Gajendra Haldea Vs. State of the Nct of Delhi and ors.

Gajendra Haldea Vs. State of the Nct of Delhi and ors.

SooperKanoon Citation : sooperkanoon.com/710534

Court : Delhi

Decided On : Jul-02-2007

Reported in : 2007(97)DRJ1; 2007LC(DEL)1429

Judge : Mukul Mudgal and; S. Muralidhar, JJ.

Acts : Delhi Electricity Reforms Act, 2000 - Sections 2, 9(2), 3(2), 10, 11, 11(1), 11(2), 12, 12(1), 12(2), 12(3), 12(4), 14, 14(2), 14(5), 15, 15(4), 16, 20, 20(9), 23, 24, 25, 26(4), 28, 28(2), 28(3), 29(2), 30 to 34, 42 and 60; Electricity Act, 1910; Electricity (Supply) Act, 1948 - Sections 49, 50, 57, 57A and 78A; Electricity Regulatory Commissions Act, 1998 - Sections 29 and 30; Electricity Act, 2003 - Sections 42(1), 42(2), 42(3), 61, 82(4), 86(2), 131(2), 185 and 185(2); Comptroller and Auditor General's (Duties, Powers and Conditions of Service) Act, 1971; Bulk Supply Tariff Order; Constitution of India - Articles 148 and 226; Delhi Electricity Reform Ordinance; Delhi Electricity Reform (Transfer Scheme) Rules, 2001

Appeal No. : W.P. (C) No. 2705/2002

Appellant : Gajendra Haldea

Respondent : State of the Nct of Delhi and ors.

Advocate for Def. : A.M. Singhvi, Sr. Adv., ; Ruchi Gour Narula, ; Brijesh Anan

Advocate for Pet/Ap. : Parasd Kuhad and; Richa Srivastava, Advs. and Party-in-Perso

Judgement :

S. Muralidhar, J.

1. This writ petition, filed as a Public Interest Litigation, seeks a declaration that Section 20(9) of the Delhi Electricity Reforms Act, 2000 (DERA) is unconstitutional and void to the extent that it envisages the creation of private monopolies in the power sector. The Delhi Electricity Reform (Transfer Scheme) Rules 2001, issued by the Government of the NCT of Delhi (GNCTD) by notification 20.11.2001 and the policy directions issued by the GNCTD by its notification dated 22.11.2001, are challenged as being ultra virus the DERA. The fourth prayer is for a direction to the GNCTD to 'create an enabling framework that would facilitate competition in generation and supply of electricity through the use of transmission and distribution networks upon payment of wheeling charges.' The petitioner had also challenged the validity of Section 3(2) DERA to the extent it permitted the creation of a one-member Delhi Electricity Regulatory Commission (DERC). However, during the hearing of the petition, the petitioner withdrew this challenge. We are, thereforee, not expressing any view on this aspect.

The Background

2. Before taking up for consideration the issues that arise for consideration, it is necessary to trace the background to the reforms in the power sector in the country. The legal framework for regulating the

distribution and supply of electricity in India was governed by the Indian Electricity Act, 1910 ('IE 1910 Act') and the Electricity (Supply) Act, 1948 ('ESA 1948'). There was a monopoly of the State Electricity Boards (SEBs) in the matter of distribution and supply of electricity. The aspect of generation and transmission of electricity was separated out during the year 1980 and assigned to the Power Grid Corporation.

3. Although between 1995-2001, 8 states in the country unbundled their respective SEBs, which were stated to have become economically unviable, into separate corporate entities for generation, transmission and distribution, the state-owned transmission companies were designated as buyers of all the electricity sold by the producers. As a result, the industry witnessed the emergence of an interconnected chain of monopolies referred to as a 'single buyer model'. Since the reforms in the power sector did not materially improve the quality and feasibility of the electricity industry, the Government desired to take a fresh look at its legal framework. As a first step towards 'restructuring the power sector', The Electricity Regulatory Commissions Act, 1998 (ERC Act 1998) was enacted on 2.7.1998. Its main features included the establishment of the Central Electricity Regulatory Commission and the State Electricity Regulatory Commissions and specifying their respective functions.

4. As far as Delhi was concerned, the Delhi Vidyut Board (DVB), a SEB functioning in terms of the ESA 1948, was stated to have made an aggregate loss of around Rs. 1470 crores in 1998-99. The Aggregate Technical and Commercial (AT&C;) losses was estimated at 58%. In this background, it was decided by the GNCTD to accord top priority for improvement of the power situation in Delhi. An independent regulatory body viz. Delhi Electricity Regulatory Commission (DERC) was constituted in March 1999 under the ERC Act 1998. The one Member DERC became operative with effect from 10.12.1999.

5. The Delhi Electricity Reform Ordinance was promulgated by GNCTD on 28.10.2000 and it was replaced by the Delhi Electricity Reforms Act 2000 (DERA), which was notified on 8.3.2001. The functions of the DERC were now widened. The main objects of DERA included restructuring the electricity industry and opening competition, 'increasing avenues for participation of the private sector in the electricity industry and generally for taking measures conducive for the development and management of the electricity industry in an efficient, commercial, economic and competitive manner in the National Capital Territory of Delhi and for matters connected therewith or incidental thereto.'

6. As a part of the restructuring exercise, the GNCTD in November 1999, appointed M/s SBI Capital Markets as consultants. Phase I of the consultancy involved study of the restructuring options and identifying the best alternatives, estimating the transmission and distribution losses (T&D; losses), evaluation of assets, technical and financial forecasts, preparation of draft transfer scheme and finalization of the agreements. Phase II of the consultancy involved evolving a strategy for private sector participation, preparation of the Request for Qualification (RFQ) and Request for Proposal (RFP) documents, due diligence, design and evaluation of bids and negotiation support to the DVB and GNCTD.

7. The RFQ document was issued on 15.2.2001. Six companies were short-listed as potential strategy partners by an empowered committee with representatives drawn from GNCTD, the DVB, the Union Power Ministry, the Central Electricity Authority, the Power Finance Corporation and the Administrative Staff College of India under the chairmanship of the Chief Secretary, Delhi.

The Transfer Scheme Rules dated 20.11.2001

8. On 20.11.2001, the GNCTD in exercise of powers conferred under Section 60 read with Sections 15 and 16 DERA notified the Delhi Electricity Reform (Transfer Scheme) Rules 2001 (Transfer Scheme Rules) providing for the reorganization of the erstwhile DVB and its transfer to the following five companies:

a) The Delhi Power Supply Company Limited (TRANSCO), to which the transmission assets of DVB were to be transferred;

b) Indraprastha Power Generation Company Ltd. (GENCO)

c) North-Northwest Delhi Electricity Distribution Company Ltd., to which the distribution assets of the North and Northwest circles of Delhi were to be transferred.

d) South-West Delhi Electricity Distribution Company Ltd., to which the distribution asset of the south and west circles of Delhi were to be transferred and

e) Central-East Delhi Electricity Distribution Company Ltd., to which the distribution assets of Central and East Circles of Delhi were to be transferred.

(the three distribution companies are hereafter referred to as 'DISCOMs')

9. In addition, a holding company, Delhi Power Company Limited, was formed in respect of the above five successor entities. All six companies were registered in July 2001. A separate company viz. Pragati Power Company Limited was incorporated by the GNCTD. The schedules to the Transfer Scheme Rules listed out the assets and liabilities of each of the undertakings that were to be transferred to and vested in the GNCTD, TRANSCO, GENCO and each of the three DISCOMs from the appointed date. In respect of each undertaking, the opening Balance Sheet was set out. The value of the assets that would stand transferred to the holding company was also specified. It was indicated that no part of the land which was being used immediately before the date of the transfer would form part of the assets being transferred under the scheme. However, 'the transferee shall be entitled to use such land as a licensee of the Government on payment of a consolidated amount of One rupee only per month during the period the transferee has the sanction or license or authorization to undertaking the distribution business.' The transfer Scheme was brought into force with effect from 1.12.2002.

10. It has been explained in an affidavit dated 17.5.2002 on behalf of respondents 2 to 5 in these proceedings, that the valuation of the DVB's assets was according to business valuation method and that the asset value has been derived on the basis of revenue earning potential. It is stated that the asset value of Rs. 3160 crores of DVB as a whole, arrived at by the business valuation method, is close to the book value of Rs. 3024 crores based on the finalized annual un-audited accounts of the DVB.

