



**4th Capacity Building Programme for
Officers of Electricity Regulatory Commissions
18 – 23 July, 2011**

**“Recent developments in Case law in
Electricity Sector: A Review of ATE
and Court Decisions”**

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**Recent case law
in Electricity Sector**

The scenario

WHAT
WHY AND HOW OF
REGULATORS

3

Who is a regulator?

- A public authority or an organ of the State responsible for exercising autonomous authority over some area of human activity in a supervisory capacity.
- Often a regulatory agency may be independent of other branches or arms of the Government

4

Regulatory bodies under the 2003 Act

- Appropriate Governments
- Appropriate Commissions
- Authority (CEA)
- Appellate Tribunal
- Load Despatch Centres

5

Why independent regulator?

- No one to be a judge in one's own case - Government is also stakeholder
- Expertise required for the task
- Time consuming
- To ensure transparency and level playing field.

6

General functions

- **Specify and enforce entry conditions and standards of performance**
- **Monitor performance**
- **Initiate action for non-compliance**
- **Impose sanctions**
- **Tariff determination**

7

What is the source of authority?

- **Article 19 (1)(g) provides a fundamental right viz.**

All Citizens shall have the right :-
to practice any profession or to carry on
any occupation , trade or business

- **Fundamental Rights are subject to limitations**

8

Limitations

- Clause 6 of Article 19 empowers the State to make law imposing, in the interests of the general public reasonable restrictions

9

Contd...

- State is specifically empowered in relation to

Prescribing professional or technical qualifications

Carrying on any trade, business , industry or service

10

Statutory Provisions

11

- **Constitution Entry 38 in List III of Seventh Schedule and Article 246**
- **Union and State legislatures can legislate on electricity**
- **In case of repugnancy, Union law to prevail**
- **Unless the State law has been reserved for the consideration of the President and has received his assent.**

12

Contd...

- Electricity Act, 2003 and the subordinate legislations made thereunder
- State laws not inconsistent with the Union Act.

13

Functions of the Central Commission

- Tariff determination
- Licencing
- Adjudication of disputes;
- Specifying Grid Code
- Specifying and enforcing standards
- Fixing the trading margin
- Regulate inter-State transmission.

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Commission discharges its functions through

- Orders which are Quasi judicial in nature
- Regulations which are Legislative in character
- Both are of binding nature

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Scope of orders

- Orders are specific to the facts and circumstances of the case
- Can be challenged on a number grounds such as:
 - Non-application of mind
 - Violation of Natural Justice
 - Irrelevant consideration, etc.

16

Status of regulations

- **General Application**
- **Not – mandatory to have regulations**
- **Regulations, if framed, are binding**
- **Cannot be challenged in appeal**
- **Subject to Judicial review**

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Law laid down by the SC

PTC India Ltd. Vs. Central Electricity
Regulatory Commission thr. Secretary
Decided On: 15.03.2010
AIR2010SC1338, JT2010(3)SC1,
(2010)4SCC603,

18

Status of Regulations and Orders

- **Section 178, which deals with making of regulations under the authority of subordinate legislation, is wider than Section 79(1), which enumerates the regulatory functions, in specified areas, to be discharged by Orders (decisions).**

19

Contd...

- A regulation under Section 178, as a part of regulatory framework, intervenes and even overrides the existing contracts between the regulated entities.
- it would be open to the Central Commission to make a regulation on any residuary item under Section 178(1) read with Section 178(2)(ze).

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Scope of Regulation (GEL Case)

- 18. It is now a well settled principle of law that the rule making power "for carrying out the purpose of the Act" is a general delegation. Such a general delegation may not be held to be laying down any guidelines.

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Contd...

- Thus, by reason of such a provision alone, the regulation making power cannot be exercised so as to bring into existence substantive rights or obligations or disabilities which are not contemplated in terms of the provisions of the said Act.

22

Impugned provisions 6A (b) & (f)

- (b) The applicant, or any of his partners, or promoters, or Directors or Associates is involved in any legal proceedings, and in the opinion of the Commission grant of licence in the circumstances, may adversely affect the interest of the electricity sector or of the consumers; or

23

Contd...

