**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CWP No. 25337 of 2015 (O&M)

Date of decision: 23.11.2016

M/s Star Wire (India) Vidyut Private Limited and another
..... Petitioners

vs

Haryana Electricity Regulatory Commission ..... Respondents

**Coram: Hon'ble Mr. Justice Rajesh Bindal
Hon'ble Mr. Justice Harinder Singh Sidhu**

Present: Mr. Nagender Rai and
Mr. Sumeet Mahajan, Senior Advocates with
Mr. Rohit Khanna and Mr. Raghav Kapoor, Advocates,
for the petitioners.

Mr. Vinod S. Bhardwaj, Advocate, for the respondent.

Rajesh Bindal, J.

1. The petitioners have filed the present writ petition impugning the notification dated 12.8.2015 (Annexure P-1) amending the Haryana Electricity Regulatory Commission (Terms and Conditions for determination of Tariff from Renewable Energy Sources, Renewable Purchase Obligation and Renewable Energy Certificate) Regulations, 2010 (for short, 'the 2010 Regulations').

2. Learned counsel for the petitioners submitted that the petitioners had set up a 9.90 MW Independent Biomass Power Plant in District Mahendergarh, which became operational on 3.5.2013. The Haryana Electricity Regulatory Commission (for short, 'the Commission'), notified the 2010 Regulations on 3.2.2011. The 2010 Regulations laid down

certain terms and conditions for setting up of Renewable Energy Power Projects. The control period or renewable period has been defined in Regulation 2(1)(9) of the 2010 Regulations, which means the period during which the norms for determination of tariff specified in the 2010 Regulations shall remain valid. Regulation 4 of the 2010 Regulations provides for control period or review period. It prescribed that it shall be three years and the first year beginning from the date of notification of the regulations till 31.3.2011. Meaning thereby the period of three years would end on 31.3.2013. 3rd proviso to Regulation 4 of the 2010 Regulations provides that revision in the 2010 Regulations for next control period shall be undertaken at least six months prior to the end of the first control period, however, if the revision is not notified for the next control period before its commencement, the tariff norms as per the existing regulations shall continue to remain in force until revised regulations are notified, subject to adjustments as per revised regulations. Though control period had expired on 31.3.2013 and the exercise for revision was to be notified six months prior thereto, no effective steps were taken and the suo moto proceedings were initiated by the Commission nearly two years thereafter.

3. The amendments in the 2010 Regulations were notified on 12.8.2015 (for short, 'the Amended Regulations').

4. Regulation 1 (2) of the Amended Regulations provides that these regulations shall extend to all the RE Projects commissioned/ to be commissioned in Financial Years 2013-14 to 2016-17.

5. Regulation 1(3) of the Amended Regulations provides that for the existing projects commissioned during the Financial Year 2013-14 onwards, the revised norms shall be applicable prospectively from the date

of notification of the Amended Regulations unless otherwise provided in the Regulations. For the period prior thereto, the existing norms as per the 2010 Regulations shall be applicable. 3rd proviso to Regulation 4 of the Amended Regulations provides that in case the revision of regulations for the next control period is not carried out before the start of that period, the tariff norms as per the Amended Regulations shall continue to be in force until the revised regulations are notified and the second control period shall be deemed to have been extended. Regulation 4 of the 2010 Regulations was amended. Control period was amended to mean four years beginning from the Financial year 2013-14.

6. The grievance of the petitioners is two fold. Firstly with the issuance of notification of the Amended Regulations on 12.8.2015, there would be different treatment for the persons operating in the same control period; namely, who had commissioned their projects in the year 2013-14 and the persons, who had commissioned thereafter, the control period being same i.e. for the years from 2013-14 to 2016-17. Further it was submitted that out of the control period prior to the date of notification of the Amended Regulations only financial year 2013-14 has been isolated for different treatment, which is discriminatory. How any of alleged Regulation is affecting the petitioner was not specifically pointed out.

7. Responding to the preliminary objection raised by the respondent in the reply filed, learned counsel for the petitioners submitted that the Regulations have been notified by the Commission, hence, the State is not a necessary party and so are the distribution companies as they have nothing to do with the regulations. It was further submitted that the challenge in the present petition being to the Regulations, appeal before

the Appellate Authority was not competent. In support, reliance was placed upon judgment of Hon'ble the Supreme Court in *PTC India Limited vs Central Electricity Regulatory Commission, through Secretary* (2010) 4 Supreme Court Cases 603.

8. On the other hand, learned counsel for the respondent submitted that framing of Regulations in the case in hand is a legislative function as these Regulations have to be placed before the Assembly for approval. Hence, the State was required to be impleaded as party. Vires of any regulation could be challenged only on the ground of incompetence of the authority and/ or in case these are in contravention of parent Act or the Constitution. In the case in hand, this is not the ground on which the challenge has been made. He further submitted that in the 2010 Regulations, it was specifically mentioned that in case regulations for the subsequent control period are not notified well in time, adjustments shall be as per the revised regulations. The Amended Regulations do not provide for any adjustment for the period in question. For the period prior to the notification of the Amended Regulations on 12.8.2015, the 2010 Regulations will be applicable. There is no arbitrariness as far as the application of the Amended Regulations is concerned. The petitioner is in no way adversely affected.

