

(2016) 08 RAJ CK 0069

In the Rajasthan High Court

Case No : Civil Writ Petition No. 3160 of 2016

Hindustan Zinc Limited

APPELLANT

Vs

Rajasthan Electricity Regulatory Commission, Jaipur

RESPONDENT

Date of Decision : 29-08-2016

Acts Referred:

Constitution of India, 1950 — Article 226
Rajasthan Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulations, 2016 — Regulation 17, Regulation 21(1), Regulation 25, Regulation 26(3), Regulation 26(6), Re

Citation : (2016) 2 WLCRajUC 409

Hon'ble Judges : Mr. Govind Mathur and Mr. Kailash Chandra Sharma, JJ.

Bench : Division Bench

Advocate : Mr. M.S. Singhvi, Senior Advocate, assisted by Mr. Anjay Kothari, Mr. Akhilesh Rajpurohit and Mr. Abhishek Mehta, Mr. Ramit Mehta, Mr. Sanjay Nahar, Mr. Neeraj Kumar Bohra, Mr. Dinesh Mehta and Mr. Sunil Beniwal, Advocates.?, for the Petitioners; ; Mr. Bu

Final Decision : Dismissed

Judgement

Mr. Govind Mathur, J.—These petitions for writ are before us to examine constitutional validity of the regulations 17, 21(1), 25, 26(3), 26(6), 26(7)(i), 26(7)(ii), 26(7)(iii), 26(7)(v) and 26(8) of the Rajasthan Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulations, 2016 (hereinafter referred to as "the Regulations of 2016").

2. Before coming to the facts and the issues under adjudication, it would be appropriate to mention introductory details about the Indian Electricity Act 2003 and the concept of "open access" incorporated therein. The provisions of the Act of 2003 and the concept of open access enshrined in it is a very ambitious step of the legislature to promote the entire electricity sector with a view to have progressive reforms to benefit industrial consumers, private utilities, power equipment providers etc.

3. The parliament enacted the Act of 2003 to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalisation of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto. The main features of the Act are as follows :-

"1. Generation is being de-licensed and captive generation freely permitted, i.e. any generating company may establish, operate and maintain a generating station without obtaining a licence under this Act with the only exception that it should comply with the technical standards relating to connectivity with the grid referred to in clause (b) of section 73.

2. No person shall (a)transmit electricity; or (b)distribute electricity; or (c)undertake trading in electricity, unless he is authorised to do so by a licence issued, exceptions are informed by authorised commissions through notifications.

3. Central Government may, make regionwise demarcation of the country, and, from time to time, make such modifications therein as it may consider necessary for the efficient, economical and integrated transmission and supply of electricity, and in particular to facilitate voluntary interconnections and co-ordination of facilities for the inter-State, regional and inter-regional generation and transmission of electricity. Transmission utility at the central and state level to be a Government company with responsibility of planned and coordinated development of transmission network.

4. Open access in transmission with provision for surcharge for taking care of current level of cross-subsidy, with the surcharge being gradually phased out.

5. The state governments are required to unbundle State Electricity Boards, However they may continue with them as distribution licensees and state transmission utilities.

6. Setting up State Electricity Regulatory Commission (SERC) has been made mandatory.

7. An appellate tribunal to hear appeals against the decision of (CERC"s) and SERC"s.

8. Metering of electricity supplied made mandatory.

9. Provisions related to thefts of electricity made more stringent.

10. Trading as a distinct activity recognised with the safeguard of Regulatory commissions being authorised to fix ceiling on trading margins.

11. For rural and remote areas, stand-alone system for generation and

distribution is permitted.

12. Thrust to complete rural electrification and provide for management of rural distribution by panchayat, cooperative societies, NGOs, franchisees etc.

13. Central Government to prepare National Electricity Policy and Tariff Policy.

14. Central Electricity Authority (CEA) to prepare National Electricity Plan.

4. Section 42 of the Act of 2003 is in respect to the open access and the duties of distribution licensee. According to it, a distribution licensee is having duty to develop and maintain an efficient, coordinated and economical distribution system in his area of supply and to supply electricity in accordance with the provisions contained in the Act of 2003.

5. Sub-section(2) of Section 42 casts an obligation upon the State Commission constituted as per Sections 82 and 83 of the Act of 2003 to introduce open access in such phases and subject to such conditions (including cross subsidies and other operational constraints) as may be specified within one year of appointed date by it and in specifying the extent of open access in successive phases and in determining charges of wheeling, it shall have due regard to all relevant factors including such cross subsidies and other operations constraints.

6. As per its proviso (1), the open access shall be allowed on payment of surcharge in addition to the charges for wheeling as may be determined by the State Commission. The term "wheeling" as defined under Section 2(76) means the operation whereby the distribution system and associated facilities of a transmission licensee or distribution licensee, as the case may be, are used by another person for the conveyance of electricity on payment of charges to be determined under section 62.