The Policy directive dated 22.11.2001

11. On 22.11.2001, the RFP inviting bids for divesting 51% equity shares in the three DISCOMS was issued to the pre-qualified investors. It is stated that at this stage, two of the six pre-qualified investors opted out of the race. On the same day, i.e. 22.11.2001, the GNCTD in exercise of its powers under Section 12 DERA, issued a notification containing policy directions. It was stated in the opening paragraph of the notification that the policy directions were being issued 'after considering the views expressed by the Delhi Electricity Regulatory Commission' (DERC). The salient features of the policy directions were:

(a) A long term definitive loss reduction or efficiency gain programme was settled in the beginning, even before the invitation of bids, in order to give certainty and to induce the investors to invest in the distribution and retail supply business in Delhi.

(b) The reduction in loss levels/efficiency gain to be achieved in the next five years would be determined through competitive bidding rather than being predetermined unilaterally in the bidding documents.

(c) In view of the above strategy, the sale of 51% equity shares to private investors would be at face value and the consideration for the equity shares would not be a bidding criteria.

(d) In order to ensure that there is overall efficiency of the distribution business, the AT&C; Loss level for each distribution company for the year 2000-01 was worked out and these were to be taken to be the opening levels of losses for the purposes of bidding since that would be the basis for determination of tariffs and also

for computation of incentives for better performance. The basis for determination of the AT&C; losses for the subsequent years 2002-03 and 2006-07 was also set out.

(e) It was further directed that if for the years 2002-03 and 2006-07, the actual AT&C; loss level of a distribution licensee was lower than that determined by the DERC, then 'the distribution licensee shall be entitled to retain 50% of the additional revenue resulting from such better performance.' The balance 50% of the additional revenue resulting from such better performance was to be counted for the purposes of tariff fixation.

(f) It was stated that although the incentives have to be determined on an annual basis, the Government was in the larger public interest 'and to effectively achieve the proposed dis-investment and privatization' specifying the incentives that would be available over a period.

(g) The tariffs to be determined by the Commission would be 'such that the distribution licensees earn, at least, 16% return on the issued and paid up capital and free reserves....'

(h) It was indicated that there would be three separate distribution licensees. Further, 'the Government, as a matter of policy has decided that retail tariffs for the 3 distribution licensees shall be identical till the end of 2006-07, i.e., consumers of a particular category shall pay the same retail tariff irrespective of their geographical location.'

(i) The Government will make available to TRANSCO approximately Rs. 2600 crores during 2002-03 to 2006-07 as loan to be repaid by TRANSCO to the Government and which loan would be used by TRANSCO 'to bridge the gap between its revenue requirements and the bulk supply price which it may receive from the distribution licensees.'

(j) The policy directions clearly stated that the DERC would decide on performance standard and other factors and determine the tariffs 'subject only to the requirement of consistency with these policy directions'.

(k) Finally, it was stated that 'These policy directions have been issued in public interest so as to implement the re-organization of the electricity industry and privatization of the distribution companies'. Further, it was indicated that 'All the stakeholders, including the Commission and other authorities, shall be bound by the above policy directions from the date of issuance thereof till the end of year 2006-07.

12. On a joint petition filed by the distribution companies and the GNCTD, a Bulk Supply Tariff Order (BST Order) was issued on 22.2.2002 by the DERC. By this Order the opening levels of AT & C losses for each distribution company was determined and further it was decided that TRANSCO would sell electricity at Rs. 1.48 per unit to the private DISCOMS who in turn would sell it to the consumers at an average tariff of Rs. 4.16 per unit in the first year of privatization. It is stated that the DERC decided on the opening AT&C; loss levels for each of the DISCOMS different from what was indicated by the DVB. Following this, on 10.4.2002, the bids from short-listed bidders for privatization of the distribution companies were opened. The successful bidders were North Delhi Power Limited (NDPL), the BSES Yamuna Power Ltd. (BYPL) and the BSES Rajdhani Power Ltd. (BRPL).

The present petition and subsequent events

13. On 29.4.2002, the present petition was filed and by an order dated 30.4.2002 Rule DB was issued. However, no stay was granted. The affidavit of the GNCTD dated 8.7.2002 in these proceedings, gives the details of the entire process of privatization and the subsequent steps after the filing of the petition. It is stated that out of the short-listed bidders, BSES Limited submitted bids for three DISCOMS whereas Tata Power Company Limited submitted the bids for two. A Core Committee was constituted to negotiate with the bidders as a result of which revised bids were submitted and accepted on 31.5.2002.

14. On the same day i.e. 31.5.2002, a further notification amending the policy directives issued on 22.11.2001

was issued by the GNCTD. It was now indicated that the AT&C; losses for the years 2002-03 to 2006-07 would be as indicated in the revised bids submitted by the successful bidders and this would be in substitution of the opening levels of AT&C; losses approved by the DERC in the BST Order dated 22.2.2002. Further, it was stated that the Government will make available to the TRANSCO Rs. 3450 crores (instead of Rs. 2600 crores as indicated earlier) as loan to bridge the gap between TRANSCO's revenue requirement and the bulk supply price it would receive from the DISCOMs. There was to be a moratorium on principal repayment for the first four years. The entire loan would be repaid by GENCO, TRANSCO and the three DISCOMs to the holding company within thirteen years with a waiver on interest and thereafter the loan would carry interest @ 12% per annum and would be repaid in eighteen equal half yearly installments.

15. On 26.6.2002, the notification making the transfer scheme effective from 1.7.2002 was published. On 27.6.2002, the selected bidders signed the share purchase agreement and acquired 51% equity shares in the DISCOMS by paying the consideration for the shares. The DISCOMS became operational on 1.7.2002. The privatization of the distribution companies thus became complete on 1.7.2002 when the Transfer Scheme was brought into force.

16. With a view to rationalizing the provisions of the IE Act, 1910, the ESA 1948 and the ERC Act, 1998, in the context of the changed policy of privatization of the power sector, the Parliament enacted the Electricity Act 2003 (EA 2003) which was brought into force with effect from 10.6.2003. Even while repealing the aforementioned three enactments, Section 185 of the EA 2003, saved the actions taken there under, to the extent not inconsistent with the provisions of EA 2003. Under Section 185(2)(e) it was stipulated that 'all directives issued, before the commencement of this Act, by a State Government under the enactments specified in the Schedule shall continue to apply for the period for which such directions were issued by the State Government'. In effect, the transfer scheme issued on 20.11.2001 and the policy directions issued on 22.11.2001, and further amended on 31.5.2002, would continue to apply notwithstanding the enactment of EA 2003.

17. Following the enactment of EA 2003, the petitioner sought to amend the present writ petition by filing CM 4192/2004 to challenge the virus of Section 82(4) of EA 2003 [which states that the State Commission shall consist of not more than three members including the Chairperson] and for certain other ancillary prayers. This application was opposed by the respondent stating that it would constitute a separate cause of action warranting a separate writ petition. By an order dated 9.8.2005, this Court passed an order permitting the petitioner to withdraw the application to file a fresh petition for the purpose.

Submissions of Counsel

18. The submissions on behalf of the petitioner by Mr. Paras Kuhad, learned Advocate, supplemented by the petitioner appearing in person, are as under:

i) The Transfer Scheme 2001 and the policy directions dated 22.11.2001 are ultra virus the DERA. It is submitted that the power of the GNCTD under Section 12 DERA is a general power and it cannot abrogate the special power of the DERC under Section 11. In the absence of prior consultation with DERC, the notifications announcing the Transfer Scheme and the policy directions must be struck down as ultra virus the DERA. Reliance is placed on the judgments in Additional District Magistrate v. Siri Ram : (2000)5SCC451 , Hukumchand v. Union of India : [1973]1SCR896 , Ester Industries v. UPSEB : (1996)11SCC199 , Chittoor Zila Vyavsayadarula Sangham v. APSEB (2001) 1 SCC 396 and Real Food Products v. APSEB : [1995]2SCR396 .

ii) The policy directives dated 22.11.2001 issued by GNCTD indicate that the functions of the DERC stand totally undermined and have in fact been taken over by the GNCTD, whether in the matter of fixation of AT & C losses or the determination of the tariff or the return on equity. The petitioner also seeks to rely on the judgment of the Supreme Court in BSES v. Tata Power Ltd. : (2004)1SCC195 in support of his contention that the powers of the State Commission cannot be overridden by the State Government.

iii) The privatization brought about in terms of the Transfer Scheme 2001, involved deliberate low asset valuation and vitiated bidding process that resulted in monopolies in favor of private companies. This is contrary to the object of the DERA and the EA 2003 which was to discourage monopolies. Reference is made to the provisions of Sections 11(1)(k) and 15(4), 11(1)(d) and (8) DERA and the Preamble, Section 61 and 86(2) of EA 2003, whereby the principal objective was to promote competitiveness and safeguard consumer's interest and not the creation of private monopolies.

