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Ex-parte:
Forum of Regulators

..... Querist

1. I have gone through the Brief for Legal Opinion sent to me. The Querist is the Forum of Regulators which has been constituted by the Central Government under section 166(2) of the Electricity Act, 2003. The Querist has very important functions including the function of harmonization of regulation in the power sector, as can be seen from Rule 4 of the Forum of Regulators Rules, 2005, which reads as follows:

"4. Functions of the Forum. - The Forum shall discharge the following functions, namely:-

- (i) analysis of the tariff orders and other orders of Central Commission and State Commissions and compilation of data arising out of the said orders, highlighting, especially the efficiency improvements of the utilities;
- (ii) harmonization of regulation in power sector;
- (iii) laying of standards of performance of licensees as required under the Act.
- (iv) Sharing of information among the members of the Forum on various issues of common interest and also of common approach;
- (v) Undertaking research work in-house or through outsourcing on issues relevant to power sector regulation;

- (vi) Evolving measures for protection of interest of consumers and promotion of efficiency, economy and competition in power sector; and
- (vii) Such other functions as the Central Government may assign to it, from time to time."

2. The queries which have been raised directly arise from this function since they relate to harmonious interpretation of sections 79(1)(b), 79(1)(f), 63 and 86(1)(b), and consequential harmonization of Regulation.
3. I have seen the queries which are as many as six in number. I think that there is an overlap in the queries. The real issues are three as I will explain hereinafter.
4. Query No. 1 reads as follows:
 - (1) Which is the 'Appropriate Commission' to decide the disputes related to tariff in the PPAs of competitively bid projects where the Generating Company supplies to more than one State?
5. It is clear that the main thrust of Query No.1 is to determine the "Appropriate Commission" in relation to a generating company which supplies to more than one State. The aspect relating to tariff in PPAs of competitively bid projects is really covered under Query (2) which reads as follows:
 - (2) Would the word 'regulate' in Section 79(1)(b) even take in regulation/revision in price of rate adopted under Section 63 that was arrived at pursuant to Competitive Bidding?
6. Queries (3) and (4) are related to the first query which relates to which is the Appropriate Commission in relation to a generating company which supplies

power to more than one State. In fact, Query No. (4) is almost identical to Query No. (3) and the two overlap. Queries (3) and (4) read as follows:

- (3) Would 'composite scheme of generation and sale in more than one State' in Section 79(1)(b) necessarily mean that a Generating Company should have had pre-identified beneficiary/buyers of the plant meaning thereby that it ought to have been originally conceived as to who would the beneficiaries/buyers be of the power to be sold by the Generating Company? If the Generating Companies which had identified only one buyer that is in the host State where the plant is located and thereafter added more units or more capacity and started supplying to beneficiaries/buyers outside the host State, can it be said that such a Generating Company has a 'composite scheme' within the meaning of Section 79(1)(b)?
- (4) Which is the 'Appropriate Commission' to decide the disputes related to tariff in the PPAs of competitively bid projects where the Generating Company did not have pre-identified beneficiary/buyers in more than one State and in fact had identified only one buyer that is in the host State where the plant is located and thereafter added more units or more capacity and started supplying to beneficiaries/buyers outside the host State?

7. Query No. (6) is really an argument with regard to an anomalous situation which would arise if the generating company has to approach the respective State Commissions to adjudicate upon disputes. Query No. 6 reads as follows:

- (6) Would it create an anomalous situation if the Generating Company has to approach the respective State Commission to adjudicate upon the dispute, and where one State Commission grants relief to the Generating Company qua the quantum of power supplied to that State but another State Commission rejects the claim of the Generating Company qua the quantum of power supplied to that other State despite the cause of dispute being the same? If so, would the harmonious interpretation of various provisions of the Act make it desirable that the Central Commission (and not the State Commissions) should 'regulate' the tariff and adjudicate upon the underlying disputes?