7. Sub-section(4) of Section 42 provides that where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply.

8. Section 181 of the Act of 2003 empowers the State Commission to make regulations consistent with the Act and the Rules generally to carry out the provisions of the Act of 2003. Sub-section(2) of Section 181 refers the matters pertaining to which regulations can be made without prejudice to the generality of power contained in sub-section(1) of Section 181. Clause (zp) of sub-section(2) of Section 181 empowers the Commission to make rules for any other matter which is to be, or may be specified.

9. Sub-section(3) of Section 181 mentions that all regulations made by the State Commission under the Act of 2003 shall be subject to the condition of previous publication.

10. The concept of "open access" under the Act of 2003 is a unique feature as that promote competition amongst generation companies. As per Section 2(47) of the Act of 2003, the term "open access" means the non-discriminatory provision for the use of transmission lines or distribution system of associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission.

11. The rational for having a system of open access is the promotion of competition amongst the generation companies who can, by virtue of the right to open access, can sell electricity of distribution licensees across the country. It is the mechanism through which the basic object of the Act of 2003 viz. Development of electricity industry and promotion of competition can be achieved effectively and efficiently. In other words, the open access in transmission has been introduced to promote competition amongst the generating companies who can sell the electricity to the different distribution licensees leading to availability of the cheaper power. The open access under the Act of 2003 is non-discriminatory for enabling bulk consumers to buy energy directly from competing generators and this competition in the market would increase availability of cheaper and reliable power supply. As per the Central Electricity Regulatory Commission, the open access is undeniably an important mechanism through which the Act of 2003 seeks to promote competition within the electricity sector. If the system of open access be used appropriately, it can promote renewable source of energy in India.

The facts and issues involved :-

12. For the sake of convenience we are referring facts relating to DB Civil Writ Petition No. 3160/2016, Hindustan Zinc Limited v. The Rajasthan Electricity Regulatory Commission, Jaipur & Ors..

13. The petitioner, a public limited company incorporated under the Indian Companies Act, 1956, is engaged in the business of mining, smelting, production and selling of non-ferrous metals lead and zinc with their by-products.

14. The company is having its captive power plants at Chanderia, Dariba and Zawar where units of the company are situated. Being consumer of respondent Ajmer Vidhyut Vitran Nigam Limited (respondent No. 2), the company entered into different agreements for its different units having separate contract demand for consumption of electricity. As per the agreements, the petitioner is entitled to draw electricity upto 70 Megawatt from the respondent No. 2 in respect of Dariba Zinc Smelter Unit at any time at its options.

15. Before introduction of the Regulations of 2016, the petitioner company was freely drawing electricity by way of open access beside the contracted demand of 70 Megawatt. The obligations of the petitioner in terms of the agreement executed and also as per the general terms and conditions for supply of electricity and tariff order was to pay minimum fixed charges irrespective of the

fact that the electricity has been consumed or not to the extent of contract demand.

16. The Rajasthan Electricity Regulatory Commission (hereinafter referred to as "the Commission") was constituted by the State of Rajasthan as per provisions of the Indian Electricity Act, 2003 (hereinafter referred to as "the Act of 2003") in the month of May, 2004. The Commission exercising powers conferred by Section 181 read with Section 42 of the Act of 2003 framed the Rajasthan Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulations, 2004 (hereinafter referred to as "the Regulations of 2004").

17. As per the Regulations of 2004, the petitioner was allowed to operate in free manner with liberty to draw electricity independently from the respondent No. 2 upto the contracted demand and such right of drawing electricity was not curtailed even in the event of drawing electricity by the petitioner from open access. The facility of open access was available to the captive generating plant of the petitioner over and above the contractual demand with the distribution licensee. Meaning thereby, the open access facility was independent to the contracted demand and no restriction was there on availing open access simultaneously with the contracted demand.

18. The respondent Commission under a public notice dated July 6, 2015, issued a draft of the proposed Rajasthan Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulations, 2015 and invited comments and suggestions thereon.

19. The petitioner under a letter dated 1.8.2015 forwarded its comments and objections for consideration with a request to allow the company to submit its view in person. The petitioner company, while tendering its objections, pointed out the different regulations which were said to be in deviation to the objects of the Indian Electricity Act, 2003.

20. The respondent Commission in exercise of the powers conferred by Section 42 and other enabling provisions read with Section 181 of the Act of 2003 and after previous publication notified the Regulations of 2016 under a notification dated January 27, 2016.