9. In response, learned counsel for the petitioners submitted that the illegality in regulations can be examined even on the touch stone of Article 14 of the Constitution of India. The regulations should have nexus with the object sought to be achieved. These are unreasonable and discriminatory on the face of it.

10. Heard learned counsel for the parties and perused the paper book.

11. Section 181 of the Electricity Act, 2003 (for short, 'the Act') enables the Commission to frame regulations in exercise of powers conferred under the aforesaid provisions. The Commission notified the 2010 Regulations on 3.2.2011. These came into force on the date of the publication in the Gazette. Relevant provisions of the 2010 Regulations are extracted below:-

> <u>Regulation 2(9) of the 2010 Regulations</u>
>
> "(9) 'Control Period or Review Period' means the period during which the norms for determination of tariff specified in these regulations shall remain valid;"
>
> <u>Regulation 4 of the 2010 Regulations</u>
>
> "4. Control Period or Review Period. - The first Control Period or Review Period under these Regulations shall be of three years of which the first year shall be the period from the date of notification of these regulations to 31st March 2011.
>
> Provided that the benchmark capital cost for Solar PV and Solar thermal projects may be reviewed annually by the Commission.
>
> Provided further that the tariff determined as per these Regulations for the RE projects commissioned during the Control Period shall continue to be applicable for the entire duration of the Tariff Period as specified in Regulation 5 below.
>
> Provided also that the revision in Regulations for next Control Period shall be undertaken at least six months prior to the end of the first Control Period and in case Regulations for the next Control Period are not notified until commencement of next Control Period, the tariff norms as per these Regulations shall continue to

remain applicable until notification of the revised Regulations subject to adjustments as per revised Regulations."

<u>Amended Regulations</u>

1. **Short Title and Commencement.-**

(1) xx xx xx

(2) These Regulations shall extend to all the RE Projects commissioned/ to be commissioned in FY 2013-14, 2014-15, 2015-16 and 2016-17 in the State of Haryana.

(3) For the existing projects commissioned during FY 2013-14 onwards, the revised norms shall be applicable prospectively from the date of notification of these Regulations unless provided otherwise in these Regulations. For the period prior to the date of notification, existing norms as per Principal Regulations shall be applicable for such projects.

(4) xx xx xx

2. Amendment of Regulation 4 of the Principal Regulations: The existing Regulation 4 of the Principal Regulations shall be substituted as under:-

"4. **Control Period or Review Period -** The second Control Period or Review Period under these Regulations shall be of four years, of which the first year shall be the FY 2013-14.

Provided that the benchmark capital cost for Solar PV and Solar thermal power projects shall be reviewed annually by the Commission.

Provided further that the tariff determined as per these Regulations for the RE projects commissioned during the Control Period, shall continue to be applicable for the entire duration of the Tariff Period as specified in

> Regulation 5 of the Principal Regulations.
>
> Provided also that the revision in Regulations for next Control Period shall be undertaken at least six months prior to the end of the this second Control Period and in case the Regulations for the next Control Period are not notified, until commencement of next Control Period, the tariff norms as per these Regulations shall continue to remain applicable until notification of the revised Regulations, and the second control period shall be deemed to have been extended upto the date of notification of Regulations for the next control period."

12. The unit of the petitioners became operational on 3.5.2013. A perusal of the 2010 Regulations shows that the period for which the regulations were to remain in force was three years. First year was from the date of notification of the 2010 Regulations till 31.3.2011. Meaning thereby the period of three years was to end on 31.3.2013. 3rd proviso to Regulation 4 of the 2010 Regulations provides that exercise for revision for next control period shall be undertaken at least six months prior to the end of the control period. In case regulations for the next control period are not notified before the next control period, the tariff as per the 2010 Regulations was to remain in force until revised regulations are notified. It was subject to adjustments as per revised regulations.

13. It is not in dispute that exercise for revision of the 2010 Regulations was not started six months before the expiry of the existing control period on 31.3.2013. The exercise was started only in the year 2015. Public hearing was held in which even the petitioner-company was represented. Vide order dated 4.8.2015, the Commission approved the proposed amendments in the 2010 Regulations. The Amended Regulations

in terms of the order passed by the Commission were notified on 12.8.2015. Regulation 1(2) of the Amended Regulations provides that the Regulations shall be applicable to all the Renewable Energy Projects commissioned/ to be commissioned from Financial Years 2013-14 to 2016-17, as the control period of four years was provided. Regulation 1(3) of the Amended Regulations provides that for the existing projects commissioned from Financial year 2013-14 onwards, the revised norms shall be applicable prospectively from the date of notification of the Amended Regulations unless otherwise provided in the Amended Regulations. For the period prior to the date of notification, existing norms as per the 2010 Regulations shall continue to be applicable. The Amended Regulations were to come into force from the date of publication in the official gazette. The Amended Regulation (4) provides that the second control period shall be of four years commencing from Financial year 2013-14. 3rd proviso thereto provides that in case revised regulations for the next control period are not notified on or before the commencement of that period, the tariff norms as per the Amended Regulations shall continue to remain applicable, until notification of the revised regulations and the second control period shall be deemed to have been extended upto the date of notification of the regulations for the next control period.

