

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 92 of 2011

Dated: 28th July, 2011

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam,
Chairperson**

Hon'ble Mr. V.J. Talwar, Technical Member

IN THE MATTER OF

**Maharashtra State Electricity Distribution Company Limited.
Prakashgard, 5th Floor, Station Road,
Bandra(East), Mumbai -400 051.**

.... Appellant

Versus

- 1. Central Electricity Regulatory Commission,
4th Floor, Chandra Lok Building,
Janpath,
New Delhi-110 001**
- 2. National Load Despatch Centre
B-9, Qutab Institutional Area,
Katwaria Sarai, New Delhi-110 016**
- 3. Maharashtra State Electricity Transmission
Co. Ltd.,C-19, E-Block, MSETCL,
Prakashganga, Bandra Kurla Complex,
Bandra(East) Mumbai- 400 051.**

....Respondent(s)

**Counsel for Appellant(s): Mr.Paras Kuhad, Sr. Advocate
Mr. Adab Singh Kapoor,
Mr. Varun Pathak
Mr. Lakshyaved R.Odhekar**

**Counsel for Respondent(s): Mr.Nikhil Nayyar for R-1
Mr. S.B. Upadhyay, Sr. Advocate with
Mr. Param Kr. Mishra for R-2.
Mr. V.V.Sharma,
Mr. Barjonda &
Ms. Jyoti Prasad(Reps)**

JUDGMENT

**PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,
CHAIRPERSON**

1. Maharashtra State Electricity Distribution Company Limited is the Appellant.
2. On the application filed by the 2nd Respondent National Load Despatch Centre, 1st Respondent, the Central Electricity Regulatory Commission (Central

Commission) passed the impugned order dated 4.4.2011 in the matter of removal of difficulties for giving effect to certain provisions of the Central Electricity Regulatory Commission(sharing of inter-state transmission charges and losses) Regulations, 2010. Aggrieved by this order amending the said Regulations, the Appellant has filed this Appeal.

3. The Appellant was not the party to the proceedings before the Central Commission. Therefore, the Appellant filed an application before this Tribunal seeking for the leave to file this Appeal. Since we entertained a doubt with regard to the maintainability of this Appeal, we issued notice to the Respondents, to hear them on the question of maintainability of the Appeal. On receipt of the notice, Respondents have appeared. We have heard both the parties who argued at length on the question of maintainability.
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4. Let us first see the relevant facts of this case. The Central Commission on 15.06.2010 notified the Central Electricity Regulatory Commission (Sharing of Inter-State Transmission of charges and losses) Regulations, 2010 (ISTS Regulations), after following the due process as contemplated under Section 178(3) of the Electricity Act, 2003.

 5. As per the ISTS Regulations dated 15.6.2010, the 2nd Respondent National Load Despatch Centre (NLDC) was designated as the Implementing Agency for implementing these Regulations. While implementing these Regulations NLDC (R-2) experienced some difficulties. Hence NLDC (R-2) wrote a letter to the Central Commission on 12.01.2011 informing the Central Commission that it is facing certain difficulties in the implementation of ISTS Regulations.
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6. Subsequent to the said letter, the NLDC (R-2) presented a petition before the Central Commission on 22.2.2011 stating that out of six difficulties mentioned in the letter dated 12.01.2011, two difficulties had been sorted out and prayed the Central Commission to consider the remaining four difficulties for removal of the same. Accordingly, the Central Commission after hearing the NLDC, passed the impugned order dated 4.4.2011 making certain amendments in the ISTS Regulations.

 7. Thereupon Maharashtra State Electricity Transmission Company Limited (R-3), sent a letter to the Appellant on 6.5.2011 informing the Appellant about the impugned order dated 4.4.2011 passed by the Central Commission thereby amending the ISTS Regulations. Being aggrieved over this order, the Appellant has filed this Appeal mainly on two grounds:-
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- i) The Central Commission while framing ISTS Regulations dated 15.6.2010 had followed the consultative process in accordance with the requirements of Section 178 of Electricity Act,2003, by making previous publication. But while passing the impugned order dated 4.4.2011 amending the regulations, the Central Commission has dispensed with the said requirement of previous publication as contemplated under Section 178(3) of Electricity Act,2003 and in violation of the procedure would make the impugned order illegal.
- (ii) Central Commission while deciding the issue raised by the NLDC should have followed the principles of natural Justice by issuing notices to the various distribution companies including the

Appellant for ascertaining the views with regard to the proposed amendments but this was not done and as such this is violative of principles of natural justice. Hence this impugned order on this ground also is illegal.