21. The grievance of the petitioner is in relation to several provisions of the Regulations of 2016 with assertion that it is having captive generating plants and these plants have to resort to open access or connected load under contractual demand with distribution licensee (respondent No. 2). The plant, at each of the six units of the petitioner company, shuts down on an average for around 20 days during the year for various reasons, including the maintenance of captive power plant. The break downs are for unseen reason and may occur at any point of time. In the event of break down or shut down, the petitioner is supposed to draw power under open access through power exchanges subject to payment of wheeling charges, cross subsidy and surcharge to distribution licensee. Prior to introduction of the Regulations of 2016, the petitioner could have drawn power

after scheduling its requirement on day ahead basis for each block of 15 minutes as per the requirement and for the balance to the extent of sanctioned demand. Under the Regulations of 2016, the petitioner is not entitled to draw its sanctioned contractual demand by distribution licensee to the extent of power drawn through open access in the event of shut down or unforeseen break down. As per the petitioner this situation can cause unreasonable and onerous obligation to provide uniform 24 hours schedule for open access. The petitioner will also be denied of any variation within the block as per its requirement and the variation is permissible only twice and such variation cannot go down below 75% of the schedule. If the petitioner undergoes variation as per its power requirement and seek drawal from distribution licensee due to nonavailability of power at exchange under open access or otherwise varies consumption based on its requirement, then even for its sanctioned contract demand or for variation under open access as per business requirement, it will have to pay penalty for access or under-drawal. As per the petitioner the levy of such penalty is totally unreasonable and without any justification. It is asserted that imposition of such penalty is ill-intended with a view to discriminate an open access customer and that defeats the purpose of open access policy. It further enrich the distribution licensee unfairly. It is emphasised that the Regulations of 2004 were in consonance to the object of the Act of 2003, but the Regulations of 2016 defeats the same. To substantiate the contention, a comparative assessment is made by the petitioner highlighting adverse impacts of the Regulations of 2016 which are as under:-

Factors

Clause No. of Regulation s of 2016

Regulations of 2016

Regulations of 2004

Impact of Regulations of 2016

Compliance and Grid Discipline

26(3)

The open access consumer shall restrict the sum of his total drawl from all sources including open access and Distribution Licensee up to the total sanctioned contract demand with the Distribution Licensee

The Regulations of 2004 allows open access as per the Electricity Act, 2003 and also to avail connected load rom distribution licencee equal to sanctioned contract demand

Under regulations of 2004, excess drawl penalty is leviable only in the event of drawl beyond sanctioned contract demand while regulations of 2016 unfairly penalise even drawl within sanctioned contract demand despite fixed charges being paid for sanctioned contract demand

26(7)

The power purchase under short term inter-State open access including transactions through power exchange shall be subject to the following

-

-

26(7)i

The consumer shall schedule power from open access for complete 24 hours of the day.

Regulations of 2004 permit open access in any 15 minute block in a day

Plant break downs cannot be foreseen 24 hours in advance and in case of break down, operations will come to a standstill

26(7)ii

The consumer shall intimate in writing the block wise maximum power to be scheduled from inter-State open access each day to the SLDC, RDPPC and Distribution Licensee before 10:00 AM of the day preceding the day of drawal.

Regulations of 2004 do not require intimation before 10 AM of the day preceding the day of drawal and it also permits it within the same day

In the event of Plant break down and shut down an open access consumer will be badly impacted and operations will come to a standstill

26(7)iii

The schedule so given shall be uniform at least for a period of eight hours and the minimum schedule during the day shall at any time not be less than 75% of the maximum schedule of the day.

Regulations of 2004 do not impose any such unfair condition

Choice of an open access customer to draw power as per its requirement is restricted which is discriminatory and heavily loaded in favour of distribution licensee as in case, power drawn from open access is more than the requirement, then it will go back to Grid and distribution licensee will be benefited. If power drawn from open access is less than the requirement, then even to access power from sanctioned load, penalty will have to be paid and for which also distribution licensee will be benefited over and above the fixed charges already being paid for sanctioned load

26(7)iv

The schedule so given shall be used to calculate the block wise maximum admissible drawal from the Distribution Licensee

Same as above

Same as above

26(7)v

If actual schedule approved in inter-State transactions is less, then the admissible drawal shall be reduced to that extent.

No such restriction in the regulations of 2004 and there is no logic and reasons for the restriction

Despite having a sanctioned contract demand, availing power from open access will lead to reduction in sanctioned contract demand despite payment of fixed charges additionally to distribution licensee

26(8)

If the actual drawal in a block is higher than the admissible drawal, then the percentage excess drawal shall be calculated on the admissible drawal and the highest percentage of such excess drawal of all blocks during a month shall be considered as excess capacity (demand) utilised during that month and shall be billed as per regulation 21(v).

