



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Reserved on: 19th September, 2023
Pronounced on: 03rd November, 2023

+ **W.P.(C) 14343/2021**
JUNIPER HOTELS PRIVATE LIMITED Petitioner
Through: Ms. Pushti Gupta and Mr. Joney,
Advocates.

versus

DELHI ELECTRICITY REGULATORY COMMISSION AND ANR
..... Respondents
Through: Mr. Sanjeev Mahajan and Mr. Rishabh
Varshney, Advocates for R-1.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J.:

1. The present writ petition challenges the Delhi Electricity Regulatory Commission (Renewable Purchase Obligation and Renewable Energy Certificate Framework Implementation) Regulations, 2021 (“**Regulations**”) and the Open Access Charges and Related Matters (Fourth Amendment) Order, 2021 (“**Order**”), which *inter alia* increase the renewable purchase obligations and imposed additional surcharges. The Petitioner contends that the changes introduced by impugned Regulations and Order are anti-consumer and render procurement of green energy unviable.

Facts and Contentions of the Petitioner

2. Juniper Hotels Private Limited (Petitioner) is purportedly an open access consumer which procures electricity through short term contracts in



bilateral transactions with the generating companies and the power exchange, in terms of the Delhi Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulations, 2005 (“**2005 Regulations**”).

3. On 13th April, 2021, the Delhi Electricity Regulatory Commission (“**DERC**”) (Respondent No. 1) promulgated the Regulations in exercise of its powers conferred under Section 181 read with Sections 61(h), 66 and 86(1)(e) of the Electricity Act, 2003 (“**Act**”); and on 03rd September, 2021, the DERC issued the Order in exercise of powers vested in it by virtue of Regulation 12 and 17 of the 2005 Regulations. The relevant enabling provisions have been extracted below for convenience:

(a) Section 181 of the Act:

“Powers of State Commissions to make regulations

(1) The State Commissions may, by notification, make regulations consistent with this Act and the rules generally to carry out the provisions of this Act.

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

...

(zd) the terms and conditions for determination of tariff under section 61;

...

(zi) the manner by which development of market in power including trading specified under section 66;

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

(b) Section 61(h) of the Act:

“The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:--

...

(h) the promotion of co-generation and generation of electricity from renewable sources of energy;

...”

(c) Section 66 of the Act:



“The Appropriate Commission shall endeavour to promote the development of a market (including trading) in power in such manner as may be specified and shall be guided by the National Electricity Policy referred to in section 3 in this regard.”

(d) Section 86(1)(e) of the Act:

“(1) The State Commission shall discharge the following functions, namely:--

...

(e) promote cogeneration and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee;”

(e) Regulation 12 of 2005 Regulations

“12. Applicable Charges:

(1) The Open Access Customers shall pay the transmission charges, wheeling charges, surcharges, additional surcharges, scheduling charges (payable to State Load Dispatch Centre), unscheduled inter-change (UI) charges, reactive energy charges and such other charges as the Commission may determine from time to time, as a part of the tariff under sections 61, 62 and 86 of the Act or otherwise decided or authorise the Nodal Agency to charge in exercise of its regulatory powers under the Act.

(2) The Commission while determining the charges for open access to the Transmission System or the Distribution System, provide for adjustment of losses in the system either in terms of money or in the quantum of electricity to be delivered at the destination, after the transmission and/or wheeling of electricity as the Commission considers to be appropriate.”

(f) Regulation 17 of 2005 Regulations

“17. Issue of Orders and Practice Directions:

Subject to the provisions of the Act, and these regulations, the Commission may, from time to time, issue Orders and Practice Directions, in regard to the implementation of these regulations and procedure to be followed on various matters, which the Commission has been empowered by these regulations to direct and matters incidental or ancillary thereto.”

4. The Regulations increased the Renewable Purchase Obligations (“RPO”) when compared to the 2012 regulations¹ from (a maximum of) 9% to (a maximum of) 21.35% of total annual consumption. RPO is the

¹ Delhi Electricity Regulatory Commission (Renewable Purchase Obligation and Renewable Energy Certificate Framework Implementation) Regulations, 2012.



requirement of certain entities as stipulated under the Regulations to source a minimum percentage of their total annual consumption of electricity from renewable sources. The Petitioner is an ‘obligated entity’ as per Regulation 2(16), and hence is required to observe the minimum thresholds prescribed in the Regulations.²

5. Under the earlier regime, Open Access Consumers enjoyed full exemption from these charges. The Order, now partly removes the exemption from Wheeling Charges, Transmission Charges, Cross Subsidy Surcharge and Additional Surcharge benefits.