8. This is not really a legal issue but raises an issue of convenience and the need to avoid conflicting orders. Nevertheless, the legal issue would have to be decided with reference to the statutory provisions. If the statutory provisions require a generating company to approach more than one State Commission (even if it is supplying to more than one State), then the fact that it would lead to an anomalous situation would not detract from the legal position.

9. In case the Central Commission is the appropriate commission to regulate tariff in PPAs under which power is to be supplied to more than one State, Query No. (5) raises an issue as to what would be the position if the State Commission of one of the beneficiary states has already passed an order adopting tariff under Section 63 or under Section 86(1)(b) of the Act. Query (5) reads as follows:

(5) Which is the 'Appropriate Commission' to decide the disputes related to tariff in the PPAs of competitively bid projects where the State Commission of one beneficiary (buyer) State has already passed an Order adopting the tariff under Section 63 or under section 86(1)(b) of the 2003 Act?

10. Therefore, to my mind, the three real queries, which need to be addressed in this matter, are:

- (i) What is the Appropriate Commission to decide disputes in relation to a generating company which supplies to more than one State?
- (ii) If the Central Commission is the Appropriate Commission then can the Central Commission, in exercise of its powers under section 79(1)(b), regulate/revise the price/rate adopted under section 63?
- (iii) Whether the Central Commission would remain the Appropriate Commission for regulating tariff in a PPA of a competitively bid project supplying electricity to more than one State, when the State

Commission of one beneficiary (buyer) State has already passed an order adopting the tariff under Section 63 or Section 86(1)(b) of the 2003 Act?

11. I shall now deal with the said issues, namely, the scope of the words "regulate" and "composite scheme" in section 79(1)(b) of the Electricity Act, 2003 and the appropriate commission for deciding disputes in relation to generation companies that supply power to more than one state. The Case for Opinion succinctly sets out both views, those in favour and against the Central Commission having jurisdiction in the matter.

12. The view in favour of holding that the Central Commission has jurisdiction proceeds on the basis that:

"Since, these Generating Companies have their plants situated in one State and not only supply to that host State but also supply to other States, it could be said that the Generating Company has a composite scheme for generation and sale of electricity in more than one State."

13. Paragraph 5(A)(2) of the Case for Opinion brings out the anomaly point but though this is relevant, as stated above, I do not think it can be over-emphasized.

14. The different point of view proceeds on the basis that:

"The words 'composite scheme of generation and sale in more than one State' used in Section 79(1)(b) means that the Generating Company should have had pre-identified beneficiary/buyers of the plant meaning thereby that it ought to have been originally conceived as to who would the beneficiaries / buyers be of the power to be sold by the Generating

Company. But there are Generating Companies which had identified only one buyer that is in the host State where the plant is located and thereafter added more units or more capacity and started supplying to beneficiaries/buyers outside the host State. Hence, these types of Generating Companies did not have a 'composite scheme of generation and sale in more than one State' within the meaning of Section 79(1)(b) and therefore the Central Commission cannot regulate the tariff of these Generating Companies."

15. In my opinion, this point does not present much difficulty. The contra point of view fails to take into account the full scope of Section 79(1)(b) of the 2003 Act and all the words appearing therein. Section 79(1)(b) does not limit itself to cases where a Generating Company originally conceived a composite scheme or to cases where the generating companies had initially identified more than one buyer in the first instance. The argument that if only one buyer had been identified in the first instance section 79(1)(b) would have no application fails to take into account the true scope of section 79(1)(b), which reads as follows:

"79. Functions of Central Commission. - (1) The Central Commission shall discharge the following functions, namely:-

- (a) To regulate the tariff of generating companies owned or controlled by the Central Government;
- (b) To regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State." [emphasis supplied]

16. In my opinion, the words "or otherwise have" are crucial. It makes it clear that there can be a composite scheme for generation and sale of electricity in more than one State not only under an agreement entered into originally (or at the

inception) but also where generating companies generate and sell electricity on other basis in more than one State. Therefore, I do not agree with the contra view.