No such restriction in the regulations of 2004 and there is no logic and reasons for the restriction

Unfairly huge penalties will be imposed without any logical reasons and this is intended solely to make open access uneconomical

Unscheduled Interchange Pricing

21(i)

Any under-injection with respect to the schedule approved by the SLDC, by an open access customer shall be settled at higher of the applicable deviation rates (as notified in CERC Deviation Settlement

The drawal at the time of under injection is treated at normal rate of distribution licensee Mechanism Regulations 2014 amended from time to time) or Temporary Tariff applicable to NDS consumer category as approved by the Commission from time to time be imposed over and above CERC prescribed rates.

CERC has jurisdiction with regard to under-injection to Grids and CERC Regulations specifies the computation mechanism and higher penalties will be imposed over and above CERC prescribed rates.

22. On basis of the comparative assessment, it is stated that the Regulations of 2016 will seriously impair and effect the open access. According to the petitioner, the Regulations of 2016 are contrary to the specific provisions of the Act of 2003 and further to the National Electricity Policy and the National Tariff Policy notified by the Central Government as per Section 3 of the Act of 2003.

23. The Commission as well as the distribution licensee (respondent No. 2) have filed counter to the petition. While defending the Regulations of 2016, it is stated that the Commission, while making the regulations, has taken into consideration all relevant aspects and circumstances pertaining to the aims and objects of the Act of 2003 and also the concept of open access. According to the respondents, all provisions of the Regulations of 2016 are reasonable, in consonance to the provisions of the Act of 2003 and in broader interest of the industry. There is no violation of any statutory provision of law or inconsistency with the Act of 2003 and the Rules framed thereunder. No ground is available to the petitioner to impugn the Regulations by alleging unreasonability or inconsistency with the objects of the Act of 2003.

24. It is asserted that validity of a subordinate legislation can be challenged only if it lacks legislative competence, violates fundamental rights or any of the provisions of the Constitution of India, inconsistent with the provisions of the parent statute i.e. the statute under which subordinate legislation is made, or exceeds the limits of the authority conferred upon it by the parent statute and, if, such law is manifestly arbitrary or unreasonable to conclude that the legislature never intended to extend authority to make such regulations. The Regulations of 2016, as per the respondents, does not suffer from any eventuality or deficiency stated above and as such challenge to some of the provisions of it is absolutely misconceived.

25. The regulations, according to the respondents, were framed after considering all the objections and suggestions extended by the stakeholders and, therefore, the allegation of the violation of principles of natural justice is absolutely ill founded. It is asserted that the regulations are essentially a matter of policy, hence, are not open for judicial review till having apparent arbitrariness or discrimination. The financial prejudice or inconvenience, if any caused to the petitioner, cannot be a reason to allege the regulations unjust, arbitrary or unreasonable. Any concession, if was available to the petitioner prior to coming into force of the Regulations of 2016 and that has been withdrawn in terms of the subsequent regulations, then that too cannot be a ground to challenge the subordinate legislation. The respondents have also defended each and every regulation under challenge on merits.

26. A rejoinder has been filed on behalf of the petitioner, mainly reiterating the facts and contentions already stated in the petition for writ.

27. In the factual and the legal introductory background as above, the first submission of Shri M.S. Singhvi, learned Senior Advocate, appearing on behalf of the petitioner is that as per Section 181(3) of the Act of 2003, it is obligatory for Commission to have previous publication as per Section 181. The obligation of previous publication of the regulations is having its own importance as the regulations made by the Commission regulates the operation of the different provisions of the Act of 2003. This condition, as per learned counsel, creates a valuable right for all the stakeholders to participate in the process of legislation

with a view to have a developed, competitive and nondiscriminatory energy supply/consumption system. This right virtually amounts to extension of the principles of natural justice while making the regulations and to adhere that the opportunity of personal hearing is necessary. The petitioner while submitting objections demanded an opportunity of personal hearing but that was not accorded. It is also stated that the regulations impugned have been made by the Commission without taking into consideration the objections raised by the petitioner and other stakeholders.

28. Responding this argument, Shri Buddy A. Rangnadhan, learned Senior Advocate, appearing on behalf of the Rajasthan Electricity Regulatory Commission, would submit that the Central Government in exercise of power conferred by Section 176(1) and 176(2)(z) of the Act of 2003 notified the Electricity (Procedure for Previous Publication) Rules, 2005 (hereinafter referred to as "the Rules of 2005"). These rules lay down the procedure to be adhered by the appropriate Commissions including the State Regulatory Commissions for previous publication of the regulations. As per the procedure given under Rule 3 of the Rules of 2005 the authority or the appropriate Commission is required to publish a draft of the regulations for the information of persons likely to be effected. The publication is required to be made in such manner as the authority or the appropriate Commission deems to be sufficient. While publishing the draft regulations, a notice specifying the date on or after which the draft regulations will be taken into consideration, is also required to be published and the authority or the appropriate Commission having powers to make regulations shall consider objections and suggestions which may be received by the authority or the appropriate Commission from any person with respect to the draft before the date so specified. Rule 4 of the Rules of 2005 prescribes that publication in the official gazette of the regulations made in exercise of a power to make regulations after previous publication shall be conclusive proof of making the regulations in accordance with law. In the instant matter, the draft regulations were published in accordance with Rule 3 of the Rules of 2005 and the petitioner submitted suggestions and objections. As per Rule 4 of the Rules of 2005 it is to be assumed that the Commission exercised the powers to make regulations in consonance with the intent of the Act of 2003 and, therefore, the argument advanced by learned counsel for the petitioner is ill-founded. It is asserted that neither the Act of 2003 nor the Rules of 2005 prescribes for grant of any opportunity of personal hearing.

