

Regulatory interface with judiciary: the Indian experience

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Introduction

Until recently, natural monopolies, established and evolved in the belief that monopolies enjoy economies of scale in the delivery of services, were providing infrastructure services in most countries. Absence of competition gave monopoly suppliers the opportunity to set prices without providing commensurate value for money, and generally, the service providers conducted their business with little regard to quality or consumer interests. Further, in many cases, this led to operational inefficiencies, poor quality of services, and inefficient allocation of resources.

Governments in many countries including India found that they could no longer subsidize the inefficient operation of these services due to worsening fiscal constraints; the resources required for infrastructure improvements were limited and there were conflicting claims from other sectors. These, in addition to certain other non-ideological factors (Ministry of Finance 1996), compelled governments in many countries to look for commercialization and privatization of their infrastructure services. Technological advances also made it possible to unbundle infrastructure services, both horizontally and vertically. Thus, services that could be performed by several operators on a competitive basis could be separated from those that are best performed by a monopolistic service provider.

Governments also discovered that commercialization and privatization were not possible without independent regulation to balance the interests of various stakeholders, including consumers; ensure financial viability of the industry; provide comfort to the private sector considering that most of the incumbent operators were large government-owned monopolies; and finally, reduce transaction costs associated with privatization. Independent regulation in infrastructure sectors is new in the South Asia region, and, naturally, poses new challenges not only to the regulators but also to the various stakeholders, including the government. There are about 25 regulatory agencies in the region of which about 20 are in India.

How do regulatory agencies differ from government and the judiciary?

Regulatory bodies, independent but accountable, have been created in most countries through specific legislation. They have been vested with functions and powers earlier enjoined on the governments or their agencies. For instance, these bodies are required to fix and regulate tariff for various infrastructure services, and regulate the quality of services. In the past, tariff-setting functions were in the domain of the government, and were performed without any effective consultation or transparency. Tariff setting was often a political decision influenced by electoral compulsions. In sharp contrast, the new regulatory process has been mandated to be consultative and transparent. The regulators are also required to be quick in their response to the needs of the stakeholders, and bring to bear expertise in decision making—expertise that governments often lacked. And all their decisions have to be well reasoned speaking orders, a compulsion that governments did not have. Above all, their orders can be appealed against—a risk that governments did not run, cloaked as their decisions were in the garb of policy. In short, although the regulators exercise the very powers that earlier were exercised by government, they are accountable to a much greater degree for their actions, and have much larger expectations to fulfil.

The regulators enjoy certain judicial powers; their proceedings are often quasi-judicial and they have the status of a civil court. But they are not the judiciary. The judicial bodies generally deal with bipolar centric interests, and in general, apply laws to facts. The regulatory bodies, on the other hand, are required to balance interests of multiple groups for the overall development of the sector. Naturally, the procedure and processes that these bodies are required to follow would have to be different, and accordingly, the legislations in different countries have addressed these issues differently.

The key aspects of ‘judicial process’ are the following. A passive judge rules on the basis of the record; the law of evidence governs what may and may not go into the record; parties adopt adversarial positions, and so on. The ‘conventional regulatory approach’ mimics this to some extent, with deviation being seen primarily with regard to the evidentiary rules. Now, the alternative process seeks to get away from the adversarial model and tries to build consensus and ‘buy-in’ from the start. The intention is to improve the quality of information coming into the decision-making process; recognize the multipolar nature of the disputes that come up before regulators; and keep down the levels of antagonisms that lead to endless appeals.

Further, in the normal judicial process, the issues are defined at the start, notices are given to the parties, all parties are heard, and impartial judges decide on the basis of the record. In fact, adversarial mode

does not always lead to a complete resolution of disputes, and is, thus, not appropriate for technical subjects that are not limited to ascertaining the facts. The process is also not efficacious in influencing long-term behavioural changes among various parties. Regulators, on the other hand, can use alternative regulatory instruments for rule making, such as workshops, advisory committees, public hearings, and negotiated rule making, and, for dispute resolution, mediation and arbitration.

