

REGULATION MAKING POWER OF CERC

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Introduction

Law comes into existence not only through legislation but also by regulation and litigation. Laws from all three sources are binding. According to Professor Wade, "between legislative and administrative functions we have regulatory functions".

Regulation implies a certain degree of external control. It is a process, prescribed by laws, which controls or directs some decisions of firms in the public interest. The purpose of regulation is to prevent profiteering, ensure the provision of a universal service, prevent self-destructive price competition, and protect customers, employees, and the environment from harm or damage resulting from the inappropriate behavior of firms.

Regulation making procedure is a legislative process work carried by the CERC to frame regulations. It is the process of decision making. These regulations are issued by CERC from time to time when there is need in relation to such regulations for conducting and promoting business.

The process of decision making is an important function in terms of both gaining support and establishing credibility. It also helps in improving the quality of decision-making.

The Regulators carries a specific work i.e. transparency. All the regulators while exercising their work and discharging their functions shall ensure transparency. Hence, the regulations formed by the regulators should be of such type which ensures transparency and not to be inconsistent with the Act.

Indian Constitution lists Electricity in ***Entry 38 List –III*** of the Concurrent List. Thus, both Centre and State Governments shall have same power to frame regulations in relation with the Electricity Sector, except in the case of Nuclear energy where the Central Government has power to frame such regulations. In case of environmental regulation, both the State and Central level Government has power to frame regulations.

The Central Electricity Regulatory Commission Act, 1998 describes in Sec. 37 about ensuring transparency in rule making power. The CERC and the other regulatory commission formed under this Act are bound to follow those procedures which ensure transparency.

The acts have also restricted the procedures in terms of their procedures by specifying their procedures that these procedures are judicial proceedings. The freedom is also provided with the commissions to evolve with their own procedures and to frame their own regulations.

A lay-man reading of the Act leads to the conclusion, that while forming the regulation, two conditions are to be satisfied, that are –

- *Regulation should be consistent with the Act.*
- *Regulation shall be made for carrying out the provisions of the Act.*

There are certain provisions in the act which ensures transparency. The regulations only have provisions, which is complement with the statutory provisions. For example, the regulations issued by the CERC, there is provision for publication of a petition – only in those cases where the commission directs. Thus, either through the legislation itself, or through regulations, there are provisions to ensure transparency. There is also mechanism for Judicial Review, thus there is necessary to enforce these provision for transparency. Thus, there is no scope that the regulator itself formulates regulations which are proved to be contradictory in relation to statutory provisions or the regulation made by it. Thus there is a clear scope for appeal to the judiciary.

CERC is being possessed with the power to frame regulations for the electricity sector. The power is defined under Sec. 178 of the Act of the Electricity Act. The Central Commission is granted with the power to frame regulations regarding the tariff, licensing, generation, transmission etc.

The project deals with the regulation making procedures of the Central Commission and where the validity of the regulations can be challenged.

Powers under Electricity Act, 2003

The Electricity Act, 2003 proved to be an exhaustive code for all matters related with Electricity. It repeals the previous *Electricity Act, 1910*, the *Electricity Supply Act, 1948* and the *Central Electricity Regulatory Commission Act, 1998*.

The 2003 Act, in furtherance of the policy envisaged under the Electricity Regulatory Commissions Act, 1998, mandated the establishment of an independent and transparent regulatory mechanism, and has entrusted wide ranging responsibilities with the Regulatory Commissions.

The Central and the State Governments are 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.

The Regulatory Commissions are vested with the power to frame policy, in the form of regulations, under the 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.

The 2003 Act contemplates three kinds of delegated legislation:-

1. 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.
2. 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.
3. 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.

Delegated legislation is law made by an executive authority under powers given to them by primary legislation in order to implement and administer the requirements of that primary legislation. It is law made by a person or body other than the legislature but with the legislature's authority.¹

CERC has got their power to frame regulations by delegated power conferred through Electricity Act, 2003. The Electricity Act confers power to CERC to frame regulations. In such case, the Electricity Act, 2003 is a parent statute, while the CERC is a delegated body to frame regulations.²

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¹ *Delegated Legislation in India*, Dr. Ketan Govekar.