29. We are in absolute agreement with learned counsel for the respondent Commission.

30. It is not in dispute that the draft of the regulations was published and the petitioner and other persons effected submitted their suggestions and objections. The final draft was published only after having suggestions and objections. As per Rule 4 of the Rules of 2005 it is to be assumed that final publication of the regulations was duly made. In usual course, a delegated legislation cannot be

questioned being hit by principles of natural justice in its making, except when the statute itself provides for that. In the instant matter this principle was adequately adhered and opportunity was given and also availed to submit objections and suggestions. The statute applicable nowhere prescribes any right to oral hearing. The first submission of the petitioner, thus, fails.

31. The next submission of learned counsel appearing on behalf of the petitioner is that the Regulations of 2016 to the extent they are under challenge, are bad on several grounds including that the Commission is not having competence to make regulations in certain areas. The regulations impugned are in direct conflict with the objects of the Act of 2003 and further those are manifestly arbitrary and unreasonable. According to learned counsel, the impugned regulations are travelling beyond the authority extended to the Commission by the legislature under the Act of 2003.

32. The validity of a subordinate legislation can be challenged on the grounds that -

- (a) the authority making subordinate legislation lack legislative competence;
- (b) the legislation made is in conflict with any provision of Part-III of the Constitution of India;
- (c) violates any provision of the Constitution of India;
- (d) fails to confirm the statute in which it is made or exceeds the limits of authority conferred by enabling Act;
- (e) repugnancy to the laws of land, i.e., any enactment; and
- (f) the subordinate legislation suffers from manifest arbitrariness/unreasonableness.

33. The court considering validity of a subordinate legislation will have to consider the nature, object and the scheme of enabling Act and also the area over which power has been delegated under the Act and then decide whether the subordinate legislation confirms to parent statute Ref. State of Tamil Nadu v. P. Krishnamoorthy, (2006)4 SCC 517. We shall be examining validity of the impugned provisions within the four corners of law discussed above.

34. At this stage, it shall also be worthwhile to mention that as per learned counsel appearing on behalf of the petitioner in light of the judgment of Hon''ble Supreme Court in PTC India Limited v. Central Electricity Regulatory Commission, reported in (2010)4 SCC 603, regulations under the Act of 2003 can be made as long as two conditions are specified, namely, that they are consistent with the Act and they are made for carrying out the provisions of the Act, but the provisions impugned in the instant matter are made just to extend extra benefits to the distribution licensees and that is contrary to the concept of competition and a non-discriminatory open access provided under the Act of 2003 and the open access has been converted into regulated access. The regulations, thus, are

bad.

35. While coming to the specific regulations, learned counsel appearing on behalf, of the petitioner submits that regulation 17 provides that "a consumer availing open access and receiving supply of electricity from a person other than the Distribution Licensee of his area of supply shall pay to the Distribution Licensee an additional surcharge, in addition to wheeling charges and cross subsidy surcharge, to meet the fixed cost of such Distribution Licensee arising out of his obligation to supply as provided under sub-section(4) of section 42 of the Act".

36. According to this provision, the consumer availing open access and receiving supply of electricity, is subjected to an additional surcharge in addition to wheeling charges and cross subsidy surcharge. Section 42(4) of the Act of 2003 restrict liability to pay additional surcharge on the charges of wheeling only. The additional surcharge imposed under regulation 17, thus, is beyond the competence to levy additional surcharge under Section 42(4).

37. The respondent Commission defended the additional surcharge with assertion as under:-

"11/A. That with reference to ground KK(i) and (ii), it is denied that Regulation 17(1) is ultra vires the powers of the State Commission as being beyond the scope of Section 42(4) of the Act of 2003 read with National Tariff Policy. The reasons for this have been adverted to in the preliminary submissions and are not being repeated herein in order to avoid prolixity. Without prejudice to the foregoing submissions, it is submitted that the contention of the petitioner that captive use of self-generated power through the usage of wheeling network of distribution licensee is excluded from the purview of levy of additional surcharge, is totally misconceived. It is submitted that the Act of 2003 does not exempt captive generating plants from being liable to pay the additional surcharge on the charges of wheeling as would be clear from a reading of Section 42(4) thereof, which is extracted below :

"42. Duties of Distribution Licensees and Open Access.