Unlike the judiciary, the regulators have to work within the parameters of specified regulatory objectives, which are made clear in the legislation itself and are also bound by the stated policy of the government. For example, the TRAI (Amendment) Ordinance Act 2000 was enacted with the objectives 'of establishing TRAI (Telecom Regulatory Authority of India) and TDSAT (Telecom Dispute Settlement and Appellate Tribunal) to regulate the telecommunication services, adjudicate disputes, dispose of appeals, and to protect the interests of service providers and consumers of the telecom sector, to promote and ensure orderly growth of the telecom sector'. Accordingly, the functions of the regulatory bodies are laid out in the legislation: for instance, the TRAI is mandated (a) to ensure compliance terms and conditions of licence; (b) fix terms and conditions of interconnectivity between service providers; (c) regulate tariff; (d) lay down standards of quality of service; etc. TRAI is also bound by the National Telecom Policy of 1994 and 1999. In the judicial arena, no such functional responsibilities are specified. Also, even for the discharge of these functions, the legislation often lays down certain principles or guidelines. For example, Section 29 of the ERC Act 1998 says that the state electricity regulatory commission shall determine by regulation the terms and conditions for fixation of tariff and, while doing so, shall be guided by seven principles. One of them is that the commission shall consider factors that would encourage efficiency, economical use of resources, good performance, optimum investments, etc. This is in sharp contrast to judicial proceedings where application of rules to facts is the primary function. The judicial process is largely retroactive whereas the regulatory process charged with responsibility for efficiency, growth, and sector development has to be pro-active, and, where necessary, go beyond current data to look at the future.

Relationship issues among government, regulator, and judiciary

In the earlier regime, the decisions on tariff were taken by the government or its agencies, and the same government could also review its own decisions. There was no provision for appeal against government's orders, as these were largely administrative orders or policy decisions;

these orders could at best be challenged in the writ jurisdiction of the High Courts. Now, the regulatory bodies have to be accountable for their actions. There is a provision for appeal against regulatory decisions. Appeals are either made in High Courts or in some cases before specialized bodies such as tribunals. In India's telecom sector, TDSAT has been set up as a specialized body to hear appeals against TRAI. This is in line with the practice in the UK and some other countries.

Framework for judicial intervention

The superior courts can always intervene in regulatory decisions through their inherent power of judicial review. In addition, regulatory decisions are appealable in the High Court in most cases. The grounds for such appeal have been left vague in many a legislation, except in some state reforms Acts such as the OER (Orissa Electricity Reforms) Act, 1995, where there is an explicit stipulation on the nature of appeal. Section 39 of the Act says, 'any person aggrieved by any decisions or order of the commission passed under this Act may file an appeal to the High Court on any question of law arising of such order'. In contrast, the ERC (Electricity Regulatory Commission) Act 1998 says that any person aggrieved by any decisions or order of the commission (either central or state) passed under the Act may file an appeal in the High Court. In this case, the regulatory legislation does not categorically state as to whether an appeal against regulatory decisions lies only on issues relating to law, jurisdiction or procedure, or whether it can also be based on merits.

That the judiciary should have the right to review regulatory decisions is not in dispute; there is also no dispute about the need to provide for appeals against regulatory decisions. The issue for discussion is what should the courts or appellate tribunals be looking for when they review or entertain appeals against regulatory decisions. Should their concern only be

- 1 whether the regulator exceeded or abused its powers;
- 2 whether the regulator committed an error of law or a breach of the rules of natural justice; or
- 3 whether a regulator reached a decision which no reasonable tribunal would have reached.

Or, should they look into the merits of the case, into facts, and take decisions such as setting tariff or passing orders on interconnectivity, substituting themselves for the regulator?

Review jurisdiction

There is a wealth of case law both in the UK and in India, where the courts have consistently taken the view that judicial review should only address questions of legality and reasonableness of tribunal decisions. In *R v Panel on Takeovers and Mergers ex p in Guinness plc*¹ Lord Donaldson referred to the judicial review jurisdiction as being supervisory or 'longstop' jurisdiction. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing the abuse of power, be itself guilty of usurping power.