iv) The selection of the Consultant, the methodology adopted for determining the AT&C; losses and the valuation of the assets were contrary to the accepted industrial practices. The petitioner seeks to derive support from the report of the Public Accounts Committee (PAC) of the Delhi Legislative Assembly, which in turn was based on the comments of the Comptroller and Auditor General of India (CAG) in his Audit Report (Civil), Delhi for the year 2002-2003.

v) The post-bid negotiations stood vitiated since huge financial concessions were given to the private DISCOMs which, if made known at the pre-bid stage, may have invited better offers. For instance, bidders were expected to submit offers where they would undertake at the minimum to reduce the losses by 20% or more. In the post bid stage the two shortlisted bidders were able to negotiate to bring down this figure to 17% which in effect translated to a figure of approximately Rs. 1000 crores. In any event, such major changes at the post-bid negotiation stage in fact called for fresh bids. The petitioner refers to the findings in the reports of the PAC and CAG in support of the submission that the asset valuation was vitiated and deprived the public exchequer of more than Rs. 3000 crores. Those reports point out that the post-bid concessions totaling Rs. 5119 crores were made at the expense of the exchequer.

vi) It is further submitted that under Section 28(3) DERA if the DERC chose to depart from the principles set out in the VI Schedule of the ESA 1948, it was required to give reasons whereas the directive dated 22.11.2001 gives no reason for such departure.

vii) In terms of Section 42(1), (2) and (3) of the EA 2003 it was incumbent upon the DERC to ensure open access to all consumers. By creating monopolies, open access is being denied.

viii) By referring to the tariff order issued by DERC for the years 2003 to 2007 petitioner points out that there is a wide credibility gap in what is stated by the distribution companies and what the DERC has found acceptable whether it be on the issue of the depreciation or expenses.

ix) Finally, the petitioner seeks the relief of the striking down the Transfer Scheme Rules, the policy directions, the asset valuation and a declaration that the bidding process was vitiated and illegal. He submits that if these prayers are granted, it will only mean reversing the transfer of 51% shares of the private companies to the GNCTD and no inconvenience would be caused to anyone in that event. Fresh bids could always be invited in accordance with the law.

19. On behalf of respondents, arguments were advanced by Dr. A.M. Singhvi, learned Senior Advocate, on behalf of TRANSCO, Mr. Sudhir Chandra, learned senior counsel on behalf of NDPL, Mr. Parag Tripathi, learned Senior Advocate on behalf of BRPL and BYPL, Ms. Ruchi Gour Narula on behalf of GNCTD and Mr. Suresh Kait on behalf of Union of India.

20. The submissions of the GNCTD were as under:

i) A preliminary objection is raised as to the locus standi of the petitioner to maintain this petition in public interest.

ii) The privatization exercise has to be seen in the context of DERA which was the relevant statute. The provision of Sections 9(2) and 11(2) read with Section 42 of the DERA provides sufficient safeguards against grant of monopoly status to any company by the DERC. Further, Sections 10, 11, 20 imposed conditions that can be included in the license. Sections 23, 24 and 25 enabled the DERC to revoke or amend the license.

Section 28 provides regulatory control and Sections 30 to 34 empowers the DERC to pass orders and enforce its decision. It is claimed that the DERC has not issued any exclusive license to any DISCOM and thereforee the apprehension of creation of monopolies is misplaced.

iii) As regards the single buyer model for procurement of electricity in bulk by the DISCOMs, reference is made to Section 26(4) DERA to contend that the DISCOMs are free to purchase electricity in bulk from any generating company. It is contended that there is no bar to procurement of additional power by the DISCOMs from any source they may consider appropriate. The supply by TRANSCO to the DISCOMs was only for the first five years and was found necessary to ensure a common retail tariff for the whole of Delhi in the transition phase.

iv) As regards the policy directives issued by the government under Section 12 DERA, it is submitted that the rationale for issuing the directives is enunciated in the policy statement itself and is based on the experience gathered for the working of the reform process in other states and the particular problems that beset the working of the power sector in Delhi. The policy directions are strictly limited to the necessary consequences of the bidding process and do not curtail the role of the DERC in considering the annual revenue requirements (ARR) of the licensees, scrutinizing their costs and expenses from the point of view of their justification and propriety, setting standards in respect of all their activities, both technical and commercial, and performing all the functions of the DERC under the DERA subject to policy directions.

v) It is further averred that the actual AT & C losses have not been determined by the government and what is mentioned in the policy direction was only indicative. The final figures were determined by the DERC.

vi) As regards the loss reduction programme, it is claimed that the Government thought it necessary to have certainty during the transition period and to avoid steep tariff increases. In order to ensure participation by the private sector in the bidding process, the shortfall in the revenue requirement, after fixing a threshold minimum loss reduction, was decided to be compensated through a soft loan to TRANSCO to reduce the impact of the bulk supply tariff on the DISCOMs. This would in turn ensure that the retail tariff did not go beyond the consumers' reach. This also explained the decision of the Government to increase the loan amount to TRANSCO from Rs. 2600 crores to Rs. 3450 crores after the DERC had issued the BST order.

vii) It is stated that the intention of the government is not to usurp the functions of the DERC to determine the tariff but to provide a mechanism whereby a pragmatic loss reduction programme is implemented during the transition period and the cost of such loss reduction programme is funded by the Government as a loan to avoid steep tariff increases. The BST has actually been determined only by the DERC and the amounts mentioned in the policy directives are only indicative figures.

viii) As regards the grant of subsidy, it is asserted that it is the prerogative of GNCTD and Section 12(3) DERA cannot have any application in this regard. Section 29(2) DERA envisages loans being made available to the licensees or generating companies. Section 12(2) DERA is referred to contend that the question whether any directive relates to matter of policy involving public interest is ultimately for the government to decide. In the matter of a policy decision, the government is final arbiter of the public interest. Reliance is placed on State of Rajasthan v. Basant Nahata : AIR2005SC3401 , Federation of Railway Officers Association v. Union of India (2003) SCC 4, Delhi Science Forum v. Union of India : [1996]2SCR767 .

ix) It is stated that the prescription of the return on equity (ROE) at 16% was not unreasonable and consistent with the VI Schedule to the ESA 1948. Reference is drawn to the Ministry of Power (MOP) notification dated 30.03.1992 with subsequent amendments which fixed the ROE at 16%.

x) As regards the reduction of AT & C losses from 20 to 17% it is submitted that this was done after the Core Committee of the government carried out the detailed negotiation with the highest bidders and that the process involved and the decision taken 'was in the best interest of the sector and public and there were no mala fides involved.'

xi) As regards asset valuation, it is submitted that the business valuation method based on revenue earning potential was adopted by the GNCTD and accepted by Government of India in its report submitted in this regard. The proviso to Section 131(2) EA 2003 is referred to in support of this submission. The higher the valuation, the consumer will have to pay a higher tariff. Asset stripping is not possible in the power sector which is capital intensive and hence the privatized DISCOMs cannot benefit from lower valuation of the assets since they cannot dispose of such assets. The terms of the Transfer Scheme and the licenses issued indicated that there is no transfer of land which was used by the DVB and only the right to use the land during the period of license has been granted.

xii) As regards the bidding process, again a reference is made to the negotiations conducted by the Core Committee where only the best bidder was selected. It is pointed out that no challenge has been raised by any of the unsuccessful bidders and thereforee such a challenge cannot be raised by the petitioner here. A reference is made to the press note dated 28.3.2002 of the Central Vigilance Commission (CVC) which found nothing amiss in the process.

xiii) As regards the comments of the PAC and the CAG, it is submitted that a detailed response was sent on 13.6.2006 but had not yet been tabled before the PAC. The GNCTD stands by the process adopted by it based on the recommendations of its Core Committee.

21. On behalf of the DISCOMs, a preliminary objection to the locus standi of the petitioner is raised. A reference is made to the DERC notification dated 3.1.2006 notifying the Delhi Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulations, 2005 ('Open Access Regulations') which indicates a phased introduction of open access to the distribution system. The open access to the intra-state transmission system has been mandated to be allowed immediately. A reference is also made to a judgment dated 15.2.2005 of the Hon'ble Supreme Court in Civil Appeal No. 2733/2006 DERC v. BSES Yamuna Power Ltd. reported in : (2007)3SCC33 . It is submitted that in this judgment, while striking down the decision of the DERC to reduce depreciation provided from 6.690% to 3.35%, the Hon'ble Supreme Court has approved of the entire Transfer Scheme and the policy directives issued by the GNCTD.

