

## Regulators and Regulation under the Electricity Act 2003

Ms. Amudhini Anbarasu\*

### Abstract

*Regulations are explicit administrative and legislative controls over entry, rates, and other aspects of economic activities in order to keep social behaviours in check. In developing nations, autonomous regulators with stringent regulations are frequently viewed as essential for increased efficiency and a level playing field across sectors.<sup>1</sup> Regulatory structures developed in a non-homogenous manner across various sectors in India post the economic-liberalization phase. This paper elucidates the overarching regulatory-environment of the electricity-sector in examining its provisional and functional-facets through powers derived under the Electricity Act 2003<sup>2</sup> and their interpretations by courts. It attempts to extrapolate the consequences of such a regulatory-model and conclude on appreciating a reformative and balanced approach to regulate the electricity-sector whilst maintaining the nature and essence of the utility.*

**Keywords:** *Regulation, Regulatory Control, Central Electricity Regulatory Commission (CERC), State Electricity Regulatory Commission (SERC), Electricity Act 2003, Indian Electricity sector*

---

\* 2<sup>nd</sup> year, LLB, Jindal Global Law School.

<sup>1</sup>Necoechea Porras, Asuncion Lopez and Salazar Elena, *Deregulation in the Energy Sector and its Economic Effects on the Power Sector*, 13 Sustainability 1 19 (2021).

<sup>2</sup>The Electricity Act 2003, No 36, Acts of Parliament 2003 (India).

## Evolution of Electricity Regulation

Electricity sectors in most countries including India, have traditionally been government regulated-cum-controlled causing vertically integrated utilities. This indicates that the government handles generation, transmission and distribution of electricity in these countries.<sup>3</sup> This structural-monopoly manifested India's post-independence 'State-led economic growth' philosophy, finding resonance in the Electricity Legislation of 1948.<sup>4</sup> But the State Electricity Boards, which are publicly-owned, are regulated by state-level departments for operational management and development. This integrated utility system showed signs of unsustainability, such as political interference, poor financial performance, frequent power outages, poor quality power supply in rural areas, and insufficient annual capacity additions.<sup>5</sup> Moreover, due to post economic-reforms of 1990s, the thrust for privatization emphasised on legislative-provisioning for involving private-players in power-generation. This emphasis was held back due to policy incoherence.<sup>6</sup>

The *Enron-Dabhol Scandal*<sup>7</sup>; non-transparent and financially-skewed power supply agreement with Mumbai State Electricity Board through lack of competitive-bidding highlighted structural discrepancies necessitating independent oversight to governmental actions. The cry for reform and restructuring was first experimented in Orissa under World-Bank supported program to 'unbundle' the sectors' vertical integration, usher privatisation and introduce management reforms<sup>8</sup> by separating the government from the role of setting Tariffs. The Orissa approach i.e. functioning of the Orissa State Electricity Commission was further replicated with the intact adoption of the Electricity Regulatory Commission Act in 1998<sup>9</sup>.

---

<sup>3</sup>*Id.*

<sup>4</sup>The Electricity (Supply) Act 1948, No. 54, Acts of Parliament 1948 (India).

<sup>5</sup> Gopal Sarangi and Arabina Mishra, *Does Regulation Promote Sustainable Developmental Outcomes* (ABDI Working Paper Series No. 1059, 2019) <https://www.adb.org/publications/does-regulation-promote-sustainable-development-outcomes-india>.

<sup>6</sup>*Id.* at 3.

<sup>7</sup>Sunil Jain, *Dispute Over Enron Power Projects; Major Political Controversy India Today* (23 June 2003) <https://www.indiatoday.in/magazine/special-report/story/19950731-dispute-over-enron-power-project-snowballs-into-major-political-controversy-807602-1995-07-31>.

<sup>8</sup>Navoz Dubash, *Independent Regulatory Agencies; A theoretical Review With Reference to Electricity and Water in India* 43(40) EPW 43 46 (2008).

