

In re: Forum of Regulators

Ex parte ----- Querist

Brief for opinion

Background:-

Forum of Regulators, the Querist herein, has been constituted by the Central Government under Section 166 (2) of the Electricity Act, 2003 (“2003 Act”) consisting of the Chairperson of the Central Electricity Regulatory Commission (“Central Commission”) and Chairpersons of the State Electricity Regulatory Commissions (“State Commissions”). The functions of Forum of Regulators are specified in the Forum of Regulators Rules, 2005, as follows:-

- “ 4. Functions of the Forum.- The Forum shall discharge the following functions, namely:-*
- (i) analysis of the tariff orders and other orders of Central Commission and State Commissions and compilation of data arising out of the said orders, highlighting, especially the efficiency improvements of the utilities;*
 - (ii) harmonization of regulation in power sector;*
 - (iii) laying of standards of performance of licensees as required under the Act.*
 - (iv) sharing of information among the members of the Forum on various issues of common interest and also of common approach.*
 - (v) undertaking research work in-house or through outsourcing on issues relevant to power sector regulation;*

*(vi) evolving measures for protection of interest of consumers and promotion of efficiency, economy and competition in power sector; and
(vii) such other functions as the Central Government may assign to it, from time to time.”*

{Emphasis supplied}

It can be seen from the above that one of the functions of Forum of Regulators is to harmonize regulation in power sector. Accordingly, one of the contemporary topics on which the Forum of Regulators have held discussions, relate to harmonious interpretation section 79 (1) (b), 79 (1) (f), section 63 and section 86(1) (b).

There are different types of generating companies. For instance, the Ultra Mega Power Project which gets selected pursuant to competitive bidding initiated by the Central Government (through Ministry of Power and Power Finance Corporation) with allocation of power purchase quantum to buyers (distribution licensees) in more than one State. The buyers of the generated electricity / beneficiaries / distribution licensees situated in various States were pre-identified at the stage of conceptualization of the Generation Plant.

Then there is a Generating Company which gets selected pursuant to competitive bidding of a single buyer (distribution licensee) in one State, thereafter adds more units or more capacity and gets selected pursuant to competitive bidding of another buyer (distribution licensee) in another State, thereby buyers (distribution licensees) are situated in more than one State. The buyers of the generated electricity / beneficiaries / distribution licensees situated in various States could not have been pre-identified at the stage of conceptualization of the Generation Plant. The transmission line for evacuation of power from such generating plant also cuts across more than one State.

2. The commonality in the above Generating Companies are as follows:-

- (i) These generating companies are not owned or controlled by the Central Government, these are privately owned;
- (ii) These generating companies engage in generation and sale of electricity in more than one State;
- (iii) These generating companies are entitled to sell to buyers / beneficiaries (distribution licensees) as they have got selected pursuant to competitive bidding undertaken by the said buyers / beneficiaries (distribution licensees).

3. The competitive bidding referred to above have taken place in accordance with Section 63 of 2003 Act and the Competitive Bidding Guidelines referred to therein as notified by the Central Government. Section 63 of the 2003 Act reads as follows:-

“63. 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.”

The Competitive Bidding Guidelines notified by the Central Government states *inter alia* as follows:-

“Arbitration

5.17 Where any dispute arises claiming any change in or regarding determination of the tariff or any tariff related matters, or which partly or wholly could result in change in tariff, such dispute shall be adjudicated by the Appropriate Commission.

All other disputes shall be resolved by arbitration under the Indian Arbitration and Conciliation Act, 1996.”

The respective power purchase Agreements also reflect almost the same language as above provided in the Competitive Bidding Guidelines notified by the Central Government.

Hence, it is the “Appropriate Commission” that will have jurisdiction to decide disputes related to tariff. The question is as to which Commission would be the “Appropriate Commission” – the Central Commission or the State Commission.