In *G B Mahajan vs Jalgaon Municipal Council*,² Justice Venkatachaliah, who later became the Chief Justice of India, discussed this issue in some detail and observed that powers must be exercised reasonably. He quoted Prof. Wade who says, 'the doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passed those bounds, it acts ultra vires. The court must, therefore, resist the temptation to draw the bounds too tightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended. Decisions which are extravagant or capricious cannot be legitimate. But if the decision is within the confines of reasonableness, it is no part of the court's function to look further into its merits. The court is not concerned with the question whether a particular policy is wise or foolish; it can only interfere if it is beyond the powers of the authority.' . . .

In *Tata Cellular vs Union of India*,³ the Hon'ble Supreme Court reiterated these views, and laid down six principles on the basis of which administrative decisions should be reviewed. These are:

- 1 the modern trend points to judicial restraint in administrative action;
- 2 the court does not sit as a court of appeal but merely reviews the manner in which the decision was made;
- 3 the court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise, which itself may be futile;
- 4 the terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally

¹ (1990) 1QB 146: (1989) 1 All ER 509

² GB Mahajan vs Jalgaon Municipal Council (1991 [3] SCC 91)

³ Tata Cellular vs UoI (1994 [6] SCC 651)

speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts;

- 5 the government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of 'Wednesbury principle of reasonableness' (including other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fide; and
- 6 quashing decisions may impose heavy burden on the administration and lead to increased and unbudgeted expenditure.

The cases discussed above mainly pertain to administrative decisions taken by governments or their agencies. But they are equally relevant to decisions taken by tribunals. And one can also argue that orders of regulatory commissions on matters such as tariff, quality etc. are, indeed, administrative decisions based on government policy, the interests of the stakeholders, the viability and the growth of the sector etc., and should be viewed accordingly. It is noteworthy that where orders of regulatory commissions have been challenged in High Courts in their writ jurisdiction, the courts have refrained from going beyond questions of legality. In *Bharat Kumar and others vs Government of Andhra Pradesh and others*,⁴ a writ petition challenging the tariff orders of the Andhra Pradesh Electricity Regulatory Commission, the Andhra Pradesh High Court held: 'in exercise of judicial review function under Article 226 of the Constitution, it is not open to the Court to find fault with the conclusion reached by the commission on the ground that a more practical view is possible or a different approach is preferable. It is trite to say that the Constitutional Court exercising writ jurisdiction, does not place itself in the position of an appellate authority on the questions of law as well as fact and embark upon a fresh appraisal of the material placed before the commission and test the decision of an expert body from the standpoint of its own appraisal especially in matters of price fixation. As pointed out in *Cyanamide's case* (supra), the Court refrains from going into facts and figures in detail with a view to seeing whether there was some error in the price fixation. The Court under Article 226 cannot undertake investigatory role. The scope of judicial review in the matter of tariff fixation has been succinctly stated by a full bench of this Court speaking through *Sudershan Reddy, J in V B C Ferro Alloy's case* (supra) in the following

⁴ WP 9388 of 2000

words. ‘...The tariff fixation can be declared unconstitutional only if it is patently arbitrary, irrational, discriminatory, or demonstrably irrelevant. The Court in exercise of its judicial review jurisdiction ought not to normally interfere so long as the exercise of the power to fix the tariff is within the zone of reasonableness. ... It is not permissible for the Courts to interfere with such tariff fixation when there is found to be a rational basis for the conclusions reached by the Board. Justice Cardozo in *Mississippi Valley Barge Line Company vs United States of America* (292 US 286-87; 78 L ed. 1260, 1265) observed: ‘The structure of a rate schedule calls in peculiar measure for the use of that enlightened judgement which the Commission by training and experience is qualified to form.... The judicial function is exhausted when there is found to be rational basis for the conclusions approved by the administrative body’. This Court has no expertise to go into the intricate and complicated mechanism of tariff fixation. It would not be possible for this Court to reweigh the relevant factors and substitute its notion of expediency and fairness for that of the statutory authority’.

Upholding the order of the A P High Court in the above writ petition, the Hon’ble Supreme Court observed⁵: ‘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 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’.

It is thus reasonably settled that in the review jurisdiction, the superior courts will only address the concerns listed by the Hon’ble Supreme Court in *Tata Cellular vs Union of India*, and not the merits or substance of the tribunal’s order.

