
(2020) 12 KL CK 0039

In the High Court Of Kerala

Case No : Writ Petition (Civil) No. 22566 Of 2020 (U)

Kerala State Electricity Board Limited Vydyuthi Bhavan

APPELLANT

Vs

Central Electricity Regulatory Commission And Anr

RESPONDENT

Date of Decision : 02-12-2020

Acts Referred:

Electricity Act, 2003 — Section 3, 25, 61, 62, 178, 179
Constitution Of India, 1950 — Article 226

Citation : (2020) 12 KL CK 0039

Hon'ble Judges : A.K. Jayasankaran Nambiar, J

Bench : Single Bench

Advocate : Maninder Singh, G. Harikumar, Akhil Suresh, Nikhil Nayyar, Pritha Srikumar, Neha Mathen, Dhananjay Baijal, Jaishankar V. Nair, Vijay V. Paul, Abiha Zaidi

Final Decision : Dismissed

Judgement

1. Every once in a while, an unsuspecting judge opens a case file, only to find himself dragged into an unfathomable ocean of technical gobbledygook.

This is one such case, and an attempt at its resolution has had me delve into the privileged domain of electrical engineers, mercifully, with able

assistance from the learned Senior Counsel, and their enthusiastic and erudite instructing counsel, appearing on either side.

The brief facts:

The State owned Distribution Licensee under the Electricity Act, 2003 (hereinafter referred to as the "2003 Act") is the petitioner in this writ

petition that questions the legality of the Central Electricity Regulatory Commission (Sharing of Inter-State Transmission Charges & Losses)

Regulations, 2020 (hereinafter referred to as the "2020 Regulations"). The petitioner argues that the impugned Regulations, by changing the

basis for the sharing of inter-state transmission charges and losses from the one that obtained under the earlier Regulations of 2010, has strayed away

from the objectives stipulated under the National Tariff Policy as also the provisions of the Electricity Act. It is also their case that the impugned

Regulations discriminate against the petitioner and similarly situated Distribution Licensees in the Southern Region of our country, as they are forced to

shoulder a heavy financial burden on account of the changed sharing criteria adopted in the said Regulations.

2. The respondent Regulatory Commission refutes the arguments of the petitioner by referring to the scheme of the 2003 Act that portrays it as a

complete code with respect to all matters concerning electricity, including the development of a national grid, ensuring optimal of the transmission

network to promote efficient utilization of generation and transmission assets in the country; attracting the required investments in the transmission

sector, providing adequate returns and transmission tariff framework with the objective of promoting effective utilization of all assets across the

country and accelerated development of new transmission capacities that are required keeping the projected demand and generation in the years to

come. Reference is made to the provisions of the 2003 Act to demonstrate that the Commission has been vested with the powers to specify the terms

and conditions for determination of tariff as also to make regulations, inter alia, for the levy and collection of fees and charges from generating

companies or transmission utilities or licencees. In the discharge of its functions, the Commission is stated to be guided by the National Electricity

Policy and the Tariff Policy that requires it, inter alia, to formulate a national transmission tariff framework that would be sensitive to distance,

direction and related to quantum of flow.

3. Referring to the challenge in the writ petition to the 2020 Regulations, it is stated that the said sharing regulations are an improvement upon

the earlier regulations of 2010, and that the changes were necessitated on account of the recommendations made by the Bakshi Committee Task

Force, as modified by the Jha Committee that was constituted to implement the recommendations of the former. Inasmuch as the changes were made

after consulting the various stakeholders and considering their objections to the draft proposals, it is argued that the petitioner cannot challenge the

2020 Regulations because it gives effect to a policy decision, the merit or wisdom of which will not ordinarily be reviewed by this Court in exercise of its power of judicial review under Article 226 of the Constitution of India.

The Statutory Framework:

Before proceeding to consider the issues and the rival submissions, it would be apposite to notice the statutory framework under the Electricity Act,

2003, particularly with reference to the role envisaged for the CERC thereunder. The scope and analysis of the 2003 Act has been succinctly laid out

in paragraphs 17 to 28 of the judgment of the Supreme Court in *PTC India Limited v. Central Electricity Regulation Commission* [(2010) 4 SCC

603] as follows:

17. The 2003 Act is enacted as an exhaustive Code on all matters concerning electricity. It provides for "unbundling" of SEBs into separate

utilities for generation, transmission and distribution. It repeals the Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity

Regulatory Commissions Act, 1998. The 2003 Act, in furtherance of the policy envisaged under the Electricity Regulatory Commissions Act, 1998

("1998 Act"), mandated the establishment of an independent and transparent regulatory mechanism, and has entrusted wide ranging responsibilities

with the Regulatory Commissions. While the 1998 Act provided for independent regulation in the area of tariff determination; the 2003 Act has

distanced the Government from all forms of regulation, namely, licensing, tariff regulation, specifying Grid Code, facilitating competition through open

access, etc.

18. Section 3 of the 2003 Act requires the Central Government, in consultation with the State Governments and the Authority, to prepare National

Electricity Policy as well as Tariff Policy for development of the power system based on optimum utilization of resources. The Central and the State

Governments are also vested with rule-making powers under Sections 176 and 180 respectively, while the "Authority" has been defined under Section

2(6) as regulation-making power under Section 177. On the other hand, the Regulatory Commissions are vested with the power to frame policy, in the

form of regulations, under various provisions of the 2003 Act. However, the Regulatory Commissions are empowered to frame policy, in the form of

regulations, as guided by the general policy framed by the Central Government.

They are to be guided by the National Electricity Policy, the Tariff

Policy as well as the National Electricity Plan in terms of Sections 79(4) and 86(4) after the 2003 Act (see also Section 66).

