



सत्यमेव जयते

केन्द्रीय विद्युत विनियामक आयोग
CENTRAL ELECTRICITY REGULATORY COMMISSION



Sanoj Kumar Jha, IAS
Secretary

File No : RA-10/6/2020-Statutory advice - CERC

Dated : 15th October 2020

Subject : Advisory under Section 79(2) of the Electricity Act, 2003 on the Draft Rules proposed by the Ministry of Power, Government of India

Dear Sir,

Ministry of Power, Government of India has circulated the following draft Rules eliciting comments thereon:

- (a) Electricity (change in Law, Must Run status, and other Matters) Rules, 2020.
- (b) Transmission System Planning, Development, and Recovery of inter-State Transmission Charges Rules, 2020.
- (c) Electricity (Late Payment Surcharge) Rules, 2020.

2. While the draft Rules at paragraph 1(a) and (c) have been put on the website of the Ministry of Power, the draft Rule at paragraph 1(b) has not been put on the website. It is requested that for greater transparency and probity, draft Rules may not only be put on the website for wide publicity and soliciting responses of wider stakeholders, but the responses received may also be disclosed on the website for stakeholders at large to appreciate the impact of such Rules.

3. While the draft Rules at paragraph 1(a) and (c) are purported to be made in exercise of powers of the Central Government under Section 176 of the Electricity Act, 2003 (EA2003), draft Rules at paragraph 1(b) are purported to be made in exercise of powers of Central Government under Section 176(2)(z) of the EA2003. The relevant provisions of Section 176 of EA2003 are extracted as under:

“176. (1) The Central Government may, by notification, make rules for carrying out the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:-

- (a) to (y).....
- (z) any other matter which is required to be, or may be, prescribed.”

4. Hon'ble Supreme Court in *Hukamchand Vs Union of India* [(1972) 2 SCC 601] has held that the initial difference between subordinate legislation and the statute laws lies in the fact that a subordinate law-making body is bound by the terms of its delegated or derived authority and court of law, as a general rule, will not give effect to the rules, thus made, unless satisfied that all conditions precedent to the validity of the rules have been fulfilled.

5. A normal feature of enabling Acts is first to grant the power to make rules etc. in general terms, e.g., "to carry out the purposes of this Act" and then to say that "in particular and without prejudice to the generality of the foregoing provisions", such rules etc. may provide for a number of enumerated matters. If power is conferred to make subordinate legislation in general terms, the particularisation of topics is construed as merely illustrative and does not limit the scope of general power [Justice G.P.Singh in his book "Principles of Statutory Interpretation"]. Therefore, the primary source of rule making power of Central Government is Section 176(1) of the EA2003 and Section 176(2) is merely illustrative in nature.

6. The primary source of rule-making power must be related to the purpose of enabling legislation. Hon'ble Supreme Court in *Shri Sitaram Sugar Co. Ltd. Vs UOI* [(1990) 3 SCC 223] has observed as under:

"47. Power delegated by statute is limited by its terms and subordinate to its objects. The delegate must act in good faith, reasonably, intra vires of the power granted, and on relevant consideration of material facts..... They must be reasonably related to the purpose of the enabling legislation."

The power conferred on the Central Government under Section 176(1) and (2) of the EA2003 must be relatable to some substantive provisions of the EA2003 and the purpose of the legislation.

7. Section 176 of the EA2003 regarding the rule making power of the Central Government is *pari materia* with Section 178 of the EA2003 regarding regulation making power of the Central Commission. In *PTC India Ltd Vs CERC* [9201) 4 SCC 603], the Hon'ble Supreme Court examined the scope of Section 178(1) and (2) of the EA2003 and observed as under:

"65.....In our view, apart from Section 178(1) which deals with "generally", even under Section 178(2)(ze) CERC could enact a regulation on any topic which may not fall in the enumerated list provided such power falls within the scope of the 2003 Act. Trading is an activity recognised under the said 2003 Act."