Appellate jurisdiction

But then what happens in the appellate jurisdiction of the superior courts? Courts have consistently drawn a distinction between ‘review’ and ‘appeals’. In *R v Panel on Takeover and Mergers, ex p Datafin plc*,⁶ Sir John Donaldson, M R commented: ‘An application for judicial

⁵ JT 2002 (2) SC 595. Association of Industrial Electricity Users Vs. State of Andhra Pradesh and Others
⁶ (1987) 1 All ER 564

review is not an appeal'. In *Lonrho plc vs Secretary of State for Trade and Industry*,⁷ Lord Keith said: 'Judicial review is a protection and not a weapon'. It is thus different from an appeal. When hearing an appeal the court is concerned with the merits of the decision under appeal'. In *Amin, Re*,⁸ Lord Fraser observed that: 'Judicial review is concerned not with the merits of a decision but with the manner in which the decision was made.... Judicial review is entirely different from an ordinary appeal. It is made effective by the court quashing the administrative decision without substituting its own decision, and is to be contrasted with an appeal where the appellate tribunal substitutes its own decision on the merits for that of the administrative officer'. The order of the A P High Court also makes this distinction, and implicitly says that the court as an appellate authority can interfere with the fixation of tariff.

Regulatory legislation in India provides for appeals against the orders of the regulatory commissions. Section 18 of the TRAI Act of 1997 provided for appeals against the order of TRAI to the High Court. The TRAI (Amendment) Act of 2000 has set up the Telecom Dispute Settlement and Appellate Tribunal to settle disputes between licensor and licensees, and between service providers, and to entertain appeals against the orders of TRAI. Section 27 of the CERC Act of 1998 similarly provides for appeals against the orders of the CERC to the High Court. Most Indian states have adopted similar provisions in their legislation relating to regulation in the electricity sector. And none of them, except Orissa, has addressed the question of whether appeals should only be on points of law or whether the appellate jurisdiction can extend to matters of fact and their interpretation as well.

In an appeal filed against the tariff order of the West Bengal Electricity Regulatory Commission by CESC (Calcutta Electric Supply Corporation), the service provider in Calcutta, the Hon'ble Calcutta High Court in a landmark judgement (2002)⁹ held that it is 'not hearing any proceeding which is akin to a constitutional writ matter. No doubt the High Court remains the High Court and its constitutional powers are not taken away and cannot be taken away even if it is designated as an appellate forum in a particular Act. Our constitutional powers we continue to possess. The additional strength that those constitutional powers render to our judgement is always present. But in so far as we discharge the function of an appellate tariff fixation body, our

⁷ (1989) 2 All ER 609

⁸ *Amin v. Entry Clearance Officer*, (1983) 2 All ER 864

⁹ *Calcutta Electric Supply Corporation Limited vs. West Bengal Electricity Regulatory Commission* (FMAT 2 of 2002)

scope of enquiry is not merely limited to law. It extends to facts, principles, and policies too. It is an overall appeal. We have all the powers that are concomitant with an appellate power. We have powers of passing orders, in substitution, in remand, and we have powers to pass interim orders and orders of stay. However, this appellate provision is new. It is so new that our judgement is probably the first one in this field all over the country. No applications for interim orders or stay order were made to us. We have thus proceeded to hear and determine the substance of the appeal itself'. A note on the judgement delivered by the Hon'ble Calcutta High Court is produced in Annexe I.

It would be seen from the note that the Hon'ble High Court has ruled that the licensee is free to fix the tariff following the principles set out in the Electricity Supply Act 1948 after providing for a reasonable return and that the commission is not to fix the tariff at the beginning of the year, for the year, but is only to ensure at the end of the year on the basis of audited accounts that the licensee has abided by the principles set out in the Supply Act. The High Court has also ruled that it is not for the commission to fix T&D (transmission and distribution) losses, that consumer representation should be restricted to those who have technical, financial, or legal expertise, and are authorized by the commission; and that in any appeal, none other than the commission has the locus to appear. The judgement is far reaching, and the learned lordships appear to have completely rewritten regulatory legislation.