19. In this connection, it may also be noted that the Central Government has also, in exercise of its powers under Section 3 of the 2003 Act, notified

the Tariff Policy with effect from 6.1.2006. One of the primary objectives of the Tariff Policy is to ensure availability of electricity to consumers at

reasonable and competitive rates. The Tariff Policy tries to balance the interests of consumers and the need for investments while prescribing the rate

of return. It also tries to promote training in electricity for making the markets competitive. Under the Tariff Policy, there is a mandate given to the

Regulatory Commissions, namely, to monitor the trading transactions continuously and ensure that the electricity traders do not indulge in profiteering

in cases of market failure. The Tariff Policy directs the Regulatory Commissions to fix the trading margin in a manner which would reduce the costs

of electricity to the consumers and, at the same time, they should endeavour to meet the requirement for investments.

20. An "electricity trader" is defined under Section 2(26) to mean a person who has been given a licence to undertake trading in electricity under

Section 12. Section 2(32) defines a "grid" as the high voltage backbone system of inter-connected transmission lines, sub-station and generating plants.

Under Section 2(33), a "Grid Code" is defined as a code specified by the Central Commission under Section 79(1)(h), while under Section 2(34), "Grid

Standards" are those specified by the Central Authority under Section 73(d). Under Section 2(47), "open access" is defined to mean the non-

discriminatory provision for access to the transmission lines or distribution system or associated facilities given to any licensee or consumer or a person

engaged in generation of electricity in accordance with the regulations specified. Section 2(62) defines the term "specified" to mean specified by

regulations made by the Appropriate Commission or the Authority under the 2003 Act. Under Section 2(71), the word "trading" is defined to mean

purchase of electricity for resale thereof.

21. Under the 2003 Act, power generation has been delicensed and captive generation is freely permitted, subject to approval as indicated in Sections

7, 8 and 9 of the Act. However, under Section 12, a licence has been provided as

a pre-condition for engaging in transmission or distribution or trading of electricity. Therefore, licensees are granted by the Appropriate Commission under Section 14 of the Act on applications made under Section 15.

Section 16 provides power to the Appropriate Commission to specify any general or specific conditions which shall apply either to a licensee or to a

class of licensees. Under Section 18, the Appropriate Commission is also vested with the power to amend the licence as well as to revoke it in certain

stipulated circumstances, if public interest so requires (see Section 19). Under Section 23, the Appropriate Commission has the power to issue

directions to licensees to regulate supply, distribution, consumption or use of electricity, if the Appropriate Commission is of the opinion that it is

necessary or expedient so to do for maintaining the efficient supply and for securing the equitable distribution of electricity and promoting competition.

22. One of the most important features of the 2003 Act is the introduction of open access under Section 42 of the Act. Under the open access regime,

distribution companies and eligible consumers have the freedom to buy electricity directly from generating companies or trading licensees of their

choice and correspondingly the generating companies have the freedom to sell.

23. Section 52 of the 2003 Act deals with trading of electricity activity. Under Section 52(1), the Appropriate Commission may specify the technical

requirement, capital adequacy requirement and credit worthiness for being an electricity trader. Under Section 52(2), every trader is required to

discharge its duties, in relation to supply and trading in electricity, as may be specified by the Appropriate Commission.

24. The standards of performance of licensee(s) may be specified by the Appropriate Commission under Section 57 of the Act.

25. The 2003 Act contains separate provisions for the performance of the dual functions by the Commission. Section 61 is the enabling provision for

framing of regulations by the Central Commission; the determination of terms and conditions of tariff has been left to the domain of the Regulatory

Commissions under Section 61 of the Act whereas actual tariff determination by the Regulatory Commissions is covered by Section 62 of the Act.

This aspect is very important for deciding the present case. Specifying the terms and conditions for determination of tariff is an exercise which is

different and distinct from actual tariff determination in accordance with the

provisions of the Act for supply of electricity by a generating company to a distribution licensee or for transmission of electricity or for wheeling of electricity or for retail sale of electricity.

26. The term "tariff" is not defined in the 2003 Act. The term "tariff" includes within its ambit not only the fixation of rates but also the rules and regulations relating to it. If one reads Section 61 with Section 62 of the 2003 Act, it becomes clear that the Appropriate Commission shall determine the actual tariff in accordance with the provisions of the Act, including the terms and conditions which may be specified by the Appropriate Commission under Section 61 of the said Act. Under the 2003 Act, if one reads Section 62 with Section 64, it becomes clear that although tariff fixation like price fixation is legislative in character, the same under the Act is made appealable vide Section 111. These provisions, namely, Sections 61, 62 and 64 indicate the dual nature of functions performed by the Regulatory Commissions, viz, decision-making and specifying terms and conditions for tariff determination.

27. Section 66 confers substantial powers on the Appropriate Commission to develop the relevant market in accordance with the principles of competition, fair participation as well as protection of consumers' interests. Under Sections 111(1) and 111(6) respectively, the Tribunal has appellate and revisional powers. In addition, there are powers given to the Tribunal under Section 121 of the 2003 Act to issue orders, instructions or directions, as it may deem fit, to the Appropriate Commission for the performance of statutory functions under the 2003 Act.

28. The 2003 Act contemplates three kinds of delegated legislation. Firstly, under Section 176, the Central Government is empowered to make rules to carry out the provisions of the Act. Correspondingly, the State Governments are also given powers under Section 180 to make rules. Secondly, under Section 177, the Central Authority is also empowered to make regulations consistent with the Act and the rules to carry out the provisions of the Act. Thirdly, under Section 178, the Central Commission can make regulations consistent with the Act and the rules to carry out the provisions of the Act.

SERCs have a corresponding power under Section 181. The rules and regulations have to be placed before Parliament and the State Legislatures, as the case may be, under Section 179 and 182. The Parliament has the power to

modify the rules/ regulations. This power is not conferred upon the State Legislatures. A holistic reading of the 2003 Act leads to the conclusion that regulations can be made as long as two conditions are satisfied, namely, that they are consistent with the Act and that they are made for carrying out the provisions of the Act.â??