(4) Where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed costs of such distribution licensee arising out of his obligation to supply." It would be clear from a plain reading of the aforesaid section that there is no exemption from the levy of additional surcharge as far as captive generating plants are concerned."

38. On consideration of the provisions of regulation 17 in light of Section 42(4) of the Act of 2003, we noticed that Regulation 17(2) nowhere indicates that determination of additional surcharge would be independent of the charges of

wheeling. It refers additional surcharge in addition to wheeling charges, but, the expression "additional surcharge on the charges of wheeling" does not necessarily mean that the additional surcharge to meet the fixed costs of the distribution licensees are also required to be calculated along with the wheeling charges or should be inextricably linked with the wheeling charges. The additional surcharge can very well be determined independently and de hors the wheeling charges. The tariff policy also nowhere indicate that the additional surcharge should be inter-linked with the wheeling charges or should be decided along with and inextricably linked with wheeling charges. Under the Act of 2003 and the regulations framed thereunder the open access consumers would be sourcing their power supply from other source and would be using network of the distribution licensee and, therefore, the appropriate manner in which the additional surcharge could be recovered would be through the wheeling charges or along with the wheeling charges. Regulation 17(2) simply provides additional surcharge along with wheeling charges, and that is in consonance with Section 42(4) of the Act of 2003.

39. Validity of Regulation 17 is questioned yet on another ground that clause (4) of it fasten a liability of additional surcharge determined by the State Commission on the consumer in respect of inter-State transmission, which as a matter of fact, as per provisions of the Act of 2003 is within the domain of the Central Electricity Regulatory Commission.

40. At the threshold we do not find any merit with the submission.

41. As per clause (4) of Regulation 17, the consumers located in the area of supply of a distribution licensee, but availing open access exclusively on inter-State transmission system, are also liable to pay the additional surcharge as determined under the Regulations of 2016. From perusal of clause (4), it is apparent that the liability to pay additional surcharge arises only when the open access is sought to be through distribution supply system. This clause specifically refers the expression "consumers located in the area of supply of distribution licensee", meaning thereby, the consumers who are connected to the distribution licensee, but availing supply of power from the source other than the distribution licensee by exclusively using the inter-State transmission system. In such circumstance the fixed cost towards the standard power purchase agreement with distribution licensee would certainly adversely effected on count of its obligation to supply the energy. The imposition of additional surcharge prescribed under clause (4) of Regulation 17, thus, is well within the domain of State Commission and it is not at all an interference with the jurisdiction of Central Commission.

42. Challenge is given by the petitioner to clause (3) of Regulation 26 of the Regulations of 2016 being beyond the scope of Section 181 read with Section 42 of the Act of 2003. According to the petitioner the State Commission is having no authority to prescribe restriction on a consumer regarding drawal of electrical energy from the open access only upto the contract demand. It is stated that the

restriction imposed on the aggregate quantum of power is contrary to the objects of the Act of 2003 as that takes away the freedom sought to be given by parliament for extending nondiscriminatory open access. Clause (3) of Regulation 26 provide that "the open access consumer shall restrict the sum of total drawal from all sources including open access and distribution licensee upto the total sanctioned contract demand with distribution licensee. It shall also be relevant to notice here that under the Regulations of 2004 it was open for the consumer to avail connected load rom by distribution licensee equal to the sanctioned contract demand. The consequence of the amended clause under the Regulations of 2016 shall be that the distribution licensee have to face penalty even on drawal of the energy within the sanctioned limit as the restriction is made for drawal of electricity from all sources.

43. In our considered opinion, this argument too is not having any force. Clause (3) referred above reads as under:-

"26(3) The open access consumer shall restrict the sum of his total drawal from all sources including open access and Distribution Licensee up to the total sanctioned contract demand with the Distribution Licensee.

Provided that open access may be allowed over and above the contract demand to a consumer who sources power both by captive generation and Discom to the extent of captive power supply subject to availability of transmission and/or distribution system as the case may be.

Provided further that long term open access may be allowed over and above the contract demand to the extent of sanctioned open access capacity."

44. As per proviso to clause (3) of Regulation 26, the petitioner is entitled to draw power over and above its contract demand to the extent of captive power supply subject to availability of transmission and/or distribution system, as the case may be. It is also pertinent to note that the consumer is also entitled to have energy over and above the contract demand to the extent of sanctioned open access capacity on being categorised as long term open access. It is also erroneous to say that the State Commission has no power to prescribe a restriction regarding drawal of energy upto the contract demand. The authority under Section 181 of the Act of 2003 available to the State Commission is quite wide as per sub-section(1). The fields narrated under sub-section(2) are illustrative and those does not restrict the authority already prescribed under sub-section(1) of Section 181 of the Act of 2003. As such, the challenge to clause (3) of Regulation 26 too fails.