But then, all this is not relevant to the discussion in this paper. What is relevant is the fact that the Hon'ble High Court's decision makes the High Court the ultimate authority for tariff fixation. And what is also relevant is that the High Court has looked into the capital base and accounts of the licensees, and fixed the tariff for the years 2000/01 and 2001/02. They are relevant because they establish the fact that a superior court in its appellate jurisdiction has the power not only to entertain questions of law but also act as a fact-finding body, and to enter in the domain of facts and policies, examine accounts and financial statements, and fix tariffs.

The issue for discussion is whether, even in their appellate jurisdiction, the superior courts should go into the merits and substance of regulatory decisions even though they have the power to do so, or confine themselves to questions of law, natural justice, and reasonableness. Jurisprudence on this is limited. As the Hon'ble Calcutta High Court observed, the appeal heard by it was the first of its kind. And it is a fact that while a number of writ petitions have been filed against regulatory decisions, appeals under Section 27 of the ERC Act have been few. Ultimately, as more appeals are filed, it would be for the superior courts to decide as to whether they would enter into the merits

of regulatory decisions or not. Hopefully, the courts would recognize that the very rationale for setting up regulatory commissions was that matters like tariff setting, quality of standards etc., called for expertise which governments did not possess, and that it may not be possible for a court to bring to bear the same amount of expertise on issues that a regulatory commission can.

As observed by the Hon'ble Supreme Court in the Tata Cellular case: 'two overriding considerations have combined to narrow the scope of review. The first is that of deference to the administrative expert. In Chief Justice Neely's words, "I have very few illusions about my own limitations, as a judge, and from those limitations I generalize to the inherent limitations of all appellate courts reviewing rate cases. It must be remembered that this court sees approximately 1262 cases a year with five judges. I am not an accountant, electrical engineer, financier, banker, stockbroker, or systems analyst. It is the height of folly to expect judges intelligently to review a 5000-page record addressing the intricacies of public utility operation".'

'It is not the function of a judge to act as a superboard, or, with the zeal of a pedantic schoolmaster, substituting its judgement for that of the administrator'.

The result is a theory of review that limits the extent to which the discretion of the expert may be scrutinized by the non-expert judge. The alternative is for the court to overrule the agency on technical matters where all the advantages of expertise lie with the agencies. If a court were to review fully the decision of a body such as state board of medical examiners, it would find itself wandering amid the maze of therapeutics or boggling at the mysteries of the pharmacopoeia. Such a situation as a state court expressed it many years ago is not a case of the blind leading the blind but of one who has always been deaf and blind insisting that he can see and hear better than one who has always had his eyesight and hearing and has always used them to the utmost advantage in ascertaining the truth in regard to the matter in question.

The second consideration leading to narrow review is that of calendar pressure. In practical terms, it may be the more important consideration. More than any theory of limited review, it is the pressure of the judicial calendar combined with the elephantine bulk of the record in so many review proceedings which leads to perfunctory affirmance of the vast majority of agency decisions.

Conclusion

The two overriding considerations, namely, lack of expertise and time constraints apply equally to appeals, and present a case for restricting the courts' intervention. Clearly, if the tariff set for a year by a regulator is

altered well after the year by a superior court there could be undue hardship to the consumer or the service provider. The judiciary will also, hopefully, appreciate that unlike in government, the decision-making process in the regulatory commissions is transparent, and that all stakeholders are given an opportunity to be heard and, therefore, there are fewer chances of facts not being brought on record. And finally, the judiciary must recognize that regulators are mandated to encourage efficiencies, protect consumer interests, promote the growth of the sector, etc., and these responsibilities call for allowing the regulators some 'play in the joints'.

Regulatory jurisprudence is yet to evolve in the subcontinent. In fact, our regulatory experience is rather recent and limited. Regulatory agencies should be allowed time to establish and grow. This would, perhaps, be facilitated if the superior courts decide, even in their appellate jurisdiction, not to look into the merits of regulatory decisions or where they find a regulator's orders erroneous in substance, remand the matter back to the regulator for revisiting its decision. But if courts were to start ruling on every aspect of regulatory decisions, the regulators would find it difficult to discharge their rather difficult mandate. Alternatively, Parliament could consider bringing Section 14(A) (2) of the TRAI (Amendment) Ordinance and Section 27 of the ERC Act on the lines of Section 39 of the Orissa Reforms Act 1995 to restrict appeals against regulatory decisions to points of law. Regulatory risk should be mitigated but not replaced by judicial risk.