2. The functions of the Central Electricity Regulatory Commission with respect to tariff fixation and framing of regulations is dealt with in paragraphs

53 to 58 of the said judgment as follows:

53. Applying the abovementioned tests to the scheme of 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 licensing), adjudication upon disputes involving generating

companies or transmission licensees fall under the head ""mandatory functions"" whereas advising 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 dependant upon making of regulations under Section 178 by the Central Commission.

Therefore, functions of Central Commission enumerated in Section 79 are separate and distinct from function of Central Commission under Section

178. The former is administrative/adjudicatory function whereas the latter is legislative.

54. As stated above, the 2003 Act has been enacted in furtherance of the policy envisaged under the Electricity Regulatory Commissions Act, 1998 as

it mandates establishment of an independent and transparent Regulatory Commission entrusted with wide ranging responsibilities and objectives inter

alia including protection of the consumers of electricity. Accordingly, the Central Commission is set up under Section 76(1) to exercise the powers

conferred on, and in discharge of the functions assigned to, it under the Act. On reading Sections 76(1) and 79(1) one finds that Central Commission is

empowered to take measures/steps in discharge of the functions enumerated in Section 79(1) like to regulate the tariff of generating companies, to

regulate the inter-State transmission of electricity, to determine tariff for inter-

State transmission of electricity, to issue licenses, to adjudicate upon disputes, to levy fees, to specify the Grid Code, to fix the trading margin in inter-State trading of electricity, if considered necessary, etc.. These measures, which the Central Commission is empowered to take, have got to be in conformity with the regulations under Section 178, wherever such regulations are applicable. Measures under Section 79(1), therefore, have got to be in conformity with the regulations under Section 178.

55. To regulate is an exercise which is different from making of the regulations. However, making of a regulation under Section 178 is not a pre-

condition to the Central Commission taking any steps/measures under Section 79(1). As stated, if there is a regulation, then the measure under Section

79(1) has to be in conformity with such regulation under Section 178. This principle flows from various judgments of this Court which we have

discussed hereinafter. For example, under Section 79(1)(g) the Central Commission is required to levy fees for the purpose of the 2003 Act. An Order

imposing regulatory fees could be passed even in the absence of a regulation under Section 178. If the levy is unreasonable, it could be the subject

matter of challenge before the Appellate Authority under Section 111 as the levy is imposed by an Order/decision making process. Making of a

regulation under Section 178 is not a pre-condition to passing of an Order levying a regulatory fee under Section 79(1)(g). However, if there is a

regulation under Section 178 in that regard then the Order levying fees under Section 79(1)(g) has to be in consonance with such regulation.

56. Similarly, while exercising the power to frame the terms and conditions for determination of tariff under Section 178, the Commission has to be

guided by the factors specified in Section 61. It is open to the Central Commission to specify terms and conditions for determination of tariff even in

the absence of the regulations under Section 178. However, if a regulation is made under Section 178, then, in that event, framing of terms and

conditions for determination of tariff under Section 61 has to be in consonance with the regulation under Section 178.

57. One must keep in mind the dichotomy between the power to make a regulation under Section 178 on one hand and the various enumerated areas

in Section 79(1) in which the Central Commission is mandated to take such measures as it deems fit to fulfil the objects of the 2003 Act. Applying this

test to the present controversy, it becomes clear that one such area enumerated in Section 79(1) refers to fixation of trading margin. Making of a regulation in that regard is not a pre-condition to the Central Commission exercising its powers to fix a trading margin under Section 79(1)(j), however, if the Central Commission in an appropriate case, as is the case herein, makes a regulation fixing a cap on the trading margin under Section 178 then whatever measures a Central Commission takes under Section 79(1)(j) has to be in conformity with Section 178.

58. One must understand the reason why a regulation has been made in the matter of capping the trading margin under Section 178 of the Act.

Instead of fixing a trading margin (including capping) on a case- to-case basis, the Central Commission thought it fit to make a regulation, which has a

general application to the entire trading activity which has been recognized, for the first time, under the 2003 Act. Further, it is important to bear in

mind that making of a regulation under Section 178 became necessary because a regulation made under Section 178 has the effect of interfering and

overriding the existing contractual relationship between the regulated entities. A regulation under Section 178 is in the nature of a subordinate

Legislation. Such subordinate Legislation can even override the existing contracts including Power Purchase Agreements which have got to be aligned

with the regulations under Section 178 and which could not have been done across the board by an Order of the Central Commission under Section

79(1)(j).â??

3. The CERC, therefore, has wide powers to make regulations under Section 178 of the Act, including inter alia in relation to the levy and collection of

fees and charges from generating companies or transmission utilities or licensees, payment of transmission charges and surcharge, and the terms and

conditions for determination of tariff. In the discharge of its regulatory functions, the CERC is required to be guided by the National Electricity Policy

and the Tariff Policy notified under Section 3 of the 2003 Act.

4. The National Electricity Policy stipulates that efficient and coordinated action be taken to develop a robust and integrated power system for the

country. It requires the Central Government to facilitate the continued development of a national grid, for providing adequate infrastructure for inter-

state transmission of power and to ensure that generation capacity is optimally

utilized for transmission of power from surplus regions to deficit

regions. The policy contemplates open access in transmission, to promote competition amongst generating companies and to enable them to sell to

distribution licensees across the country. For the cost effective transmission of power across the region, the policy contemplates development and

implementation of a national transmission tariff framework by CERC.

5. The National Tariff Policy notified by the Central Government in 2006 identifies two objectives with respect to transmission of electricity viz.