<sup>9</sup> The Electricity Regulatory Commission Act 1998, No 14, Acts of Parliament 1998 (India).

However, only with the Electricity Act 2003<sup>10</sup>, emerged a comprehensive actional-reform, defining the sectors' future trajectory. Its objective included *firstly* unbundling the segments of generation, transmission and distribution, *secondly* infusing competition while protecting consumer interest, *thirdly* tariff-rationalisation and functional transparency. The Central and State Electricity Regulatory Commission (CERC and SERC) were introduced as institutional innovations for sectoral-transformations. Their pervasive-roles transformed electricity into a heavily regulated sector in almost all its aspects, playing the twin-role of making regulations with enforceable legal implication and that of quasi-judicial bodies with adjudicatory-functions.

### Wide Functional Facets of Regulation

Participation in transmission, distribution and trading of electricity are strictly-controlled; licensed activities under Section 12<sup>11</sup> of the Electricity Act 2003, with interstate-trading and transmission by CERC and intra-state distribution, transmission and trading by SERC under Sections 79(1)(e) and 86(1)(d)<sup>12</sup> respectively. After compliance with the application and procession<sup>13</sup>, the license may be 'granted' by the appropriate commission under Section 14<sup>14</sup> with its satisfaction, to allow entry into the sector. In the Sesa Sterlite Case<sup>15</sup>, the wide scope of regulatory scrutiny was upheld, even though there was no requirement to "grant" a licence. Even though entities were "deemed distribution-licensees" because of other laws, they still had to meet new legal requirements that were enforced by regulatory commissions in order to be "recognized" as having a licence and get other benefits from the Electricity Act.

Despite Generating-entities not requiring a license for sectoral entry, they are regulated through tariff determination for supplying power under Section 62(1a) of the Electricity Act, 2003<sup>16</sup> by CERC for those owned and controlled by central government<sup>17</sup> or engaged in composite supply

---

<sup>10</sup>The Electricity Act 2003, No 36, Acts of Parliament 2003 (India).

<sup>11</sup>*Id.*

<sup>12</sup>*Id.*

<sup>13</sup>*Id.* at § 15.

<sup>14</sup>*Id.*

<sup>15</sup> Sesa Sterlite Ltd. v. Orissa Electricity Regulatory Commission, (2014) 8 SCC 444.

<sup>16</sup>The Electricity Act 2003, No 36, Acts of Parliament 2003 (India).

<sup>17</sup>*Id.* at § 79(1)(a).

schemes<sup>18</sup> and by SERC for generation within the state.<sup>19</sup> Moreover, their following directions and usage of meters are also regulated under Section 55 of the Electricity Act, 2003<sup>20</sup> and oversight on their duty to maintain a system under Section 10 of the Act is exercised through reviewing submissions of required technical-details. Albeit captive-generation (transmission outside the grid through dedicated-lines) being traditionally outside the regulatory purview, *Hindustan Zinc v. Rajasthan Electricity Regulatory Commission*<sup>21</sup> intruded the veil holding that SERC directions under Section 86(1e) of the act on renewable-energy obligation percentage also apply to entities using captive-generation; they fall within ‘total energy-consumption’ in distribution-licensees ‘area of supply’, thereby bringing them under the ambit of regulatory-compliance.

Distribution-services being direct consumer points of contacts, their price and procurement are heavily regulated by SERCs for supply within the state under Section 86(1)(b) of the Act. Furthermore, duties including system-development and non-discriminatory open-access provisions, are also regulated under Section 42 of the Act<sup>22</sup>. Due to this, there has been determination of charges on wheeling and cross-subsidy. As from *Sesa Sterlite Case*<sup>23</sup>, it can be observed that entities simply by opting for open-access come under ‘regulatory ambit’ in their obligation to pay Cross Subsidy purports to Surcharge to the distribution-licensee of the ‘supply-area’. This shows regulation even in electricity consumption, specifically when operationalised through fully dedicated-lines without grid connectivity or with the distribution-licensees system for the entities’ own use. Distribution-licensees also have a ‘Universal Service Obligation’ within their area of supply as specified in Section 43 of the Act<sup>24</sup>. In this context, *Brihanmumbai Electric Supply & Transport Undertaking v. Maharashtra Electricity Regulatory Commission*<sup>25</sup> held that such a duty to supply can’t be diluted by the presence of more than one license for an area of supply which would undermine consumer choice.

