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Karnataka High Court strikes down Central Government's Green Energy Open Access Rules and Karnataka Electricity Regulatory Commission's Green Energy Open Access Regulations as being *ultra vires* the Electricity Act, 2003

In a significant judgment, the Karnataka High Court ("**Karnataka HC**"), in the case of ***Brindavan Hydropower Pvt. Ltd. vs. Union of India and Ors***¹, struck down Central Government's Electricity (Promoting Renewable Energy Through Green Energy Open Access) Rules, 2022 ("**2022 GEOA Rules**") and Karnataka Electricity Regulatory Commission (Terms and Conditions for Green Energy Open Access) Regulations, 2022 ("**2022 GEOA Regulations**") as being *ultra vires* the Electricity Act, 2003 ("**Electricity Act**"). This is bound to have a significant impact across the renewable energy space in the country.

Brief facts

1. On June 6, 2022, the Central Government framed the 2022 GEOA Rules in exercise of Sections 176(1) and 176(2)(z) of the Electricity Act. The 2022 GEOA Rules amongst others provided that banking will be permitted only for a month and prescribed the manner of charges to be levied for open access. Rule 5 provided that the Appropriate Commission may, if necessary, amend its regulations to be consistent with the 2022 GEOA Rules.
2. Karnataka Electricity Regulatory Commission ("**KERC**") in light of 2022 GEOA Rules, framed the 2022 GEOA Regulations.
3. Both 2022 GEOA Rules and 2022 GEOA Regulations were challenged by generators as being *ultra vires* the Electricity Act.

Issues framed

The questions of law framed by the Karnataka HC were:

1. whether the provisions of the Electricity Act enable the Central Government to frame the impugned GEOA Rules 2022?
2. whether the Central Government - by the framing of said GEOA Rules of 2022 - could have directed the KERC to frame the impugned KERC Regulations of 2022, thereby depriving it of its statutory function of being the regulator, and whether these KERC Regulations would survive in view of the answer to this issue? and

¹ Writ Petition no. 11235 of 2024

3. whether the consequential orders passed by the KERC fixing the charges for open access in exercise of its powers under said KERC Regulations can be sustained?

Findings of Karnataka High Court

Re. Findings regarding the validity of the 2022 GEAO Rules and 2022 GEOA Regulations

1. From the scheme of the Electricity Act, it is evident that the role of the Central Government is confined to formulate policy on electricity, tariff, standalone system in rural areas etc., whereas the Appropriate Commission has been conferred with the power to regulate/grant of open access and the Central/ State Government has no role to play. This is evident from the following:
 - a) as per Section 3 of the Electricity Act, Central Government does not have the independent power to frame the National Electricity Policy or the Tariff Policy. Central Government is statutorily required to consult the State Governments and the Central Electricity Authority;
 - b) even under the National Electricity Policy, the responsibility and obligation to facilitate non-discriminatory open access is only on the Regulatory Commissions;
 - c) all aspects regarding tariff determination, regulation of electricity purchase and facilitation of intra-state open access are to be monitored by the State Commission;
 - d) charges for transmission and wheeling of electricity is to be determined only by the State Commission;
 - e) the purpose of creating a Regulatory Commission is to ensure that there is an independent and impartial body to deal with open access charges and that this would ensure a fair determination;
 - f) the Appropriate Commission is not required to consult the State Government when determining tariff under Section 64. If the State Government decides to provide subsidy to those affected by a tariff order, it is required to pay such subsidy in advance; and
 - g) as per Sections 107-108 of the Electricity Act, directions of both Central and State Governments on Appropriate Commissions are only guiding factors and the same is not binding on the Appropriate Commission.
2. If the power to frame regulations for determination of transmission and wheeling charges is conferred on the Commission and the substantive provisions are also categorical that aspects of transmission and distribution, especially in relation to open access, are to be determined by the State Commission, it is obvious that no other authority can have a role to play nor can any other authority have even a supervisory role in these matters. All aspects of open access lie within the exclusive domain of the State Commission. Hence, the Central Government does not have the power to frame the rules dealing with the issue of open access and determination of wheeling and transmission charges.
3. Central Government's submission that it has the power to frame the 2022 GEAO Rules under Section 176(2) (z) of the Electricity Act, i.e. 'any other matter which is required to be, or may be, prescribed', is incorrect. The Central Government cannot take the support of the residual power to frame the 2022 GEOA Rules. If such contention is accepted, it will grant the power to the Central Government to amend Section 42(2) by virtue of passing the 2022 GEAO Rules, which is impermissible. Hence, they have to be struck down.
4. The Central Government's submission that it has enacted 2022 GEOA Rules on account of the fact that India is a signatory to the Paris Convention and that India has committed to achieve net zero emission, is contrary to Article 253 of the Constitution of India. Article 253 does not permit the Central Government to transgress an existing law and frame Rules/Regulations by sidestepping the Electricity Act. However, Parliament is empowered to amend the Electricity Act if it is of the view that the nation is to implement an international treaty.
5. Since the 2022 GEOA Regulations have been framed by KERC as a consequence of 2022 GEOA Rules, 2022 GEOA Regulations also have to be struck down.