(i) ensuring optimal development of the transmission network to promote efficient utilization of generation and transmission assets in the country and

(ii) attracting the required investments in the transmission sector and providing adequate returns.

6. In furtherance of the objectives of the National Electricity Policy, Section 25 of the 2003 Act provides that the Central Government may make

region wise demarcation of the country for the efficient, economical and integrated transmission and supply of electricity and in particular to facilitate

voluntary inter-connections and co-ordination of facilities for the inter-state, regional and inter-regional generation and transmission of electricity.

Accordingly, the entire country has been divided into five regions â?" Northern Region, North Eastern Region, Eastern Region, Western Region and

Southern Region. While the regional grids of the former four regions were synchronized by August 2006, the synchronization of the southern regional

grid with the other grids happened only by December 2013. With this last synchronization, the nation was able to fulfill the concept of â?"One Nation,

One Gridâ??".

7. The Sharing Regulation, with which we are concerned in this writ petition, is one that has been framed by the CERC in exercise of its regulation

making power under Section 178 of the 2003 Act. It is different from a Tariff Regulation that is framed by the CERC, and its relevance arises in the

context of inter-state transmission of electricity where a consumer of electricity may be situated in a different state from that in which the generating

company is situated. The regulation essentially prescribes a formula for the sharing of yearly transmission charges and losses among the various users

of the Inter-State Transmission System Network.

8. The earlier Sharing Regulations of 2010 adopted the Point of Connection (PoC)

charging method for sharing of yearly transmission charges and losses by the Designated ISTS Customers (DIC). Briefly stated, it involved a computation of the yearly transmission charges and losses at the PoC of the DIC concerned, based on technical and commercial information provided by the DICs, transmission licensees etc, including forecasts of generation and demand. Thus, it relied on projected estimate figures pertaining to a DIC for the upcoming quarter and made suitable adjustments thereto, taking into account the distance from the nearest generating station, direction of the power flow and the quantum of power flow. The PoC charges so determined were then adjusted into slabs and the respective entities were put under the nearest slab as per their PoC rates.

9. While the 2010 sharing regulations were periodically reviewed in 2011, 2012, 2015, 2017 and 2019, some issues that were raised by stakeholders

continued to remain unresolved. Principal among the said issues was the concern raised from some quarters as regards the reliability of load flow

studies that had hitherto formed the basis of determination of transmission charges/losses at the PoC. It was felt that since the load flow studies were

based on projected data and not actual data regarding usage, the charges/losses determined were not reliable. There was also the issue of sharing of

costs arising out of non-generation / non-utilization of power in various segments of the network as the consumers in the particular region were made

to bear the said costs despite having generating stations located nearby. To examine the said issues, the CERC constituted a task force under the

Chairmanship of Sri. A.S.Bakshi, then Member, CERC to critically examine the efficacy of the PoC mechanism, identify deficiencies therein and to

suggest modifications thereto. The Bakshi committee submitted its report in March, 2019 and suggested a modification to the PoC mechanism so that

the computation of transmission charges would hereinafter be on monthly basis and based on actual usage data at the PoC of the respective

DICs. The monthly transmission charge for AC Systems was to have three components viz. (i) PoC portion, (ii) Reliability portion and (iii)

Residual Portion and would be shared amongst the DICs in accordance with a prescribed formula.

10. To examine the recommendations of the Bakshi committee, the CERC constituted a committee under Sri. I.S.Jha, Member (Technical) CERC.

The said committee in its report suggested that the mechanism for sharing of transmission charges by different DICs, should take into account the quantum of Long Term Access granted on the basis of which transmission systems have been planned as well as utilization of different elements by different DICs that would be determined through load flow studies on actual data. It was also suggested that for deciding part of tariff based on LTA quantum, objectives of different transmission elements or systems should be taken into account. Accordingly, if some system or element had been planned keeping in view the entire grid, the tariff of the same had to be shared by all the DICs of the grid and, likewise, if they were planned for the benefit of a particular region, the same had to be shared by the DICs of the particular region. It was felt that the monthly transmission charges for the AC system should comprise of two parts - first part based on utilization and the balance on the basis of contracted capacity of LTA + MTOA.

11. The 2020 Regulations that are impugned in this writ petition are the result of the CERC's acceptance of the Jha committee's recommendations. The regulations were notified on 04.05.2020 and it was followed by a Statement of Reasons (SOR) dated 10.08.2020 in support of the regulations.

The Issue:

The issue that arises for consideration in the instant case is the legality of the 2020 Regulations to the extent it makes an alleged departure as regards the basis for determination of the transmission charges and losses that would be shared between the Designated Inter-State Consumers (DIC) of electricity who access the inter-state transmission network from designated nodal Points of Charge (PoC). The petitioner contends that as per the 2010 Regulations framed by the CERC, the sharing mechanism was sensitive to distance, direction and quantum of flow, in deference to the mandate of the National Electricity Policy and Tariff Policy that required the CERC to give due weightage to the said utilization factors. In particular, the earlier regulations provided for the conduct of a load flow study on the basis of which the load requirements for the various DICs would be estimated and thereafter, a cost advantage worked out for particular DICs depending on whether their power drawal requirements were met from the

quantum of power injected into the network by a generator located nearby. To illustrate, if the petitioner had entered into a PPA with a generator

company in Jharkhand for the supply of 1000 MW of power, while the normal cost of the power made available to the petitioner would have taken into

account the distance of the transmission lines from Jharkhand to Kerala as one of the factors, if there was another generating company that was

injecting a like quantity of power into the system from a nearby location, say Tamil Nadu, then the cost of the power made available to the petitioner

would be reduced considerably on account of the reduction in the distance for transmission.