14. The contention raised by learned counsel for the petitioners that there is discriminatory application of regulations qua the petitioners' company only because it started operation in the Financial year 2013-14, as compared to the other projects, which started functioning after Financial year 2013-14 is merely to be noticed and rejected. Though the control period is from the Financial Years 2013-14 to 2016-17, however, the

Amended Regulations clearly provide that for the existing projects from Financial year 2013-14 onwards, the revised norms shall be applicable prospectively, from the date of notification of the Amended Regulations.

15. As far as the second contention raised by learned counsel for the petitioners regarding application of the Amended Regulations in terms of 3rd proviso to Regulation 4 of the 2010 Regulations is concerned, it clearly provides that the existing norms, even for the period subsequent to the expiry of control period, shall be applicable till such time revised Regulations are notified. However, the same shall be subject to adjustments as per revised regulations. That would mean, adjustments, if any, are to be specifically provided for in the Amended Regulations for the period prior to the notification of Amended Regulations. Wherever special conditions have been provided for in the Amended Regulations for different years, learned counsel for the petitioners did not point out how that prejudiced the petitioners. It is all matter of calculations for which facts were examined by the Commission while passing the order on 4.8.2015, on the basis of which, the Regulations were amended.

16. The preliminary objection raised by learned counsel for the respondent regarding non-impleadment of the State as well as the distribution companies is merely to be noticed and rejected as they cannot be said to be necessary parties for adjudication of the lis challenging the validity of the Regulations framed by the Commission.

17. As far as the issue of alternative remedy is concerned, suffice to add that once the Regulations framed by the Commission are under challenge, the Appellate Authority has no jurisdiction to go into the validity thereof. It is not simple order of the Commission which was under

challenge. Reference can be made to judgment of Hon'ble the Supreme Court in *PTC India Limited* 's case (supra).

18. For the reasons mentioned above, we do not find any merit in the present writ petition. The same is accordingly dismissed.

19. Before parting with the order, we could not restrain ourselves from noticing the purpose for which the Electricity Act, 2003, was enacted and the responsibilities assigned to various authorities. The objects as contained in the Act are reproduced hereunder:-

> "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, rationalization of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto."

20. The Act provided for constitution of Regulatory Commissions at the Central level and the State level. Their functions have been defined. One of the function assigned to the State Commission is to regulate electricity purchase and procurement, process of distribution of licensees including the price at which the 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. Another important function assigned is to promote bio-fuel co-generation and generation of electricity from renewable sources of energy

and purchase of electricity from such sources. The 2010 Regulations were framed for the purpose of determination of tariff for purchase of power from renewable energy sources. Renewable energy means power generation from small hydro, wind, solar, biomass, bio fuel cogeneration, urban or municipal waste. Certain parameters have been laid down for determination of tariff for purchase of power from different sources. Prior to framing of the 2010 Regulations, the tariff was determined in view of the orders dated 15.5.2007 and 6.11.2009 passed by the Commission. However, the conditions laid down therein were superseded by the 2010 Regulations notified on 3.2.2011. It is clearly provided in the 2010 Regulations that the Commission shall start the process to determine the generic tariff suo moto at least six months prior to the beginning of each control period. For any specific project, separate application can also be filed for determination of tariff. For determination of tariff, first time regulations were notified on 3.2.2011 effective upto 31.3.2013. Though the regulations clearly provided that exercise for revision of the regulations shall start six months before the expiry of the period so that the revised regulations come into force immediately when new control period starts, however, as the facts are available on record, the exercise was started nearly two years after the earlier control period was already over. The Amended Regulations were notified on 12.8.2015 for control period from 1.4.2013 till 31.3.2017. In fact, the regulations were effective only from 12.8.2015. To take care of the interest of various stake holders which include power generators, distribution companies and the consumers, and the purpose for which the Commissions have been constituted, it is expected that if some suo moto power is to be exercised within some time frame, needful should be done, to avoid unnecessary litigation.

21. In case, as laid down in any provisions of the law or the rules framed by the State or the Commission, any power is to be exercised by the Commission suo moto within certain time frame and it fails to initiate the process, it shall be open to any of the affected party to move appropriate application to the Commission to take up the issue. It shall work only as a reminder. This Court is not giving right to any of the party to invoke jurisdiction, where it does not have a right and it is only the Commission which can exercise suo moto power. We hope in future timely action shall be taken.

(Rajesh Bindal)
Judge

23.11.2016
vs

(Harinder Singh Sidhu)
Judge

Whether speaking/ reasoned Yes/No
Whether Reportable Yes/No