the Respondent no.1. The contention of the Respondent no.1 is only that the Appeal is maintainable before the High Court under the provisions of the Reforms Act, 1999.

10.15 The cases referred to (c) and (d) above, has been cited to press the point that while interpreting a special statute which is a self-contained code, the Court must consider the intention

of the legislature, which must be given effect. We have already considered the provisions of the Act and intention of the legislature before deciding the matter.

10.16 In case (c) referred to above, the Hon'ble Supreme Court has held that a statute or any enacting provision must be so construed as to make it effective and operative and any such construction which reduces the statute to a futility has to be avoided. This finding also does not help the Respondent no.1 in this case.

10.17 The case referred to at (e) deals with the period of limitation in filing the Appeal against the order of this Tribunal before the Hon'ble Supreme Court. This judgment will also not be of any help to the Respondent no.1.

10.18 In view of above we hold that the above Appeals are maintainable before this Tribunal and the contentions of the Respondent no. 1 with regard to maintainability of these Appeals is rejected.

11. The second issue is regarding jurisdiction of the State Commission in adjudicating upon the billing dispute of the consumer raised in this matter.

11.1 According to the Ld. Counsel for the Appellant, the State Commission has no jurisdiction to decide a billing dispute or consumer disputes and the same has to be raised before Consumer Grievance Redressal Forum under Section 42(5) and against the decision of the Forum, the Appeal would lie before Ombudsman under Section 42(6) of the Electricity Act, 2003.

11.2 According to the Ld. Counsel for the Respondent no.1, the Supply Code, 2005 under the Electricity Act, 2003 was framed on 18.02.2005 and thus, prior to framing of the Supply Code, 2005 the provisions of Supply Code, 2002 would apply.

11.3 This issue in fact has been decided by this Tribunal in its judgment dated 23.12.2009 in Appeal no.42 of 2006 in the

matter of U.P. Power Corporation Ltd. & Others Vs M/s. Premier Ispat (Pvt) Ltd & Others. The relevant extracts of the judgment are reproduced below:-

“04) The petition No.148 of 2003 was purportedly filed under the Uttar Pradesh Electricity Supply Code of 2002. The validity of the Code is not in dispute. Nor has it been argued before us that the petition was incompetent under the Code. We, therefore, proceed with the assumption that Uttar Pradesh Electricity Supply Code 2002 permitted the Commission constituted under the Reforms Act to adjudicate upon a dispute between a licensee and the consumer. Now we can refer to the corresponding provisions of the Act. The functions of the State Commission are enumerated in section 86 of the Act. Clause (f) of section 86 (1) specifically gives power to the State Commission to adjudicate upon disputes between licensee and generating companies. The Act conspicuously deprives the Commission of any power to adjudicate upon a dispute between a consumer and a licensee including a distribution licensee, like the Appellant. The Act makes special provisions for adjudication of such disputes. Section 42, inter alia, prescribes that the distribution licensee appoints, within six months of the appointed date (the date when the Act comes into force namely 10th June 2003) a Forum for redressal of the grievances of the consumers. The same section requires the State Commission to appoint an Ombudsman to hear representations of a consumer whose grievance have not been redressed by the Consumer Grievance Redressal Forum. Thus the Act makes specific provision regarding the mode of redressal of a grievance of a consumer. Any power given by the Reforms Act to the Commission for redressal of grievance thus becomes inconsistent with the Act. The Reforms Act to that extent is repealed. The Uttar Pradesh Electricity Supply Code 2002 cannot have a force better than the Reforms Act. The

Commission, therefore, acting under the Uttar Pradesh Electricity Supply Code 2002, cannot assume any power to adjudicate any disputes between a consumer and a licensee.

- 05) *The plea of the learned counsel for the Respondent that the Uttar Pradesh Electricity Supply Code 2002 continued to be in force till it was repealed by a fresh Code in 2005 cannot be accepted in view of the fact that on repeal of the Reforms Act of 1999 the Code formulated under the Reforms Act also cannot survive.*
- 06) *The Appellant was required to constitute the Consumer Grievance Redressal Forum within six months of the appointed date i.e. 12.05.04. The Commission formed Uttar Pradesh Electricity Supply Code 2005 which came into force on 18.02.2005. As per clause 7.10 of the Uttar Pradesh Electricity Supply Code 2005 such a complaint is entertainable by Consumer Grievance Redressal Forum. Admittedly, the Consumer Disputes Redressal Forum was in existence when the impugned order was passed. The learned counsel for the Appellant, Mr. Misra, says that even if the commission has entertained the petition No. 148 of 2003 on a wrong or right assumption of jurisdiction the petition was required to be transferred to the Consumer Grievance Redressal Forum. The judgment of the Supreme Court in the matter of New India Insurance Co. Ltd. Vs. Smt Shanti Misra (1975) 2 SCC 840 has been cited in support. In paragraph 5 of the judgment the Supreme Court related to the change of Forum as well as the period of limitation on account of amendment in section 110 of the Motor Vehicles Act. The Supreme Court made the following clear observations in respect of change of Forum by a new law.*