17. To restrict section 79(1)(b) to only cases where the original scheme contemplated generation and sale of electricity in more than one State is unjustified. It amounts to taking a very narrow and restricted view of section 79(1)(b). What is of essence is that there is generation and sale of electricity in more than one State, in which case the Central Commission would be the Appropriate Commission.

18. In my opinion what is important is that there must be generation and sale of electricity in more than one State. Such sale is not haphazard or sporadic. It has to be systematized. Obviously, where such generation and sale takes place, there would be a composite scheme for such generation and sale. Even if more units and more capacity is subsequently added and supplies started to beneficiary buyers outside the State, the same would fall within the expression "or otherwise have". Therefore, the Central Commission would have jurisdiction in this matter. This not only appears to be the correct view on a proper reading of the Section but also the sensible and practical view because it will eliminate conflicting orders by the different State Commissions.

19. What should be the correct approach in a matter of this kind is the subject matter of several decisions. In **Atma Ram Mittal vs. Ishwar Singh Punia** - (1988) 4 SCC 284, Justice Sabyasachi Mukharji (as His Lordship then was) emphasized the proposition that each word, phrase or sentence was to be construed in the light of the purpose of the Act itself. He said:

"9. Judicial time and energy is more often than not consumed in finding what is the intention of Parliament or in other words, the will of the people. Blackstone tells us that the fairest and most rational method to interpret the

will of the legislator is by exploring his intentions at the time when the law was made, by signs most natural and probable. And these signs are either the words, the context, the subject-matter, the effects and consequence, or *the spirit and reason of the law*. (emphasis by the court) See *Commentaries on the Laws of England* (facsimile of 1st Edn. of 1765, University of Chicago Press, 1979, Vol. 1, p. 59). Mukherjea, J. as the learned Chief Justice then was, in *Poppatlal Shah v. State of Madras* said that each word, phrase or sentence was to be construed in the light of purpose of the Act itself. But words must be construed with imagination of purpose behind them said Judge Learned Hand, a long time ago."

20. Justice Sinha in **State of UP & Ors. Vs. Jeet S. Bisht & Anr.** - (2007) 6 SCC 586 dealt with this issue at an academic level and said:

".....It is no more the black letter in the law which guides the interpretation but the goal which is embodied by the particular body of law, which may be termed as the rationality of law.

73. Law, in its value-laden conception, is not entirely endogenous in its meaning and purpose: the construction thereof also depends on the statement of purport and object. There is a spillover of the aforementioned shift in philosophy of law to statutory interpretation. Purposive interpretation, of lately, has gained considerable currency, which is relevant for the sake of maximizing the efficiency in respect to the point behind the rule. There may be a situation when purposive interpretation is required even in the context of deciphering the constitutional mandate by invoking the notion of active liberty discovered by Justice Stephen Breyer of the American Supreme Court. This is the precise role which was exhorted by Bruce A. Ackerman in the famous Storrs Lecture:

'If we are to make sense of our Constitution, we must cut ourselves off from the framers' theory of democracy. The least dangerous branch opens with a second declaration of independence, not an effort at constitutional interpretation. The beginning of constitutional wisdom, apparently, is that Hamilton, Marshall, and the rest were utterly mystified by representative Government'."

21. The whole basis of having a Central Regulatory Commission is to deal with matters which concern more than one State. Obviously, State Regulatory Commissions are confined to matters within their respective States. Section 86 of

the Act also makes this clear with repeated reference to the expression "within the State". Section 79 which deals with the function of the Central Commission repeatedly repeats the words "inter-State operations". The Central Commission has a premier role to play under the Electricity Act and section 79(1)(b) reiterates this aspect. The correct approach should be to give a purposive meaning and effect to section 79(1)(b) and not an unnecessarily narrow and restricted view.