---

<sup>18</sup>*Id.* at § 76(1)(b).

<sup>19</sup>*Id.* at §86(1)(a).

<sup>20</sup>*Id.*

<sup>21</sup> *Hindustan Zinc Ltd. vs. Rajasthan Electricity Regulatory Commission*, (2015) 12 SCC 611.

<sup>22</sup>The Electricity Act 2003, No 36, Acts of Parliament 2003 (India).

<sup>23</sup> *Sesa Sterlite Ltd. v. Orissa Electricity Regulatory Commission* (2014) 8 SCC 444.

<sup>24</sup>The Electricity Act 2003, No 36, Acts of Parliament 2003 (India).

<sup>25</sup> *Brihanmumbai Electric Supply & Transport Undertaking v. Maharashtra Electricity Regulatory Commission*, (2015) 2 SCC 438.

Governments' separation from direct tariff-determination in the sector where public-utilities are traditionally prime-players, was one of the main reasons in pervasive regulatory tariff-determination powers enumerated under Section 62 of the Act<sup>26</sup> for generation, transmission, wheeling and retail sale. This is regulated under legal-principles enumerated in Section 61 of the act, guided by the Governments' National Electricity and Tariff policies. Moreover, tariff determination through bidding under Section 63 of the Act<sup>27</sup> also attracts regulatory oversight over the transparency and procedural fairness. In this regard, *V.S. Rice v. State of Andhra Pradesh*<sup>28</sup> held that 'regulation' in prices to include increasing or decreasing as per necessity in maintaining secure-supply, fair-pricing and equitable distribution of essential-articles. Its application to Electricity laws was dealt in *Ramanathan v. State of Tamil Nadu*<sup>29</sup>, wherein it was elucidated the wide amplitude of regulatory-powers in tariffs-pricings.

Section 66 of the Act mandating promotion of power-markets extends regulatory-supervision to power-trading markets establishment. The CERC's Power Market Regulations cover the most important parts of this area, such as eligibility, control and management, exchange products, clearing and settlement, trading margins, and market bylaws.<sup>30</sup> It enables free and transparent price-discovery supported by transparent oversight committees for surveillance, risk management and prompt trading-terminal report-publishment. The recently decided conflict on financial-futures trading in commodity-exchanges elucidates the overarching regulatory-ambit of CERC's supervisory-role over Electricity-trading. It won't cease when electricity is traded as a futuristic product despite its inclusion in Forward-Markets Commission list; the agreement between CERC and SEBI affirmed by the Court, CERC will continue to regulate all physical-delivery based forward-contracts.<sup>31</sup>

Finally, Appropriate-commissions also exercise quasi-judicial functional regulation through dispute-adjudication between generating-companies and licensees as provided under Section

---

<sup>26</sup>The Electricity Act 2003, No 36, Acts of Parliament 2003 (India).

<sup>27</sup>*Id.*

<sup>28</sup> V. C. Rice and Oil Mills v State of Andhra Pradesh, AIR (1964) SC 1781.

<sup>29</sup> Ramanathan v State of Tamil Nadu, (1985) 2 SCC 116.

<sup>30</sup>Power Market Regulations, CERC Regulations (2021).

<sup>31</sup>ET Bureau, *SC settles 10-year long CERC, SEBI dispute; paves way for power derivatives, futures*, The Economic Times (7 Oct 2021), <https://m.economictimes.com/industry/energy/power/sc-settles-10-year-long-cerc-sebi-dispute-paves-way-for-power-derivatives-futures/articleshow/86835184.cms>.