22. Reliance is placed on several judgments of the Hon'ble Supreme Court and the High Courts to indicate that the scope of interference by this Court is extremely limited. These include Association of Registration Plates v. Union of India : AIR2005SC469 , Nava Bharat Ferro Alloys Ltd., Hyderabad v. Andhra Pradesh State Electricity Board : AIR1985AP299 , Real Food Products Ltd. v. A.P. State Electricity Board : [1995]2SCR396 , Andhra Pradesh State Electricity Board Hyderabad v. A.P. Carbides Ltd. : AIR1986AP317 , G.S. Lamba v. Union of India : (1985)IILLJ282SC , Balco Employees Union (Regd) v. Union of India : (2002)ILLJ550SC .

23. It is submitted that the larger public interest requires the rejection of the present petition since granting of the reliefs prayed for would upset the entire privatization scheme which has already been successfully implemented for five years. A reference is made to the performance statistics of the BRPL, BYPL and NDPL to show that they have helped generate profits, reduce losses and improve the overall performance of the power sector in Delhi. It is claimed that there is greater customer satisfaction and that the GNCTD model of power privatization has been hailed as a success story.

Locus standi of petitioner

24. This Court will first deal with the preliminary objection raised by the respondents to the maintainability of this petition by the petitioner. This petition is by a person working as the Chief Adviser and Head of the Centre for Infrastructure and Regulation at the National Council of Applied Economic Research. The petitioner claims to have been closely associated with the electricity reforms and with the drafting of the Electricity Bill 2000 for the Government of India. Throughout these proceedings, the petitioner has supplemented the submissions made on his behalf by his counsel and has demonstrated his intimate knowledge of the subject. He also appears to have researched and written extensively on the subject matter of the present petition. The court is satisfied that this petition is not by an interloper but by a public spirited person with a bonafide concern

about the privatization of the power sector in the country. The Court is satisfied that the petitioner has the locus standi to file this public interest litigation.

Creation of private monopolies: Interpretation of Section 20(9) DERA

25. The concern of the petitioner is not so much about the constitutional validity of Section 20(9) DERA as about its interpretation with a view to permitting private monopolies in the power sector. Section 20(9) DERA reads as under:

Unless indicated in the terms of a license, the grant of a license under this section to a person shall not in any way hinder or restrict the grant of a license to another person within the same area of supply for a like purpose, the licensee shall not claim any exclusivity.

26. It is not possible to accept the submission of the petitioner that the mere possibility of the abuse of this provision renders it unconstitutional. It has been repeatedly asserted before this Court on affidavit by the GNCTD that the general rule is against the grant of an exclusive license, that under Section 9(2) read with 11(2) of DERA the discretion is with the DERC to grant an exclusive license in specific cases provided reasons are given to show that such decision is consistent with the objectives and purposes for which the DERC has been established and that it is not inconsistent with the other provisions of the DERA. The GNCTD has also pointed out that in fact, the DERC has not issued any exclusive license to any of the DISCOMs. This Court finds that the terms of the license deeds also do not indicate that any of them has been granted an exclusive license. While it is true that for the first phase the number of DISCOMs was limited by the GNCTD to three, thereby effectively denying any choice to the consumer, that by itself will not render the provision unconstitutional. Also, it is to be expected that this is an arrangement only in the first five-year phase of privatization and not intended to continue beyond it.

27. As regards the single buyer model, it requires to be noticed that Section 26(4) DERA permits the holder of a supply or transmission license to enter into arrangements for purchase of electricity from any person or generating company with the consent of the DERC. It has been made clear that the TRANSCO would act as the bulk purchaser; that the bulk supply would be only for the existing generation of the DVB and that all future purchases can be made by the DISCOMs from any generating company or person they consider appropriate with the prior approval of the DERC. Since the Open Access Regulations have also been issued, it is to be expected that the situation of the single buyer model will also change.

28. In that view of the matter, it is not possible to conclude that Section 20(9) DERA has resulted in the creation of monopolies in the power sector in Delhi or is capable of giving rise to that situation. The challenge to the constitutional validity of Section 20(9) DERA on this ground is hereby rejected.

Open access

29. One of the major grounds on which the petitioner has assailed the privatization of the power sector in terms of the DERA is that it has effectively negated the concept of open access to either the distribution network or the transmission network. The argument is that under Section 11(1) of DERA it was the function of the DERC to promote competition and competitiveness. This has been reiterated in Sections 61(c) and 86(2) of the EA 2003.

30. According to the petitioner the electricity industry can be divided into two segments namely carriage and content. 'Carriage' implies the fixed electricity lines such as transformers, substations etc., whereas 'Content' in the context of electricity, refers to the electrical current. Carriage is typically regarded as a natural monopoly not attracting competition whereas Content is amenable to competition. Although earlier levels of technology required the separation of the content from the carriage and every supplier had to build a network of its own, the duplication of such network was, thereforee, unavoidable. Instead, there can be one line carrying electricity whereas there can be several distribution lines with regard to the content. A reference

is made to the judgment of the Supreme Court of the United States in Otter Tail Power Co. v. US (supra) which recognised the obligation of the owner of transmission lines to provide their usage to third parties upon payment of 'wheeling' charges. The parallel provisions in Section 16(1) and 17(1) of the UK Act of 1989 are also referred to. A reference is also made to Section 42(2) of the EA 2003 which requires the State Commission to introduce 'open access in such phases and subject to such conditions as may be specified within one year of the appointed date.' Even under Section 42(3) the duties of a distribution licensee with respect to the supply of electricity from a generating company is mandated to be of a common carrier providing non-discriminatory open access.

31. On perusing the Government's notification announcing the Open Access Regulations this Court is satisfied that the phased manner in which open access is sought to be provided as far as the DISCOMs is concerned and immediately as regards the generation company is both reasonable and based on relevant material. It also conforms to the objective behind Sections 42(2) and 42(3) EA 2003. The delay in notifying the Open Access Regulations cannot be said to be so unreasonable to the extent of vitiating the entire privatisation process.

Mandatory prior consultation with the DERC

32. It has been urged by the petitioner that the requirement of prior consultation by the GNCTD with the DERC was not an empty formality. The scheme of DERA indicates that the DERC was to be an independent autonomous body which will perform the task of the regulator of the privatized power industry.

33. With its written submissions, the GNCTD has placed on record the relevant correspondence which shows that the GNCTD wrote a letter dated 22.10.2001 to DERC as part of this consultation process. The DERC wrote a reply on 6.11.2001 raising its objections to the proposal of the GNCTD. It is not clear if these objections raised by the DERC were taken note of when the policy directions dated 22.11.2001 were issued. In the written submissions filed by the GNCTD, while referring to the fact that prior consultation with the DERC did take place, it is categorically stated that the requirement of consultation did not necessarily mean concurrence o the DERC. This aspect will again be discussed in some detail after examining the position in law.

34. Section 11 DERA sets out the functions of the DERC. Among these functions are the determination of the tariff for electricity 'wholesale, bulk, grid or retail, as the case may be', promoting competition, efficiency and economy in the electricity industry, setting standards related to quality, continuity and reliability of service, promoting competitiveness, 'regulating the assets, properties and interest in properties concerned or related to the electricity industry in the National Capital Territory of Delhi including the conditions governing entry into and exit from the electricity industry in such manner as to safeguard public interest'. Section 11(2) mandates that the DERC 'shall always act consistent with the objectives and purposes' for which it has been established and that all its decisions and orders shall be geared to achieve such objectives and purposes.

35. Section 12 DERA which sets out the general powers of the Government reads as under:

12. General powers of the Government. (1) In the discharge of its functions, the Commission shall be guided by such directions in matters of policy involving public interest as the Government may issue from time to time.

(2) If any question arises as to whether any such direction relates to a matter of policy involving public interest, the decision of the Government thereon shall be final.

(3) The Government shall be entitled to issue policy directions concerning any subsidy to be allowed for supply of electricity or any other infrastructure services to any class or classes of persons:

Provided that the Government shall contribute an amount to compensate the Board or any company affected to the extent of the subsidy granted. The Commission shall determine such amounts, the terms and conditions on which and the time within which such amounts are to be paid by the Government.

(4) The Government shall consult the Commission in relation to any proposed legislation or rules concerning any policy direction and may taken into account the recommendations made by the Commission.