² *Study of Regulatory Institutions in the Infrastructure Sectors*, Preeti Gureja, Sumit Jalan, IIM Ahmedabad.

The 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).

Section 178 (Powers of Central Commission to make regulations): --- (1) The Central Commission 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 following matters, namely:-

- a) period to be specified under the first proviso to section 14;***
- b) the form and the manner of the application under sub-section (1) of section 15;***
- c) the manner and particulars of notice under sub-section (2) of section 15;***
- d) the conditions of licence under section 16;***
- e) the manner and particulars of notice under clause (a) of subsection (2) of section 18;***
- f) publication of alterations or amendments to be made in the licence under clause(c) of sub-section (2) of section 18;***
- g) Grid Code under sub-section (2) of section 28;***
- h) levy and collection of fees and charge from generating companies or transmission utilities or licensees under sub-section (4) of section 28;***
- i) rates, charges and terms and conditions in respect of intervening transmission facilities under proviso to section 36;***
- j) payment of the transmission charges and a surcharge under-sub-clause (ii) of clause (d) of sub-section (2) of section 38;***
- k) reduction of surcharge and cross subsidies under second proviso to sub-clause (ii) of clause (d) of sub-section (2) of section 38;***
- l) payment of transmission charges and a surcharge under sub-clause (ii) of clause (c) of section 40;***

- m) reduction of surcharge and cross subsidies under the second proviso to sub-clause (ii) of clause (c) of section 40;*
- n) proportion of revenues from other business to be utilised for reducing the transmission and wheeling charges under proviso to section 41;*
- o) duties of electricity trader under sub-section (2) of section 52;*
- p) standards of performance of a licensee or class of licensees under sub-section (1) of section 57;*
- q) the period within which information to be furnished by the licensee under sub-section (1) of section 59;*
- r) the manner of reduction of cross subsidies under clause (g) of section 61;*
- s) the terms and conditions for the determination of tariff under section 61;*
- t) details to be furnished by licensee or generating company under sub-section (2) of section 62;*
- u) the procedures for calculating the expected revenue from tariff and charges under sub-section (5) of section 62;*
- v) the manner of making an application before the Central Commission and the fee payable therefor under sub-section (1) of section 64;*
- w) the manner of publication of application under sub-section (2) of section 64;*
- x) issue of tariff order with modifications or conditions under subsection (3) of section 64;*
- y) the manner by which development of market in power including trading specified under section 66;*
- z) the powers and duties of the Secretary of the Central Commission under sub-section (1) of section 91;*
- za) the terms and conditions of service of the Secretary, officers and other employees of Central Commission under sub-section (3) of section 91;*
- zb) the rules of procedure for transaction of business under subsection (1) of section 92;*
- zc) minimum information to be maintained by a licensee or the generating company and the manner of such information to be maintained under sub-section (8) of section 128;*
- zd) the manner of service and publication of notice under section 130;*

ze) any other matter which is to be, or may be, specified by regulations.

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

Section 179 (Rules and regulations to be laid before Parliament):-

Every rule made by the Central Government, every regulation made by the Authority, and every regulation made by the Central Commission shall be laid, as soon as may be after it is made, before each House of the Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or regulation or agree that the rule or regulation should not be made, the rule or regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation.⁴

Section 178 talks about the regulation making procedures vested in the Central Commission. The Commission can make regulations on those matters, which is described from Cl. (a) to Cl. (ze). However, two conditions are to be satisfied: - that the regulations should be consistent with the Act, and the regulations are made to carry out the provisions of Act.

All the regulations should also be subjected with the previous publications of such regulations also. The previous regulations shall be kept in consideration while making new regulations.

