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Ex parte

Central Electricity Regulatory Commission ...

Querist

1. I have gone through the note submitted under cover of the letter dated 29 July 2009. Sections 107 and 108 provide for the discharge of functions by the Commissions. The Central and State Commissions shall, in matters of policy involving public interest, be guided by such directions given to them in writing by the Central or State Government respectively.
2. In the discharge of their functions, the Commissions are set up as independent bodies carrying out statutory functions. They decide both quasi judicial and adjudicatory matters. It is well settled that in the discharge of such functions they cannot be directed to decide matters in a particular manner. (See **Orient Paper Mills v. Union of India**, AIR 1969 SC 48)
3. Importantly, the word used in Sections 107 and 108 is 'guided' and not 'bound'. To guide only means to 'show or indicate the way to'. It does not have the force of an order or command, which must be obeyed.
4. The word 'guide' can only be used to explain, amplify or supplement the functioning of the Commission in accordance with the relevant provisions of

the Act. It cannot be said to require mandatory compliance in a manner that deprives the Commission of the power to make its own decision as opposed to what it may be guided to make. The distinction between a direction and guidance is well settled in **Laker Airways Ltd. v. Department of Trade, [1977] 2 All E.R. 182**, Lord Denning held as under:

"Directions versus guidance

The word 'directions' in s 4 is in stark contrast with the word 'guidance' in s.3. It is used again in ss 24(2), (6)(b) and 28(2). It denotes an order or command which must be obeyed, even though it may be contrary to the general objectives and provisions of the Act. But the word 'guidance' in s 3 does not denote an order or command. It cannot be used so as to reverse or contradict the general objectives or provisions of the Act. It can only be used so as to explain, amplify or supplement them. So long as the 'guidance' given by the Secretary of State keeps within the due bounds of guidance, the authority is under a duty to follow his guidance. Even so, the authority is allowed some degree of flexibility. It is to perform its function 'in such a manner as it considers is in accordance with the guidance'. So, whilst it is obliged to follow the guidance, the manner of doing so is for the authority itself. But, if the Secretary of State goes beyond the bounds of 'guidance', he exceeds his powers, and the authority is under no obligation to obey him."

Therefore, while the Commissions ought to take into account the directions given by the Central or State Government, as the case may be, the manner of doing so is for the Commissions to decide.

5. In any case, the legal position is settled by judgments of the Supreme Court.

(A) In **Real Food Products Ltd. v. A.P. State Electricity Board and Others, (1995) 3 SCC 295**, the Supreme Court dealt with the question of whether the Electricity Board was bound to follow the direction of

the State Government, where, according to the statute, the Board was to be guided by the direction of the State Government. The Court held as follows:

"8. The only surviving question is with regard to the nature and effect of the direction given by the State Government under Section 78A of the Act. The question has to be examined in the context of the facts of the present case which is confined to the charging of a flat rate per H.P. for agricultural pump sets. The nature of the function of the board in fixing the tariffs and the manner of its exercise has been considered at length in the earlier decisions of this Court and it does not require any further elaboration in the present case. Section 78A uses the expression "the Board shall be guided by such directions on questions of policy as may be given to it by the State Government." It does appear that the view expressed by the State Government on a question of policy is in the nature of a direction to be followed by the Board in the area of the policy to which it relates. In the context of the function of the Board of fixing the tariffs in accordance with Section 49 read with Section 59 and other provisions of the Act, the Board is to be guided by any such direction of the State Government. Where the direction of the State Government, as in the present case, was to fix a concessional tariff for agricultural pump sets at a flat rate per H.P., it does relate to a question of policy, which the Board must follow. However, in indicating the specific rate in a given case, the action of the State Government may be in excess of the power of giving a direction on the question of policy, which the Board, if its conclusion be different, may not be obliged to be bound by. But where the Board considers even the rate suggested by the State Government and finds it to be acceptable in the discharge of its function of fixing the tariffs, the ultimate decision of the Board would not be vitiated merely because it has accepted the opinion of the State Government even about the specific rate. In such a case the Board accepts the suggested rate

because that appears to be appropriate on its own view. If the view expressed by the State Government in its direction exceeds the area of policy, the Board may not be bound by it unless it takes the same view on merits itself."

(B) In **Chhittoor Zilla Vyavasayadarula Sangham v. A.P. SEB, (2001) 1 SCC 396**, the question before the Court was whether the direction of the State Government on the question of policy was binding on the Electricity Board. After discussing the above case, the Court held that:

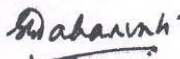
"25... Thus it is clear that the Board would not be bound to follow every policy direction. According to the Board, if tariff was charged at the rate of Rs. 50/- per HP per annum, as per the direction in question, loss to the Board would have been to the extent of Rs. 1,553 crores for the year 1996-97. This would have gone contrary to the obligation cast on the Board under Section 59. Section 59 mandates the Board to leave such surplus not less than 3% of the revenue, after meeting all its expenses referred to therein. This Board has not to supply electricity at such rate to be in deficit, leaving no hope for its extensions for the benefit of persons living in an uncovered area. It is for this and other reason statute mandates Board to maintain this surplus in every year. If it has to perform this statutory obligation, how can it do so, if it follows any such direction, which takes it away from it. It is true government can to cater to the popular demand in order to earn its legitimate favour, give any such policy direction, but it should have to be within permissible limit."

6. The appropriate Commissions are required to take a myriad of factors into account before coming to a conclusion. On certain aspects of policy the directions may be binding. However, the discretion of the Commissions is not taken away. The directions that are issued by the Central or State

Governments are one of many such factors that are taken into account by the respective Commissions. What weight is to be accorded to each factor is for the Commissions to decide, in the exercise of their statutory functions and in public interest.

7. I have nothing further to add.

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