36. Sections 14 and 15 DERA stipulate the manner in which the reorganization of the electricity industry is to be undertaken. Under Section 14(2) the designation of a Principal Company to undertake planning and coordination in regard to generation or transmission and the determination of the requirements of the territory is to be done in consultation with the Commission. Under Section 14(5) it is prescribed that the government may determine the lines that shall be treated as transmission or distribution lines 'in consultation with the Commission.' Under Section 28(2) DERA it is the work of the Commission to fix the tariffs and in doing so it is to be guided by three parameters: the financial principles set out in the VI Schedule to the ESA 1948, the factors which would encourage efficiency, economic use of resources, good performance etc. and thirdly, the interest of the consumers. Under Section 28(3) DERA, where the DERC departs from the factors specified in the Section 'it shall record the reasons thereforee in writing.'

37. It is clear that the entire exercise of fixing the tariffs is the exclusive domain of the DERC in terms of Section 28 DERA. Earlier there was Section 29 of the ERC 1998 which detailed the powers of the SERC in relation to fixation of tariffs. Although the earlier regime under the ESA, 1948 which contemplated fixation of tariffs by SEBs has undergone a change with the new legislative regime ushered in by the DERA 2000 and the EA 2003, the provisions concerning the role of the state government are not very different. Under Section 78-A of the ESA 1948, the SEB was to be 'guided by such directions on questions of policy as may be given to it by the State Government.' Under the present Section 12 DERA, the DERC 'shall be guided by such directions in matters of policy involving public interest as the Government may issue from time to time.'

38. In order to understand the scope of the power of the GNCTD to issue binding directions under this provision, it may be useful to refer to the case law concerning the corresponding provision in the ESA 1948. A question often arose in the context of Section 78-A of the ESA 1948 whether an SEB was bound to implement the policy directives of the State Government. In Ester Industries v. UPSEB : (1996)11SCC199 it was held that it was open to the SEB to either accept or not to accept the policy directions of the State Government which in any event had to be 'consistent with the provisions of the Act.' In Chittoor Zilla Vyavasaydarula Sangham v. APSEB (supra) it was held that 'there cannot be any policy direction which pushes the Board to perform its obligations beyond the limits of the two Sections (Sections 49 and 50 of the ESA, 1948)... If any policy direction pushes the Board in its compliance beyond statutory limitations, it cannot be a direction within the meaning of Section 78-A.' The decision in Real Food Products v. APSEB (supra) explained the law in relation to the role of the State Government to give directions under Section 78-A of the ESA 1948. It was held that (SCC.p.299) : 'the view expressed by the State Govt. on a question of policy is in the nature of direction to be followed by the Board in the area of the policy to which it relates.' As regards the fixation of tariffs it was held that

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.

39. As far the present legislative regime is concerned, the decisions of the Hon'ble Supreme Court have recognized the primacy of the role of the Commission, particularly in the context of its powers under Section 29 of the ERC Act 1998 (which is akin to Section 28 DERA). In BSES Ltd. v. Tata Power Co. Ltd. (supra) the Hon'ble Supreme Court underscored the importance of the Regulatory Commissions in the fixation of the tariffs, in exercise of the powers under Section 29 of the ERC Act, 1998. It was said (SCC p. 211) that:

The effect of Section 29 and the Regulations framed there under is that it is no longer open to a licensee or utility to unilaterally increase the tariff. The tariff can be enhanced only after approval of the Commission and charging of an enhanced tariff which has not been approved by the Commission will amount to commission

of an offence. thereforee, the notice to enhance the charges given by TPC, which was subsequent to the enforcement of the Act, can have no legal effect.

40. The other relevant decision is West Bengal Electricity Regulatory Commission v. Central Electricity Supply Co. : AIR2002SC3588 where it has been held that it was the State Electricity Regulatory Commission alone which was, in terms of the ERC Act 1998, empowered to fix the tariffs. Further, in this decision it was explained in para 66 SCC 747 that while fixing the tariff:

the Commission is bound to take into consideration the principles found in Section 57 and 57-A and Schedule VI to the 1948 Act, to the extent it has become applicable. While so applying these principles of the 1948 Act, including the Sixth Schedule, it is open to the Commission to weigh these principles with other requirements which it has incorporated in the form of regulations and suitably apply the same. In this process, if it chooses to place more reliance on one or more of other principles than those found in Schedule VI to the 1948 Act, then it is open to the Commission to do so and in such an event it is not necessary for the Commission to again invoke Section 30 of the 1998 Act because the requirement of invoking Section 30 arises only at the stage of framing of regulations, thereafter, it is for the Commission to consider the various principles which it has incorporated in its regulations and then apply the same, depending upon the facts of the cases with which the Commission is concerned.

41. Turning to the facts on hand, the policy directions issued by the GNCTD on 22.11.2001 are not merely that. These have been set out in para 11 of this judgment. They go far beyond outlining the broad principles on the basis of which the DERC should undertake its exercise of tariff fixation. There can be no manner of doubt from the explicit wording of para 8 of the notification dated 22.11.2001 that the stipulations laid down there were binding on the DERC. In effect, it left the DERC with no discretion.

42. In this context, the documents placed on record by the GNCTD along with its written submissions makes interesting reading. In its letter dated 22.10.2001, the GNCTD while eliciting the views of the DERC and ascertaining the latter's recommendation had only indicated that the Government would make available to TRANSCO Rs. 2600 crores in the period 2002-2003 to 2006-2007 as loan to bridge the gap between its revenue requirements and the bulk supply price which it may receive from the distribution companies.

43. In its reply dated 6.11.2001, the DERC sought to know from the GNCTD and DVB, the evidence of an energy audit having been carried out in regard to the T&D; losses. The DERC was not in agreement with the proposal for reduction of loss levels and pointed out that 'collection efficiency is not taken into account in tariff fixation.' It accordingly conveyed that it was 'not in agreement with the proposal to pass through the revenue loss attributable to the collection inefficiency to the consumers within the same year.' The DERC also made detailed recommendations in regard to the deviation from the VI Schedule to the ESA 1948. It was not in favor of the Government taking on an additional burden of the failure to achieve the loss-reduction target falling on the DISCOM and suggested that it should be the responsibility of the strategy partner. As regards the loan of Rs. 2600 crores given by GNCTD to TRANSCO, the DERC suggested that it should defer a part of the revenue for future recovery if it is in the interest of the consumers. It was also pointed out that the 'the proposal of the Government to advance loan to the transmission company may attract objections from the consumers in case it is treated as loan and interest in repayment liability is passed on the consumers ultimately.' The DERC in its letter asserted the primary role of the Commission. Neither in its counter affidavit nor in its written submission has the GNCTD indicated how it has addressed these concerns expressed by the DERC. It must be recalled that the DERC is not a mere consulted but a statutory authority vested with definite powers and functions.

44. This is not all. The Court also finds that the GNCTD did not, in its letter dated 22.10.2001 to the DERC, indicate the percentage of the rate of return on equity. This it fixed at 16% in its notification dated 22.11.2001 for the first time. The GNCTD also did not in its letter to the DERC specify the precise opening levels of AT&C; losses. Importantly, it did not inform the DERC that there would be only three separate distribution licensees

as a result of the reorganization of the DVB and that this position would continue till 2006-2007. These were important factors that would impact the decision on the fixation of tariffs.

45. The DERC had expressed its reservations about the GNCTD advancing Rs. 2600 crores as soft loan to TRANSCO. Following the BST Order dated 22.2.2002 of the DERC (which did not accept the AT & C opening loss figures suggested by the GNCTD), the GNCTD on 31.5.2002 amended the earlier notification dated 22.11.2001 and this time made an important change. Inter alia, the soft loan to TRANSCO was enhanced to Rs. 3250 crores. Also, the AT & C losses were specified as that agreed with the DISCOMs. Admittedly, the GNCTD did not consult the DERC when these changes were brought about.

46. The Hon'ble Supreme Court has underscored the primacy of the role of the Regulatory Commissions in the fixation of the tariffs. Certainly, on a reading of the statutory provisions and the judgments of the Court it cannot be said that the role of the DERC under the DERA is subservient to that of the GNCTD. That, in fact, would be contrary to the very scheme of the DERA where the DERC is given a central role. Even if the GNCTD was not prepared to accept the views of the DERC, it should have either got back to the DERC on those issues or at least explained in the notification issued by it on 22.11.2001 why it was not accepting those views. An indication of the type of consultation involved is also provided by Section 12(4) DERA which mandates that 'the Government shall consult the Commission in relation to any proposed legislation or rules concerning any policy direction and may taken into account the recommendations made by the Commission.'

