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ATTORNEY GENERAL FOR INDIA

Ex parte

Central Electricity Regulatory Commission

1. I have gone through the Case for Opinion sent under cover of a letter dated 30 July 2009. My opinion is sought on the following question:

"Whether the regulations on standards of performance to be specified under section 47 of the Electricity Act, 2003 could provide for automatic compensation as provided in the regulations to be paid by the licensees for their failure to meet certain standards of performance."

2. My answer to the aforementioned query is that the action of some State Governments relating to Automatic Compensation runs contrary to the provisions of The Electricity Act, 2003.

3. Section 57 of the Act provides as follows:

"57. Standards of Performance of Licensee: (1) The Appropriate Commission may, after consultation with the licensees and persons likely to be affected, specify standards of performance of a licensee or a class of licensees.

(2) If a licensee fails to meet the standards specified under subsection (1), without prejudice to any penalty which may be imposed or prosecution be initiated, he shall be liable to pay such compensation to the person affected as may be determined by the Appropriate Commission:

Provided that before determination of compensation, the concerned licensee shall be given a reasonable opportunity of being heard.

(3) The compensation determined under sub-section (2) shall be paid by the concerned licensee within ninety days of such determination."

4. Section 57(1) authorizes the Appropriate Commission to consult licensees and persons likely to be affected and thereafter specify standards of performance of a licensee or a class of licensees.
5. Ordinarily, the determination of standards of performance should be license-wise. However, Section 181 of the Act, which deals with the power of the State Commissions to make regulations, provides, under Sub section 2 that :

"181. Powers of State Commissions to make regulations:- (1) ...

(2) In particular and without prejudice to the generality of the power contained in sub-section (1), such regulations may provide for all or any of the following matters, namely-

...

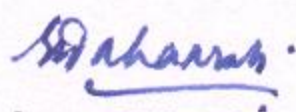
(za) standards of performance of a licensee or a class of licensees under sub-section (1) of section 57;"

6. It is clear from Section 181(2)(za) that standards of performance of a licensee or a class of licensees can be the subject matter of regulation. Significantly, Section 181(2)(za) makes reference only to Section 57(1) and not to Section 57(2). There is good reason for this. If a licensee fails meet one standard specified in sub-section (1) he is liable to pay such compensation to the person affected as may be determined by the Appropriate Commission. The proviso requires that before determination of compensation, the concerned licensee shall be given a reasonable opportunity of being heard.
7. Section 57(2) provides for a case by case determination of compensation. Such compensation has to be paid to the affected person. In other words, the

Commission will have to determine if, how and to what extent the person has been affected. It may be so that in a particular case the person is unaffected. Besides, the Appropriate Commission has to determine the compensation and before such determination, the concerned licensees shall be given a reasonable opportunity of being heard. Accordingly, it is clear that compensation is to be determined on a case by case basis. An automatic imposition of compensation by way of regulation is not possible.

8. In the circumstances, for the reason that Section 57(2) is not the subject matter of Section 181(2)(za) and for the reason that there has to be a casewise determination of compensation, after a proper hearing, I am of the opinion that there cannot be any regulation providing for automatic compensation. All such regulations are *ultra vires* the provisions of the Act viz. Section 57(2) read with Section 181(2)(za).
9. I have nothing further to add.

25 August 2009
New Delhi


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