The matters, on which the Central Commissions have made regulations, are listed below:-

- a) The Central Electricity Regulatory Commission (*Terms and Conditions of Tariff Regulations, 2014*). (Sec. 61)
- b) The Central Electricity Regulatory Commission (*Fees and Charges of Regional Load Despatch Centre and other related matters) Regulations, 2015*). (Sec. 28 (4)).

³ Section 178, Electricity Act, 2003.

⁴ Section 179, Electricity Act, 2003.

- c) The Central Electricity Regulatory Commission (*Rates, Charges and Terms and Conditions for use of Intervening Transmission Facilities*) Regulations, 2010. (Sec. 36 (1)).
- d) The Central Electricity Regulatory Commission (*Terms and Conditions for recognition and issuance of Renewable Energy Certificate for Renewable Energy Generation*) Regulations, 2010. (Sec. 66).
- e) The Central Electricity Regulatory Commission (*Procedures for calculating the expected revenue from tariffs and charges*) Regulations, 2010. (Sec. 62(5)).
- f) The Central Electricity Regulatory Commission (*Indoor/Outdoor Medical Facilities*) Regulations, 2005. (Sec. 91).
- g) The Central Electricity Regulatory Commission (*Recruitment, Control and Service Conditions of Staff*) Regulations, 2007. (Sec. 91(3)).
- h) The Central Electricity Regulatory Commission (*Open Access in inter-State Transmission*) Regulations, 2008.
- i) The Central Electricity Regulatory Commission (*Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters*).
- j) The Central Electricity Regulatory Commission (*Payment of Fees*) Regulations, 2008. Sec. (64(1)).
- k) The Central Electricity Regulatory Commission (*Procedure, Terms and Conditions for grant of trading licence and other related matters*) Regulations, 2009. (Sec. 16).
- l) The Central Electricity Regulatory Commission (*Power Market*) Regulations, 2010.
- m) The Central Electricity Regulatory Commission (*Unscheduled Interchange charges and related matters*) Regulations.
- n) The Central Electricity Regulatory Commission (*Indian Electricity Grid Code*) Regulations, 2010. (Sec. 28(2)).
- o) The Central Electricity Regulatory Commission (*Power System Development Fund*) Regulations, 2010.
- p) The Central Electricity Regulatory Commission (*Sharing of Inter State Transmission Charges and Losses*) Regulations, 2010. (Sec. 41).
- q) The Central Electricity Regulatory Commission (*Rates, Charges and Terms and Conditions for use of Intervening Transmission Facilities*). (Sec. 36(1)).
- r) The Central Electricity Regulatory Commission (*Standards of Performance of inter-State transmission licensees*) Regulations, 2012. (Sec. 57).

- s) The Central Electricity Regulatory Commission (*Deviation Settlement Mechanism and related matters*) Regulations, 2014.
- t) The Central Electricity Regulatory Commission (*Ancillary Services Operations*) Regulations, 2015. (Drafted Regulation).

The State Electricity Commissions also vested with some more powers defined under section 181. The SECs exercise same functions of making regulations within a state.

Regulation Making Procedure

The Commission makes regulations in cases where it is necessary that such regulations are to be included.

The Commission either:-

- *Amend the present regulations*
- *Brings new regulation and repealing the old regulations*

The Commission either by going through the whole procedure makes regulation or the Commission itself passes regulations by the discussion of the quorum in the form of order. Such orders are temporary in nature.

The Commission possesses with inherent power of *suo-moto*. Hence, the commission itself takes cognizance of any matters and passes such orders as it may deem necessary.

The commission also passes regulation in those cases where a large group is affected. No such amendment takes place where an individual person is being affected by such regulation. However, such aggrieved person has right to go to approach the commission for solving issues.

The Regulation making procedure is a lengthy step which involves different steps. The Commission follows a detailed and transparent process before issuing a Regulation. It includes:-

1. Approach Paper
2. Comments
3. Open or Public Hearing
4. Draft Regulation
5. Public Hearing

6. Final Regulation

The steps are discussed in details further below

Approach Paper is a document which gives a basic idea on which the regulations are proposed by the Commission. It is also called Staff Paper or Consultation Paper. It gives the background understanding of the topic. It gives the whole idea that why the regulation is proposed, what is the need of such regulation etc. The paper is made by the Commission at the staff level by analyzing reports, data, and records.