8. Objecting to both these grounds, the Learned Counsel for Respondent submitted that impugned order is in the nature of the amending the Regulations under Section 178 and as such the vires of the Regulations framed by exercising the Regulatory Power cannot be questioned before this Tribunal as laid down by the Hon'ble Supreme Court.
9. In view of the said objection, the learned Senior Counsel appeared for the Appellant has now raised fresh grounds. The fresh grounds are as follows:-
 - i) *The impugned order purports to be an exercise of power under Regulation 21. The contents of the impugned order would show that it was in the*

nature of the determination arrived at after following quasi-judicial procedure which culminated in the issuance of an order. Thus, the impugned order is not in the nature of legislative exercise since the said order was issued by the Central Commission in the executive capacity, the Appeal is maintainable under Section 111 of the Electricity Act, 2003.

- ii) *The Appellant in this Appeal has not assailed the vires of the Regulations. Instead they are merely questioning the manner of the exercise of the power admitting the availability of the enabling power under Regulation 21. In this case,*
- (1) the conditions that controlled the invocation of the power were not satisfied;*
 - (2) the procedural norms available were not followed in the matter of exercise of power;*
 - and*
 - (3) the said exercise was not within the scope and ambit of the power conferred.*
- (iii) *At any rate the ISTS Regulations, 2010 are in the nature of tariff order issued under Section 62 of the Electricity Act, 2003. Thus any order purporting to remove difficulty cannot be considered as representing an exercise of the powers beyond that of determination of tariff under Section 62 of the Electricity Act, 2003.*

10. On these three fresh grounds, elaborate arguments were advanced by the learned Counsel appearing for both the parties.

11. We have heard their submissions at length and we have given our anxious consideration to their submissions.

12. At the outset, it shall be pointed out that the Constitutional Bench of the Hon'ble Supreme Court in PTC India Limited case (2010(4) SCC 603) has clearly held that the validity of the Regulations framed while exercising the Regulatory powers cannot be questioned before this Tribunal. As a matter of fact, main Regulations were framed on 15.6.2010 and were amended by the Central Commission on 4.4.2011 while exercising powers under Section 178 of the Electricity

Act, 2003. Let us quote Section 178 of the Electricity Act, 2003:

“178. Powers of Central Commission to make regulations.—(1) The Central Commission may, by notification make regulations consistent with this Act and the rules generally to carry out the provisions of this Act.

(2) In particular and without prejudice to the generality of the power contained in sub-Section (1), such regulations may provide for all or any of following matters, namely:—

...

...

(3) All regulations made by the Central Commission under this Act shall be subject to the conditions of previous publication.”

13. In this Appeal the Appellant had specifically raised the point that though the powers have been exercised under Section 178 of the Act, the mandatory requirement of previous publication as contemplated in sub-Section 3 of Section 178 had not been followed. If that is the stand of the Appellant, the Regulation framed on 15.6.2010 as well as the amendment of the

Regulations carried out on 4.4.2011 under Section 178 of the Act, 2003 can not be questioned in this Appeal. Merely because the required procedures have not been followed while framing the Regulations, this Tribunal cannot set aside those Regulations. The main prayer in the Appeal is as follows:-

- i) Set aside the impugned order and direct the Central Electricity Regulatory Commission to follow the requirement as mentioned in Section 178(3) of the Electricity Act, 2003 and also follow the principles of Natural Justice;*
- ii) Direct the CERC that actual value of YTC should be considered instead of average value so that DIC's using older lines are not unnecessarily burdened as the same is in accordance with the ISTS Regulations; and*
- iii) Direct the CERC, that hybrid methodology should be utilised for determining the RPC certified non-ISTS lines as is used for ISTS lines. Further all the non-ISTS lines carrying ISTS power to all the DICs of CTU should considered for POC charges; and*
- iv) Direct the CERC that instead of using average energy data for base case load flow studies, forecasted data given by DIC's should be used.*

14. This shows that the impugned order has been mainly assailed on the ground that the Appellant was not heard by the Central Commission before passing the impugned order and that the amendment of the Regulations were made under Section 178 of the Electricity Act without meeting the mandatory requirement of previous publication under Section 178(3) of the Act.