“On the plain language of section 110-A and 110-F there should be no difficulty in taking the view that the change in law was merely a change in forum i.e. a change of adjectival or procedural law or substantive law. It is a well established proposition that such a change of law operates retrospectively and the person has to go to the new forum

even if his cause of action or right of action accrued prior to the change of forum. He will have a vested right of action but not a vested right of forum.”

07) In view of the above discussion, we have no option but to hold that the Commission did not have the jurisdiction to pass the impugned order. Accordingly, we allow the appeal and set aside the impugned order for having been passed without jurisdiction.”

11.4 In another judgment dated 20.11.2009 in appeal no.165 of 2005 in the matter of Madhyachal Vidyut Vitran Nigfam Ltd & Another Vs Uttar Pradesh Electricity Regulatory Commission & Another, this Tribunal has decided as under.

“05) The question before us is whether the order dated 13.04.05 and the penalty order dated 23.08.05 are within jurisdiction. The order dated 23.08.05 is passed for non-compliance of the order dated 13.04.05. Therefore, the principal issue is whether the Commission had the jurisdiction to pass the order dated 13.04.05.

06) There is no dispute that the order dated 13.04.05 was passed in a petition challenging the order of CGRF. Therefore, the Commission has exercised appellate jurisdiction over an order of CGRF. There is no dispute that the CGRF which was constituted on 12.05.04 was the right forum which heard the Respondent’s application regarding the bills raised by the appellant and regarding its prayer for restoration of connection. It is also not disputed that there is no provision either in the Act or in the Regulations framed by the Commission providing for any appeal to the Commission from the order of the CGRF. The learned counsel for the Respondent No.2 contends that since there was no Ombudsman the Respondent No.2 contends that

since there was no Ombudsman the Respondent No.2 took up the matter with the Commission. The Ombudsman came into existence on 16.08.05. Admittedly the Regulation allows an appeal from the order of the CGRF to the Ombudsman. On 13.04.05 when the impugned order was passed by the Commission there was no Ombudsman and, therefore, no appeal from the CGRF could be presented. The simple question is whether in the absence of the Ombudsman the Commission could have assumed the appellate jurisdiction from the order of CGRF.

07) The powers of the Commission are enumerated in section 86 of the Act. One of the powers enumerated therein is the power to adjudicate a dispute between the licensees and generating companies and to refer any dispute to arbitration. There is no power given to the Commission to adjudicate upon disputes between licensees and consumers. The Commission framed the Electricity Supply Code 2005 in exercise of powers conferred by section 50 and section 181, read with sections 43 to 48, 50, 55 to 59 of the Act which was notified on 18.02.05. The Supply Code, inter alia, provided for setting up of CGRF in accordance with UPERC Consumer Grievance Redressal Forum and Ombudsman Regulations 2003 as amended from time to time. This also provides that any consumer aggrieved by non-redressal of his grievance by CGRF may make a representation for the redressal of his grievance by CGRF may make a representation for the redressal of his grievance to the Ombudsman appointed by the Commission. Earlier to that the Commission had framed UPERC (Consumer Grievance Redressal Forum and Ombudsman Regulation 2003) which came into effect on 09.12.03. These Regulations provided an appeal before the State Regulatory Commission from the order of the Ombudsman. There was no provision at any point of time for an appeal to the Commission from the CGRF.

08) The Commission cannot assume jurisdiction to hear the appeal from the order of CGRF simply because the Ombudsman had not been established till then. The

jurisdiction of the Commission has to be granted by the legislature. The legislature not having granted any such power the Commission could not have assumed such a jurisdiction. The Commission did not have any original jurisdiction to decide the question as section 86 does not give any such power to the Commission.