Reference

Ministry of Finance. 1996

The India infrastructure report: policy imperatives for growth and welfare

New Delhi: Ministry of Finance, Government of India.

Annexe I

Brief on the judgement delivered by the Hon'ble High Court of the State of West Bengal at Kolkata

In the matter of

Calcutta Electric Supply Corporation Ltd Appellants

vs

West Bengal Electricity Regulatory Commission Respondents

The parties

- The appellant enjoys a licence to supply electricity in the city of Calcutta.
- The respondent is a commission formed under Section 17 of the Electricity Regulatory Commission Act, 1998 (hereafter Commission Act).
- Matters pertaining to electricity are covered under the Indian Electricity Act, 1910 (hereafter the Act of 1910) and the Electricity (Supply) Act, 1948 (hereafter the Supply Act).
- Section 3 of the Act of 1910 provides for the issuance of licences.
- Section 57 of the Supply Act provides that the provisions of the Sixth Schedule shall govern the charges/tariff charged by the licensee from consumers.
- The Sixth Schedule – which set out the methodology for the calculation of the tariff – stated that :

‘... the licensee shall so adjust his charges for the sale of electricity whether by enhancing or reducing them that his clear profit in any year of account shall not, as far as possible, exceed the amount of reasonable return.’

‘Provided that such charges shall not be enhanced more than once in any year of account.’

The Electricity Regulatory Commission Act of 1998

- Was an Act enacted by Parliament and came into force on the 25th day of April, 1998. Further, the Act provides for the establishment

of a Central Electricity Regulatory Commission and state electricity commission, rationalization of electricity tariff, transparent policies regarding subsidies, promotion of efficient and environmentally benign policies and for matters connected therewith or incidental thereto.

- Section 3(1) provides that the central government shall, within three months from the date of the commencement of this Act by notification in the Official Gazette, establish a body to be known as the Central Electricity Regulatory Commission to exercise the powers conferred on, and the functions assigned to it under the Act.
- Section 17 provides that the state government may, if it deems fit, by notification in the Official Gazette, establish, for purposes of this Act, a Commission for the state to be known as the (name of the state) Electricity Regulatory Commission.
- Section 22 provides for the functions of the state commission. One of the functions is to determine the tariff for electricity—wholesale, bulk, grid, or retail.
- Section 27 provides for an appeal against an order of the commission before the High Court.
- Section 29 provides for the parameters – by which the state commission is to be guided – for determining the tariff.
- Section 29 reads as under:
 - 1 Notwithstanding anything contained in any other law, the tariff for intra-state transmission of electricity and the tariff for supply of electricity, grid, wholesale, bulk, or retail, as the case may be, in a state (hereinafter referred to as the ‘tariff’), shall be subject to the provisions of this Act and the tariff shall be determined by the state commission of that state in accordance with the provisions of this Act.
 - 2 The state commission shall determine by regulations the terms and conditions for the fixation of tariff, and in doing so, shall be guided by the following.
 - a) the principles and their applications provided in Sections 46, 57, and 57A of the Electricity (Supply) Act, 1948 and the Sixth Schedule thereto;
 - b) in the case of the board or its successor entities, the principles under Section 59 of the Electricity (Supply) Act, 1948;
 - c) that the tariff progressively reflects the cost of supply of electricity at an adequate and improving level of efficiency;
 - d) the factors which would encourage efficiency, economical use of the resources, good performance, optimum investments, and other matters which the state commission considers appropriate for the purposes of this Act;

