

**(2013) 07 DEL CK 0048**

**In the Delhi High Court**

**Case No :** CM No. 16060 of 2011 in Writ Petition (C) 7017 of 2011, CM No's. 11667 of 2012, 572 of 2013 in WP (C) No. 4867 of 2012 and CM No. 11666 of 2012 in WP (C) No. 5397 of 2012

Maharashtra State Electricity Distribution Co. Ltd.

APPELLANT

Vs

Central Electricity Regulatory Commission and Another  
<BR> GRIDCO Ltd. Vs State of Orissa and Others <BR> The  
Bihar State Electricity Board Vs The Union of India and  
Others

RESPONDENT

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**Date of Decision :** 30-07-2013

**Acts Referred:**

Constitution of India, 1950 — Article 226  
Electricity Act, 2003 — Section 38

**Citation :** (2014) 1 AD 290 : (2013) 202 DLT 751

**Hon'ble Judges :** S. Ravindra Bhat, J;Najmi Waziri, J

**Bench :** Division Bench

**Advocate :** Ravi Prakash and Mr. Varun Pathak, in CM No. 16060/2011 in W.P. C 7017/2011, Mr. Soli J. Sorabjee, Mr. R.K. Mehta, Mr. Antaryami Upadhyaya and Mr. Premjit Elangbam, in CM Nos. 11667/2012, 572/2013 in WP C No. 4867/2012, Mr. Upamanyu Hazarika, Mr. Sakya Sinha Chaudhari and Ms. Purna Priyadarshini, in CM No. 12129/2012 in WP C No. 5396/2012 and Mr. M.K. Singh in CM No. 11666/2012 in WP C No. 5397/2012, for the Appellant; G.E. Vahanvati, Attorney General, Mr. S.B. Upadhyay , Mr. Pawan Upadhyay, Ms. Sharmila Upadhyay, Anupam Prasad and Ms. Tara Narula, Advocates in CM No. 16060/2011 in W.P. (C) 7017/2011, CM Nos. 11667/2012, 572/2013 in WP (C) No. 4867/2012, CM No. 12129/2012 in WP (C) No. 5396/2012 and CM No. 11666/2012 in WP (C) No. 5397/2012 and Mr. M.Y. Deshmukh and Mr. Yatin M. Jagat, for R-3 in CM No. 16060/2011 in W.P. (C) 7017/2011, for the Respondent

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## **Judgement**

S. Ravindra Bhat, J.—The common grievance of all the writ petitioners in these batch of proceedings under Article 226 of the Constitution of India relates to the framing, enforcement and interpretation of the Central Electricity Regulatory Commission (Sharing of Interstate Transmission and Losses) Regulations, 2010 (hereafter called "the impugned regulations"). This order proposes to dispose of

one set of applications seeking interim orders (CM Nos. 16060/2011 in WP(C) No. 7017/2011, 572/2013 in WP(C) No. 4867/2012, 12129/2012 in WP(C) No. 5396/2012 and 2999/2012 in WP(C) No. 5397/2012. These have been preferred by the Petitioners. The order also disposes off two other applications (CM Nos. 11666/2012 and 11667/2012 preferred by the Power Grid Corporation of India seeking appropriate directions. These applications were heard with consent of counsel for the parties, on 23rd July, 2013 and listed for orders for today, i.e. 30th July, 2013. The petitioners are transmission utilities or corporations, in terms of Section 38 of the Electricity Act, 2003. The petitioners submit that in the "Postage Stamp Method", in vogue prior to enforcement of the impugned order GRIDCO and others were paying amounts towards transmission charges to the Power Grid Corporation. This method incorporated all the assets of the concerned region whose transmission charges were finalized by the Central Electricity Regulatory Commission, till 30.06.11. Under the said old method (Postage Stamp Method) only Rs. 11 crore, approximately was payable, for instance by the GRIDCO. However, now GRIDCO is being billed for an amount of Rs. 15.69 crore towards the transmission charges which has increased by 43 % which entails a heavy financial burden upon it (GRIDCO). If the Transmission charges are billed 100% on the basis of Point of Connection (POC) Methodology such charges will go up to the extent of Rs. 20.26 Crores per month which would translate to an increase by 88%.