- 09) *In our earlier judgment, in M/s. Polyplex Corporation Ltd. Vs. Uttaranchal Power Corporation Ltd. & Ors. in appeal No.220 of 2006, this Tribunal held that no petition/appeal/application lies before any Regulatory Commission or this Tribunal in respect of billing matters. We also held that no petition/appeal/application lies to any Regulatory Commission or Appellate Tribunal from an order passed by the Ombudsman or CGRF or any other body like the Appellate Committee. The Hon'ble Supreme Court in the case of Maharashtra Electricity Regulatory Commission Vs. Reliance Energy Ltd. (2007) 8 SCC 381 held that section 86(1) (f) of The Electricity Act 2003 which prescribes the adjudicatory functions of the State Commission does not encompass within its domain complaints of individual consumers and that it only provides that the Commission can adjudicate upon the disputes between the licensees and the generating companies and to refer any such dispute to arbitration. The Supreme Court affirmed that this does not include in it a grievance of an individual consumer. The Supreme Court further held that a proper forum for that is section 42(5) and thereafter section 42(6), read with the Regulation, if any, which provide for establishing the CGRF and the Ombudsman.*
- 10) *In view of the above discussion, we hold that the order dated 13.04.05 was entirely without jurisdiction. We also hold that the Commission could not have proceeded to impose any penalty for non-compliance with the order dated 13.04.05. Accordingly, both the orders dated 13.04.05 and 23.08.05 are liable to be set aside. Hence, the appeal is allowed and the orders dated 13.04.05 and that of 23.08.05 are set aside."*

11.5 In the above judgments it has been decided that the State Commissions do not have the powers to adjudicate on a billing dispute between a consumer and licensee. The findings rendered by this Tribunal in the above judgments, will squarely apply to the present case.

11.6 According to Ld. Counsel for the Appellant, even under the provisions of the Supply Code, 2002 the Appeal against the decision of Executive Engineer or Dy. General Manager (now Superintending Engineer) will lie to the Appellate Committee as provided in Annexure 7.2 of the Code, 2002 but the Respondent no.1 had not filed any Appeal before the said committee against the order dated 3.11.2003 passed by DGM and hence, the complaint before the State Commission was not maintainable even as per the Supply Code, 2002.

11.7 We have examined the UP Electricity Reforms Act, 1999 and the Supply Code, 2002. The functions of the State Commission under the Reforms Act, 1999 do not include the adjudication of billing dispute between a consumer and distribution licensee.

There is no other provision in the Reforms Act, 1999 which empowers the State Commission to adjudicate upon the billing disputes between a consumer and licensee.

11.8 Clauses 7.26, and 7.29 of the Supply Code, 2002 do provide for filing complaints to the State Commission only when the consumer is aggrieved by the decision of the licensee after exhausting the channels for redressal of grievance as specified in the Code. Clause 7.18 to 7.20 of the Supply Code, 2002 describe the consumer grievance redressal mechanism for billing. According to clause 7.20 of the Supply Code, 2002 the Appeal from the order of the Executive Engineer or Dy. General Manager shall lie to the Appellate Committee as per the procedure detailed in Annex 7.2. According to Annex 7.2, the Committee at area level/CGM headed by Chief Engineer (Distribution) for the billing disputes above Rs.10 lacs was the Appellate Committee in the present case.

11.9 Clause 7.29 of the Supply Code stipulates that complaints shall not be admitted by the State Commission for hearing unless it

is accompanied by documentary evidence that the procedure for redressal of grievance of the licensee as specified in the Code has been fully complied with. Admittedly, the Respondent no.1 had not filed an appeal against the order of the DGM before the Appellate Committee.

11.10 The Reforms Act, 1999 did not empower the State Commission to adjudicate upon the billing disputes between the consumer and the licensee. So, the State Commission could not have assumed powers to adjudicate upon the billing disputes under the Supply Code, 2002 if the Reforms Act did not provide for the same. Even if it is assumed for argument sake that the State Commission had powers to adjudicate upon the billing disputes under the Supply Code, 2002 the procedure of consumer grievance redressal was not followed by the Respondent no.1 and without the compliance of the same, the State Commission could not adjudicate upon the dispute as per clause 7.29 of the Supply Code, 2002.

11.11 We also notice from paragraph 12 of the impugned order dated 3.9.2004 that the State Commission has referred to its functions under 61(d) of the Electricity Act, 2003 in safeguarding the consumer interest for adjudicating upon the billing dispute of the Respondent no.1 Section 61(d) of the 2003 Act is under tariff determination and does not empower the State Commission to adjudicate upon the consumer billing disputes. Thus, reference to Section 61(d) of the 2003 Act in the impugned order for adjudicating the billing dispute between Respondent no.1 and the Appellant is not warranted.

11.12 In view of above, we hold that the State Commission had no jurisdiction to adjudicate the billing dispute between the Respondent no.1, a consumer, and the distribution licensee, the Appellant.