45. The next submission of learned counsel appearing for the petitioner is that as per the Regulations of 2004 it was open for the petitioner to obtain power from the power market at any time in a day with a block of 15 minutes within a period of 24 hours. By virtue of the provisions contained in Regulations 26(7)(i) and 26(7)(iii) of the Regulations of 2016, the petitioner has to purchase the power for 24 hours whether he requires it or not and further the variation permissible is

only twice to the extent of 25%. It is submitted that the consequence of clause (7) impugned would be that a consumer in spite of having no need of a particular quantum of power have to pay for it though the surplus power will go to the distribution company only. Effort is also made to illustrate that in the event of break down after 10:00 AM, it would not be possible to have power supply before 38 hours. The onerous restriction under clause (7) of Regulation 26 is that the consumer have to schedule power from open access for complete 24 hours and further the intimation about block-wise maximum power to be scheduled is required to be given before 10:00 AM of the day preceding the day of drawal. This condition was not available in Regulations of 2004. It is asserted that the eventuality of break down cannot be foreseen 24 hours advance, and as such if any immediate break down occurs, then as a result to clause (7), all operations shall be stalled.

46. We would like to mention here that unseen eventualities cannot be a reason to declare a provision bad. We are required to see as to whether the Commission is having authority to prescribe such regulation or not. From perusal of sub-section(2) of Section 42 of the Act of 2003, it is apparent that open access is subject to conditions which may be specified by the State Commission. While specifying conditions for the grant of open access, the Commission is supposed to take care of all operational factors and constraints.

47. Be that as it may, we do not find any unreasonability with the impugned clause. The distribution licensee is required to maintain its daily load curve with a view to economise power purchase cost. The cost of market power varies time to time and it is quite higher in peak hours vis-a-vis the off-peak hours. The open access consumers in natural course will like to procure power from market during off-peak periods, which may lead to a situation wherein the licensee may have to back down even the cheaper generation during off-peak period and to procure costlier power during peak periods. This would result in overall rise in power purchase cost posing additional burden on other consumers. The condition with regard to have schedule power from open access for complete 24 hours of the day as per clause (7) of the Regulation 26, as a matter of fact, secures overall interests of consumers. It is also pertinent to notice that even in the event of break down, a consumer can avail supply from the distribution licensee as per clause (3) of Regulation 13. Adequate provisions are available under the Regulations of 2016 enabling the consumers like petitioner to continue their operations, even if, power supply ceases from generating station in the case of break down or otherwise.

48. While challenging the Regulation 21(i) of the

49. Regulations of 2016, it is stated that as per the availability based tariff framed by the Central Electricity Regulatory Commission, the supplier as well as the receiver, both units are liable to be charged for shortfall, but in terms of Regulation 21(i) the higher of availability based tariff mechanism or temporary tariff applicable for HT/NDS category has been made applicable, is in excess to

the powers conferred under Section 181 of the Act of 2013. 49. We are of the view that the challenge to this provision is based on the provisions prescribed under regulations provided by the Central Electricity Regulatory Commission. Validity of a regulation cannot be tested on the touchstone of any other regulation made by any other body. The petitioner is required to establish his own case within the four corners settled to challenge a subordinate legislation. No such ground has been advanced before us. Irrespective of it, we would like to state that the explanation given by the respondent Commission is quite satisfactory to explain the intent of the regulation 21. The explanation extended reads as under:-

"It is also submitted that the Respondent Commission is empowered u/s 86(1)(c) to "facilitate intra-state transmission and wheeling of electricity". Therefore, the Respondent Commission is empowered in law to specify what rate would be applicable to any under-injection with respect to the schedule approved by the State Load Despatch Centre. Such a rate could very well be the higher of the rates specified by CERC or the energy charge at the rate of temporary tariff applicable for HT (NDS) category as determined by the Respondent Commission. The rationale behind this provision is that the incumbent distribution licensee will have to procure power at very high rates at very short notice from the open access consumer on account of under-injection by the source of its alternate open access supply including a generating station. Any under-injection would mean that power from alternate sources is not available to the open access consumer. Such a deficit will have to be met by the incumbent distribution licensee which has a statutory obligation to supply power u/s 43 of the 2003 Act.