6. The Petitioner’s contentions, while varied, do not offer much elaboration and can be aptly and comprehensively summarised in the following manner:

- a. A transparent bidding process in accordance with Section 63³ of the Act was not adopted, which violates the legal right of the Petitioner as due process of law was not followed;
- b. The preamble⁴ of the Act was violated by the impugned actions, which

² Regulation 4 of the Regulations

Table 1: RPO Targets for Obligated Entities

Sr. No.	Particulars		FY 2020-21	FY 2021-22	FY 2022-23
1.	Non-Solar	Other Non Solar RPO	10.25%	10.25%	10.50%
		HPO (applicable only for Distribution Licensees)	-	0.18%	0.35%
2.	Solar		7.25%	8.75%	10.50%
Total			17.50%	19.18%	21.35%

³ 63. Determination of tariff by bidding process. —Notwithstanding anything contained in section 62, the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government.

⁴ “An Act 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



seeks to provide *inter alia* transparent policies regarding subsidies;

c. The impugned actions defeat the very objectives of Electricity Act, 2003, National Tariff Policy, 2016, National Electricity Policy, 2005 by rendering procurement of green energy as unviable;

d. The Regulation and the Order create an oligopoly as they affect competition and fairness in the power sector;

e. Promulgation of the Regulation and the Order is against consumer interests, and hence violative of the parent statute(s)/related policies as Respondent No. 1 is obligated to function efficiently and judiciously under the statutory framework; procurement of power from green energy resources has become unviable defeating the very objective of Electricity Act and the national tariff and electricity policies which have been framed for promotion of green power in India.

Analysis

Scope of Court's jurisdiction

7. In the present case, the challenge is directed towards the Order concerning the fixation of charges applicable to open access consumers and the Regulations increased the RPO compliance thresholds. Historically, these consumers were wholly exempted from charges like wheeling, transmission, cross subsidy, and additional surcharge. However, DERC has now partially reduced these exemptions, tying them directly to the quantum of renewable energy purchase obligation compliance. Petitioner has raised grievances regarding this change, arguing for a return to the full exemptions previously

Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto."



enjoyed. Yet, upon close examination, we find no valid legal foundation to challenge the commission's decision.

8. It is a well-settled principle that delegated legislation cannot travel beyond the substantive provisions of the parent statute; however, apart from merely raising the challenge on *ultra-vires*, the Petitioner has failed to lay out any foundational facts or legal grounds to demonstrate any failure in the due process. The Petitioner challenges withdrawal of exemption from wheeling, transmission and additional surcharge and the increase in RPO compliance on the grounds that the impugned actions are *ultra vires* of the Constitution of India and fail to adhere to due process. The exemption for the open access in the form of subsidy is now limited to the extent of the RPO compliance threshold. The impugned Order has been promulgated in exercise of powers vested under Regulations 12 and 17 of the 2005 Regulations, and the Regulations have been promulgated under Section 181 read with Section 61(h) (the promotion of co-generation and generation of electricity from renewable sources of energy), 66 (development of market) and 86(1)(e) (promotion of co-generation and generation of electricity from renewable sources of energy and specification for purchase of electricity from such sources, a percentage of the total consumption of electricity).

9. The Petitioner emphasises that a transparent bidding process was not adopted as stipulated in Section 63 of the Act. This provision has a *non-obstante* clause, which allows the Commission to override Section 62 (*determination of tariff*) if a transparent process of bidding has been adopted for determination of tariff. Sections 62 and 63 provide as follows:

Section 62 - Determination of tariff

(1) The Appropriate Commission shall determine the tariff in accordance with the



provisions of this Act for--

(a) supply of electricity by a generating company to a distribution licensee:

PROVIDED that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;

(b) transmission of electricity;

(c) wheeling of electricity;

(d) retail sale of electricity:

PROVIDED that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for the promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity.

(2) The Appropriate Commission may require a licensee or a generating company to furnish separate details, as may be specified in respect of generation, transmission and distribution for determination of tariff.

(3) The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required.

(4) No tariff or part of any tariff may ordinarily be amended, more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified.

(5) The Commission may require a licensee or a generating company to comply with such procedure as may be specified for calculating the expected revenues from the tariff and charges which he or it is permitted to recover.

(6) If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee.

Section 63 - Determination of tariff by bidding process

Notwithstanding anything contained in section 62, the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government.