 15. The question arises in this case is this “whether the impugned order amending the Regulations by the Central Commission is the outcome of the exercise of the power by the Central Commission under Regulatory power or under adjudicatory power?”. It is strenuously submitted by the Appellant that the impugned order is not in the nature of legislative exercise and as such Appeal is maintainable. This submission is misconceived. We are of the view that even assuming that the exercise is not in the legislative exercise, the
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Appeal cannot be maintained as the impugned order passed by the Commission was only by exercising its Regulatory power and not adjudicatory power and as such the submissions of the Appellant have to be rejected. The detailed reasons are as follows:

16. As Hon'ble Supreme Court has held, the twin powers have been conferred to the Central Commission with regard to their functions by the Act. Section 61 of the Act deals with the powers of the Central Commission under which the ISTS Regulations have been framed by exercising the Regulatory Power. Under Section-62 of the Act, the Central Commission has been vested with the adjudicatory power in connection with determination of the tariff.

17. The learned Senior Counsel for the Appellant submits that the ISTS Regulations must be considered to be

- the order relating to the tariff determination of under Section 62 of the Electricity Act, 2003. This submission deserves outright rejection.
18. The ISTS Regulations were notified on 15.06.2010 and they were to come into force with effect from 01.01.2011. By this order, the NLDC (R-2) was designated as Implementation Agency to implement the Regulations. As R-2 experienced difficulties in implementing these Regulations, it approached the Central Commission under Regulation 21 for removal of certain difficulties which were being encountered in the run up to the implementation of the said Sharing Regulations.
19. Regulation 21 of ISTS Regulations, confers power on the Central Commission to remove difficulties. The

scheme of Regulation 21 makes it clear that power under the said Regulation is to be exercised by way of

- (i) general or Special order under Regulation 21(1),
- (ii) suitable orders under Regulation 21(2),
- (iii) general or specific order under Regulation 21(3)

20. The Central Commission through an order passed under 21(1) may direct the Implementation Agency or other named entities to take suitable action. The overall scheme of Regulation 21 makes it clear that the nature of power under Regulation 21 is administrative while exercising the Regulatory powers.

21. The Appellant in his submission strenuously contended that the ISTS Regulations in reality fixes tariff and is relatable to Section 62 of the Act and therefore an exercise under Regulation 21 is necessarily an 'order' which attracts Section 62 of the Act and that therefore, the Appeal is maintainable.

22. Tariff of the inter-State transmission system is fixed under Chapters 3 & 4 of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations 2009 ("Tariff Regulations") which has been framed under Section 61 read with Section 178(2)(s) of the Act. Regulation 33 of the Tariff Regulations dealt with sharing of inter-State transmission charges determined under chapters 3 and 4 of the Tariff Regulations. The ISTS Regulations has repealed the Regulation 33 of the Tariff Regulations which governed the sharing of transmission charges till 30.06.2011. The ISTS Regulations introduced a new methodology for sharing of transmission charges and losses based on actual use of Inter-state Transmission System. The ISTS Regulations in Chapter 3 details the principles and mechanism for sharing ISTS losses and charges. Chapter 4 of ITSS Regulations provides for

processes for sharing of transmission charges and losses allocations which is a radical change from the earlier 'postage stamp method'. Based on the Yearly Transmission Charges (YTC) of ISTS network, the Point of Connection charges and Loss Allocation Factors for the designated ISTS customers shall be computed by the Implementing Agency using load flow based method and Point of Connection charging method (Regulation 4). 'Yearly Transmission Charges' has been defined in Regulation 2(y) of ISTS Regulations as the annual transmission charges for existing lines determined by the Commission in accordance with the Tariff Regulations or adopted in case of tariff based competitive bidding and for new lines based on benchmarked capital cost. Thus the ISTS Regulations contain the principles and methodology for sharing ISTS charges and loses and

there is no determination of tariff as is sought to be contended.

23. As indicated above, the exercise of the power while passing this impugned order was not under adjudicatory power of the Central Commission but was under regulatory power. It is clarified, in the para 22 above, that the tariff of Inter State Transmission System under Section 62 of the Act is fixed in accordance with principles and methodology laid down in Chapter 3 & 4 of the Tariff Regulations of the Central Commission.