The paper also contains the questions on which the Commission has asked comments from the Stakeholders and interested persons. *For example, the Commission formulates the regulation regarding the Tariff policy in five years. The Commission in year 2013 has circulated an approach paper regarding the tariff policy for 2014-19 to seek recommendations from stakeholders.* After circulating in the staff level the paper is published by the Commission through electronic and print media inviting comments from stakeholders.

Next step involves interested persons or stakeholders, may give their recommendations or comments regarding the paper. The Interested persons submit its recommendations on the Approach Paper. Regulatory Commissions have constituted Advisory guidelines which represents various stakeholders groups. They have to send their comments and recommendations to the Commission within a stipulated time which is prescribed by the commission itself.

Next Step involves open hearing, where the different stakeholders are invited for the discussion of approach paper and to discuss recommendations from stake-holders regarding the approach paper.

After considering the comments, and recommendations from the stakeholders the Commission makes a draft regulation on the topic and published through electronic or print media. Explanatory memorandum and Statement of Reasons are also attached with the regulations. It explains the regulations briefly. It invites comments from the stakeholders on such regulation within a specific period which is determined by the Commission itself. The time period for which the comments are needed are:-

- *In case of amendments of any regulation, time period for seeking comments is approx. 15 days. **For example,** the Commission is amending the Regulation for Terms and*

Conditions of Tariff, 2015. The Commission has published draft regulation on 4th June, 2015 and inviting comments latest by 19th June, 2015.

- *In case of any new regulation, time period for seeking comments from stakeholders is approx. 30 days.*

As per the requirement of the Act, the draft Regulations undergoes the process of ‘*previous publication*’. While altering the regulations, the CERC also have to comply with the ***Electricity (Procedure for Previous Publication) Rules 2005***. This rule prescribes about the procedure for the purpose of previous publication of regulations. The previous publication of rules deemed to be a conclusive proof that the regulations have been duly made.

The procedure for previous publication is defined in Rule 3 of the Regulation. The Commission publishes notice for such regulations to the affected persons. The publication shall to be made in manner as Commission thinks fit. The draft regulations also accompanied with a notice which specifies date on which the regulations is to taken into consideration. The Commission shall also consider the objections and statement and after considering the objections the regulations are formulated.

Similar provision for previous publication of rules and bye-rules is also embedded in ***General Clauses Act, 1897. Section 23*** of the Act states about the previous publication of rules framed by the regulators

The draft Regulations are published for comments from the stakeholders. Proper opportunity is given to the stakeholders. Interested or affected person again give suggestions in regards with the regulation. The commission if it thinks so will add those suggestions in the regulation. Also, those suggestions which are not included in the regulations proper reasons are given by the regulation for not including those suggestions. Thus, again the regulations are published through electronic and print media.

Then, the final regulations are framed by the Commission and presented to the Parliament for its assent.

Section 179 states that all the regulations made by the Central Commission is to be laid before each house of the Parliament when it is in session for a total period of 30 days which may be comprises in one session or in two or more successive sessions. The Parliament can also alter or modify the regulations if both the houses are agreed. Such regulations shall

thereafter have effect only in such modified form. Then, the final regulations are published through printed and electronic media and notified in the official gazette.

The same procedures are also applied in the State Regulatory Commissions. The powers are vested in Section 181 of the Act. In State Commissions, all such regulations are laid before the respective State Legislatures, section 182 of the Act contemplates that the regulations formed by the State Commissions are to be laid before the State legislatures.

However, the Act provides more power to the Parliament as compared to the State legislatures. From Section 179 and 182 of the Act, it can be concluded that ***the Parliament can alter or modify the regulations made by the Central Commission if both the houses are agreed to do so, but no such powers are given to the State Legislatures.***

Case-Laws

There are some cases where the regulations made by the commission proved to be arbitrary and ambiguous in nature. The regulations are deemed to be against the spirit of the Act. In these cases the regulations are proved to be ultra-vires. Then, the remedy available to the affected persons is Judicial Review which is under Article 32 and Article 226 of the Constitution of India.