12. Let us now take up the third issue on merits of the impugned order dated 3.9.2004.

12.1 The Ld. Counsel for the Appellant has argued that the Respondent no.1 did not have the option under the Tariff Order for Rural Supply Schedule tariff. The Tariff Order had given option to the consumers getting supply with urban supply schedule or rural schedule to avail supply or not to avail supply during the restricted hours. However Respondent no.1 availing supply through an independent feeder was not entitled to opt for rural schedule.

12.2 Ld. Counsel for the Respondent no.1 has submitted that the Tariff Order for the FY 2002-03 provided for option to the consumer to get supply as per the location of the unit. It is stated that since their unit is located in the rural area they opted for supply as per rural schedule and the State Commission correctly allowed the same.

12.3 Let us now examine the rate schedule for HV-2 category according to the Tariff Order dated 20.10.2002 applicable from 9.11.2002. The relevant rate of charge is reproduced below:-

“

Large and Heavy Power HV-2	Urban Schedule			Rural Schedule		
	Energy Charge (Rs)	Demand Charge (Rs)	*Minimum Charge (Rs)	Energy Charge (Rs)	Demand Charge (Rs)	*Minimum Charges (Rs)
	per kVAh	Per kVA	Kva/Year	kVAh	Per kVA	Per Kva/Year
A For consumers opting for supply during restricted hours						
For supply above 11kV and upto & including 66 kV	3.55	170	5340 (445/month)	3.00	145	4140 (345/month)
B. For consumers not opting supply during restricted hours						
For supply above 11 kV and upto & including 66kV	3.20	170	4740 (395/month)	2.70	145	3960 (330/month)

“

“(b) All consumers will have an option to avail supply or not to avail supply during restricted hours. In both the cases his option is to be intimated to the concerned Executive Engineer of UPPCL under registered post and after issuance of formal order by him, they will avail the supply according to the option opted by them

and will pay the demand charges and energy charges under item 4 of "Rate of Charge". However the Licensee shall intimate to the consumer connected on the rural feeder about its readiness/availability of power to supply during restricted hours, in case, consumer opts for supply during restricted hours.

- (c) *Consumers who do not opt for supply during peak hours/restricted hours shall be allowed to use the power not more than 15% of their contracted demand in restricted hours. In case of use of excess power over 15% during restricted hours, for such consumers a penalty of Rs.50 per kVA per day of contracted load for the number of days in a month in which he defaults shall be levied. In the month of default, the consumer shall be billed at the rates specified for consumers having unrestricted supply in addition to the above penalty."*

12.4 The above rate schedule for HV-2 category provides for different tariff for urban schedule and rural schedule. The consumer have also option to avail supply or not to avail supply during the peak hours/restricted hours and for which different tariffs will be applicable. For consumer opting for supply during peak hours/restricted hours, the tariff is higher. The rate schedule did not provide any option to the consumer for availing supply as per Urban Schedule or Rural Schedule. It only provided for lower tariff for rural schedule presumably due to availability of lesser hours of supply compared to urban schedule. The option was only available for availing or not availing supply during the peak hours/restricted hours. There was a provision for penalty

on consumers opting for not availing supply during peak hours/restricted hours to exceeding use of more than 15% of the contracted demand during the peak hours/restricted hours.

12.5 Now let us examine the findings of the State Commission. The relevant paragraphs of the impugned order dated 3.9.2004 are reproduced below:-

“4. In first instance, the Commission observed that the tariff order for FY 2002-03, HV-2, Clause 4, specifies separate rate of charges for the urban and rural schedule, and further categorized for restricted and unrestricted category. The Petitioner applied for billing in rural schedule, as the installation is located in rural area, in accordance to tariff order that confers rights to option for not availing supply during restricted hours. The Executive Engineer, granted the consumer’s request for billing in rural schedule under restricted category, but did not take the requisite follow up action to curtail use as per the rural schedule nor amended the agreement. The required vigil for peak hour/restricted hour use by consumer was also not exercised as per clause 4(c) of the note in Tariff order for FY 2002-03, when the MRI downloads were available.

12. *The Commission has an important function under Section 61(d) of EA-2003 in tariff regulations towards all consumers as per Electricity Act 2003 in safeguarding of consumers interest and at the same time. Recovery of the cost of electricity in a reasonable manner.*

13. *In the present matter, the consumer has ‘used the supply’ whatsoever made available to him, and has also not ‘restricted’ himself for adhering to notified rural hours. The learned counsel for Petitioner has also willfully consented on*

behalf of consumer, to bear any penalty imposed as called for in 4(c) for use during restricted hours.

