GUJARAT ELECTRICITY REGULATORY COMMISSION
AHMEDABAD

6th December, 2001

CORAM: Justice S.D. Dave, Chairman
Shri B.M. Oza Member
Shri R.K. Sharma, Member

CASE NO. 34 OF 2000

ORDERS C.A.V.
6/12/2001

1. We at the Commission, are called upon to decide and answer the questions, which could be formulated as under:

1. Whether the Application/Petition, presented by the A.E.C is not in conformity with the G.E.R.C (Conduct of Business) Regulations 1999 ? If yes, what is the course in Law to be adopted by the AEC ?
2. Whether the AMC is required to be given the time of a week, so as to enable them, to file their Reply after the Application/ Petition of the AEC is put to order ?
3. Whether the AMC is entitled to be impleaded, as the Party, in the Proceedings?
4. Whether the AMC is entitled to cross-examine the Officers– Directors-Affiant of the AEC, qua their Application/Petition ?

(The Ahmedabad Electricity Co. Ltd, having their office at Lal Darwaja, Ahmedabad has been referred to in the above said questions as the A.E.C, while the Ahmedabad Municipal Corporation has been referred to as the AMC)

The above said questions, arise for our consideration and answer in the facts and circumstances which could be noticed as under:

2. The AEC has taken out the Petition/ Application under Section-29 of the Electricity Regulatory Commissions Act 1998 for the fixation/ approval of the tariff. The Petition/ Application also contains the Affidavit filed by one Shri Sudhir Shah who happens to be the Executive Director (Finance) of the AEC. The Petition came to be presented before the Commission on 18/12/2000.

3. We are a Statutory Commission constituted under the ERC Act, 1998 and as especially under the provisions contained in Section –17 thereof. The functions of the State Commission have been defined under Section-22 of the Act. A reference to the provisions contained in Section –22 of the ERC Act, 1998 would go to show that, one of the functions assigned to us is to determine the tariff for electricity. It is because of this, that the AEC has filed the above said Application / Petition on 18/12/2000 before this Commission.

4. It appears that during the earlier hearing, certain Applications came to be presented by the learned Sr. Counsel Mr. S.B. Vakil who appears on behalf of the AMC. Later on, the matter was carried before the High Court of Gujarat by filing Special Civil Application No. 2044 of 2001 which came to be decided and disposed off under the Orders dated 16/4/2001.

5. The relevant portions of para-9 of the decision rendered by the High Court of Gujarat can be reproduced thus :

" Accordingly, I am of the view that the Commission should give reasonable time to the petitioner which shall not be less than seven days to file their objections and suggestions and thereafter, after hearing the petitioner Corporation, the Commission may take their decision on the application of the Ahmedabad Electricity Company in accordance with the law. The Commission is also directed to decide the application of the petitioner dated 22-2-2001 in accordance with the law."

6. Placing reliance upon, the said directions coming from the High Court of Gujarat, and also on the provisions contained in the ERC Act, 1998 and the Regulations framed thereunder, Learned Sr. Counsel Mr. Vakil has urged that the Application/ Petition filed by the AEC is not in conformity with the G.E.R.C (Conduct of Business) Regulations, 1999 and that therefore probably, this Commission cannot proceed ahead for hearing the Application/ Petition presented by the AEC. The second submission coming from the Learned Counsel for the AMC is that, the AMC is required to be given the time of one week so as to enable them to file their reply, after the Application/ Petition of the AEC is put to order. Taking up his third contention, the Learned Counsel has urged that, they are entitled to be impleaded as the party in the proceeding before us. In this respect, Mr. Vakil, Learned Counsel for the AMC has placed reliance upon the provisions contained in the ERC Act, 1998 and the Regulations of 1999. The Learned Counsel has also

preferred to place reliance upon certain pronouncements. The last and the fourth contention coming from the Counsel is that the AMC should be permitted to cross-examine the Officers/ Director/ Affiant of AEC.

7. Learned Sr. Counsel, Mr. Mihir Thakore, who appears on behalf of the AEC has controverted the say coming from the Learned Counsel for the AMC and has urged that, if it is found that the Application/ Petition filed by the AEC is not in conformity with the Regulations, then ofcourse, the AEC is prepared to file the necessary Affidavit so as to bring the entire Proceedings in conformity with the requirements of the Regulations. Mr. Mihir Thakore has fairly conceded, looking the Orders of the High Court of Gujarat, that the time of one week requires to be granted to the AMC for filing the reply.

8. Any how, so far as, other two remaining questions are concerned, Mr. Thakore has urged that the AMC is not entitled to be impleaded as the party in the proceedings and in the same way is not entitled to cross examine the Officers/ Directors/ Affiants of the AEC, qua their Application/ Petition on the basis of the claim or the entitlement, of the benefit under the principle of Natural Justice.