24. Merely because the presentation through the petition was submitted by the NLDC (R 2) and the same was entertained by the Central Commission which heard the NLDC and passed the impugned order amending the Regulations by giving reasons, it cannot be held that this order has been passed by exercising the adjudication of quasi-judicial powers conferred upon

- the Commission under Section-62 of the Electricity Act, 2003.
25. The bare reading of the impugned order dated 4.4.2011 clearly shows that the directions given by the Commission becomes integral part of ISTS Regulations of 2010. When the direction in relation to the amendment of Regulations is given, it cannot be said that it is an adjudicatory order which decides the disputes between the parties. The Electricity Act, 2003 contains separate provisions for performance of dual functions of the Commission.
26. Section-61 is the enabling provision for framing of the Regulations by the Central Commission. As per this Section the determination of terms and conditions of tariff i.e. Regulations that have been left to the Regulatory function of the Commission. However, Section 62 is the provision conferring powers to the
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Commission for actual tariff determination on the basis of Regulations framed under Section-61. As held by the Hon'ble Supreme Court, specific terms and conditions for the determination of the tariff are different from the actual tariff determination in accordance with the provision of the Act for supply of electricity. We now quote relevant observations of the Hon'ble Supreme Court by the Constitutional Bench(2010)4 SCC 603).

Para (53) “ Applying the above mentioned tests to be scheme of the 2003 Act, we find that under the Act, the Central Commission is a decision-making as well as regulation-making authority, simultaneously, Section 79 delineates the functions of the Central Commission broadly into two categories – mandatory functions and advisory functions, Tariff regulation, licensing (including inter-State trading lincensing), adjudication upon disputes involving generating companies or transmission licensees fall under the head “mandatory functions” whereas advising the Central Government on formulation of National Electricity Policy and tariff policy would fall under

the head “advisory functions” . In this sense, the Central Commission is the decision-making authority. Such decision-making under Section 79(1) is not dependent upon making of regulations under Section 178 by the Central Commission. Therefore, the functions of the Central Commission enumerated in Section 79 are separate and distinct from functions of the Central Commission under Section 178. The former are administrative/adjudicatory functions whereas the latter are legislative.

(Para 66) While deciding the nature of an order (decision) vis-à-vis a regulation under the Act, one needs to apply the test of general application. On the making of the impugned 2006 Regulations, even the existing power purchase agreements (PPA) had to be modified and aligned with the said Regulations. In other words, the impugned Regulations made an inroad into even the existing contracts. This itself indicates the width of the power conferred on CERC under Section 178 of the 2003 Act. All contracts coming into existence after making of the impugned 2006 Regulations have also to factor in the capping of the trading margin. This itself indicates that the impugned Regulations are in the nature of subordinate legislations. Such regulatory intervention into the existing contracts across the board could have

been done only by making regulations under Section 178 and not by passing an order under Section 79(1)(j) of the 2003 Act. Therefore, in our view, if we keep the above discussion in mind, it becomes clear that the word “order” in Section 111 of the 2003 Act cannot include the impugned 2006 Regulations made under Section 178 of the 2003 Act.

27. The ratio decided in the above judgment is culled out which is as follows:

- (1) In the hierarchy of regulatory powers and functions under the 2003 Act, Section 178, which deals with making of regulations by the Central Commission, under the authority of subordinate legislation, is wider than Section 79(1) of the 2003 Act, which enumerates the regulatory functions of the Central Commission, in specified areas to be discharged by orders(decisions).

- (2) A Regulation under Section 178 is made under the authority of delegated legislation and consequently its validity can be tested only in judicial review proceedings before the courts and not by way of appeal before the Appellate Tribunal for Electricity under Section 111 of the said Act.

- (3) If a dispute arises in adjudication on interpretation of a Regulation made under Section 178, an appeal would certainly lie before the Appellate Tribunal under Section 111, however, no appeal to the Appellate Tribunal shall lie on the validity of a Regulation made under Section 178.”

TO SUM UP

- 28. As per the ratio, referred to above, laid down by the Hon’ble Supreme Court, this Tribunal, under Section 111 of the Act cannot interfere with the orders passed by the exercise of the Regulatory Powers vested with the Central Commission under Sections 61 and 178 of Electricity Act 2003. We can only entertain the Appeal related to the orders passed by the Commission for determination of tariff and for resolution of the disputes through the exercise of the adjudicatory power, but not against the orders passed under Regulatory Power..**
29. In view of the above, we are to conclude that the impugned order is not as a result of the exercise of the
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normal Adjudicatory power but the same is the outcome of the exercise of the Regulatory power. Therefore, we are of the view that the Appeal is not maintainable. Accordingly, the, Appeal is dismissed. However, there is no order as to cost.

(V.J. Talwar)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 28th July, 2011

REPORTABLE/~~NON-REPORTABLE~~