2. The petitioner submits that the respondent CERC received complaints from DICs in some other regions where, on account of relinquishment

of Long Term Access commitments by private power generators, for whom nine high capacity corridors had been created, the DICs concerned

had to incur higher costs on account of having to draw their power requirements from distant generating companies. To ameliorate the said problem,

the CERC, through the impugned Regulation, acted on the recommendations of the Jha Committee, by removing the distance factor from the list of

utilization factors, and stipulating a sharing of the higher costs among all the DICs accessing the network in the ratio of their contracted capacities

(LTA + MTOA). It is this shift in the basis of sharing of charges and losses that the petitioner is aggrieved by, for it allegedly has the effect of

increasing the cost of power made available to it, by depriving it of the cost advantage that was earlier available to it on account of its proximity to a

generator company that was injecting power into the network. The petitioner sees this shift as a deviation from the notified Tariff Policy and therefore,

as ultra vires the power of the CERC to frame regulations.

The Arguments of Counsel:

Arguments in this case were advanced by Sri. Maninder Singh, the learned Senior Counsel, duly assisted by Adv. Harikumar on behalf of the

Petitioner and Sri. Nikhil Nayyar, the learned Senior Counsel, duly assisted by Adv.Smt. Pritha Srikumar, Adv.Smt.Neha Mathen, Adv.Sri.Dhananjay

Baijal and Adv.Sri.Jaishankar v. Nair on behalf of the respondent Commission.

2. The submissions of Sri. Maninder Singh, the learned senior counsel appearing for the petitioner, briefly stated, are as follows:

The National Electricity Policy and the Tariff Policy can be formulated only by the Central Government in consultation with the State Governments

and the CEA. Any revision to the said policy can also be only at the instance of the central government. The CERC does not have any role in the

formulation of the National Electricity Policy and the Tariff Policy.

In the 2010 Regulations, the foundational pillar that informed the sharing of charges was utilization. That was in conformity with the national

electricity policy as well as the tariff policy. In the 2020 regulations, however, the principle of utilization is given a go-by and it has been substituted by

contracted capacity, which goes against the principles of the national tariff policy. Even assuming that there is a portion of charges that is levied based

on utilization, the said portion is no longer the dominant portion as envisaged by the national electricity and tariff policies. Section 61 of the Act also

mandates that the terms and conditions for determination of tariff are subject to the provisions of the Act and shall be guided by the National

Electricity Policy and the Tariff Policy. The power to make Regulations under Section 178 is also subject to similar conditions.

The Bakshi committee had, in its report, recommended the continuation of the PoC methodology for sharing of charges. This committee included

the CEA as well. The Jha committee was formed for implementation of the recommendations of the Bakshi committee but they went beyond their

mandate and changed the very basis for sharing of transmission charges by ignoring the load flow studies that had earlier informed the Bakshi

committee report. In the process, they departed from the criteria of utility stipulated in the National Tariff Policy and allocated a large portion of

transmission charges to customers in proportion to their contracted capacity ie. Long Term Access and Medium Term Open Access. The utilization

factor for transmission charges has been reduced from 80% under the earlier regulation to a mere 20% under the new regulations. This was beyond

the mandate of the Jha committee and in accepting the recommendations of the Jha committee and framing regulations based thereon, the CERC

acted ultra vires Section 3 of the 2003 Act, as also the National Electricity Policy and the Tariff Policy. The 2020 Regulations that adopt the

recommendations of the Jha committee must therefore be held ultra vires and illegal. Reliance is placed on the decisions in Petroleum & Natural Gas

Regulatory Board v. Inraprastha Gas Limited & Ors. â?" [(2015) 9 SCC 209,] Union of India & Ors. v. S. Srinivasan â?" [(2012) 7 SCC 683,] State of Karnataka & Anr v. H. Ganesh Kamath & Ors. - [(1983) 2 SCC 402]and Pankajakshy & Ors v. George Mathew & Ors. - [1987 SCC Online Ker 534.

As early as in May 2017, the CERC had decided to shift to the mechanism of General Network Access (GNA). The Bakshi committee in its report had also taken note of the impending shift to the GNA mechanism and had recommended a modified PoC method to inform the fixation of transmission charges under the GNA mechanism. While doing so, the Bakshi committee, that considered the observations of the CEA in this regard, also noted that the PoC method had led to an overall growth in the transmission system at the rate of 20% Compounded Annual Growth Rate and that it had resulted in an improvement of the power market. Despite that, the CERC had chosen not to wait for the roll out of the GNA mechanism by the central government and accepted the recommendations of the Jha committee to change the basis of fixation of transmission charges and losses, and the sharing thereof. The decision to ignore relevant facts, while framing the new regulations, constitutes malice in law that vitiates the impugned regulations.

The CERC received complaints from DICâ??s in some other regions where, on account of relinquishment of Long Term Access commitments by private power generators, for whom nine high capacity corridors had been created, the DICâ??s concerned had to incur higher costs on account of having to draw their power requirements from distant generating companies. To ameliorate the said problem, the CERC, through the impugned Regulation, acted on the recommendations of the Jha Committee, by removing the distance factor from the list of utilization factors, and stipulating a sharing of the higher costs among all the DICâ??s accessing the network in the ratio of their contracted capacities (LTA + MTOA). The said action of the CERC spells in the realm of arbitrariness and legal malafides and ought not to be countenanced.

The CERC ought to have found that if the impugned regulations are given effect to, then it would lead to compliant units bearing the burden of higher transmission charges owing to the default of non- compliant units and the

said fact should have persuaded the CERC to allow the 2010 regulations to operate for some more time till the Draft Rules framed by the Central Government for the GNA mechanism are finalised. Such a decision would have been more conducive to the interest of all stakeholders.