The landmark Judgment in this context is *Power Trading Corporation India Ltd v. Central Electricity Regulatory Commission*⁵. The case dealt with the issue that whether the Appellate Tribunal has jurisdiction to examine the validity of regulations made by the CERC. The appropriate course of action for the appellants is to proceed by way of judicial review under the Constitution. Aggrieved person can approach High Court, if they found that such regulations are ultra vires. PTC argued that parent act has conferred power on the APTEL to check the validity of the regulations framed by the Commission under Section 111 and Section 121.

A statutory instrument, such as a rule or regulation, emanates from the exercise of delegated legislative power which is a part of administrative process resembling enactment of law by the legislature whereas a quasi-judicial order comes from adjudication which is also part of administrative process resembling a judicial decision by a court of law.⁶

*Section 121 of the 2003 Act does not confer power of judicial review on the Appellate Tribunal. The words "orders", "instructions" or "directions" in Section 121 do not confer power of judicial review in the Appellate Tribunal for Electricity. Thus, the court held that the Regulations framed by the Commission under the Act are subordinate legislations and therefore can be challenged only under judicial review.*⁷

APTEL do not have powers of judicial review both under Section 111 as well as under section 121. Hence, no appeal to the Appellate Tribunal shall lie on the validity of a regulation made under Section 178.

In the case, *Global Energy Ltd. & Another vs. Central Electricity Regulatory Commission*, the constitutionality of Regulation 6A of the CERC (Procedure, Terms and Conditions of License and other related matters) Regulation, 2004 has come before the Hon'ble Court. Global Energy Ltd appellant in the case, the application for inter-state trading license has been rejected by CERC due to amendment of Regulation 6A. The Appellant has filed writ petition in Delhi High Court, where the constitutionality of Cl. (b) & (f) of Regulation 6A was upheld. Aggrieved by the decision, the Appellant approached in the Supreme Court.

The court examines the object of the Act and the regulation. The court held that if the regulations travel beyond the power expressly conferred by the Act, or are inconsistent with

⁵ AIR 2010 SC 1338.

⁶ IMPORTANT JUDGMENTS OF SUPREME COURT AND APPELLATE TRIBUNAL, VJ Talwar

⁷ *Power Trading Corporation vs. Central Electricity Regulatory Commission.*

the provisions of the Act, they will be ultra- vires. The court expressed the view that a subordinate legislation must be read in the context of the principal Act, and hence the regulation 6A is to read with Sec. 52 of the Act. The court also keeps the view of reasonableness. It is also observed that the rule making power is a general delegation and such a delegation does not extend to laying down guidelines which affects the parties and also the Act itself. Hence, the Court struck down the High Court's judgment and held Cl. (b) and (f) as unconstitutional.⁸

The court also clearly laid down the circumstances under which a subordinate legislation may be struck down as unconstitutional. Firstly, where the regulation is vague and ambiguous and secondly where there is no clear nexus between its provision and the object of the principal Act.

Thus, the duty of the Court is to ensure that an authority is not conferred with the arbitrary or untrammelled powers by means of a subordinate legislation.

Conclusion

The process of decision-making is important, both in terms of gaining support and establishing credibility, and in terms of improving the quality of decision-making. The regulations are issued by CERC from time to time when there is a need in relation to such regulations for conducting and promoting business.

The Central Commission is granted with the power to frame regulations regarding the tariff, licensing, generation, transmission etc.

There are many areas where the CERC doesn't have power to frame regulations and State Commission can exercise such powers. As the conditions of State Commissions are not good, the Government should confer more powers to CERC for performing better function. The PTC judgment had clarified that the CERC has power to frame regulations.

⁸ PSA Infrastructure Bulletin, Regulating Inter-State Trading in Electricity, August 2009.