79(1)(f) and 86(1)(f) of the Act. Moreover, they hold ‘exclusive-power’ in referring disputes for arbitration, (usually exercised on purely-contractual disputes requiring remedy in-personam) overriding parties’ choice under Arbitration Act<sup>32</sup>, as noted in *Gujarat Urja Vikas Nigam Ltd v. Essar Power Ltd*<sup>33</sup>. Therefore, any process initiated by party-appointed arbitrators was held to be null and void as was done in *Global Energy v. Karnataka Electricity Regulatory Commission*<sup>34</sup>.

For consumer-disputes, SERC’s guidelines on establishing redressal-forums by distribution-licensees have to be adhered,<sup>35</sup> with appeals lying only through an SERC appointed Ombudsman.<sup>36</sup> As noted in *P.T.C. India Ltd. v. Central Electricity Regulatory Commission*<sup>37</sup>, the Electricity Act is a complete code-in-itself, providing relief and regulatory-mechanism for all dispute-resolution. This was further illustrated in *U.P. Power Corporation v. Ahmad*<sup>38</sup> affirming supremacy in applying provisions of Electricity Act for grievance-redressal over Consumer Protection Act<sup>39</sup> in cases lacking inconsistency between them, as per Section 174 of the Act.

## Analysis of the Regulatory-Environment

The two-decade sectoral restructuring has metamorphosed into various commendable-progresses; *firstly*, increase in overall and private generation capacity,<sup>40</sup> *secondly* increase in competitive-market transactions through power-exchanges, *thirdly* increase in power procurement and price discovery through competitive-bidding, *fourthly* formation of thrust to renewable-energy through reduced costs by new modes of procurement such as competitive-bidding and grid-interactive renewable-capacities,<sup>41</sup> *fifthly* composing fast-redressals for improving service-quality<sup>42</sup> and underlining the importance of consumer-inclusive avenues for service-delivery,<sup>43</sup> etc. However, the sector’s various entrenched-infirmities, especially in the State-owned distribution-companies (financial pressure amounts to a debt of 4.3 lakh crores) are

---

<sup>32</sup>The Arbitration and Conciliation Act 1966, No. 26, Acts of Parliament 1966 (India).

<sup>33</sup> *Gujarat Urja Vikas Nigam v. Essar Power Ltd*, [2008] 4 SCC 755.

<sup>34</sup> *Global Energy Private Limited v. Karnataka Electricity Regulatory Commission & Anr*, [2014] ELR APTEL 539.

<sup>35</sup>The Electricity Act 2003, No 36, Acts of Parliament 2003 (India).

<sup>36</sup>*Id.* at § 42(6).

<sup>37</sup> *PTC India Ltd. vs. Central Electricity Regulatory Commission through its Secretary*, (2009) 5 SCC 466.

<sup>38</sup> *U.P. Power Corpn. Ltd. v. Anis Ahmad*, (2013) 8 SCC 491.

<sup>39</sup>The Consumer Protection Act 1986, No.34, Acts of Parliament 1986 (India).

<sup>40</sup> Sarangi *supra*. Note 6 at 1.

<sup>41</sup>*Id.*

<sup>42</sup> Singh *supra*. Note 1 at 20.

<sup>43</sup> Consumer Participation and Protection in Electricity Regulations CUTS International 2 (2012).

deep-seated<sup>44</sup> from high technical-losses coupled with inadequate tariffs cum subsidy support. Lack of tariff fixation on 'fair-cost'; creating regulatory-assets to be recovered through future tariff hikes coupled with lack of state-governments subsidy-compensation as under Section 65 of the act and consumer-defaults are major impediments in the fair regulation of electricity sector.