3. Per contra, the submissions of Sri.Nikhil Nayyar, the learned senior counsel appearing for the respondent CERC, are as follows:

The original tariff policy of 2006 was amended in 2016 to specifically ensure that the utilization factor duly captured the advantage of reliability reaped by all users of the transmission system. It was also envisaged that the spread between the minimum and maximum transmission rates, which was disparate, was such as not to inhibit planned development/augmentation of the transmission system, while at the same time discouraging non-optimal transmission investment. The said amendment to the policy was necessitated on account of the synchronization of the other regional grids with the southern grid thus realizing the goal of one nation one grid.

It is clarified that the impugned Regulation is not a tariff regulation as envisaged under Section 62 of the Act but a Sharing Regulation framed in exercise of the power of the CERC under Section 178 of the Act. Referring to the earlier Sharing Regulations of 2010, it is pointed out that the said Regulations came into force with effect from 01.07.2011 and were to remain in force for a period of five years. In 2016, however, the validity of the said Regulations was extended by a further period of five years. During the said ten years, the Regulations were amended about six times to take care of changed factual scenarios, and in 2019, the CERC proposed to frame fresh Regulations to replace the earlier Regulations.

The fundamental change brought about by the 2020 Regulation is stated to be with regard to the determination of the Point of Connection (PoC) charges and Loss Allocation Factors, which as per the 2010 Regulations was to be on estimation basis, by considering the anticipated generation and demand of various DICs for the next quarter, but as per the 2020 Regulations is to be based on actual data available with regard to the DICs, on monthly basis.

The other significant improvement that is stated to have been brought about by the 2020 Regulations is with regard to the determination of Monthly

Transmission Charges for the Alternating Current (AC) System. While under the

2010 Regulations, the said charges were computed under the PoC method, under the 2020 Regulations, the Monthly Transmission Charges for the AC System are computed under four components viz. (i) National Component (ii) Regional Component (iii) Transformer Component and (iv) AC System Component. It is stated that while under the 2010 Regulations, the impact on transmission costs, consequent to the underutilization of a particular transmission line, was being borne by the DICs utilizing the said line, under the 2020 Regulations, the said impact on transmission costs has been distributed between DICs utilizing the said line in proportion to their utilization of the line, and the balance portion shared among all the DICs accessing the network, in proportion to their contracted LTA or MTOA capacity.

Responding to the allegations in the writ petition as regards the impropriety of accepting the recommendations of the Jha committee, it is pointed out that the Bakshi committee had merely given recommendations and the Jha committee, being an in-house committee was set up to critically examine the task force report and take a view on the recommendations, to suggest modifications in the existing PoC mechanism and formulate draft Regulations. That apart, the mere fact that one of the special invitees from the CEA had made some observations before the Bakshi committee did not require the CERC to treat the said observations as binding for the purpose of framing Regulations. It was open to the CERC to consider the recommendations of both committees and decide on an appropriate course of action.

It is contended that inasmuch as the impugned Regulation adheres to the criteria of distance, direction and quantum of flow of power while fixing the formula for sharing of transmission charges and losses, it does not offend the National Electricity Policy or the Tariff Policy and further, cannot be said to be ultra vires the 2003 Act and Rules.

Responding to the averments in the writ petition that suggest that the CERC was effectively trying to recover the increased cost suffered by them, on account of relinquishment of Long Term Access commitments by private power generators for whom nine high capacity corridors had been created, by fastening the said cost on all DICs accessing the network, it is stated that there is no material to show any causal link between the

relinquishment of Long Term Access commitments by private power generators and the sharing of the AC System component of the Monthly

Transmission Charges determined for DICâ??s in the AC System.

As regards the GNA mechanism that is stated to be in the anvil, it is submitted that the said mechanism is not a mandate either under the Act or the

policies. It is a proposed planning concept mooted by the CERC where users will give their access requirements for transmission planning purposes in

advance, in lieu of seeking LTA/MTOA which is the current basis of planning. The mere fact that there is a different mechanism for fixing

transmission charges on the anvil does not mean that the CERC cannot frame sharing regulations in the meanwhile, since the sharing regulations are

meant to fix the criteria for sharing of transmission charges that may be fixed by the PoC method or any new method under the GNA mechanism.

As regards compliance with the statutory requirements for framing the impugned Regulations, he would point out that the draft Regulations were

duly published as required under the Electricity (Procedure for Previous Publication) Rules, 2005, the objections of all stakeholders called for and

considered, and a detailed Statement of Reasons published thereafter, before notifying and publishing the Final Regulation. The laying procedure

contemplated in Section 179 is also stated to have been complied with. It is submitted therefore that the Regulation cannot be challenged as illegal.

Lastly, he would place reliance on the judgments in *Bhavesh D. Parish & Ors v. Union of India & Anr* â?" [(2000) 5 SCC 471,] *U.P.Power*

Corporation Ltd v. NTPC Ltd & Ors. - [(2011) 12 SCC 400] and *Reliance Infrastructure Ltd v. State of Maharashtra & Ors.* - [(2019) 3 SCC 352] to

contend that the Regulation having been framed by an expert body, after due consideration of commercial and economic factors, this court ought not

to exercise its powers of judicial review to interfere with the said Regulation.

The jurisdictional question:

At the very outset, this court must remind itself of the limits that it must adhere to while exercising its power of judicial review under Article 226 of our

Constitution. It is trite that in matters involving economic policy, tariff fixation, and requiring commercial or technical expertise, this court would

ordinarily defer to the decision of experts in the field, rather than substitute its own decision for that of the expert body. This self-imposed discipline

would be adhered to with greater rigour when what is impugned before it is a piece of delegated legislation. The following observations of the

Supreme Court in *Reliance Infrastructure Ltd v. State of Maharashtra & Ors.* [(2019) 3 SCC 352] are worthy of reproduction for they were

rendered in a context very similar to that obtaining in the instant case:

29. Section 181 empowers the State Commissions to make regulations consistent with the Act and the rules to carry out the provisions of the Act.