14. *Also, in the present instance, the Executive Engineer of the division issued his orders for rural schedule in compliance to provision given in the agreement with the consumer. But going by the reasoning concluded in para 4, 12 & 13 above, the Commission, in the interest of fair play, deems fit, that the consumer should be billed under rural Schedule, with options to use only during unrestricted hours.*

15. *The Commission directs the Respondents that from the date of orders of Executive Engineer of the division, and subsequently thereafter, the billing of consumer shall be done on the basis of rural schedule with restricted supply to consumer. The load factor rebate shall be admissible as per rules. The licensee shall revise the billing from the period of dispute and adjust the payments made by the consumer, if any, and also levy the penalty on account of peak hour/restricted hours as per tariff schedule.”*

12.6 Thus, according to the State Commission, the consumer Respondent no.1 located in rural area could opt for rural schedule. This, is an incorrect interpretation of the Tariff Order. As evident from the tariff schedule, the consumer only had the option of availing or not availing supply during the peak hours/ restricted hours but did not have the option for urban or rural supply schedule. If a consumer is connected to feeder which is

following the supply of rural schedule then only the rates for rural schedule will be applicable.

12.7 We notice from the documents filed before the State Commission by the Appellant, the Respondent no.1 was drawing power from an independent feeder emanating from a 132 kV Grid Sub-station and was receiving supply for about 20 hours per day as against supply of 8 or 9 hours per day of rural schedule.

12.8 Thus, rural schedule was not applicable to the Respondent no.1 which was drawing power through an independent feeder with no other rural load connected to the feeder which was required to be rostered as per the rural schedule. Having availed the benefit of supply as per the urban schedule, Respondent no.1 could not claim the benefit for tariff applicable for rural schedule.

12.9 Hence, we are not in agreement with the contention of the Respondent no.1 that being located in rural area he will be

entitled to tariff for rural schedule. It appears from the Tariff Schedule for HV-2 consumers that the tariff is linked to the urban or rural schedule followed on the feeder on which the consumer is connected. If the intention of the Tariff Order was to apply tariff as per the location of the consumers in rural or urban area then there was no need to add the word “schedule” after the urban and rural categories and the State Commission in the Tariff Order would have used the words ‘Urban Area or Rural Area’ in place of ‘Urban Schedule or Rural Schedule’.

12.10 In view of the above we are not in agreement with the findings of the State Commission regarding applicability of tariff for rural schedule to the Respondent no. 1.

12.11 For the above reasons, the impugned order dated 3.9.2004 is set aside both on the ground of lack of jurisdiction and also devoid of merits.

13. The fourth issue is regarding the directions of the State Commission in the review order dated 12.1.2005 for review of

its earlier order dated 3.9.2004 relating to penalty on account of peak hours/restricted hours as per the tariff schedule.

13.1 In view of our setting aside the main order dated 3.9.2004, the Review order dated 12.1.2005 also does not survive. Thus both the impugned orders dated 3.9.2004 and 12.1.2005 are set aside.

Summary of findings:

- (i) The Appeal against the orders dated 3.9.2004 and 12.1.2005 lie with the Appellate Tribunal as the cause of action arose and the order was passed by the State Commission after the enactment of the Electricity Act, 2003 and the Appeals filed before the High Court by the Appellant due to Appellate Tribunal being not functional at that time and the issues had not been decided by the High Court.

- (ii) The State Commission did not have the jurisdiction to adjudicate upon the billing disputes between the consumer and a

- distribution licensee both under the State Reforms Act, 1999 and the Electricity Act, 2003. Even otherwise, the Consumer Grievance Redressal Mechanism specified under the Supply Code, 2002 had not been complied with fully by the Respondent no.1 before filing complaint before the State Commission. Thus, the State Commission could not have entertained the application as per the provisions of the Supply Code, 2002.
- (iii) The tariff order did not provide any option to the consumer for availing Rural Schedule and Urban Schedule. The option provided in the tariff order was for availing or not availing supply during peak hours/restricted hours. Respondent no.1 which is getting supply from an independent feeder from a 132 kV Grid Sub-station was not entitled to tariff applicable to rural schedule. Respondent no.1 could have only opted for availing or not availing supply during peak hours/restricted hours. Thus, the order dated 3.9.2004 is set aside both on jurisdiction and merits.

(iv) As the main order dated 3.9.2004 is set aside, the consequent order passed in the Review dated 12.1.2005 does not survive.

14. Both these Appeals are allowed. Both the impugned orders passed by State Commission dated 3.9.2004 and 12.1.2005 are set aside. However, no order as to costs.

Pronounced in open court on 19th day of July, 2012.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

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REPORTABLE/NON-REPORTABLE

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