The aggravated covid-distress caused many distribution-companies to fall back on 'late payment surcharge' (LPS), whose accumulation not only worsens their financial position but coupled with the fact that CERC's intervene to maintain LPS moratorium it also hits generating companies' rights in compensating late-payments, affecting their viability. Inherent-disadvantages also include the sector's operation on a vertically post-consumption payment structure with long durations and inability of changing the 'to and from supply source' on deficiencies and defaults. Other instances of regulatory intrusions are many such as- CERCs introduction of 'Compensatory-Tariff' to be borne by the State-Discoms signified by the *Adani Mundra case*<sup>45</sup> is reflective of disturbance of the sanctity of a competitive-bid by reopening negotiations and using a method of compensation which was not provided for in any law or bid-agreement. This also raised questions on impractical regulatory-frameworks allowing excessively long-terms (such as over 25 years) for PPA contracts and their operational-cum-obligational difficulties.

Impediments to robust regulatory-structure also include contradictions in enforcement support to independent regulators when most of the regulated-entities are not just state-owned and controlled but also act as State-instrumentalities.<sup>46</sup> For Instance, withholding of subsidy-payments and lack of complaints from utilities with the view of undermining financial-viability to keep tariffs-low based on political-agendas, makes regulators' role ambiguous to instrumentalise appropriate-action. Moreover, uncertainty over tariff-regulation is a primary concern for slow entry of private-players in the sector which already has a heavy investment threshold. This hinders competitiveness and efficiency as many state-owned electricity boards continue to run inefficiently without being privatized.<sup>47</sup>

---

<sup>44</sup> Sarangi *supra*. Note 6 at 1.

<sup>45</sup> *Adani Power (Mundra) Ltd. v. Gujarat Electricity Regulatory Commission*, (2019) 19 SCC 9.

<sup>46</sup> Ajay Pandey, *Electricity Reforms and Regulations; A Critical Review of the Last 10 Years Experience* (Final Report IIM Ahmedabad 2009) 96.

<sup>47</sup> Singh *supra*. Note 1 at 29.

## Way Forward and Conclusion

The justification for a robust regulatory regime runs with ‘public-interest theory’ illustrated in the early US Supreme-Court case of *Munn v. State of Illinois*<sup>48</sup>; properties for public-interest must be controlled by the public for common-good. Despite the above examined wide ambit of regulatory roles and concerns of lack of independence, predictability and accountability, electricity-regulators are an outcome slew of reforms aimed at enabling better-access, healthy competition, costs reduction and preventing market-failure. These are essentially-desirable due to electricity access playing an indispensable role in facilitating developmental indicators. As rightly noted in *T.M. Prakash v. Tamil Nadu Electricity Board*<sup>49</sup>, the right to electricity is implicit within the right to life,<sup>50</sup> lack of access to which is causative of economic-inequality and disparity in society.

Therefore, gradual strengthening of structural reforms premised on due deliberations rather than dilution should be the practical way-forward for sectoral robustness. This is reflected in various provisions of the Draft Electricity Bill<sup>51</sup> such as ‘cost-reflective’ tariff determination for distribution-licensees, direct benefit transfer of government-subsidized to improve transparency and counter late reimbursements, increased penalties for regulatory non-compliance,<sup>52</sup> non-license requirement for Distribution-company franchisees to foster entry of more private players, a separate contract enforcement authority to oversee fulfillment of PPA agreements, etc. Moreover, government enrolled schemes such as UDAY are also expected to grant financial-relief to overhaul the distribution-segment with some success. However, their easing implications contextualized in the larger regulatory-framework and the subsequent effectiveness is to be seen.

---

<sup>48</sup>*Munn v. State of Illinois*, (1876) 94 U.S. 113.

<sup>49</sup> *T M Prakash and Ors v. The District Collector and The Superintending Engineer, Tamil Nadu Electricity Board*, (2014) 1 MLJ 261.

<sup>50</sup> INDIA CONST. art. XXI.

<sup>51</sup> Electricity (Amendment) Bill 2021, L.S. No.42 (2021).

<sup>52</sup>The Electricity Act 2003, No 36, Acts of Parliament 2003 (India).