22. The next question is as to whether the Central Commission can re-look at the tariff even in cases where there has been a Power Purchase Agreement specifying tariff obtained through a transparent process of bidding in accordance with guidelines issued by the Central Government. This aspect has two dimensions. On the one hand there is the argument of sanctity of contracts. It is argued that a long term contract fixes tariff for supply for a long period and parties enter into such contracts knowingly and consciously. On the other hand emphasis is laid on the necessity to approach the appropriate Commission for relief by way of "Regulation".

23. The Electricity Act, 2003 highlights various competing interests to be reconciled and managed under the Act. The Long Title of the Act reads as follows:

"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."

24. The Long Title of the Act emphasizes measures for the development of the electricity in the forefront. One way of developing the electricity industry, as mentioned in the Long Title, is to promote generation and competition. The main thrust of the Electricity Act is to promote generation, transmission, distribution and use of electricity in the country which needed a boost in the electricity supply. It also talks of supply of electricity to all areas which can only take place if there is a boost in generation, transmission and distribution. At the same time, the interest of the consumers has to be taken into account. Rationalization of electricity tariff is also a must. All this has to be done by the Appropriate Commissions. If a Power Purchase Agreement breaks down and the generator approaches the Central Commission for redetermination of tariff, can the Central Commission say that it will not discharge its regulatory functions only because the Power Purchase Agreement has already been entered into? Is it so sacrosanct that it cannot be disturbed at all?

25. The Case for Opinion makes reference to the unreported judgment dated 5th March, 2002 of the High Court of Judicature at Bombay in Writ Petition No. 1205/2001, filed by the **Dabhol Power Company (DPC) against Maharashtra State Electricity Board (MSEB)**. I may mention that I had appeared for the MSEB in that case. There were serious disputes arising out of the PPA between DPC and MSEB. MSEB had terminated the PPA on the ground of misrepresentation. DPC insisted that the matter be referred to International Arbitration. MSEB approached the Maharashtra State Electricity Regulatory Commission. The Regulatory Commission stated that it would consider the aspect of jurisdiction. Before it could go into it, DPC filed a Writ Petition in the Bombay High Court which held that the aspect of jurisdiction would be determined by the Commission itself. In an appeal, the Supreme Court directed the Bombay High Court to consider the aspect of jurisdiction itself. This led to the judgment dated 5th March, 2002.

26. This was a case under ERCA, 1998. The High Court held that the special law pertaining to electricity (ERCA and the relevant statutory provision) overrode the arbitration clause. In my opinion, the reasoning of the High Court would apply with greater force in relation to the Electricity Act, 2003.

27. At this stage I may draw attention to the judgment of the Appellate Tribunal for Electricity in Appeal No. 35/2011 in the case of **Konark Power Projects Ltd. vs. Bangalore Electricity Supply Company Ltd.** In this case the Tribunal held that the State Commission has the power to modify the tariff for the concluded PPA in larger public interest. The Tribunal noted that the State Commission had also held that it had power to modify the tariff even in the case of a concluded PPA. The Appellate Tribunal has also referred to certain other previous orders. It has considered section 62(1)(a) in relation to the State Commission but the reasoning would apply even to the Central Commission.

28. I may point out that Bangalore Electricity Supply Company has filed a Civil Appeal in the Supreme Court. I appeared in the matter for Bangalore Electricity Company on 27th July, 2012 when Notice has been issued and stay has been granted. Though the effective portion of the order has been stayed, clearly a view has been taken by the Appellate Electricity Tribunal and until the Supreme Court reverses this in relation to PPAs, this point of view holds the field.

29. The word "regulate" has a wide import. If the word "regulate" does not include the power to revise/amend/alter or change the tariff then it could be argued that the Appropriate Commission will not be able to effectively discharge its functions under the Electricity Act, 2003. The case of **Tata Power Co. vs. Reliance Energy Ltd.** - (2009) 16 SCC 659 was in relation to the power of the Appropriate Commission to adjudicate upon disputes between licensees and

generating companies. It was held that the power of regulation also encompasses fixation of rates.