47. Section 29 read with Section 30 of the ERC Act 1998 and the later Section 28(3) DERA require that for deviating from the principles of the VI Schedule of the ESA 1948 while fixing tariffs reasons have to be given by the DERC. What has happened here is that the decision to deviate from the principles of the VI Schedule of ESA 1948 was taken by the GNCTD itself. The occasion for the DERC to discharge this statutory function of explaining the reasons for such deviation did not arise at all. Clearly thereforee the statutory requirement was given a go by without any rational Explanationn.

48. The Explanationn offered that the power under Section 12 DERA is sufficient to clothe the GNCTD with this function cannot be accepted for more than one reason. First, that provision is not a non-obstante clause and is thereforee subject to the other provisions of the DERA. Secondly, a collective reading of Sections 11, 14 and 28 DERA indicates that the role of the DERC is central to the determination of tariffs and cannot be whittled down by reference to a general power under Section 12 DERA. Thirdly the policy directions are only to guide the DERC in its functions. Those directions are not meant to usurp the functions of the DERC itself. Fourthly the DERC is an independent regulatory body meant to act as a check on the deviation from the statutory norms both by the licensees as well as the government. To permit the Government to take over this function would defeat the entire scheme of privatization which has to go hand in hand with regulation by an independent autonomous regulator. In fact, the DERC did express its reservations on many of these aspects when it was consulted by the GNCTD. Fifthly, the Court is not impressed with the argument that these policy directions have received statutory imprimatur under Section 185(2)(e) of EA 2003. Those directives which may have to be continued under EA 2003 have nevertheless to be tested on the anvil of the other provisions of EA 2003 as well as the DERA 2000. This provision of the EA 2003 was not meant to save the illegality of such a directive. Sixthly, the Court is also unable to accept the submission that the determination by the GNCTD of what it considers in terms of Section 12(2) DERA to be in public interest is final to the exclusion of judicial review by the Court. It is, on the contrary, in public interest for GNCTD to ensure that the consultation with the DERC and the guidance it extends through its directions do not undermine the role of the DERC thereby defeating the objective of the DERA. The Court is thereforee of the considered view that the impugned notification dated 22.11.2001 containing the policy directions issued by the GNCTD is unsustainable in law and is ultra virus the provisions of DERA.

49. Although the Court has come to the conclusion that the impugned notification dated 22.11.2001 issued by the GNCTD is invalid, the subsequent developments and events do not permit the Court to put the clock back at this stage and undo all that has transpired in the intervening period. For one, the DERC itself has in terms

of the said directions issued the BST order, which, for reasons explained hereinafter, this Court does not find justification to interfere with. Secondly, the period during which the directions were to remain operative has come to an end. A fresh exercise will have to be undertaken by the DERC for determining the tariff for the years 2007-08 onwards. Thirdly, in the absence of any stay order passed by this Court, it would not be possible to ignore the tremendous inconvenience that may be caused if one were to put the clock back at this stage. Finally, there are many technical elements of the policy directives which are, for reasons to be explained, not being examined.

50. For all these reasons, even while this Court holds the impugned notification dated 22.11.2001 containing the policy directives to be ultra virus DERA, it is not inclined to grant any consequential relief of undoing all the steps that have been taken pursuant to such notification. However, this Court directs that the GNCTD will hereafter, in exercising its powers under Sections 12(1) and 12(2) DERA, abide by the mandate of the DERA and not reduce the role of the DERC to a mere consulted whose views do not matter. Clearly, the GNCTD cannot under the pretext of exercising its powers under Section 12 DERA take over the function of determining the tariff as it has in the first phase.

The BST Order

51. The determination of the bulk supply tariff by the DERC was based on the data concerning the T&D; losses as well as the cost and expense involved in the distribution and retail supply of electricity. The DERC has had to go by the figures of the AT & C losses and the revenue earning potential of the different agencies. It has based its decision on the extent of soft loan given by the government to TRANSCO and also keeping in mind the ROE already determined by the GNCTD. It is possible to argue that if there had been a proper consultation by the GNCTD with the DERC, and it had not issued a binding policy directive, the tariffs fixed by the DERC may have been different. Also, the parameters were again changed when on 31.5.2002 the GNCTD issued an amendment to the policy direction dated 22.11.2001, without consulting the DERC. However, the fact that the period of the BST Order has also run out is one factor that weighs against this Court striking it down at this stage.

Appointment of Consultants, Asset Valuation, the Bid process and post-bid negotiations

52. To briefly recapitulate, the challenge to the Transfer Scheme Rules is both on procedural and substantive grounds. It has been submitted by the petitioner that from the stage of appointment of Consultants, the invitation of bids, the short listing of bidders and the post bid negotiations and finally the award of the licenses, there have been irregularities which cannot be condoned and which render the entire exercise illegal. The defense of the Respondents has been on the following lines. First, they contend that the scope of the jurisdiction of this Court under Article 226 does not permit it to examine the decisions themselves but only the decision making process. It is submitted that since the bids have been finalised at the recommendations of the Core Committee of experts, there is no scope for interference by this Court with such a decision. Secondly it is stated that the decision to either increase the soft loan to TRANSCO or to re-determine the terms and conditions on which the licenses would be awarded partook of a policy decision by the GNCTD and thereforee was outside the purview of judicial scrutiny. It is also claimed that the Hon'ble Supreme Court has first in a public interest litigation and thereafter in a recent judgment on 15.2.2007 put its seal of approval on the entire process of privatization. Fourthly, it is stated that the issues concerning evaluation of bids, asset valuation are all matters of technical detail which cannot be tested on judicially manageable standards.

53. At the outset it must be noticed that the judgment dated 15.2.2007 of the Hon'ble Supreme Court in Civil Appeal No. 2733 of 2006 DERC v. BSES Ltd. (supra) concerned the validity of an order of the DERC which had re-computed the permissible deduction on the head of depreciation by reducing it from 6.690% to 3.35%. In that process the Hon'ble Supreme Court discussed the policy directions issued by the GNCTD on 22.11.2001, the instructions of the MOP and the Transfer Scheme in general. The relevant portions of the said judgment read as under (SCALE, p.310):

The object underlying the MOP Notifications which provided for higher rate of depreciation appears to be two-fold firstly, to reduce the Asset Replacement Period ('ARP') and secondly, to fund the rapid increase in the replacement cost. The MOP Notifications proceeded on the basis that the Utilities were making losses, expenses on replacement was heavy and that the assets needed replacement in the shorter ARP. It is for this reason that in the MOP Notifications higher rate of depreciation stood prescribed without nexus to the fair life of the asset(s). This Principle under the above MOP Notifications got reflected in the subsequent BST Order which also, inter alia, prescribed the principles for tariff determination for 5 years. The above principles also got reflected in the Policy Directions issued by GoNCTD under Section 12 of DERA. It is for this reason that in the RFQ document the timetable shows that the bidders were required to take note of the Tariff Structure before making bids. The investors were put to notice regarding the Tariff Structure which existed before privatization. We are living in the complex and ever-expanding exigencies of Government. In the matter of grant of benefit of depreciation, the extent of the benefit lies in the economic wisdom of the Government. That wisdom constituted the basis of the MOP Notifications which emphasized Asset Replacement Period to be reduced by prescribing higher rate of depreciation because the Government intended replacement to take place not after 25 years but at the end of 13 to 15 years. The order of DERC dated 26.6.2003 runs counter to the above reasoning behind the MOP Notifications as reflected in the BST Order dated 22.2.2002 and in the Policy Directions of GoNCTD dated 22.11.2001.

54. Thereafter, the Hon'ble Supreme Court held (SCALE, p.311)

In the present case, we are of the view that DERC was certainly entitled to take a departure from the principles set out in the Sixth Schedule to the said 1948 Act. However, that departure, in the facts and circumstances of the case, had to be within the framework of the Policy Directions issued by GoNCTD under Section 12. Further, in any event, the departure from the principles under the 1948 Act was required to be based on proper reasoning. In the present case, DERC was required to consider the effect of its decision. Privatisation and dis-investment were the Policy decisions taken by GoNCTD. The Utilities were incurring losses. The assets of the Utilities were getting depleted. The public-private participation is the order of the day. thereforee, the Policy Directions invited bids from the private sector on the basis of certain assurances. Under the above circumstances, on the facts of the present case, Legitimate Expectation was built into the investments made by the DISCOMs herein. The representations were there in the Policy Directions, BST Order laying down Normative Principles for tariff fixation for 5 years and the Transfer Scheme. Drawing up of tariff for 5 years was to impart certainty. As stated above, the tariff for the financial year 2001-2002 namely, financial years 2002-03, 2003-04, 2004-05 and 2005-06. It is for this reason that even the RFQ document indicated Tariff Principles in the case of NDPL for the financial years 2002-03 and 2005-06.