- (f) The applicant is not considered a fit and proper person for the grant of licence for any other reason to be recorded in writing;

24

Illustrative list

- Explanation: For the purpose of determining as to whether the applicant is a 'fit and proper person', the Commission may take account of any consideration, as it deems fit, including but not limited to the following,
 - namely:
 - (i) financial integrity of the applicant.
 - (ii) His competence;
 - (iii) His reputation and character; and
 - (iv) His efficiency and honesty

25

Decision of Supreme Court

- Global Energy Ltd. and Anr. Vs. Central Electricity Regulatory Commission
- Decided On: 11.05.2009
- AIR2009SC3194, 2009ELR(SC)227, JT2009(11)SC164, (2009)15SCC570,

26

Supreme Court Observations

- The Act is silent as regards conditions for grant of licence. It does not lay down any pre-qualification therefor.

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Contd...

- 26. A legislative policy providing for qualification or disqualification of a person for obtaining a trading licence should not be vague or uncertain. Parameters must be laid down therefor for determining the financial integrity, reputation, character, efficiency and honesty of the applicant. An explanation appended to Clause (f) of Regulation 6A points out various aspects that may be considered while determining the said criteria.

28

Contd...

However, what should be the criteria in regard to financial integrity, character, reputation, etc. have not been defined. How and in what manner the said criteria are required to be ascertained have not been laid down, the criteria are subjective ones.

29

Contd...

- We are not unmindful of the fact that Clause (f) to Regulation 6A of the Regulations mandates recording of reasons in writing. In the event, thus, if wrong reasons are recorded a judicial review would be maintainable. But availability of judicial review itself, although is a relevant factor, by itself cannot be a ground to declare a subordinate legislation valid which otherwise it is not.

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Contd...

- {See State of Kerala and Ors. v. Unni and Anr. MANU/SC/8737/2006 : AIR2007SC819 } Judicial review from an administrative decision lies on a very narrow compass. The superior courts in exercise of their jurisdiction under Article 226 or 32 of the Constitution of India ordinarily would not enter into the merit of the matter. Their primary concern are with the decision making process.

31

Grounds of challenge

It is also well recognized that a subordinate legislation can be challenged under any of the following grounds:

- (a) Lack of legislative competence to make the subordinate legislation.
- (b) Violation of fundamental rights guaranteed under the Constitution of India.
- (c) Violation of any provision of the Constitution of India.

32

Contd..

- (d) Failure to conform to the statute under which it is made or exceeding the limits of authority conferred by the enabling Act.
 - (e) Repugnancy to the laws of the land, that is, any enactment.
 - (f) Manifest arbitrariness/unreasonableness (to an extent where the court might well say that the legislature never intended to give authority to make such rules
- (State of T.N. and Anr. v. P. Krishnamurthy and Ors. AIR2006SC1622)

33

Contd...

- An explanation appended to Clause (f) of Regulation 6A points out various aspects that may be considered while determining the said criteria. However, what should be the criteria in regard to financial integrity, character, reputation, etc. have not been defined. How and in what manner the said criteria are required to be ascertained have not been laid down, the criteria are subjective ones.
- 27. A disqualifying statute, in our opinion, must be definite.

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Contd...

All law making, be it in the context of delegated legislation or primary legislation, have to conform to the fundamental tenets of transparency and openness on one hand and responsiveness and accountability on the other. These are fundamental tenets flowing from Due Process requirement under Article 21, Equal Protection clause embodied in Article 14 and Fundamental Freedoms clause ingrained under Article 19.

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Contd...

- Law has to provide a basic level of "legal security" by assuring that law is knowable, dependable and shielded from excessive manipulation. In the context of rule making, delegated legislation should establish the structural conditions within which those processes can function effectively. The question which needs to be asked is whether delegated legislation promotes rational and accountable policy implementation.

36

Point for consideration

- Whether provisions of Section 23 of the Act empowers the Commission to direct a generator to equitably supply power to three Discoms in an area in derogation of valid PPAs?

37

Scope of Section 23

23. If the Appropriate Commission is of the opinion that it is necessary or expedient so to do for maintaining the efficient supply, securing the equitable distribution of electricity and promoting competition, it may, by order, provide for regulating supply, distribution, consumption or use thereof.

38

Definition of Supply

(70) "supply", in relation to electricity, means the sale of electricity to a licensee or consumer;

39

Answered in the negative:

Tata Power Company Ltd. Vs.
Maharashtra Electricity Regulatory
Commission and Ors.