- e) the interests of consumers are safeguarded and at the same time, the consumers pay for the use of electricity in a reasonable manner based on the average cost of supply of energy;
 - f) the electricity generation, transmission, distribution, and supply are conducted on commercial principles;
 - g) national power plans formulated by the central government.
- 3 The state commission, while determining the tariff under this Act, shall not show undue preference to any consumer of electricity, but may differentiate according to the consumer's load factor, power factor, total consumption of energy during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply, and the purpose for which the supply is required.
 - 4 The holder of each licence and other persons including the board or its successor body authorized to transmit, sell, distribute, or supply electricity wholesale, bulk, or retail, in the state shall observe the methodologies and procedures specified by the state commission from time to time in calculating the expected revenue for charges which he is permitted to recover and in determining tariffs to collect those revenues.
 - 5 If the state government requires the grant of subsidy to any consumer or class of consumers in the tariff determined by the state commission under this section, the state government shall pay the amount to compensate the person affected by the grant of subsidy in the manner the state commission may direct, as a condition for the licence or any other person concerned to implement the subsidy provided for by the state government.
 - 6 Notwithstanding anything contained in Sections 57A and 57B of the Electricity (Supply) Act, 1948 no rating committee shall be constituted after the date of commencement of this Act and the commission shall secure that the licensees comply with provisions of their licence regarding the charges for the sale of electricity both wholesale and retail and for connections and use of their assets or systems in accordance with the provisions of this Act.
 - Section 30 provides that where a commission departs from factors specified in clauses (a) to (d) of Section 28 and clauses (a) to (f) of sub-section (2) of Section 29, it shall record the reasons for such departure in writing.

The facts

- The appellant filed two tariff petitions before the respondent for the years 2000/01 and 2001/02 for fixation of tariff.

- A third petition for the year 2002/03 was filed with the request for extension of the time limit for filing the tariff petition.
- Against the claim of the appellant the tariff fixed by the commission was as under:

Year	<i>Claim by Appellant (paise per kilowatt hour)</i>	<i>Granted by Commission (paise per kilowatt hour)</i>
2000/01	426 (28% increase)	339 (1.9% increase)
2001/02	446 (4.5% increase)	337 (-0.5%)
2002/03	Extension of time	Rejected

- The appellant filed Appeals before the Hon'ble High Court under Section 27 of the Commission Act.

Issues before the court

Jurisdiction

- Proceedings are not akin to a constitutional writ petition.
- Present proceedings are under an appeal provision. In appellate jurisdiction, the court has the power to not only entertain questions of law but also act as a fact-finding body. As such, the court is empowered to enter in the domain of facts and policies.

How should the tariff be fixed?

- 1 Whether the parameters set out under Section 57 read with the Sixth Schedule of the Supply Act are binding on the commission or not?
- 2 Whether the permission given by the Supply Act to the licensee to earn reasonable return has been cut down in any manner?

Decision of the High Court

- To hold that the commission has the power to determine whether the provisions of Section 57 read with the Sixth Schedule of the Supply Act would apply to a particular case or not, would amount to holding that Parliament has delegated its power of amendment and repeal and also its power of re-enactment and cancellation of repeal. This is impermissible besides being unconstitutional.
- The permission to earn reasonable return has been maintained in the Commission Act and, therefore, the provisions of Section 57 read with the Sixth Schedule of the Supply Act have to be given full weightage and are the guiding principles by which the tariff has to be determined.

When will tariff be fixed?

- Section 22 lists the fixation of tariff as one of the functions of the commission.
- However, no time line has been prescribed for such fixation. Whether it will be at the beginning of the year, during the year, or the end of the year is the question to be considered.

Questions posed

- 1 Whether the licensee has to submit tariff petitions at all to the commission?
- 2 When does the commission fix the tariff?
- 3 What is the nature of the order fixing such tariff?

Decision of the High Court

- The licensee need not submit the tariff petitions before the commission at all. The licensee is only required to follow the principles set out under Section 57 read with the Sixth Schedule of the Supply Act and maintain a reasonable return.
- The time line for the commission (and in turn the High Court) to fix tariff is flexible. There is a difference between projection and fixation. The commission is not to project the tariff at the beginning of the year but is to secure – and that too at the end of the year after finalization of accounts – that the licensee has abided by the principles set out under Section 57 read with the Sixth Schedule of the Supply Act during the year.
- Once the commission fixes the tariff, it is a supervening decision and the licensee must obey the tariff decision. The Commission Act provides for punishments also in the circumstance of failure to comply with such decision on fixation of tariff.