4. It is in this regard it is necessary to examine the functions of the Central Commission and the State Commission which are found in Section 79 and Section 86, respectively, as follows:-

- “79. (1) The Central Commission shall discharge the following functions, namely:-*
- (a) to regulate the tariff of generating companies owned or controlled by the Central Government;*
 - (b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;*
 - (c) to regulate the inter-State transmission of electricity ;*
 - (d) to determine tariff for inter-State transmission of electricity;*
 - (e) to issue licenses to persons to function as transmission licensee and electricity trader with respect to their inter-State operations.*
 - (f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration;*
 - (g) to levy fees for the purposes of this Act;*
 - (h) to specify Grid Code having regard to Grid Standards;*
 - (i) to specify and enforce the standards with respect to quality, continuity and reliability of service by licensees.*
 - (j) to fix the trading margin in the inter-State trading of electricity, if considered, necessary;*
 - (k) to discharge such other functions as may be assigned under this Act.*
- (2) The Central Commission shall advise the Central Government on all or any of the following matters, namely :-*
- (a) Advise the Central Government on all or any of the following matters, namely:-*
 - (i) formulation of National electricity Policy and tariff policy:*

(ii) promotion of competition, efficiency and economy in activities of the electricity industry;
(iii) promotion of investment in electricity industry;
(iv) any other matter referred to the Central Commission by that Government.

(3) The Central Commission shall ensure transparency while exercising its powers and discharging its functions.

(4) In discharge of its functions, the Central Commission shall be guided by the National Electricity Policy, National Electricity Plan and tariff policy published under section 3.”

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

(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:

Providing that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;

(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;

(c) facilitate intra-state transmission and wheeling of electricity;

(d) issue licences to persons seeking to act as transmission licensees, distribution licensees and electricity traders with respect to their operations within the State;

(e) promote co-generation 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 licence;

(f) adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration;

(g) levy fee for the purposes of this Act;

(h) specify State Grid Code consistent with the Grid Code specified under clause (h) of sub-section (1) of section 79;

- (i) specify or enforce standards with respect to quality, continuity and reliability of service by licensees;*
- (j) fix the trading margin in the intra-State trading of electricity, if considered, necessary; and*
- (k) discharge such other functions as may be assigned to it under this Act.*
- (2) The State Commission shall advise the State Government on all or any of the following matters, namely :-*
 - (i) promotion of competition, efficiency and economy in activities of the electricity industry;*
 - (ii) promotion of investment in electricity industry;*
 - (iii) reorganization and restructuring of electricity industry in the State;*
 - (iv) matters concerning generation, transmission, distribution and trading of electricity or any other matter referred to the State Commission by that Government.*
- (3) The State Commission shall ensure transparency while exercising its powers and discharging its functions.*
- (4) In discharge of its functions the State Commission shall be guided by the National Electricity Policy, National Electricity Plan and tariff policy published under section 3.”*

5. Probable arguments in the context are as follows:-

(A) One view: The Central Commission has jurisdiction because of the following reasons:-

- (1) Since, these Generating Companies have their plants situated in one State and not only supply to that host State but also supply to other States, it could be said that the Generating Company has a composite scheme for generation and sale of electricity in more than one State. Hence, under Section 79(1)(b) of the 2003 Act, the Central Commission is mandated to regulate the tariff of such a Generating Company. The word “regulate” is of wide import, and hence even if the rate in the power purchase agreement has been competitively arrived at, it could be re-opened and relooked at by the Central Commission. The words “in regard to matters connected” used in Section

79(1)(f) are broad enough to cover the present situation of “regulating tariff” used in Section 79(1)(b) demanding relook at the tariff competitively determined and to adjudicate upon the disputes if any involving generating companies. The words “to regulate the tariff of generating companies” would cover the present disputes seeking revision in the tariff of competitively bid projects. In any case, the Power Purchase Agreement and the Competitive Bidding Guidelines notified by the Central Government provide that where any dispute arises claiming any change in or regarding determination of the tariff or any tariff related matters, or which partly or wholly could result in change in tariff, such dispute shall be adjudicated by the Appropriate Commission (Relevant extract from bidding guidelines is attached as Annexure-....). The ratio of the unreported judgment dated 5th March 2002 of the High Court of Judicature at Bombay in Writ Petition No. 1205 of 2001 in Dabhol Power Company vs Maharashtra State Electricity Board is that the Electricity Regulatory Commission can re-open the Power Purchase Agreement to adjudicate upon inter parties disputes.