Decided On: 06.05.2009

[2009(111)BomLR2966,

2009ELR(SC)246,

40

Reasoning

- Generation has been de-licenced
- Section 11 provides for issue of directions only under extra-ordinary circumstances
- Definition of 'supply' need not be applied in reading Section 23 because of the phrase 'unless the context otherwise requires in section 2

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Contd...

- Marginal note of Section 23 reads "Directions to licensees"
- Assigning Contextual meaning
- Adopting purposive interpretation

42

Applicability of Limitation Act

Section 125 of the Electricity Act will prevail

Chhattisgarh State Electricity Board Vs.

Respondent: Central Electricity Regulatory
Commission and Ors

Decided On: 15.04.2010

2010ELR(SC)313,

43

Reasoning/Observations

- ...the Electricity Act ...is a self-contained comprehensive legislation, which not only regulates generation, transmission and distribution of electricity by public bodies and ... but also ensures creation of special adjudicatory mechanism to deal with the grievance of any person aggrieved by an order ... made by the appropriate commission.

44

Contd...

- The object underlying establishment of a special adjudicatory forum i.e., the Tribunal to deal with the grievance of any person who may be aggrieved by an order of ... an appropriate commission with a provision for further appeal to this Court and prescription of special limitation for filing appeals under Sections 111 and 125 is to ensure that disputes ... are expeditiously decided by an expert body and no court, except this Court, may entertain challenge to the decision or order of the Tribunal.

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Contd...

- It is thus evident that the Electricity Act is a special legislation within the meaning of Section 29(2) of the Limitation Act, which lays down that where any special or local law prescribes ... a period of limitation different from the one prescribed by the Schedule, the provisions of Section 3 shall apply as if such period were the period prescribed by the Schedule and provisions contained in Sections 4 to 24 (inclusive) shall apply for the purpose of determining any period of limitation prescribed for any suit, appeal or application unless they are not expressly excluded by the special or local law.

46

Ratio

- Any interpretation of Section 125 of the Electricity Act which may attract applicability of Section 5 of the Limitation Act read with Section 29(2) thereof will defeat the object of the legislation, namely, to provide special limitation for filing an appeal against the decision or order of the Tribunal and proviso to Section 125 will become nugatory.

47

Point for consideration

- Can a State Commission entertain an application relating to grievance of a consumer?

48

Law Laid down by the SC

Maharashtra Electricity Regulatory
Commission Vs. Reliance Energy Ltd. and
Ors.

Decided On: 14.08.2007

AIR2008SC976, JT2007(10), (2007)8SCC381

49

Ruling

12. It may be noted from a perusal of Section 86(1)(f) of the Act that the State Government has only power to adjudicate upon disputes between licensees and generating companies. It follows that the Commission cannot adjudicate disputes relating to grievances of individual consumers. The adjudicatory function of the Commission is thus limited to the matter prescribed in Section 86(1)(f).

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Contd...

- 13. Section 14 of the Act provides for grant of licence; Section 16 provides for conditions of licence; Section 61 lays down the tariff regulations and Section 62 provides for determination of tariff. The Commission under Section 94 has civil powers also and under Section 96 it has power of entry and seizure. Under Section 126 the Commission has the power to investigate and make assessment. Section 127 provides for an appeal to the appellate authority.

51

Contd...

- Under Section 128 the Commission can make investigation of certain matters where it is satisfied that the licensee has failed to comply with any of the conditions of licence or failed to comply with any of the provisions of the Act or the rules and regulations made thereunder. Sub-Section (6) of Section 128 empowers the Commission to take any action against the licensee/generating company.

52

Ratio

18. Thus while we hold that the Commission has power to issue a general direction to licencees that they should abide by conditions of the licence issued by them and charge only as per the tariff fixed under the Act so that the public at large should not be harassed, we are of the opinion that so far as the blanket direction given by the Commission for refunding the entire amount without making a proper investigation whether the issue of supplementary/amended bills was really warranted in every case or not is unsustainable.

[contd.]

53

Contd...

- Under these 2003 Regulations a proper forum for redressal of the grievances of individual consumers Ms been created by the Commission. Therefore, now by virtue of Sub-section (5) of Section 42 of the Act, all the individual grievances of consumers have to be raised before this forum only. ... we fail to understand how could the Commission acquire jurisdiction to decide the matter ... when an individual consumer has a grievance he can approach the forum created under Sub-section (5) of Section 42 of the Act.