The impugned Regulation has also been made with an intent to hinder consumer from gaming activities on the grid. It is submitted that such a provision is necessary to balance the interest of consumers as well as the distribution licensee. It is furthermore submitted that :-

(a) Under the scheme of the 2003 Act, the State Electricity Regulatory Commissioner (hereinafter "SERC") are not subordinate to nor subservient to the Central Electricity Regulatory Commission (hereinafter "CERC").

(b) The SERCs operate in their own sphere and are completely independent of the CERC;

(c) The Regulations and Orders made or passed by the CERC are not binding upon the SERCs.

(d) The only reference to the interplay between the Regulations framed by the SERCs and the CERC is under Section 61(a) of the EA 2003 which mandates that the SERC's are "to be guided" by the "principles and methodologies" adopted by the CERC and that too only for the purpose of the tariff applicable to generating companies and transmission licensees.

(e) Hence, the Regulations of the CERC are not binding on the SERCs. It is only

the "principles and methodologies" specified by the CERC which are to "guide" the SERCs.

(f)The Deviation Settlement Regulations of the CERC are not relatable to Section 61(a) of the EA 2003 since they do not deal with the tariff of either generating companies or transmission licensees. The charges payable under the Deviation Settlement Mechanism of CERC do not go to the Transmission licensee but to a special fund set up for that purpose under the same Regulations. In any case such charges are not "tariff payable to generating companies or transmission licensees". They are only a commercial mechanism installed to instill grid discipline.

(g)Even assuming without admitting that the CERC Deviation and Settlement Mechanism Regulations 2014 were relatable to Section 61(a) (which they are not), the SERCs is only to be guided by the principles and methodologies mentioned in such Regulations. The quantum of charges payable under Regulation 21 therefore are entirely unfettered by anything contained in the CERC's Regulations.

(h)It is therefore submitted that the RERC is entirely free to determine charges under its Regulations untrammelled by the CERC's Regulations as SERCs have their statutory powers conferred under the Electricity Act 2003 independently of CERC Regulations.

(i)Without prejudice to the above it is submitted that even assuming without admitting that the CERC's Regulations were at all applicable for any part of the transactions in question, the CERC Deviation and Settlement Mechanism Regulations 2014 (relied on by the Petitioner) have been amended on 6th May 2016 to come into effect from 30th May 2016. The Amended Regulations contain a provision that :-

"Provided that deviation shall be calculated for the Regional Entities by the concerned RLDC/RPC which shall be attributed to various entities embedded within the State by SLDC."

The aforesaid proviso is to be added below Regulation 2(1)(h) of the Principal Regulations which reads as under:-

"(h)"Deviation" in a time-block for a seller means its total actual injection minus its total scheduled generation and for a buyer means its total actual drawal minus its total scheduled drawal."

(j)The CERC's Regulations as amended clearly contemplate that the deviation in the schedule has to be reckoned with reference to the "..various entities embedded within the State by the SLDC..".

Hence, whether there is a particular deviation or what is the extent of such deviation for the state as a whole is dependent on the deviations of each embedded entity (like the Petitioner) and such deviation is to be attributed by

the SLDC which is under the overall jurisdiction of the RERC and not the CERC.

(k)Therefore, the SLDC can only attribute deviations from the schedule in terms of the Regulations that hold the field in the State, i.e. the RERC's Regulations. Hence in whichever view of the matter, there is no contradiction between the Regulations of the CERC and the RERC."

50. Now coming to the validity of Regulation 25 of the Regulations of 2016, without discussing much, we would like to state that the provision aforesaid on its face is not in conflict with the objects of the Act of 2003. This provision provides for priority for adjustment of energy drawal by open access consumer from different sources in the sequence of reducing priority. Such priority is desirable for the reason that renewable power generation is infirm power and cyclic in nature, which depends upon seasonal variations, therefore, whenever power generation from renewable source is available, then that deserves first priority. The Commission is under a mandate to promote cogeneration and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sell of electricity to any person and also specify for purchase of electricity from such sources. The sequence list is in terms of Section 86(1)(e) of the Act of 2003.

51. Certain other provisions too have been referred by learned counsels appearing on behalf of the petitioners pointing out certain inconvenience caused to the petitioners or which are not said to be as petitioner friendly as the Regulations of 2004 were. It would be appropriate to mention that inconvenience caused or even some hardship faced by the petitioners shall not make these provisions illegal. The petitioners have to establish that the Regulations are in contravention of their rights protected under Part-III of the Constitution of India, any right accrued to them under any other provision of the Constitution of India, the Regulation is enacted without having competence to do so, the Regulation is manifestly arbitrary or unreasonable to conclude that the legislature never intended to extend such authority, but the petitioners failed to convince the Court in this regard. We are of the view that the Regulations impugned are in consonance to the objects of the Act of 2003 and have been framed as per the competence available under Section 181 read with Section 42(4) of the Act of 2003.

52. In result, the writ petitions fail, hence dismissed.