Re. Findings regarding 'Banking of Electricity'

1. The Electricity Act does not contain any provision which entitles the generating company to demand a banking facility. The banking facility is, in essence, a process where a generating company injects the energy that it has generated into the grid and withdraws the same at a subsequent point in time, as per its choice and convenience. Electricity generated by a generating company is deposited in a bank i.e., the grid and this energy is withdrawn from the bank whenever the generating company desires.
2. While the generating company has the statutory right to inject the energy that is generated into the grid and have the same to be transmitted and distributed to its consumers, it would not have any statutory right to bank its energy. If the statute does not provide for a statutory right to bank the energy so generated, the generator cannot demand that he be provided with banking facility. The facility of banking is a mere promotional benefit allowed by the Commission.

Basis the above, the following directions were passed:

1. 2022 GEAO Rules and 2022 GEOA Regulations are *ultra-vires* the Electricity Act and therefore struck down;
2. KERC is directed to frame appropriate regulations if it so desires in the matter of granting of open access to green energy generators and consumers. This does not mean that KERC has to necessarily make the regulations. It can continue with the 2004 Regulations as well;
3. since there would be vacuum till the time new regulations are formulated, an interim arrangement would therefore have to be made to ensure that the wheeling and banking facilities availed hitherto by the petitioners are facilitated;
4. the parties will continue to pay transmission charges at the rate of 50% of the transmission charges determined by KERC *vide* its order dated July 5, 2024;
5. the petitioners are also be permitted to avail banking facility subject to payment of 4% under the wheeling and banking arrangements;
6. since the wheeling and banking agreements have expired, monthly banking will be allowed till new regulations are formulated by KERC;
7. it is suggested that KERC examines the possibility of providing the annual banking facility. KERC could ensure that the generators do not take advantage of the annual banking facility, by holding that the generators would be entitled to energy charges as was prevailing on the date of injection into the grid and not the charges that are prevailing on the date they seek to withdraw the energy from the grid;
8. this would ensure that the green energy generators do not hedge their profits by taking advantage of the annual banking facility and entitle themselves to a higher energy charge during periods when the demand for electricity is high and, consequently, higher electricity prices would be prevailing in the market; and
9. an oral request for grant of stay of this order was made at the time of pronouncement of this order, and the same is refused since it has been held that Central Government lacked the competence to frame the 2022 GEOA Rules and therefore the question of permitting it to continue would be illegal.

Conclusion

Karnataka HC struck down the Central Government's 2022 GEOA Rules holding them as being contrary to the Electricity Act, 2003 as well as settled administrative law principles. 2022 GEOA Regulations were also struck down since these were premised on the 2022 GEOA Rules. The judgment is silent on whether the 2022 GEOA Rules and 2022 GEOA Regulations are being struck down prospectively. This lack of clarity may give rise to several questions *qua* validity of open access/banking facility granted in terms of the the 2022 GEOA Rules/2022 GEOA Regulations. However, Karnataka HC has put in place an interim arrangement regarding payment of open access/banking charges

until fresh regulations are framed. This judgment may have some impact on the issues stated above as well as several other rules framed by Central Government and/or regulations formulated in terms of such rules.

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