9. So far as, question No. 1 is concerned, our concentration requires to be on the provisions contained in the Regulation No. 29 of the Regulations of 1999. A reference to the above said provision would go to show that the Petition shall have to be supported by an Affidavit before the Secretary or a designated Officer of the Commission and that such

an Affidavit should be in Form No. 2 and that the Affidavit shall clearly and separately indicate the statements which are true to the:

(a) knowledge of the deponent

(b) information received by the deponent; and

(c) belief of the deponent

10. Reading the above said provisions, the Learned Counsel for the AMC has urged that the Petition before us is not in conformity with the above said provisions and that the Affidavit does not clearly and separately indicate the statements which are true to the knowledge of the deponent, or the information received by the deponent or the belief of the deponent.

11. Learned Counsel, Mr. Mihir Thakore, who appears for the AEC has fairly conceded that the Affidavit in support of the Petition, which is before us, is not in conformity with the above said requirements and that the AEC is ready, willing and prepared to file one more Affidavit, which would be in conformity with the above said provisions.

12. Taking the above said say coming form the Learned Counsel Mr. Mihir Thakore, in consideration, we direct the AEC to file a supporting Affidavit which should be in conformity with the requirements of the Regulations of 1999. This should be done by the AEC on or before 7th December, 2001.

13. Learned Counsel, Mr. Vakil has urged that the AMC is entitled **to a reasonable time for filing the reply which should not be less than seven days. This, in fact, is the direction issued by the High Court of Gujarat under the Orders dated 16/4/2001. We therefore would say that, it would be open for the AMC to file the reply within a period seven days thereafter, namely, on or before 14th December, 2001.**

14. So far as, question No. 3 is concerned, the contention coming from Learned Counsel for the AMC is that they are entitled to be impleaded as the party in the proceedings. In support of his contention, Learned Counsel Mr. Vakil has placed reliance upon the Regulations of 1999, with a view to urge, that unless and until the AMC is permitted to be joined as the party in the proceedings before the Commission, probably, the AMC would not be able or entitled to file an appeal before the appropriate Forum against the Orders of the Commission.

15. It is true that a reference to some of the Regulations would go to show that there could be more than one party to the Proceedings before the Commission, but, that does not mean that each and every objector or a person likely to be affected by the Tariff Orders, who comes before the Commission, is necessarily required to be permitted to be impleaded as the party in the Proceedings. A specific mention requires to be made to the provisions contained in Section –27 of the ERC Act , 1998 which confers the statutory right to file an appeal to the High Court, upon any person who is aggrieved by any decision or Order of the State Commission. This provision therefore would go to show that, in case of an envisaged future eventuality, of the need to file an appeal before the

High Court, against the Orders of this Commission, it would not be a legal or tenable argument before the High Court that , as the AMC is not a party before us, they would not be having a statutory right of appeal before the High Court.

16. **Looking to the above said position, we are of the opinion that, the AMC cannot be said to be entitled, to be impleaded, as the party in the proceedings before the Commission, on the above said grounds.**

17. Moreover, it should not escape notice that the AMC is before the Commission in response to a Public Notice and have filed Part- I of the Reply and would be entitled to file further or Part –II Reply in view of our Orders as indicated above. The Commission has had and is going to hear the AMC and to take into consideration their say in the matter. The fact that, the AMC, as urged by Mr. Vakil is the biggest or one of the big consumers, would not be able to persuade us to take a different view because though not a party till date the AMC is being heard by the Commission.

18. The last question is in respect of the entitlement of the AMC to cross examine the Officers/ Directors/ Affiants etc of the AEC, qua the averments made in the Application/Petition for the fixation of the tariff.

19. According to us, the answer is provided by the provisions contained in the Regulation No. 54 of the Regulations of 1999. It has been said that, the Commission may decide the matter on the pleading of the parties and the affidavits in support thereof

and evidence on record and **may call for the parties** to produce evidence by way of Affidavit OR **direct the party to lead oral evidence.** It is also said, that, **IF the Commission, directs a party to adduce oral evidence, then the Commission may, if considered necessary or expedient, grant an opportunity to, the other party to cross examine the persons giving the evidence.**

20. Upon a conjoint reading of the provisions contained in Regulation No. 54 (1) & (2), it is clear that ordinarily , the Commission would decide the matter on the basis of the pleadings of the parties and the Affidavits, but at the same time, the Commission has the discretion of calling upon the party to lead oral evidence in the matter. If this is done, and the oral evidence is adduced, then, if considered necessary or expedient, the Commission may or can grant an opportunity to the other party to cross- examine the persons who has given the evidence.

21. It is required to be appreciated that, still this Commission has not directed the AEC or any other party to lead oral evidence in the matter and that therefore, there is absolutely no question for this Commission, considering it necessary or expedient to grant an opportunity to the AMC to cross-examine any person. Such an eventuality may arise only when a party is directed to adduce oral evidence and there is a judicious feeling on the part of the Commission that it is expedient to allow the cross-examination.