Therefore, the principle laid down in PTC case as quoted above is that apart from the generality of power under Section 178(1), the Central Commission can enact regulation on any topic under Section 178(2)(ze) if such power falls within the scope of EA2003. Since the Central Commission has the power under Section 79(1)(j) of the EA2003 to fix trading margin, the Hon'ble Supreme Court upheld the power of the Central Commission to make regulation with regard to trading margin under Section 178(2)(ze) apart from Section 178(1) of the EA2003. In other words, the power to make regulations under Section 178(1) or (2)

will have to be relatable to some substantive provisions in the EA2003 conferring power on the Central Commission to deal with the topic on which regulation is made.

8. The same principle is applicable in case of rule making power of the Central Government under Section 176 of the EA2003. Under Section 176(1) of the EA2003, the Central Government has been vested with the power to make rules for carrying out the provisions of the EA2003. The general principle in such cases is that the rule making power is to be exercised subject to the overall requirement that the rules made ought to have nexus with the underlying purposes of the EA2003. Further, the power of the Central Government to make rule under Section 176(2)(z) of the EA2003 “on any other matter which is required to be or may be prescribed” must fall within the scope of and be relatable to the purposes and objects of the EA2003. The question that arises is: what is the test of a rule satisfying the criteria of purposes and objects of a statute?

9. The Hon’ble Supreme Court in the case of *Minerva Talkies Bangalore Vs State of Kerala* [(1988) Supp SCC 176] has held that “the declared will of the legislature and the policy and purpose of the Act are discernible from the title, **preamble and express provisions of the Act**”. Therefore, the **statement of Objects and Reasons** of EA2003 and the **substantive provisions** of the Act need to be considered for examining the basis of the rule making power of the Central Government under Section 176(1) of the EA2003 “to carry out the provisions of the Act” or under Section 178(2)(z) “on any other matter which is required to be or may be prescribed”.

10. The Statement of Objects and Reasons of the EA2003 provides as under:

“3. With the policy of encouraging private sector participation in generation, transmission and distribution and the objective of distancing the regulatory responsibilities from the Government to the Regulatory Commissions, the need for harmonising and rationalising the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and Electricity Regulatory Commission Act, 1998 in a new self-contained comprehensive legislation arose. Accordingly, it became necessary to enact a new legislation for regulating the electricity supply industry in the country which would replace the existing laws, preserve its core feature other than those relating to the mandatory existence of the State Electricity Board and the responsibilities of the State Government and State Electricity Board with respect to regulating licensees. There is also need to provide for newer concepts like power trading and open access.....”

11. Hon’ble Supreme Court in *Sesa Sterlite Limited Vs OERC* [(2014) 8SCC 444] has underscored the object of the EA2003 in the following terms:

“22.The main failure on the part of the Electricity Boards was to take decision on tariffs in independent manner and cross-subsidies had reached untenable levels. To address this issue and also to distance governance from determination of tariffs, the Electricity Regulatory Commission Act was enacted in the year 1998. This Act created the regulatory mechanism. Within few years, it was felt that the three Acts of 1910, 1948 and 1998 which were operating in the fields needed to be brought in a new

self-contained comprehensive legislation with the policy of encouraging private sector participation in generation, transmission and distribution and also the objectives of distancing the regulatory responsibilities from the Government and giving it to the Regulatory Commissions. With these objectives in mind the Electricity Act, 2003 has been enacted.....”

12. Therefore, one of the avowed objectives of the EA2003 was distancing the regulatory responsibilities from the Government and vesting it in the Regulatory Commissions. In order to achieve the said objectives, the powers and functions of the Central/State Governments and Regulatory Commissions have been separately and distinctly specified in the EA2003.

