



GOPAL SUBRAMANIAM

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SOLICITOR-GENERAL OF INDIA

## OPINION

### Forum of Regulators

Through: Central Electricity Regulatory Commission ... Querist/Ex-parte

1. The Querist has sought my opinion on the interpretation of the proviso to section 86(1)(a) of the Electricity Act, 2003 (the "Act").
2. Section 86 of the act lays down the functions of the State Commission. Section 86(1)(a) reads as follows:

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

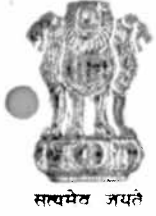
(a) Determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:

Providing 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;"

3. It appears from the above provision that where open access has been permitted to a category of consumers, the role of the State Commission is only to determine the wheeling charges and surcharge thereon. Various queries have been put to me, all concerning a situation where open access has been permitted to a consumer or a category of consumer. The principal issue is whether such consumer is then obliged to purchase electricity only through open access or whether it can choose to purchase electricity from the local distribution company like any other consumer, that is, whether open access is an option or an obligation for the eligible consumer.

### Analysis of Relevant Statutory Provisions

4. Some further provisions relating to open access may be considered. Under section 2(47) open access has been defined as follows:



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"open access" means the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulation specified by the Appropriate Commission;

5. Section 42 of the Act reads as follows:

(1) It shall be the duty of a distribution licensee to develop and maintain an efficient, co-ordinated and economical distribution system in his area of supply and to supply electricity in accordance with the provisions contained in this Act.

(2) The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross subsidies, and other operational constraints:

Provided that such open access shall be allowed on payment of a surcharge in addition to the charges for wheeling as may be determined by the State Commission:

Provided further that such surcharge shall be utilised to meet the requirements of current level of cross subsidy within the area of supply of the distribution licensee:

Provided also that such surcharge and cross subsidies shall be progressively reduced in the manner as may be specified by the State Commission:

Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use:

Provided also that the State Commission shall, not later than five years from the date of commencement of the Electricity (Amendment) Act, 2003, by regulations, provide such open access to all consumers who require a supply of electricity where the maximum power to be made available at any time exceeds one megawatt.

(3) Where any person, whose premises are situated within the area of supply of a distribution licensee, (not being a local authority engaged in the business of distribution of electricity



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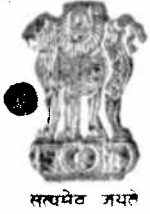
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before the appointed date) requires a supply of electricity from a generating company or any licensee other than such distribution licensee, such person may, by notice, require the distribution licensee for wheeling such electricity in accordance with regulations made by the State Commission and the duties of the distribution licensee with respect to such supply shall be of a common carrier providing non-discriminatory open access .

6. Section 42 is the substantive provision on open access. Sub-section (2) of section 42 of the Act provides the framework of introduction of open access by the State Commission and the factors and the factors it must bear in mind while introducing open access. It requires the State Commission to specify regulations in this behalf delineating the phases in which, and conditions under which, open access will be introduced for a specific category of consumers.
7. Sub-section (3) of section 42 provides that a consumer seeking open access shall give a 'notice' to the distribution licensee of his area of supply for wheeling the electricity contracted by him from a person other than distribution licensee and in such circumstances the duties of the distribution licensee shall be of a common carrier providing non-discriminatory open access.
8. Section 49 reads as follows:

Where the Appropriate Commission has allowed open access to certain consumers under section 42, such consumers, notwithstanding the provisions contained in clause (d) of sub-section (1) of section 62, may enter into an agreement with any person for supply or purchase of electricity on such terms and conditions (including tariff) as may be agreed upon by them.

9. This provision stipulates that where Appropriate Commission has allowed open access to certain consumers under section 42 of the Act, such consumers may enter into an agreement with any person for supply or purchase of electricity. There would be no determination of tariffs by the Regulatory Commission in such an event. This is also clear from the Statement of Objects and Reasons of the Electricity Act, 2003 which provides inter alia that "where there is a direct commercial relationship between a consumer and a generating company or a

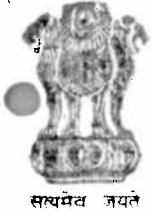


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trader, the price would not be regulated and only the transmission and wheeling charges with surcharge would be regulated”.