Among the matters for which the regulations may provide are the terms and conditions for the determination of tariff under Section 61. In

specifying the terms and conditions for the determination of tariff, the appropriate commission (as Section 61 provides) shall be guided by the

factors which are set out in clauses (a) to (i). The expression shall be guided comprises of two elements: the shall and, the

guidance. Clauses (a) to (i) provide guidance to the commission in specifying the terms and conditions for the determination of tariff. The

expression shall indicates that the factors which are specified in clauses (a) to (i) have to be borne in mind by the appropriate commission. As

guiding factors, they provide considerations which are material to the determination of tariffs by the appropriate commission.

30. The National Tariff Policy has multi-faceted objectives. Significant among them is the need to ensure to consumers the availability of electricity at

reasonable and competitive rates. The policy also seeks to ensure the financial viability of the sector and underlines the need to attract investments. A

financially sustainable electricity sector is an important facet of the overall regulatory framework. The objectives of the policy emphasise the need to

promote transparency, consistency and predictability in regulatory approaches across jurisdictions. The policy emphasises the need to minimise

perceptions of regulatory risk. Finally, the policy recognises the need to promote competition, efficiency in operations and improvements in the quality

of supply. In designing and formulating the regulatory framework for tariffs, the delegate of the legislature has to bring about a balance between the

competing goals which the tariff policy incorporates.

31. As part of the process, the delegate has to bear in mind the interests of diverse stake holders including consumers and producers. The process of

framing tariffs is of equal significance, for it is through the procedural framework

that norms of consistency, transparency and predictability can be enforced. Competition, efficiency and quality of supply are key components of the policy framework in designing tariffs. Clause 5.3(f) of the tariff policy speaks of the need to evolve performance norms which incorporate incentives and disincentives and provide an appropriate arrangement that fosters the sharing of gains of efficiency in operations with consumers. Operating parameters in tariffs are required to be pegged only on a "normative level" and not at the "lower of normative and actuals", save and except in those cases referred to in paragraph 5.3(h)(2). Para 5.3(h)(2) deals with those cases where operations have been much below the norm for several previous years. In those cases, the initial starting point in determining the revenue requirement and the trajectories are fixed at a relaxed level and not at desired levels. Under clause 5.3(f), the operating norms must fulfil several parameters. They must be (i) efficient; (ii) relatable to past performance; (iii) capable of achievement; and must progressively reflect increased efficiencies. They may also take into consideration latest technological advances, fuel, vintage of equipment, nature of operations, level of service to be provided to consumers, among other factors. Continuous and proven inefficiency has to be controlled and penalised. The operating norms must be designed to promote efficiency and to ensure that the gains which accrue on account of efficient operations are shared with the consumers of electricity. The operating norms will, therefore, have due regard to the performance in the past as well as capacities for future achievement. These must be dovetailed with all relevant considerations, bearing on the requirements of the policy.

32. The Tariff Policy provides guidance to the appropriate Commission when it frames regulations. The power to frame regulations is legislative in nature. It is conferred upon the appropriate Commission. The Commission weighs numerous factors. Its discretion in carrying out a complex exercise cannot be constrained. The delegate of the legislature is therefore under a mandate to bring about a fair and equitable balance between competing considerations. Standing at the forefront of those considerations is above all the need to ensure efficiency and to protect the interests of consumers. The submission which has been urged on behalf of the appellant would reduce tariff fixation to a rather simplistic process of bringing about equality

between generating units which have the same design and manufacturing origin. Such an approach overlooks the complex factors which have to be borne in mind in the determination of tariffs.

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37. Tariff fixation is a complex exercise involving a careful balance between numerous considerations. The â??shall be guidedâ? prescription under

Section 61 requires the appropriate commission to bear those considerations in mind. Deducing past performance on the basis of historical data,

balancing diverse policy objectives and evaluating the comparative weight to be ascribed to the interests of stakeholders is a scientific exercise which

is carried out by the commission. The nature of judicial review that is exercisable in a given subject area depends in a significant measure on the

nature of the area and the body which is entrusted with the task of framing subordinate legislation.

38. MERC is an expert body which is entrusted with the duty and function to frame regulations, including the terms and conditions for the

determination of tariff. The Court, while exercising its power of judicial review, can step in where a case of manifest unreasonableness or

arbitrariness is made out. Similarly, where the delegate of the legislature has failed to follow statutory procedures or to take into account factors which

it is mandated by the statute to consider or has founded its determination of tariffs on extraneous considerations, the Court in the exercise of its power

of judicial review will ensure that the statute is not breached. However, it is no part of the function of the Court to substitute its own determination for

a determination which was made by an expert body after due consideration of material circumstances.

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40. We commenced our discussion by emphasising, in our prefatory observations, that the power to frame regulations is of a legislative nature. The

CPRI report was an input before the MERC in carrying out that exercise. MERC followed the statutory procedures laid down for the determination of

tariffs. It took into account factors which it is mandated by the statute to consider. The national tariff policy, suggestions of stakeholders as well as the

assessment carried out by the CPRI were duly considered. Hence, the present case does not fall in the paradigm of manifest unreasonableness or

arbitrariness to warrant the interference of this Court. It would be rather formulaic for the Court to accept that merely because DTPS was placed at par in the immediately previous period (2006-07) and the period immediately succeeding (2016-20), that this must necessarily be extrapolated to the intervening period governed by the MYT Regulations 2011. A body which is entrusted with the task of framing subordinate legislation has a range of options including policy options. If on an appraisal of all the guiding principles, it has chosen a particular line of logic or rationale, this Court ought not to interfere. (emphasis supplied)â??

2. Having noticed the aforesaid caveat, I must hasten to add that, in cases where the legislative exercise by a statutory delegate is found to have traversed beyond the powers conferred on it under the parent statute, then this court would be abdicating its powers if it does not strike down the impugned Regulation as ultra vires and illegal. The question, however, is whether such interference is warranted in the instant case?