13. Perusal of the provisions of the EA2003 reveals that it clearly demarcates the powers and functions of the Central Government, State Governments, Central Commission, State Commissions and Central Electricity Authority and Appellate Tribunal for Electricity. Some of the provisions are discussed as under:

(a) Section 2(5) of the EA2003 defines Appropriate Government to mean Central Government and State Governments. Central Government is appropriate Government in respect of generating companies wholly or partly owned by it, in relation to any inter-State generation, transmission, trading or supply of electricity and in respect of mines, oil-fields, railways, national highways, airports, telegraphs, broadcasting stations, and any work of defence, dockyard, nuclear power installations, in respect of NLDC or RLDC and any work or electric installation belonging to it or under its control. State Government is the appropriate Government in any other case where it is having jurisdiction under the EA2003.

(b) Central Government has been vested with the responsibilities to prepare National Electricity Policy and Tariff Policy (Section 3), national policy on standalone system including renewable and non-conventional sources of energy (section 4), national policy on rural electrification (Section 5), joint endeavour with State Government to provide access to electricity to all areas (Section 6), to issue direction to a generating company to operate and maintain and operate its generating station in extraordinary circumstances [Section 11(1)], prescribing capital adequacy, credit worthiness or code of conduct for two or more persons seeking to distribute electricity in the same area (6th Proviso to Section 14), fees for seeking licence [Section 15(1)] to make region-wise demarcation of the country for efficient, economical and integrated transmission and supply of electricity (Section 25), establishment of NLDC (Section 26), establishment of RLDCs (Section 27), directions to RLDCs to take measures for maintaining smooth and stable transmission of electricity (Section 37), Notification of Central Transmission Utility (Section 38), issue guidelines for competitive bidding (Section 63), make rules for works of licensees (Section 67(2), approval for laying overhead lines (Section 68), appointment of Members and Chairpersons of CEA (Section 70), prescribing the functions and duties of CEA (Section 73), directions in policy matters to CEA (Section 75), constitution of Selection Committee for selection and appointment of Chairperson and Members of Central Commission (Section 78), referring any matter to Central Commission for advice [(Section 79(2)], constitution of Joint Commission (Section 83), Removal of Members (Section 90), approval of the posts and categories of officers and employees of Central Commission (Section 91), grant to Central Commission (Section 98),

constitution of CERC Fund (Section 99), directions to Central Commission in the matter of policy involving public interest (Section 107), directions on policy to Joint Commission for Union Territories [Section 109(b)], establishment of Appellate Tribunal (Section 110), terms and conditions of the Chairperson and Members of Appellate Tribunal (Section 115), providing officers and other employees to Appellate Tribunal (Section 119), appointment of Chief Electoral Officer (Section 162), issue of authorisation to officer, licensee or other person to exercise powers of Telegraph Authority (Section 164), direction for acquisition of land by a person other than a company (Section 165), constitution of coordinated forums (Section 166), prescribing rules for service of notices, orders or documents (Section 171), Power to make rules (Section 176), power to remove difficulties (Section 183), Power to amend the Schedule containing State specific laws [Section 185(4)].