Consumer representation

- Section 29(2)(e) of the Commission Act clearly spells out that the interest of the consumer is to be protected/safeguarded.
- Section 31(4) of the Commission Act sets out the persons who can file objections and association permitted by the commission to participate in the proceedings.
- In terms of regulation 25, when tariffs are fixed the commission issues notices in the newspapers inviting objections or comments.
- Section 26 of the Commission Act authorizes the commission to authorize any person it deems fit to represent the cause of the consumers.
- Section 37 of the Commission Act mandates the commission to ensure transparency.

Decision of the High Court

- 1 Transparency does not mean an open or public hearing.
- 2 To argue that 17 lakh consumers are entitled to be heard individually is merely a theoretical objection and not a practical one. The law does not provide for indiscriminate participation in these proceedings.
- 3 Prior to 1998, there did not exist or vest in the consumers any such right.
- 4 Merely because the commission or the High Court heard some parties or allowed certain consumers to participate does not mean that the person is authorized in terms of Section 26 of the Commission Act.
- 5 Any person authorized by the commission in this regard would have to be an expert in technical, financial, or perhaps even in legal matters.

Transmission and distribution losses

- Energy to the tune of about 22% generated and purchased by the appellants from its generating stations gets lost and is never billed for.
- The appellants had generated and purchased more than 6000 mega units in the year 2000/01 but billed for only 5165 mega units. The rest got lost in T&D (transmission and distribution).
- The commission had fixed about 16% of the total generation and purchase as the permissible T&D loss for this year. Further, they wanted the appellants to minimize the loss every year by 0.7% until they reach the figure of 14%. This was based on the departmental letter of government of the year 1993.
- Half of the total loss of 22% was technical loss and the other half was lost due to theft of electricity, i.e., large scale consumption without paying for it. The consumers and the commission wanted the appellants to shoulder a large part of the loss caused by theft.
- In this situation the High Court wanted to know, on a matter of principle, whether actuals should be disallowed to the appellants or not?

Decision of the High Court

- 1 The voltage of supply is an ordinary 220 volts or 440 volts at some places and about 6000 volts in industrial undertakings. Large voltages need special type of gears and transformers and those are no items for ordinary households.
- 2 It is not disputed that a lot of energy gets dissipated in transmission. It is also accepted that the large expenditure incurred by the appellant to counteract this loss is proper and within the terms of the Sixth Schedule.

None of the appearing parties had any problem with the 11% technical losses.

- 3 The issue regarding theft is a contentious issue. What is relevant is that no fraud in the accounts of the appellant is either imputed or proved by any party or authority. Also, no mala fide has been imputed to the appellant.
- 4 The appellant has not conspired to have its own electricity stolen. The appellant in this case does not cause or voluntarily allow theft of electricity but is as much a victim of it as a paying consumer. There are no good or cogent grounds to hold that the appellant is liable for the theft of its energy.
- 5 The commission's reason for disallowing the actuals of theft is based on a government letter without really assessing whether it is actually realisable or not. The commission has merely set a standard, without any basis.
- 6 The reading of the 16% as T&D losses is not permissible since a pre-set percentage cannot be a substitute for fresh and judicial assessment. In each case, a controversy is raised about the propriety of actuals.
- 7 The comparison between the appellant and BSES, Mumbai, is also not correct. The same BSES has much higher losses in Orissa. Further, the business of generation and supply of electricity is so huge that the comparison of two licensees is bound to mislead. It is, therefore, better to scrutinize the particular licensees' own records and dealings.
- 8 The final conclusion is that on account of T&D losses the accounts of the licensee does not need any rectification.

Locus

In appeal only the commission has locus to oppose the appeal of the licensee and none other has any locus.

Finally, against the claim of the appellant and the tariff fixed by the commission, the decision of the High Court was as under:

Year	<i>Claim by Appellant</i> (paise per kilowatt hour)	<i>Granted by Commission</i> (paise per kilowatt hour)	<i>High Court</i> (paise per kilowatt hour)
2000/01	426 (28% increase)	339 (1.9% increase)	396
2001/02	446 (4.5% increase)	337 (-0.5%)	400
2002/03	Extension of time	Rejected	400