55. It nevertheless requires to be considered if the Hon'ble Supreme Court has in the above judgment put its seal of approval on both the policy directives as well as the Transfer Scheme. A careful reading of the judgment reveals that the legal position concerning the prior consultation by the GNCTD with the DERC in terms of the DERA was not considered by the Hon'ble Supreme Court. It was only considering the consequent step of the BST Order dated 22.2.2002 and the attempt by the DERC to amend that order. It is not possible to read the judgment as upholding the validity of the policy directive. However, it does appear that the Hon'ble Supreme Court has proceeded on the basis that the ROE was rightly fixed at 16% and that the deviation from the VI Schedule by the DERC at the subsequent stage was also justified. Again, this was from the perspective of the terms of the RFQ and RFP documents and the argument of legitimate expectation. Importantly, the Hon'ble Supreme Court clarified that even its ruling on the rate of depreciation having to remain at 6.69% was 'confined to the facts of the present case alone and the reasoning given hereinabove is in the context of the period of 5 years.'

56. It also requires to be noticed that in a public interest litigation under the title Power Crisis in NCT Delhi v. Union of India (Writ Petition Civil 328 of 1999), the Hon'ble Supreme Court has been passing numerous orders on the issue of privatisation of the power sector in Delhi in terms of the DERA and the EA Act 2003 as well as the Transfer Scheme 2001. Copies of the orders passed have been placed on record with the written

submissions of the NDPL. It is contended by the NDPL that on 1.6.1998 the Hon'ble Supreme Court took suo motu cognizance of the lack of adequate power supply to hospitals in Delhi in Writ Petition (C) No. 333 of 1998 titled In Re : News Item 'Power Crisis Paralyses AIIMS. It is stated that by an order dated 17.8.1998 the Hon'ble Supreme Court asked the GNCTD to respond as to the steps taken to privatize the power sector. Later, on 10.5.1999, while disposing of the aforementioned PIL, the Supreme Court requested the amices Curiae appointed by it to file a 'proper petition joining all the concerned authorities as respondents.' Thereafter, a series of orders were passed by the Hon'ble Supreme Court in the new PIL Power Crisis in NCT Delhi v. Union of India to ensure that all facilities were provided to the DISCOMs in terms of the DERA. The setting up of the special courts and implementation of other provisions of the DERA were closely monitored by the Hon'ble Supreme Court. The said PIL is stated to be pending.

Reports of the PAC and the CAG

57. This Court is conscious of the limitations of examining the technical aspects of selection of consultants, asset valuation, evaluation of bids, selection of bidders, fixing of loss reduction levels, limits of post-bid negotiations and so on. It is not possible for this Court to enter into a fact finding on these issues. At the same time, the Court is not able to avoid taking note of the reports of the PAC and the CAG which have, on the basis of their respective expertise, come to certain conclusions. A sampling of the findings in the report of the PAC on the aspects submitted before this Court by the petitioner are as under (page 43 of the Report):

Role of DERC

The Committee observed that the DERC (Delhi Electricity Regulatory Commission) over a period of time seems to have lost its independence, autonomy and credibility. Rather than safeguarding the interest of the consumers at large it has acted as a hidden hand of the government and Distribution Companies. As mentioned in para relating to 'Rebate (Para 6.14 12) in spite of the fact that the Distribution Companies had claimed excess rebate in violation of the Bulk Supply Agreement, no penalty, interest or late payment surcharge was allowed to be collected from the Distribution Companies. Instead it ordered that TRANSCO would have to pay penal interest if it does not calculate the rebate due to each Distribution Companies and make the payment within a day. Surprisingly this issue was not before the DERC at all.

The Standing Committee of the Parliament on Energy has also passed severe strictures against the working of the DERC and Distribution Companies. The functioning of the DERC should be strengthened and made more transparent so that it is able to function effectively as a watchdog of the interest of the consumer.

(at page 45)

The Government should ensure a thorough audit (including physical audit) of the billing software system and the entire accounts of the Distribution Companies (since their inception) by independent auditors and technocrats preferably from the IITs. At present there is no mechanism to ensure that the Distribution Companies have made the necessary investments, utilised the APDRP funds diligently, achieved the loss targets or accounted properly for the Government dues in matters of recovery of arrears, stores etc. The independent auditors should be entrusted with the responsibility of ensuring the compliance of the Distribution Companies in these areas also.

(at page 46)

The Committee recommends that Government should approach the Central Vigilance Commission to order an enquiry into the conduct of all those top officials, who managed the erstwhile DVB in the last three years prior to privatization, for their acts of criminal breach of trust, dereliction of duty, negligence and lack of supervision on their part. They had failed to ensure proper maintenance of audited books of accounts, asset registers, inventory of stocks etc. This gross act of negligence has cost the exchequer several thousand crores since in the absence of all these vital records the government was forced to accept the asset valuation done

by the sole consultant and property of the erstwhile DVB running into several thousand crores was transferred to the Distribution Companies for pittance. This action at this stage is of paramount importance so that it acts as a deterrent for the Heads of other Commercial Undertakings of the Government.

The Government should get the role of the officers of the Core Committee investigated by the Central Bureau of Investigation who were involved in the screening of bids, effecting changes in the transfer scheme, and played a pivotal role in final negotiations with the conditional bidders without the prior approval of the Competent Authority. These very officers advised the cabinet that the bids should not be 'accepted in the present form' and after incorporating modifications as dictated by the bidders they recommended that the revised bids be accepted.

The action taken by the Department on the recommendations of the Committee should be submitted within three months of the adoption of the Report by the Assembly.

58. The Court finds that the CAG has also commented on these aspects in its report as under (page 66, para 7.4.10):

It was noticed in audit that the Transfer Scheme along with its specific stipulations and conditions had been approved by the competent authority viz. the Lt. Governor of Delhi on 12 November 2001. After receipt of the bids, the GNCTD carried out significant modifications and additions in the Transfer Scheme. These modifications were however not submitted to the competent authority for approval. The terms of the Scheme modified/added and its impact is given in the table below:

Government stated (October 2003) that the directions of the Council of Ministers had been adhered to and that the Council had approved the recommendations made by the Core Committee. It was added that such matters did not require the approval of the Lt. Governor. However, the relevant notes of the Law Department on this aspect were not readily available.

The reply of the Government is not tenable. The Transfer Scheme had been framed under the provisions of the Delhi Electricity Reforms Act which vests the authority to frame the Scheme in the Government. Section 2(d) of the Act stipulates that 'Government' means the Lt. Governor of the NCT of Delhi. It was under these provisions that the GNCTD had sought and obtained the specific approval of the Lt. Governor for the Transfer Scheme on 12 November, 2001. Hence, any substantial changes to the terms of the Transfer Scheme should have been re-submitted to the Lt. Governor for approval.

(para 7.4.13 at pages 71-72)

It was seen that the figure of acceptable technical loss was only 7.43 percent as per the technical consultant's report and ranged between 8.04 and 5.80 for the different circles according to the SBI CAPS Report. The figure of reduction of AT&C; loss envisaged in the RFP was by 20.75 percent for DISCOM I and 19.25 percent for DISCOMs II and III. The opening loss for DISCOM I was 57.2 percent and 48.1 percent for DISCOMs II and III. Since the technical losses cannot be reduced beyond 11 percent as stated by Government, the stipulated loss reduction can be achieved only by reducing the losses on account of collection efficiency and non-technical losses. Loss on account of collection efficiency was 5.11 percent which was to be reduced to zero over a five year period. Deducting this from the total loss reduction to be achieved, the total reduction to be achieved on account of non-technical loss worked out to 15.64 for DISCOM I and 14.14 percent for DISCOMs II and III over a five year period against 5.80 percent arrived at after taking into account the technical consultants losses and transmission loss allowed by DERC to the DISCOMs. The level of loss reduction targets envisaged in the RFP should have been ensured. Failure to do so may have an adverse impact on tariffs.

It concluded (at page 72):The actual implementation of the privatization process was not in conformity with either the initial Inception Report as approved by the GNCTD or with many of the conclusions and recommendations made by the Consultant. There was no effort to assess the actual requirement and scope

of work before selection and appointment of consultant, which would have enabled a systematic and transparent selection. The provisions of the Transfer Scheme were substantially modified to allow additional concession to DISCOMs which exposed the Government and the Holding Company to additional liability. The provisions of the Transfer Scheme and other agreements like the Bulk Supply Agreement were not strictly adhered to. There was also a significant dilution in AT&C; loss reduction targets from that originally envisaged.