(c) The Central Commission has been vested with the responsibility to specify regulation on open access to ISTS [Section 2(47)], offsetting the adverse impact of directions issued by Central Government under Section 11(1) of the EA2003 on a generating company [Section 11(2)], terms and conditions, grant, amendment and revocation of licence for inter-State Transmission and trading of electricity, (Sections 12 to 22), directions to licensees for efficient supply and to promote competition (Section 23), wheeling and optimum scheduling of electricity and real time operation to be carried out by RLDCs as per Grid Code (Section 28), adjudication of disputes with regard to directions issued by RLDC [Section 29(5)], facilitate use of intervening transmission and specify the rates, charges and terms and conditions for use of intervening transmission facility (Section 35), transmission charges and surcharge for use of ISTS [Section 38(2)(d) and provisos there under], other business of transmission licensees (Section 41), specify the technical requirement, capital adequacy, credit worthiness and duties of inter-State trading licensee (Section 52), Specifying standard of performance of licensees (Sections 57 and 58) directions to prevent market domination by a licensee or generating company (Section 60), Specifying Terms and Conditions of Tariff (Section 61), determination of tariff (Sections 62 and 64), adoption of tariff discovered through competitive bidding (Section 63), development of market (Section 66), disputes with regard to works of licensees (section 67), functions of the Central Commission (Section 79), Centra Advisory Committee (Section 80), terms of office and conditions of service of members of CERC (Section 89), to specify the Staff Service Regulations with the approval of Central Government and appointment of consultants (Section 91), Specifying Conduct of Business Regulations and regulating proceedings before Commission (Section 92), Powers of the Commission with regard to enquiry or proceedings (Section 94), power of entry or seizure (Section 96), delegation of power (Section 97), CERC Funds, Grants and Loans, accounts and audits, Annual Reports (Sections 98 to 101), directions by Central Government (Section 107), directions by Appellate Tribunal to Central Commission (Section 121), representation before Appellate Tribunal (Section 124), investigation of generating company or licensee (Sections 127 to 130), penalty for non-compliance (Section 142), adjudication of disputes referred under Section 29 (Sections 143 & 144), dispute resolution through arbitration (Section 158), Coordination Forum (Section 166), Power to make regulations to carry out the provisions of the EA2003 (Section 178).

(d) Similarly, various provisions of the EA2003 demarcate the legislative and administrative powers of the State Governments, State Commissions and Central Electricity authority.

14. It is therefore evident that EA2003 vests legislative and regulatory power in the Central Commission (also State Commissions) in respect of open access, licensing, tariff, Grid Code, Market Development. In respect of these, no such power has been vested in the Central Government or State Government. This is on account of the objective of the EA2003 to distance the regulatory responsibilities from the Government and vesting in the Regulatory Commission.

15. In the case of Indian Council of Legal Aid & Advice and Others Vs Bar Council of India [(1995)1 SCC 732], Rule 9 was framed by Bar Council of India in exercise of its powers under Section 49(1)(ag) of the Advocates Act, 1961 which provides for “the class or category of persons entitled to be enrolled as advocates”. In exercise of the said power, Rule 9 provided that “a person who has completed the age of 45 years on the date on which he submits his application for his enrolment as an advocate to the State Bar Council shall not be enrolled as an advocate”. The functions of Bar Council of India has been set out in Section 7 which include the laying down of standards of professional conduct and etiquette for advocates and for safeguarding their rights, privileges and interest. Hon’ble Supreme Court noted that Bar Council of India has been vested with the power to make rules “for discharging its functions” under the Act and in particular, such rules may prescribe the class or category of persons entitled to be enrolled as advocate. After noting that the functions of the Bar Council of India enumerated in Section 7 do not envisage a stipulation disqualifying persons otherwise qualified for entering into legal profession merely because they have completed the age of 45 years, the Hon’ble Supreme Court held the said rule as ultra vires of the Advocates Act, 1961. Thus, if the rule-making power is not supported by the substantive provisions in the function of the delegate, making rules in exercise of such power is ultra vires of the parent Act.

16. In the case of Gadde Venkateswara Rao Vs. Government of Andhra Pradesh & Others [(1966)2SCR172], Hon’ble Supreme Court was considering whether the Rules made by the Government of Andhra Pradesh under Section 69 of the Andhra Pradesh Panchayat Samithis and Zila Parishads Act, 1959 was consistent with the provisions of the said Act. The Rules provided for shifting of Primary Health Centre from one place to another within a block on the recommendation of the Panchayat Samithi. Hon’ble Supreme Court noticed that under Section 18 of the Act, establishing and maintaining Primary Health Centre and Maternity Centre is vested in the Panchayat Samiti, and not in the State Government. Hon’ble Supreme Court held as under:

“10.....But a scrutiny of the relevant provisions of the Act shows that the said rules are inconsistent with the provisions of the Act and they cannot possibly override the statutory power conferred on the Panchayat Samithi. Under Section 18(1) of the Act, subject to the provisions of the Act, the administration of the Block shall vest in the Panchayat Samithi; and under sub-section (2) thereof the Panchayat Samithi shall exercise the powers and perform the functions specified in the Schedule. When we refer to the Schedule, it will be seen that the following entry is found under the heading “Health and Rural Sanitation”, “Establishing and maintaining Primary Health Centres and Maternity Centres”. It is manifest that under the Act the statutory power to establish and maintain Primary Health Centres is vested in the Panchayat Samithi.

There is no provision vesting the said power in the Government. Under Section 69 of the Act, the Government can make rules for carrying out the purposes of the Act; it cannot, under the guise of the said rules, convert an authority with the power to establish a Primary Health Centre into only a recommendatory body. It cannot, by any rule, vest in itself a power which under the Act vests in another body. The rules, therefore, in so far as they transfer power of the Panchayat Samithi to the Government, being inconsistent with the provisions of the Act, must yield to Section 18 of the Act.”

17. The above judgements of the Hon'ble Supreme Court lays down the principle that the Government or an authority in the guise of carrying out the purposes of the Act cannot make rules on a subject which is vested in another body or authority.

18. Hon'ble Supreme Court in PTC Judgement supra after examining the various provisions of the EA2003 has made the following observations with regard to delegated legislation:

“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 State Legislatures, as the case may be, under Section 179 and 182. Parliament has the power to modify the rules/regulations. This power is not conferred on 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 they are made for carrying out the provisions of the Act.”

19. The subjects covered under the draft Rules at Serial No.(a) and Serial No.(c) and partly at Serial No.(b) (with regard to transmission access, charges and losses) are covered under the substantive functions of the Central Commission (also State Commissions), satisfy the twin conditions as enumerated by Hon'ble Supreme Court and therefore the Central Commission (also State Commissions) have the jurisdiction to make regulations. As these subjects are not covered under any of the substantive functions of the Central Government and therefore, making of rules in exercise of rule making power under Section 176 to carry out the provisions of the EA2003 will be against the letter and spirit of EA2003.

20. The Central Government is vested with the power to make the National Electricity Policy and Tariff Policy in consultation with the State Governments and Central Electricity Authority for development of the power system based on optimal utilisation of resources such as coal, natural gas, nuclear substances or materials, hydro and renewable sources of energy. The Central Commission and State Commissions, while specifying the regulations

on terms and conditions of tariff under Section 61 and discharging their functions under Section 79 and 86 respectively, are to be guided by such policy. Therefore, the statutory route available to the Central Government to influence the legislative and regulatory functions of the Central Commission is through the policies issued under Section 3 of the EA2003.

21. In light of above, the Ministry of Power is advised under Section 79(2) of the EA2003 not to proceed with the framing of rules on these subjects. The EA2003 envisages coordination between the Central Government and the Central Commission through various provisions. Under Section 79(2) of the EA2003, the Central Government can refer any matter for advice of the Central Commission. Further, Section 3 of EA2003 provides for formulation of National Electricity Policy and Tariff Policy by the Central Government and Section 79(4) provides that the Central Commission in discharge of its functions under EA2003 shall be guided by the National Electricity Policy, National Electricity Plan and tariff policy published under Section 3 of the EA2003. It would, therefore, be in the larger interest of the sector that the Central Government and the Central Commission work in harmony by honouring the respective jurisdiction carved out in the EA2003.

22. This issues with the approval of Chairperson, CERC.

With regards,

Yours Sincerely,


(Sanoj Kumar Jha)
15/10/2018

Shri S.N.Sahai
Secretary,
Ministry of Power,
Shram Shakti Bhavan, Rafi Marg
New Delhi - 110001