54

Nature of Depreciation

- **Our answer is: In the light of above discussions it is clear that as per definition depreciation is replacement cost of an asset but in practice it is utilized for repayment of loan taken for creation of that asset.**

Appellate Tribunal for Electricity

Appeal No. 134 of 2009

Dated : 7th April, 2011

PGCIL Vs CERC

55

Agreement tariff

- **ISSUE: Can the central commission accept tariff as submitted in joint application by the Appellant and Respondent-2/distribution licensee?**
- **We find that the Central Commission has rightly determined the tariff as per its Regulations as it can determine the tariff only as per its Regulations and in no other way**

Appellate Tribunal for Electricity

Appeal No. 130 of 2009

Dated: 25th March, 2011.

56

Power to remove difficulty

- 10.3. In our opinion, power to remove difficulties is to be exercised when there is difficulty in effecting the Regulations and not when difficulty is caused due to application of the Regulations.

57

Need for uniform approach

APPELLATE TRIBUNAL FOR ELECTRICITY,

Appeal Nos. 100 of 2009, 146 and 151 of 2010

Decided On: 24.05.2011

U.P. Power Corporation Limited Vs.

Central Electricity Regulatory Commission

- Entertaining of interlocutory applications after disposal of a matter from which appeal is preferred is definitely a procedure quite unusual and this leads us to hear a somewhat embarrassing submission of Mr. Pradeep Misra that the ...

58

- **Commission** is not following a **uniform** procedure, for in one matter they say that they are powerless to do anything being *functus officio*, while in others they entertain application attempting to make a distinction between the two situations. What we want to emphasize is that the procedure must be uniform and uniformly applied leading no scope for anybody to assail that one is discriminated against the other.

59

Scope of Section 11

- **GMR Energy Limited Vs. Govt. of Karnataka**
- Writ Petition Nos. 590, 591, 4693 and 9721 to 9722 of 2009
- Decided On: 26.03.2010
- Whether Severe power shortage and glaring demand – supply gap constitute extra-ordinary situation?
- Held :YES

60

Operate and maintain

- **The direction to operate means to generate electricity for supply to the State grid only and not for commercial supply. Direction to maintain means to keep the generating company in good condition by checking or repairing it regularly so that the production and supply of electricity in to the State grid is unimpaired, to enable the Government to meet the extra ordinary circumstance arising out of scarcity of electricity to meet, the public demand.**

61

Section 11 Vs. Article 301

- **Therefore, the provisions of Section 11 of the Act, is regulatory in nature. It is not a restriction as contended by the counsel for the petitioners and, therefore, we do not see any substance in the said contention also.**

62

Present position

- Appeals are pending before the Hon'ble Supreme Court

63

MULTI COMMODITY EXCHANGE CASE

**Multi Commodity Exchange of India Limited
Vs.
Central Electricity Regulatory Commission and
Ors.**

Writ Petition No. 1197 of 2010 and

Notice of Motion No. 100 of 2010

Decided On: 07.02.2011

2011(113)BomLR531, 2011ELR(BOM)1

64

ELECTRICITY DISTINGUISHED

- (a) The Electricity Act deals with in every respect including trading in electricity. The electricity is a non-storable goods, except produced by hydro projects. The trading of electricity falls within the concept of commodity trading. Therefore, it may or may not physically available all the time, unless generated on the day and/or the date of delivery. This distinguishes electricity as a goods from other commodities as contemplated under the FCR Act, which at present deals exclusively with all aspect of futures/ forward contracts.

65

Limited role of FMC and MCX

- (b) In view of the reasoning's earlier recorded, it will not be possible either for FMC or MCX to control and regulate the mandatory requirements of electricity, at various stages, which are well within the exclusive domain and control of the CERC and/or authorities/commissions. It will create more complications than solving it, unless an expert's body constituted and specialized rules and regulations are framed. Both authorities/commissions cannot deal in futures/forward contract in electricity excluding other and/or independently.