22. Learned Counsel Mr. Vakil, who appears for the AMC has urged that, this question cannot be concluded on the basis of the Regulations only because one shall

have to look at the principles of Natural Justice. Mr. Vakil has urged that unless and until, the say of a party is examined on the touch stone of the cross-examination, the veracity and the evidentiary value of the averments in the Petition, cannot be judged by this Commission.

23. In support of his contention, Learned Counsel Mr. Vakil has drawn our attention to the pronouncement of the Supreme Court in M/s. Sukhwinder Pal Bipan Kumar Vs. State of Punjab – AIR-1982- S.C –65. Para –12 of this decision on which reliance has been placed by the Learned Counsel Mr. Vakil, goes to show that when malafides are alleged, the onus of proof lies on the person, who makes the allegations and that unless and until the Affiant is permitted to be cross examined, the veracity of the averments made in the Petition cannot be examined and judged.

24. This decision as well as the decision rendered by the S.C in A.K.K. Nambir Vs. Union of India and Another – AIR-1970 S.C 652 were also pressed in service with a view to show that the Affidavit has to show very clearly as to which paragraph is based upon the knowledge of the deponent or the information received by the deponent and/or the belief of the deponent.

25. We have said herein above that the AEC will be filing the other Affidavit in support of their Application/Petition on or before on 7th December, 2001. It therefore appears that the reliance to the above said two Supreme Court decisions recedes in the background.

26. Learned Counsel Mr Vakil has urged with a great vehemence that not permitting the AMC to cross-examine the Affiant or the Deponent of the AEC would result in violation of the principles of Natural Justice.

27. With a view to meet with this contention coming from Mr. Vakil, Learned Counsel Mr. Mihir Thakore who appears on behalf of the AEC has pressed in service the Supreme Court pronouncement in A.K. Roy Vs Union of India & Others in Writ Petition No. 5724 of 1980, Than Singh Tyagi Vs Union of India & Others in Writ Petition No. 5874 of 1980 & Dr. Vasantkumar Pandit Vs Union of India & Others in Writ Petition No. 5433 of 1980. Para 97 deals with the question of the rights to cross-examination an integral and inseparable part of the principles of Natural Justice. Para 97 reads thus:-

> **" The principal question which arises is whether the right of cross examination is an integral and inseparable part of the principles of natural justice. Two fundamental principles of natural justice are commonly recognized, namely, that an adjudicator should be dis-interested and unbiased (*nemo judex in cause sua*) and that, the parties must be given adequate notice and opportunity to be heard (*audi alteram partem).* There is no fixed or certain standard of natural justice, substantive or procedural, and in two English cases the expression " natural justice" was described as one " sadly lacking in precision" and as "vacuous".**

The principles of natural justice are, in fact mostly evolved from case to case, according to the board requirements or justice in the given case."

28. Learned Counsel Mr. Mihir Thakore has also placed reliance upon the Supreme Court pronouncement in Nagendranath Vs Commissioner of Hills Division & Appeals , Assam and Others- AIR – 1958 SC 398 . The relevant portion of para 17 appearing on page No. 409 reads thus:-

" In that case, this Court has laid down that the rules of natural justice vary with the varying constitution of statutory bodies and the rules prescribed by the Act under which they function ; and the question whether or not any rules of natural justice had been contravened, should be decided not under any pre-conceived notions, but in the light of the statutory rules and provisions. In the instant case, no such rules have been brought to our notice, which could be said to have been contravened by the Appellate Authority. Simply because it viewed a case in a particular light which may not be acceptable to another independent Tribunal is no ground for interference either under Article 226 or Article 227 of the Constitution"

29. Looking to the above said say coming from the Supreme Court and looking to the scheme of the Electricity Regulatory Commissions Act, 1998 and the Regulations of 1999, we are not in a position to say that the refusal to cross-examine the Officers etc of the AEC to the AMC would result in violation of the principles of natural justice.

30. On the contrary, our view is that the question whether or not any of the rules of Natural Justice has been contravened should be decided, not under any preconceived notion, but in the light of the statutory rules and the provisions. This view of the Supreme Court affirms our view that looking to the Act and the Regulations , not granting of the permission to the AMC for cross- examination would not result into the violation or contravention of the principles of Natural Justice.

31. The above said, are our answers to the questions formulated by us and the reasons behind the same.

32. The net effect is that the AEC would be entitled to file other supporting Affidavit on or before 7th December, 2001 and the AMC shall be entitled to file their reply against the Application/ Petition of the AEC on or before 14th December, 2001.

The matter should be listed on 18th December, 2001.

The Application/s of the AMC shall stand disposed off accordingly.

Sd/-	**Sd/-**	**Sd/-**
(JUSTICE S.D. DAVE)	**(B.M.OZA)**	**(R.K.SHARMA)**
CHAIRMAN	**MEMBER**	**MEMBER**

Place: Ahmedabad
Date: 6th December, 2001