59. In this context we may also refer to a news item titled 'Delhi Government funding Discoms in violation of norms : CAG' which appeared in 'The Tribune', New Delhi Edition on Monday, April 23, 2007 at page 3. The news report indicates that the CAG has found that the release of Accelerated Power Development and Reform Programme (APDRP) funds of Rs. 105.51 crores to the DISCOMs was not in conformity with the guidelines issued by the Central Government. Certain other irregularities have also been highlighted in the report of the CAG referred to in the said news item.

60. Even if it were to be argued that the Transfer Scheme Rules have received the imprimatur of the Hon'ble Supreme Court there cannot be any doubt that the Hon'ble Supreme Court did not have the occasion in either the DERC case or in the PIL (Power Crisis in NCT Delhi) to consider the above findings of the PAC or the CAG which point to serious irregularities in the entire process beginning with the selection of consultants, the question of asset valuation, the bid process and the validity of the post-bid negotiations. This Court is unable to postulate whether the Supreme Court would have, had its attention been drawn to the above reports, approved of the entire process of privatization in the manner undertaken by the Respondents.

61. This Court does not have the means to assess the findings returned by the PAC or the correctness of the conclusions reached by the CAG. Also this Court, in view of the limited scope of judicial review, does not consider it necessary to itself express any opinion on the various contentions raised on the aspect of the choice of consultants, the question of asset valuation, the bid process and the validity of the post-bid negotiations. It also need not express any view on whether a privatisation scheme that involves the government having to subsidise the tariff to be charged by the TRANSCO to the DISCOMs by advancing an interest-free soft loan of Rs. 3250 crores of tax payers' money is a constitutionally and statutorily tenable privatization exercise. This Court also need not answer itself whether the consumers of electricity in Delhi are better or worse off than before, or if they are being made to pay higher tariffs than in other cities without there being any noticeable improvement in the power situation. The validity of the Transfer Scheme Rules, which in turn involves an examination of all of the above aspects also need not be pronounced upon.

62. On these aspects as already noticed, the CAG and the PAC have both raised serious questions and expressed opinions. The response of the GNCTD to the above findings of the PAC and the CAG does not inspire much confidence. It is stated in the written submissions dated 10.1.2007 of the GNCTD that its comprehensive reply to the report of the PAC is yet to be tabled in the Legislative Assembly. There is no response to the question whether any corrective actions have been initiated on the findings of the CAG.

63. The CAG is a constitutional authority in terms of Article 148 of the Constitution. His functions are governed by the Comptroller and Auditor General's (Duties, Powers and Conditions of Service) Act 1971. thereforee the findings of the CAG deserve the most serious consideration at the hands of other constitutional functionaries, in this case the GNCTD. Likewise the PAC of the legislative assembly is another body that enforces accountability of the executive government consistent with the system of checks and balances that our Constitution enshrines. The deployment of that rule of law device must be permitted to be taken to its logical conclusion. The issue is really about legal and constitutional accountability. The court would be failing in its duty if it did not enforce this. It would not thereforee be correct to avoid answering the questions posed by the petitioner on the grounds that (a) the orders of the Hon'ble Supreme Court already cover the field or (b) pleading lack of judicially manageable standards that render the issues non-justiciable. As regards (a), it is apparent that the Hon'ble Supreme Court has not considered the issues from the perspective of the reports of the PAC and the CAG. As regards (b), while this Court may lack the competence to examine the technical

aspects of the above issues it certainly can seek to know what action the GNCTD has taken on the basis of these fact finding reports of the PAC and the CAG.

64. In the circumstances, in exercise of its power of judicial review under Article 226 of the Constitution this Court considers it necessary to seek an Explanationn from the Government as to whether it has taken, or does not for any reasons wish to take, any action on the reports of the PAC and the CAG. It is only for this limited purpose that certain directions are being issued to the GNCTD.

Summary of Conclusions

65. Before issuing the final directions, it may be useful to summarise the conclusions arrived at in this judgment:

(i) The Court is satisfied that the petitioner has the locus standi to file this public interest litigation.

(ii) It is not possible to conclude that Section 20(9) DERA has resulted in the creation of monopolies in the power sector in Delhi or is capable of giving rise to that situation. The challenge to the constitutional validity of Section 20(9) DERA on this ground is hereby rejected

(iii) This Court is satisfied that the phased manner in which open access is sought to be provided as far as the DISCOMs is concerned and immediately as regards the generation company is reasonable, based on relevant material and in conformity with the spirit of Sections 42(2) and (3) EA 2003. The delay in notifying the Open Access Regulations cannot be said to be unreasonable to the extent of vitiating the entire privatisation process.

(iv) The impugned policy directives dated 22.11.2001 issued by the GNCTD is unsustainable in law and is ultra virus the provisions of DERA. However, the subsequent developments and events do not permit the Court to put the clock back at this stage and undo all that has transpired in the intervening period.

(v) However, this Court directs that hereafter while exercising its powers under Sections 12(1) and 12(2) DERA, the GNCTD will abide by the mandate of the DERA and not reduce the role of the DERC to a mere consulted whose views do not matter. Clearly, the GNCTD cannot under the pretext of exercising its powers under Section 12 DERA take over the function of the DERC in determining the tariff.

(vi) The fact that the period of the BST Order has also run out is one factor that weighs against this Court striking it down at this stage.

(vii) It is evident that the legal position concerning the prior consultation by the GNCTD with the DERC was not considered by the Hon'ble Supreme Court in the DERC case. It was only considering the consequent step of the BST Order dated 22.2.2002 and the attempt by the DERC to amend that order. It is not possible to read the judgment as upholding the validity of the policy directive.

(viii) Even if it is argued that the Hon'ble Supreme Court implicitly approved the Transfer Scheme Rules it is clear that the Hon'ble Supreme Court did not have the occasion in either the DERC case or in the PIL (Power Crisis in NCT Delhi) to consider the above findings of the PAC or the CAG which point to serious irregularities in the entire process beginning with the selection of consultants, the question of asset valuation, the bid process and the validity of the post-bid negotiations.

(ix) While this Court may lack the competence to examine the technical aspects of the above issues and thereforee may not itself pronounce on the validity of the Transfer Scheme Rules it certainly can seek to know what action the GNCTD has taken on the basis of the fact finding reports of the PAC and the CAG

(x) The CAG as a constitutional functionary has raised serious questions and expressed opinions on these issues which, according to the Court, deserve the most serious consideration at the hands of the GNCTD. The GNCTD if it wishes not to accept the report of the CAG must indicate its reasons in a reasoned decision in

writing. Likewise the PAC of the legislative assembly is another body that enforces accountability of the executive government consistent with the system of checks and balances that our Constitution enshrines. The deployment of that rule of law device must be permitted to be taken to its logical conclusion. In the circumstances, in exercise of its powers of judicial review under Article 226 of the Constitution this Court considers it necessary to seek an Explanationn from the Government as to whether or not it has taken any action on the reports of the PAC and the CAG.

Directions

66. Accordingly, this Court directs the GNCTD to follow up with the Secretariat of the Delhi State Legislative Assembly as regards the tabling of the response of the GNCTD to the report of the PAC excerpts from which have been set out in para 57 of this judgment. This should be done by the GNCTD within a period of eight weeks from today and in any event not later than 2.9.2007.

67. The GNCTD will also, within a period of eight weeks from today and in any event not later than 2.9.2007, take a reasoned decision on the action it either proposes to take or not to take on the reports of the CAG excerpts from which have been referred to in paras 58 and 59 of this judgment. The decision taken by the GNCTD should be publicized sufficiently well so that the general public including the Petitioner are made aware of it. In addition the GNCTD will send a copy of its decision to the petitioner within ten days of its being taken. If the petitioner is still aggrieved, it would be open to him to seek any further remedy available to him in law.

68. The Court reiterates the direction in para 65(v) of this judgment that while exercising its powers under Section 12(1) and 12(2) DERA, the GNCTD will abide by the mandate of DERA and not reduce the role of the DERC to a mere consulted whose views do not matter.

69. With the above directions this petition and all applications are disposed of. For the efforts made by him in pursuing this petition relentlessly and for a good cause for over five years, the GNCTD will pay to the petitioner costs of Rs. 10,000 within a period of four weeks from today. A certified copy of this judgment be delivered by the Registry to the Chief Secretary, GNCTD within a period of three days today and not later than 5.7.2007.