- (2) Since, these Generating Companies supply electricity to more than one State, it might be a peculiar situation if the Generating Company has to approach the respective State Commission to adjudicate upon the dispute. One State Commission may grant relief to the Generating Company qua the quantum of power supplied to that State but another State Commission may reject the claim of the Generating Company qua the quantum of power supplied to that other State, despite the fact that the cause of dispute in either case remains the same. Hence, the Central Commission is in a better position to adjudicate upon these disputes.

(B) The other view: The Central Commission does not have jurisdiction because of the following reasons:-

- (1) The words “composite scheme of generation and sale in more than one State” used in Section 79(1)(b) means that the Generating Company should have had pre-identified beneficiary / buyers of the plant meaning thereby that it ought to have been originally conceived as to who would the beneficiaries / buyers be of the power to be sold by the Generating Company. But there are Generating Companies which had identified only one buyer that is in the host State where the plant is located and thereafter added more units or more capacity and started supplying to beneficiaries / buyers outside the host State. Hence, these types of Generating Companies did not have a “composite scheme of generation and sale in more than one State” within the meaning of Section 79(1)(b) and therefore the Central Commission cannot regulate the tariff of these Generating Companies.
- (2) These Generating Companies are supplying to specific buyers pursuant to being selected under specific competitive bidding in specific States. The tariff arrived at under the competitive bidding has been “adopted” by the State Commission of that respective State, under Section 63 read with section 86(1)(b) of the 2003 Act, for the purposes of the annual revenue requirements of the distribution licensee that procures the power under the power purchase agreement. Therefore, any dispute in relation to the tariff adopted by the State Commission must be adjudicated upon by the State Commission.

6. In the above background, the kind opinion of the Ld. Attorney General of India is sought on the following queries:-

- (1) Which is the “Appropriate Commission” to decide the disputes related to tariff in the PPAs of competitively bid projects as discussed above, where the Generating Company supplies to more than one State?
- (2) Would the word “regulate” in Section 79(1)(b) even take in regulation / revision in price of rate adopted under Section 63 that was arrived at pursuant to Competitive Bidding?
- (3) Would “composite scheme of generation and sale in more than one State” in Section 79(1)(b) necessarily mean that a Generating Company should have had pre-identified beneficiary / buyers of the plant meaning thereby that it ought to have been originally conceived as to who would the beneficiaries / buyers be of the power to be sold by the Generating Company? If the Generating Companies which had identified only one buyer that is in the host State where the plant is located and thereafter added more units or more capacity and started supplying to beneficiaries / buyers outside the host State, can it be said that such a Generating Company has a “composite scheme” within the meaning of Section 79(1)(b)?
- (4) Which is the “Appropriate Commission” to decide the disputes related to tariff in the PPAs of competitively bid projects where the Generating Company did not have pre-identified beneficiary / buyers in more than one State and in fact had identified only one buyer that is in the host State where the plant is located and thereafter added more units or more capacity and started supplying to beneficiaries / buyers outside the host State?

- (5) Which is the “Appropriate Commission” to decide the disputes related to tariff in the PPAs of competitively bid projects where the State Commission of one beneficiary (buyer) State has already passed an Order adopting the tariff under Section 63 or under section 86 (1) (b) of the 2003 Act?
- (6) Would it create an anomalous situation if the Generating Company has to approach the respective State Commission to adjudicate upon the dispute, and where one State Commission grants relief to the Generating Company qua the quantum of power supplied to that State but another State Commission rejects the claim of the Generating Company qua the quantum of power supplied to that other State despite the cause of dispute being the same? If so, would the harmonious interpretation of various provisions of the Act make it desirable that the Central Commission (and not the State Commissions) should “regulate” the tariff and adjudicate upon the underlying disputes?
- (7) Any other matter on which the Ld. Attorney General of India may wish to opine on?