2. Mr. Sorabjee, learned senior counsel appearing on behalf of the GRIDCO relies upon the orders of the Orissa High Court, dated 04-11-2011 and 08-11-2011, to submit that there is a subsisting interim order which in effect directs the respondents not to recover amounts based on the impugned regulations. He also submits that the impugned regulations are ex-facie arbitrary and discriminatory. Counsel relied on the following averments in the reply to the Power Grid Corporation's application for directions:

10. That the methodology whose objective was to make Transmission Tariff sensitive to Distance, Direction & Quantum of flow has been ultimately defeated and could not be concluded an appropriate methodology. In the present PoC regime (as per recent CERC Order DPi 30.11.12) purchase of power from Taicher-IT by Odisha which is at periphery of TSTPS is 24.38Pf Unit whereas purchase of Taicher 11 power by Andhra Pradesh (at a distance of 1000 Kms) and Karnataka (1500 Kms) is 20.70 P/unit and 18.70 P/unit respectively. Hence Odisha is paying more as the far off region for the generator situated in Odisha. A Map sharing the Pictorial presentation of the location of injection point and drawal point of Odisha, Andhra Pradesh and Karnataka is filed herewith as Annexure I3.

3. It was contended that while framing the impugned Regulations, it was assumed that States like Odisha Housing Generating Stations located near the Load Centers, will have to pay lesser Transmission Charge as the Network utilized by the load for drawing its power from the Generators shall be less. The above presumption was further substantiated by Para 3.1.6 of CERC Statement of

Reasons dated 11.06.10. That document stipulates as follows:

...These days ER imports power from WR under most grid conditions, therefore any generation in Orissa will most likely get absorbed in Orissa itself, thereby using very less transmission network (and hence lower transmission charges). This will further lead to reduction in the utilization of the transmission network (reduced flow on the ER4VR links) and invite lower transmission charges for the generator....

4. Relying on the averments in the application for stay, and the materials on record, including the copy of a map produced for the purpose of this petition, it was argued that the PoC regime through which the impugned regulations have been brought into force in fact undermines its objective. There is utter arbitrariness in regard to the levy of charges. In several places or regions, which are located within short geographical proximity of the electricity generating assets, under the pre-existing regime, the rates payable were reasonable, and had a nexus with the distance. However, under the new regime through the impugned regulations, in the Eastern Region like Odisha and West Bengal, etc the companies had to pay more, even though the transmission or generating assets were located geographically close to the units; on the other hand, units located far away in Karnataka and Andhra Pradesh had to pay less than the petitioner. This was iniquitous and arbitrary.

5. The petitioners also rely on Para 7 (q) of the impugned regulations, which is as follows:

...For the first two years, the zonal charges obtained using the Point of connection method shall be adjusted such that 50% of the Yearly Transmission Charge of the ISTS Licensees is recovered through Hybrid methodology and the balance 50% of the Yearly Transmission Charge of the ISTS Licensees is recovered based on Uniform Charge Sharing Mechanism. After a period of two years from the implementation of these arrangements, the Commission may review the weightages accorded to the Hybrid methodology and the Uniform Charge Sharing Mechanism.

6. It is submitted that any system or regime which does not predominantly take into account actual usage charges, and is based primarily on some formula, is bound to be arbitrary, which is the vice of the impugned regulations. The PoC method is based on right of use, or contract and not on actual usage. Other counsel also adopted the submissions of Shri Sorabjee.

7. Mr. Upamanyu Hazrika learned senior counsel for the West Bengal Electricity Board, one of the writ petitioners adopted the submissions of Mr. Sorabjee. He argued that the impugned regime introduced by the impugned regulations cannot be sustained because in spite of the non-participatory nature of some or predominant constituents in a grid system, they would have to bear uniform charges. Thus, for instance, transmission charges from the Northern to the North Eastern Regions would have to be borne by all grid transmission participants,

regardless of their involvement or usage through such transactions.

8. The Attorney General, who appeared on behalf of the Power Grid Corporation-i.e. the respondent in all writ petitions, and applicants in the two interim applications seeking directions, submitted that the impugned regulations have statutory force; consequently a presumption of Constitutionality attaches to them. That apart, argued counsel, the Petitioners are stressing unduly on the distance factor, in support of the case. In this context, it was contended that the impugned regulations, as indeed the National Transmission Policy framed under the Act, envisions a scientific and rational method of apportioning expenses borne by transmission companies and entities. It was argued that while the previous policy did take into account regional requirements, that did not mean that such policy had to be continued. The power of the respondents to revise and put in place a system or tariff policy which was rational to all users, was unquestioned. It was contended that 66 of the 71 users in the country adopted the new regime and have been making payments. The petitioners have, however chosen to challenge the policy, and unjustifiably resisted making payments towards the bills raised upon them by the Power Grid Corporation.