30. There is another way of looking at this matter also. All these cases of concluded PPAs are now arising by reason of one aspect, namely, increase in the price of inputs which has led to the demand for revising tariff. However, the matter can be looked at from a converse point of view also. If a tariff is fixed under a PPA on the higher side and then there is a sharp decline in the cost of the inputs for generating power and an application is made to the Commission for downward revision of the tariff, a Commission may not decline to interfere merely on the ground of a concluded PPA being sacrosanct, without considering the statutory duty to act as a Regulator.

31. What relief is to be granted is ultimately a matter for the appropriate Commission to consider in the light of its powers, functions, role and duties under the Electricity Act, 2003.

32. Turning to the third issue (see para 10), once it is held that the Central Commission is the appropriate commission for regulating tariff under PPAs where power is to be supplied in more than one State, it is immaterial whether a State Commission has already passed an order under Section 63 or 86(1)(b) of the Act. The Central Commission would nevertheless continue to be the appropriate commission.

33. I shall now deal with the Queries:

(Q.1) Which is the 'Appropriate Commission' to decide the disputes related to tariff in the PPAs of competitively bid projects where the Generating Company supplies to more than one State?

Ans: The Appropriate Commission is the Central Electricity Regulatory Commission which has the jurisdiction to decide on disputes in relation to a generating company which generates and supplies power to more than one State.

(Q.2) Would the word 'regulate' in Section 79(1)(b) even take in regulation/revision in price of rate adopted under Section 63 that was arrived at pursuant to Competitive Bidding?

Ans: Yes.

(Q.3) Would 'composite scheme of generation and sale in more than one State' in Section 79(1)(b) necessarily mean that a Generating Company should have had pre-identified beneficiary/buyers of the plant meaning thereby that it ought to have been originally conceived as to who would the beneficiaries/buyers be of the power to be sold by the Generating Company? If the Generating Companies which had identified only one buyer that is in the host State where the plant is located and thereafter added more units or more capacity and started supplying to beneficiaries/buyers outside the host State, can it be said that such a Generating Company has a 'composite scheme' within the meaning of Section 79(1)(b)?

Ans: No. A composite scheme arises not only at the stage of inception but also otherwise than under the original scheme. It applies to cases where power is generated and supplied to more than one States for more than one reason. This can include adding more units and more capacity.

(Q. 4) Which is the 'Appropriate Commission' to decide the disputes related to tariff in the PPAs of competitively bid projects where the Generating Company did not have pre-identified beneficiary/buyers in more than one State and in fact had identified only one buyer that is in the host State where the plant is located and thereafter added more units or more capacity and started supplying to beneficiaries/buyers outside the host State?

Ans: This has been already answered above, in relation to Query No. (3).

(Q. 5) Which is the 'Appropriate Commission' to decide the disputes related to tariff in the PPAs of competitively bid projects where the State Commission of one beneficiary (buyer) State has already passed an Order adopting the tariff under Section 63 or under section 86(1)(b) of the 2003 Act?

Ans: The Appropriate Commission is Central Commission, for the reasons given above. Once it is held that the Central Commission is the appropriate commission for regulating tariff under PPAs where power is to be supplied in more than one State, it is immaterial whether a State Commission has already passed an order under Section 63 or 86(1)(b) of the Act. The Central Commission would nevertheless continue to be the appropriate commission.

(Q. 6) Would it create an anomalous situation if the Generating Company has to approach the respective State Commission to adjudicate upon the dispute, and where one State Commission grants relief to the Generating Company qua the quantum of power supplied to that State but another State Commission rejects the claim of the

Generating Company qua the quantum of power supplied to that other State despite the cause of dispute being the same? If so, would the harmonious interpretation of various provisions of the Act make it desirable that the Central Commission (and not the State Commissions) should 'regulate' the tariff and adjudicate upon the underlying disputes?

Ans: Yes.

(Q.7) Any other matter on which the Ld. Attorney General for India may wish to opine on?

I have nothing further to add.

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