10. In my view, a plain reading of the above provisions leads to the following conclusions:
- (i) Prior to the enactment of the 2003 Act, there was no concept of open access. All consumers (except those having captive generation capacity) had to purchase electricity from the local distribution companies.
  - (ii) The concept of open access has been introduced in the 2003 Act for the first time, giving consumers the option to purchase electricity from a source other than the local distribution company. The term really implies non-discriminatory open access to the distribution network, on payment of the wheeling charges.
  - (iii) This option is available only to certain categories of consumers.
  - (iv) The Appropriate Commissions will have to make Regulations dealing with open access, how it is to be sought and provided, etc.
  - (v) When an eligible consumer desires to take open access, he must notify the local distribution company accordingly. In such an event, the State Commission will have the jurisdiction to determine wheeling charges, but not the electricity price.
11. It is clear that open access is a right, or an option given to eligible consumers. A consumer who is eligible for open access may for various techno-commercial reasons choose not to avail of this facility and opt instead to purchase electricity from the local distribution company. That option cannot be taken away from the consumer. Where it chooses to purchase electricity from the



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local distribution company, the usual retail tariff as determined by the State Commission will have to apply.

### Queries

12. The first query posed is whether the proviso to clause (a) of sub-section (1) of section 86 of the Act implies that the consumers who have been permitted open access are mandatorily required to take supply of electricity from a person other than the local distribution company.
13. In my opinion, there is no such mandatory obligation cast by the proviso. The contrary interpretation would force such consumers to take supply from such other source thereby curtailing the right and choice of such consumers to either take open access or take supply from the local distribution company. A combined reading of section 49, section 42 and Section 86(1)(a) makes it amply clear that category of consumers having open access are not mandated to take supply from person other than the local distribution company. The open access option, in this context, implies *freedom* to get supply from a person other than the distribution licensee of his area of supply. Section 42 being an enabling provision should not be interpreted to mean that all consumers satisfying the condition under regulations must necessarily avail open access. Sub-section (3) of section 42 of the Act, further makes it clear that consumers seeking open access can do so after giving notice. The distribution licensee will be mandated to provide non-discriminatory access to his network for such wheeling. As per the provisions of section 43 the distribution licensee is under an obligation to supply electricity as and when requested to do so, implying that the option and choices remain open to the consumers.
14. The second query relates to whether consumers having open access have a right but not an obligation to take supply of electricity from a person other than the local distribution company, and when the right to open access is not exercised, whether they could still take supply of electricity from the Distribution



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licensee of their area of supply by paying the retail tariffs determined by the State Commission under section (1) of section 86 of the Act.

15. The answer to the first query would hold good here as well. It will remain open to the consumer having open access to instead take supply of electricity from the local distribution company, if it chooses to do so. Further the distribution licensee as per the provisions of section 43 of the Act is under an obligation to supply electricity on receiving a request from the consumer in the area of supply. The price at which the electricity has to be supplied will be the retail tariff as determined by the State Commission.
16. The third query relates to the word “only” appearing in the said proviso implying that the State Commission is not to determine the retail tariff for the category of consumers who have been permitted open access. Would it consequently imply that the distribution licensee of their area of supply would no longer have the obligation to supply to these consumers?
17. In my view, the proviso has to be read with the fundamental obligation of the distribution company under Section 43 to provide supply of electricity when requested for such supply. As has been stated above, the eligible consumers in the area of supply have an option to take supply either from the distribution licensee or sources other than the distribution licensee. Being eligible to seek supply of electricity from a source other than the distribution licensee does not bar the consumer in the area of supply to instead opt to take supply from distribution licensee and does not relieve the distribution licensee of the obligation to supply.
18. With regard to the fourth query, in my opinion the word “only” appearing in the said proviso will have to be interpreted in the light of the other provision of the Act. The correct interpretation of the proviso is that when eligible consumers actually avail of open access, i.e. they purchase electricity from a source other than the local distribution company, wheeling charges alone would be payable



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- by them to the local distribution company as determined by the Appropriate Commission. But if they do not wish to take supply through open access they would still have the choice to take supply from the distribution licensee of their area of supply by paying the retail tariffs determined by the Commission, and the proviso would not come in the way of such determination.
19. The fifth query relates to whether the words "notwithstanding the provision contained in clause (d) of sub-section (1) of the section 62," and the word "may" appearing in section 49 imply that retail tariffs under clause (d) of the sub-section (1) of section 62 are to be determined notwithstanding the fact that the Appropriate Commission has allowed open access to certain consumers under section 42.
20. In view of the answers to the earlier queries, it follows that the Appropriate Commission must determine retail tariffs for all categories of consumers, including those eligible for open access. However, if such eligible consumers actually avail of open access, then the tariff determined by the Commission will not be applicable to them and their purchase will be governed by the agreed price as per Section 49. The Commission will only have the jurisdiction to determine wheeling charges in such cases. On the other hand, if such eligible consumers choose not to avail open access and instead procure electricity from the local distribution company, the retail tariff as determined by the Commission will apply.
21. I have nothing further to add, at this stage.

June 8, 2010  
New Delhi

  
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