

||

OFFICE OF SHRI G E VAHANVATI
ATTORNEY GENERAL FOR INDIA
SUPREME COURT, NEW DELHI 110 001

1. Law Secy. Dy. No. 3576/2010 dt. 28.10.10
2. FTS Nos. 3816 & 4275/Adv "B" Min.Law

1. Two separate references have been made to me. One was sent on 8th November, 2010 in relation to the Case for Opinion received from the Adviser to Deputy Chairman, Planning Commission dated 22.10.2010 and the second is a reference which has been received on 25th November, 2010 which sets out the Note of the Ministry of Power. In the note of the Director, Ministry of Power dated 23.9.2010 the view points of the Adviser to the Planning commission are set out in para 3 (A) and the view points of the Ministry of Power are set out in para 3(B) of the said note.

2. In my opinion there are two separate issues. The first issue is as framed in conclusion 1 in the Note of the Adviser to the Dy.Chairman whether all bulk consumers shall be deemed to be open access consumers with effect from January 2009 in terms of the proviso to section 42(2). According to the Adviser, all bulk consumers fall into a category to whom open access has been permitted and for such consumers the State Commissions can only fix wheeling charges and surcharge. As against this, according to the Ministry of Power, all consumers of 1 mw and above do not automatically become open access consumers. According to the Ministry of Power notice has to be given by such consumers who wish to avail of open access and it is only if a consumer exercises his option of seeking open access that the provisions of section 49 and section 86(1)(a) of the Electricity Act, 2003 will apply.

3. Section 42 of the Act comes within Part VI which deals with distribution of Electricity. Section 42 deals with duties of distribution licensees and open access in relation to consumers who require supply of electricity where maximum power to be made available at any time exceeds 1 mw. The Fifth Proviso to section 42(2) stipulates that the State Commission shall not later than 5 years from the date of the commencement of the Electricity (Amendment) Act, 2003 frame regulations which will provide for such open access to these consumers. This proviso is mandatory.

4. Once such consumers have open access, the first proviso to section 42(2) will come into operation. It reads as follows:

"Provided that such open access may be allowed before the cross subsidies are eliminated, on payment of a surcharge in addition to the charges for wheeling as may be determined by the State Commission.

5. In my opinion, the provisions of section 42(3) are important. Even after Regulations are framed a person may continue to avail of electricity from a distribution licensee. A person can require supply of electricity under open access other than from a distribution licensee but such person has to give notice requiring such supply. Further, such consumers have to enter into an agreement with the supplier in terms of section 49. Where there is no such notice and there is no such agreement, it cannot be that all such consumers are not bound by the tariff even though they have not asked for supply under open access. Any other interpretation can lead to an anomalous situation. It can result in a situation where a consumer may not avail of open access and yet it could be contended by him that he is not bound to pay for electricity availed of from a distribution licensee as per the tariff of the distribution licensee.

6. The second issue is with regard to whether once such consumers avail of open access the State Commissions have jurisdiction to fix tariffs and whether

their jurisdiction is limited to fixing of wheeling charges and surcharge and not tariffs.

7. A conjoint reading of first proviso to section 42 read with section 49 shows that where consumers are allowed open access, such consumers are free to enter into an agreement with any person for supply or purchase of electricity on such terms and conditions as may be agreed upon between them. Therefore, the charges for such supply (the tariff) is left to the parties by agreement.

8. Further, one may refer to section 86(1)(a) of the Act which reads as follows:

"86(1) The State Commission shall discharge the following functions, namely:

(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:

Provided that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;"

9. The proviso to section 86(1)(a) makes it clear that where open access has been permitted under section 42, the State Commissions are determined only dealing with wheeling charges and surcharge thereon for the said category of consumers. In my opinion, the use of the word "only" in the proviso is determinative.

10. In this background, my answers to the questions framed in the note dated 22.10.2010 are as under:

Q. A Whether all bulk consumers (above 1 MW) shall be deemed to be open access consumers with effect from January 2009 in terms of the proviso to Section 42(3)?

Ans: No. All bulk consumers are not deemed to be open access consumers. Only those who opt for open access are entitled to open access.

Q. B Whether the regulatory commissions can continue to regulate the tariffs for supply of electricity to the aforesaid open access consumers after January 2009?

&

Q. C Whether the jurisdiction of State Commission in respect of the bulk consumers is limited to fixing the wheeling charges and surcharge thereon in accordance with the provisions of Sections 49 and 86 (1)(a)?

Ans: The jurisdiction of the State Commissions in relation to bulk consumers who opt for open access is limited to the determination of wheeling charges and surcharge and not fixation of tariff.

Goolam E. Vahanvati
(Goolam E. Vahanvati)
Attorney General for India
7.12.2010

Ac
8.12.10