10. A plain reading of the afore-noted provision makes it evident that Section 63 does not provide for bidding as the *only* mechanism for determination of tariff. We thus find no force in the submission of the Petitioner on the ground of challenge relating to lack of due process. Furthermore, we also note that Respondent No. 1 adopted transparent process and floated public notices in newspapers and on its website regarding the draft regulations at several instances for each draft version, true copies of which have been annexed to the counter-affidavit. Suggestions, comments and objections were invited from stakeholders before the Regulations were enacted. The Petitioner has not controverted this categorical assertion and never sent in any objections, comments or suggestions in response to these draft regulations. Rather, at this stage, after finalisation of the Regulations, challenge is being raised on non-existent and invalid grounds.

Exemption as a matter of right

11. The exemption from wheeling, transmission and additional surcharge for the open access consumer cannot be claimed as a matter of right. In ***State of Rajasthan v. J.K. Udaipur Udyog Ltd. (2004) 7 SCC 673***, the Apex Court observed that exemptions and concessions granted by the Government are privileges and they do not confer upon the beneficiary any legally enforceable right against the Government for grant of a concession, except to enjoy the benefits of the concession during the period of its grant. The relevant observations of the Supreme Court are reproduced below:

“25. An exemption is by definition a freedom from an obligation which the exemptee is otherwise liable to discharge. It is a privilege granting an advantage not available to others. An exemption granted under a statutory provision in a fiscal statute has been held to be a concession granted by the State Government so that the beneficiaries of such concession are not required to pay the tax or duty they are otherwise liable to pay under such statute. The recipient of a concession has no legally enforceable right



against the Government to grant of a concession except to enjoy the benefits of the concession during the period of its grant. This right to enjoy is a defeasible one in the sense that it may be taken away in exercise of the very power under which the exemption was granted. (See Shri Bakul Oil Industries v. State of Gujarat (1987) 1 SCC 31, Kasinka Trading v. Union of India (1995) 1 SCC 274 and Shrijee Sales Corporation v. Union of India (1997) 3 SCC 398).”

12. Therefore, the recipient of a plain concession without a vested legally enforceable right cannot seek continuation of the grant of waiver, except to enjoy the benefits during the concession period of the grant. Additionally, as pointed out by the Respondents, waiver of wheeling, transmission, cross subsidy surcharge and additional surcharge was provided to Open Access Consumers at the time when the per unit charges for renewable energy sources were INR 10-12 kWh. Since then, the prices have dropped significantly to a fraction of the earlier prices, and are now around INR 2-2.50 kWh, which is even lower than the conventional sources of power. However, to promote renewable energy in Delhi while also avoiding subsidizing tariffs of retail consumers, the Respondent Commission in Delhi has allowed the benefit of waiver of transmission charges, cross subsidy surcharge, additional surcharge to Open Access Consumers to the extent of their RPO compliance.

13. The Petitioner has also not explained as to how the Regulations affects competition and fairness rendering electricity in Delhi more oligopoly. Likewise, there is no substantiation or foundation in the allegation that procurement of power from green sources has been rendered unviable. These grounds are thus rejected, as unsustainable.

14. Lastly, we must reiterate principles relating to scope of judicial review concerning tariff rate determinations is narrow. Unquestionably, the power to review policy decisions rests inherently within the prerogative of the governing bodies, allowing them to adapt and evolve in response to changing



circumstances. Similarly, while concessions might be granted, they can be retracted or modified if deemed to be in the best interests of the public. The State possesses the authority to modify or pivot its economic policies as the need arises. As such, Petitioners must understand that they do not possess an irrevocable right to perpetually enjoy the concessions that have been granted to them. Moreover, it has been consistently held that Courts must only intervene minimally when it comes to judicial review over determination of tariff rates. Judicial intervention becomes justifiable only when the contested action is found to be illegal, arbitrary, or beyond the powers conferred by the governing statute. An action is deemed illegal if it disregards the legally mandated procedure or is so egregiously arbitrary that it offends the judicial sensibilities of the Court, thus compelling intervention. In the present case, none of the such legal grounds have been established before us. The fixation of tariffs through subordinate legislation is within the commission's purview, and no manifest arbitrariness has been demonstrated to call this decision into question.⁵

15. In light of the aforesaid, we find no reason to intervene and the writ petition is disposed of.

SANJEEV NARULA, J

SATISH CHANDRA SHARMA, CJ

NOVEMBER 03, 2023/nk

⁵ Association of Industrial Electricity Users v. State of Andhra Pradesh, (2002) 3 SCC 711 at Paragraph 11.