Findings and reasons therefor:

It is the case of the petitioner that the changes introduced in the sharing methodology, through the impugned regulations, ignore the fundamental principles of distance, direction and quantum of power flow that have to inform the framing of a regulation by the CERC under Section 178 of the 2003 Act. It is stated that under the extant regulations of 2010, where the PoC mechanism was resorted to for determination of the transmission charges and losses at the PoC for the petitioner, it obtained a definite cost advantage owing to its proximity to a generating station that was able to supply it with the quantum of power for which it had contracted through an inter-state Power Purchase Agreement, and that the said advantage has been taken away through the present regulations.

2. A consideration of the sequence of events that led to the framing of the impugned regulations, as also the new mechanism introduced therein for sharing of transmission charges and losses does not, however, show this to be true. The arguments of the petitioner lose sight of the fact that DICâ??s accessing the ISTS network have to be seen as integral components of a single network that connects the entire nation. Accordingly, the system is designed to ensure optimal utilization of infrastructure, irrespective of its geographical location, to provide seamless transmission of power to

consumers across the country. For the said purpose, there are several nodal points of access provided in the network where power is either injected into the network or drawn from the network. Although the petitioner may be drawing power from a particular nodal point in the network, it cannot forget that it is drawing power from the network and not from the generator who is situated in close proximity to it, geographically. On injection into the network, the injected power loses its origin-based identity and merges with the power carried by the Inter-State Transmission System. The petitioner cannot, therefore, be heard to contend that factors that affect the rest of the ISTS system, save the transmission lines to his PoC from the nearest generator, are inconsequential to the determination of his share of the transmission charges/losses pertaining to the network. So long as the transmission charges determined for the petitioner at the relevant PoC takes in a component that considers the distance from the nearest generator, the regulation cannot be said to have ignored the guiding principles laid down by the National Electricity Policy or the Tariff Policy.

3. The 2020 Regulation clearly indicates that the AC System component of the monthly transmission charges will comprise of two components viz. (i) Usage based component (AC-UBC) and (ii) Balance component (AC-BC). The monthly transmission charges to be allocated to each DIC under this component is determined based on load flow studies that determine the power flow on each transmission line, and prevailing hybrid method of transmission charge allocation that apportions the charges made on per circuit kilometer basis for each voltage level and conductor configuration. Thus, the distance factor is very much retained under the new sharing regime introduced through the impugned regulations.

4. The petitioner would next contend that there has been a complete inversion of the ratio of utilization-based and contracted capacity based allocation of the transmission charges and losses under the impugned regulations when compared to the earlier regime. It is argued that while under the 2010 regulations the utilization-based component accounted for almost 80% of the shared transmission charges, under the impugned regulations, the utilization-based charges account for only 20% of the shared transmission charges. According to the petitioner, this shift in the basis of sharing ignores the weightage that is to be given to utilization-based charges as per the prevailing Electricity Policy and Tariff Policy.

5. The said contention of the petitioner cannot be accepted. There is nothing in either the 2003 Act, the 2010 regulations, or the 2020 regulations, that prescribes any particular ratio to be maintained between the utilization-based and contracted capacity based allocation of transmission charges. So long as there is a utilization-based component that is in-built into the formula for sharing of transmission charges, the utility criteria must be seen as having been considered while determining the shared transmission charges. The respective proportions of user based and contracted capacity based components that must go into the fixation of shared transmission charges has necessarily to be left to the wisdom of the expert body ie. CERC, since it has to strike a balance between commercial and technical feasibility while determining the said charges. The CERC has to be allowed a reasonable play in the joints and the formula devised by them cannot be viewed through the lens of mathematical exactitude.

6. I also do not find merit in the argument advanced by the petitioner that suggests that there has been a covert shifting of the costs incurred by the CERC on account of the relinquishment of Long Term Access commitments by private power generators, for whom nine high capacity corridors had been created. While the petitioner would maintain that its shared transmission charges will not escalate if the CERC recoups the costs incurred by it from the defaulting private power generators, I fail to see the causal connection between the failure to recoup costs from the private generators and the anticipated increase in shared costs for the petitioner. As a matter of fact, the sharing formula under the impugned regulations apportions the increased costs of transmission noticed in particular segments of the network, owing to elements that are maintained for the benefit of the entire network, between users of the said segment first, based on their respective utilization of the network, and it is the balance portion remaining unabsorbed that is shared between all the DISCOMs in the network in proportion to their contracted LTA/MTOA capacity. The formula, in other words, provides for an equitable distribution of transmission charges/losses, based on access and utilization of the network.

7. The contentions of the petitioner, as regards the alleged impropriety/illegality occasioned through not accepting the recommendations of the Bakshi committee, also do not persuade me to interfere with the impugned regulations. The Bakshi committee and the Jha committee were constituted to

offer suggestions as regards a methodology for sharing of transmission charges and losses by the users of the Inter State Transmission Network

(ISTN). Their suggestions can only be seen as recommendatory in nature, and in the absence of any material to suggest that the CERC did not take

into account relevant aspects, or took into account irrelevant aspects while framing the impugned regulations, this court would not be justified in

interfering with the legislative exercise undertaken by a statutory body. That apart, the mere fact that there is a different basis for determination of

transmission charges, through the GNA mechanism that is under the contemplation of the Central Government, cannot be a reason to read malafides,

either factual or legal, into the framing of the impugned regulations.

The upshot of the above discussion is that I do not find the impugned regulations to suffer from any constitutional or statutory infirmity that would

warrant an interference with the same in these proceedings under Article 226 of the Constitution of India. The writ petition in its challenge against the

said regulations fails and is accordingly dismissed. There will be no order as to costs.