66

Exclusive jurisdiction - difficult

- (c) It is not only question of resolving the conflict between two entries and/or mandates of the respective specialized Act, but actual and physical workable solution to permit and/or to allow either authorities/ commissions/ exchanges to deal with the electricity in the futures/ forward market. Both authorities/ commissions under the respective Acts may not be in a position to control and regulate the futures contract in electricity exclusively, unless those Acts and regulations are amended /revised and reframed. Both cannot have exclusive jurisdiction as claimed in the present scenario in India

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Proposed solution

- (d) It is clarified that the Union of India and/or the concerned commission and/or the regulatory authorities are free to revise and/or to reframe the rules and the regulations and/or to amend the concerned statutes to permit the futures/ forward and derivatives contract in electricity, if so advised.

68

- **(e) The regulations of CERC as notified on 20 January, 2010, which deals with the aspects of futures contracts or forward contracts, therefore, are inoperative to that extent only. The impugned order dated 28th April, 2009 and order dated 11th January, 2010 upholding the regulations are also unsustainable to the extent of reasoning and direction relates to forward contracts in electricity.**

69

Scope of Section 121

- Held, Tribunal can exercise revisional power under Section 121 of Act of 2003 only when aggrieved party had either initiated proceeding before concerned Electricity Regulatory Commission or made any grievance relating to excessive exercise of jurisdiction by such Regulatory Commission

Central Electricity Regulatory Commission Vs.
Gajendra Haldea and Ors.

Decided On: 15.04.2010

2009ELR(SC)508, JT2009(14) SC317, (2009)11SCC556

70

Point for consideration

- Does the Commission have power to fix tariff of generating Company when power is sold to an agency other than distribution company?

71

Judgment of the Tribunal

- under sub-section (1) of Section 62 of the Act, there is no power with the State or the Central Commission to determine or fix tariff, price or rate to be charged for supply of electricity by: (i) a generator to a trader or an intermediary; (ii) a distributor to a trader; and (iii) by a trader to a distributor or any other person.

72

Contd...

- 34. It appears to us that the general words in Sections 79 (1) (a) & (b) and 86(1) (a) must take colour from the words used in Section 62 (1), particularly Section 62 (1) (a). Otherwise, it is not possible to reconcile the provisions of Section 62(1) on the one hand and Section 79 (1) (a) & (b) and Section 86(1) (a) on the other.

73

Contd...

- Section 64 of the Act of 2003 postulates filing of an application under Section 62 thereof by a generating company or a licensee.

74

Contd...

- Therefore, the words “to regulate the tariff of generating companies” occurring in Section 79(1)(a) & (b) are to be read with Section 62(1)(a). When so read they imply: to regulate the tariff of generating companies for supply to a distribution licensee. Similarly the meaning of the words “generation & supply” occurring in Section 86(1)(a) are controlled by Section 62(1)(a) to mean supply of electricity by a generating company to a distribution

75

Ratio

- we hold that the Appropriate Commission under Section 62(1) (a) read with Sections 79 (1) (a) & (b) and Section 86 (1) (a) of the Act has been empowered to determine tariff for sale of electricity by a generating company to a distributor and it does not impose any restriction of tariff on the generating company or the distribution licensee to sell electricity to a trader or an intermediary or on the trader to sell electricity to any person. ...

76

Contd...

- This leaves the generator free to have a direct commercial relationship with a trader or an intermediary, a vital factor for encouraging competition, which is extremely important for securing power for the consumers at reasonable rates. This is also clarified in the National Electricity Policy, which has captured the spirit of the Act.

77

Additional issue

- 56. Since the generator is free to sell power to the traders and intermediaries directly, which can have an impact on the consumers, the Appropriate Commission must take recourse to Sections 60 and 66 of the Act.

78

Proposed solution

- In other words, if the base price for 'X' units is Rs. 100/- as fixed by the Appropriate Commission, the maximum price at which the generator is to be allowed to sell electricity to a trader or an intermediary shall not be more than Rs. 104/- for the same units of electricity. In this way the generator in a competitive market would be able to sell electricity even below the base price fixed by the Appropriate Commission.

79

Contd...

- We would also like to clarify that the generator will not supply electricity to entities, utilities or persons other than the distributor, unless it fulfils its obligation to supply electricity to the distributor for the consumption of the consumers.

80

Appeal to SC

- Decided on the basis of Locus standi of the petitioner
 - Legal merit of the ruling of the Tribunal not commented upon
- Central Electricity Regulatory Commission Vs. Gajendra Haldea and Ors.

Decided On: 09.04.2009

2009ELR(SC)508, JT2009(14)SC317

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THANK YOU

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