9. The Attorney General referred to a study conducted by the Central Commission which preceded the introduction of the impugned Regulations. It was urged that the National Electricity Policy and the National Tariff policy envisage a transmission pricing sensitive distance, direction and quantum of power flow. This enjoins upon the Central Commission to develop and implement a National Transmission Tariff frame-work to meet the stated objectives envisaged in the National Electricity Policy. The Petitioners' argument that the new methodology is ultra vires the provisions of the Electricity Act, 2003 or the National Electricity Policy or the National Tariff Policy was denied.

10. It was submitted that the intransigence of the petitioners cannot be countenanced and if the directions sought for are not granted, the Power Grid Corporation itself would face serious financial crisis. The Attorney General emphasized that it was only the Orissa High Court which had granted an interim order, limited in point of time. When the Supreme Court directed the transfer of all proceedings pending before various High Courts, there was in fact no interim order suspending the petitioners' obligations to make monthly payments.

11. This court notices that the present proceedings were taken up by this Court, further to directions of the Supreme Court dated 7th May, 2012. The Supreme Court had transferred writ petitions from various High Court, involving challenges to the impugned Regulations. They were, thereafter, referred to the Division Bench, on account of the fact that a challenge to the validity of statutory Regulations was involved.

12. The Petitioners' contention that the Orissa High Court's interim order of 4th November 2011 has continued and is subsisting, in the opinion of this Court, is insubstantial and meritless. Facially, that order directed the parties to maintain

status quo till the next date of hearing; so did the next order of 8th November, 2011. Thereafter, transfer proceedings were initiated before the Supreme Court. The record does not disclose that the Supreme Court made any interim order, or that it expressed any view on the feasibility of such interim orders. The record shows that the interim order made by the Orissa High Court had exhausted itself, by 8th November 2011.

13. As far as the merits of the arguments concerning grant of interim order in favour of the writ petitioners are concerned, this Court is of opinion that the writ petitioners' contentions do not warrant the grant of any interim order. Firstly, what is in issue is the validity of statutory regulations. The power to frame and issue those regulations is not questioned; what is sought to be highlighted is that it has an arbitrary effect. Now, the petitioners may undoubtedly be affected by the operation of the impugned regulations; they might be casting a greater financial burden upon them than was being cast on them hitherto. That by itself in the opinion of the court, does not amount to arbitrariness. As far as the complaint that the petitioners, though located nearer the transmission assets, have to pay more amounts than those who are located farther away are concerned, the argument overlooks that distance is one of the factors which weighed with the policy makers while framing the regulations. Three factors, i.e. distance, direction and quantum of power flow appear to have been the guiding factors while fixing the transmission tariff costs in the facts of this case. It would be well-nigh impossible for this court, at this stage of the hearing, to characterize all, or any one of these considerations as arbitrary, or even say that the administration of the impugned regulations has led to demonstrable and manifest arbitrariness or discrimination. The court is conscious of its limitation in exercising ad-interim jurisdiction in a matter which has received the attention of experts and was concededly preceded by a process of consultation. To delve deep into the issues, at this stage of the proceeding, without a full understanding or grasp of the complexities of the issues, sans a palpable and manifest arbitrariness on the face of the record (the existence of which alone can justify an ad-interim interdiction by a writ court) would be to assume that the petitioners' submissions are correct- a course clearly impermissible in law. Consequently, this court is of opinion that the applications for ad-interim stay of the impugned regulations have no force; they are consequently dismissed.

14. Dealing next with the applications of the Power Grid Corporation, the claim made is for appropriate directions to the petitioners to pay the charges which they have to bear in terms of the impugned directions. This court is of opinion that with the dismissal of the petitioner's application, there really should be no need for such directions. Nevertheless, to put the matter beyond the pale of controversy, the writ petitioners are hereby directed to abide by the conditions in the impugned regulations, with regard to payments to the Power Grid Corporation. In case any of the petitioners makes a request for payment of arrears of charges, the respondents should consider the same reasonably, and in the light of the applicable rules and regulations, including those pertaining to

paying such amounts through installments, subject to prescribed conditions in that regard. In the light of the above discussion, CM Nos. 16060/2012, 572/2013, 12129/2012 and 2999/2013 are rejected; CM Nos. 11666/2012 and 11667/2012 are allowed, in the above terms. There shall be no order as to costs. Order Dasti.

WP (C) Nos. 7017/2011, 4867/2012, 5396/2012, 5397/2012

List for hearing on 17th September, 2013.

The concerned parties shall file synopsis of arguments not exceeding seven pages with appropriate cross references. The parties shall restrict their respective arguments to half an hour each.