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**OPINION**

My opinion has been sought on the interpretation of the fifth proviso to Section 42(2) of the Electricity Act, 2003. The said sub-section reads as follows:

> ***"42 (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.***" [Highlight supplied]

Specifically, my opinion has been sought on:

(i) Whether incorporation of fifth proviso to section 42(2) of the Act can be construed to mean that powers of the State Commission in terms of introduction of open access have been restricted and that the State Commissions can make regulations for introduction of open access for consumers with demand

exceeding one MW and not for consumers with demand of one MW and below; or

(ii) Whether incorporation of fifth proviso to section 42(2) of the Act should be interpreted to mean that the State Commissions have unhindered powers on introduction of open access for all consumers, subject to the condition that open access for consumers with demand exceeding one MW has to be necessarily introduced within five years from 27th January 2004 i.e. within five years from the date of effect of the Electricity Act.

Before adverting to the interpretation to be accorded to the fifth proviso to section 42(2), it may be useful to briefly analyze the statutory scheme and objectives.

The term 'open access' is defined in section 2(47) of the Act, as follows: *"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 regulations specified by the Appropriate Commission.*

The definition of the term open access contemplates open access in transmission (i.e. open access to the transmission network by generators and licensees) as well as open access in distribution (i.e. open access to the transmission / distribution network such that a generator may directly transact with the end-consumer of electricity).

In understanding the scheme for open access, as envisaged in the Electricity Act, 2003, reference may usefully be made to the duties of

generating companies, transmission licensees, and distribution licensees, as set out under the said Act.

Section 10 sets out the duties of a generating company, and sub-section (2) of section 10 states as follows: *"A generating company may supply electricity to any licensee in accordance with this Act and the rules and regulations made thereunder and may, subject to the regulations made under sub-section (2) of section 42, supply electricity to any consumer."* Under the Electricity Act, 2003, generating companies do not require a license. In accordance with the Act and rules and regulations made thereunder, they may supply electricity to licensees (i.e. distribution licensees or trading licensees). In addition, subject to the regulations made under section 42(2), they may directly provide electricity to "any consumer". It is important to note that as per the Act, the only restriction on the ability of a generating company to provide electricity to "any consumer" is that such supply of electricity must be subject to regulations made under section 42(2). Section 10(2) itself refers to "any consumer" and does not distinguish between bulk consumers and retail consumers. The term "consumer" is defined in an open-ended manner in section 2(15) of the Act.

Likewise, Section 40 sets out the duties of a transmission licensee, and sub-section (c) of section 40 states that it shall be the duty of a transmission licensee *"to provide non-discriminatory open access to its transmission system for use by – (i) any licensee or generating company on payment of the transmission charges; or (ii) any consumer as and when*

*such open access is provided by the State Commission under sub-section (2) of section 42, on payment of transmission charges and a surcharge thereon, as may be specified by the State Commission."* Again, section 40 contemplates that open access may be provided to "any consumer" as and when the State Commission makes regulations to that effect under section 42(2).

Section 42 is entitled "Duties of distribution licensee and open access", and sub-section (2) has already been extracted above. The main clause of section 42(2) empowers the State Commission to introduce open access in such phases, and subject to such conditions, as may be specified by it. Again, it may be noticed that the main clause in section 42(2) is worded in an open-ended manner, without – in any way – restricting the introduction of open access with respect to only a certain category of consumers.

Reference may also be made to the functions of the State Commission as set out in Section 86 of the Act. Section 86(1)(a) states that the State Commission shall determine the tariff for generation, supply, transmission and wheeling of electricity, *wholesale, bulk or retail,* as the case may be, within the State. Thus, explicit reference is made to different categories of consumers. The proviso to section 86(1)(a) proceeds to state 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. The phrase 'a category of consumers', as

occurring in the proviso to section 86(1)(a) must be interpreted to mean any of the categories of consumers referred to in the main clause of 86(1)(a). If open access could only be introduced for a restricted set of consumers (such as, for example, those whose requirements exceed one megawatt at any given time) there would be no need to refer to 'a category of consumers' in the proviso to section 86(1)(a). Rather, the proviso could directly have referred to that restricted category as contemplated in section 42(2). The fact that it does not do so, is an indication that section 42(2) contemplates open access for all categories of consumers. It is only the timing and sequencing of introduction of open access that is left to the State Commission, subject to such conditions as it may specify.

Thus, an analysis of the scheme of the Act (particularly, the sections setting out the duties of the generating companies, transmission licensees and distribution licensees) would clearly suggest that section 42(2) enables a State Commission to introduce open access for any category of consumers. The timing of such open access, and the sequencing of such open access – in terms of which categories of consumers are first permitted open access – is left to the State Commission, subject to such conditions as may be specified by it. This analysis of the scheme of the Act is in keeping with the goal of promoting competition in the electricity industry, as stated in the Preamble to the Act. Further, Section 66 of the Act states that the appropriate Commission shall endeavour to promote the development of a market in power. It is widely accepted that the electricity sector, like many other infrastructure sectors, involves an element of natural monopoly. A

natural monopoly exists in situations where, on account of various factors, it is more economically efficient to have one supplier, as opposed to competing suppliers. However, once a monopoly is allowed to exist, regulation becomes extremely important to protect the interests of consumers. However, in a given sector, a natural monopoly could exist in only one part of that sector. For example, in the electricity industry, a natural monopoly exists in transmission. It would not be efficient to allow competing transmission networks. But a natural monopoly does not exist in the generation and distribution segments. The Electricity Act, 2003, is predicated on a disaggregation of the various segments in the electricity sector, and seeks to introduce competition in some of these segments. The enabling provision for open access is a step in this direction, such that consumers may directly choose between different competing suppliers (i.e. generators). When consumers are allowed to directly transact with generators (subject to wheeling charges / surcharge etc.), it would create a market in electricity, and would lead to competitive pricing, which would ultimately benefit the consumer. The introduction of open access in foreign jurisdictions (such as the U.K.) has led to a fall in electricity tariffs. It is hoped that if introduced in a planned and phased manner, the introduction of open access in India may bring similar benefits to consumers. The manner in which open access is to be introduced (and the working out of wheeling charge / surcharge etc.) is therefore left to the individual State Commissions. But neither the scheme of the Act, nor the rationale behind open access would suggest that the introduction of open access is envisaged only for a restricted set of consumers (i.e. those whose demand exceeds one megawatt at any given time).

The interpretation to be placed on the fifth proviso to section 42(2) of the Act must be based on a correct understanding of the statutory scheme and objectives, as set out above. The said proviso was introduced through an amendment to the Electricity Act, 2003, which came into effect on January 27th, 2004. The Statement of Object and Reasons to the Amendment Act (which introduced the fifth proviso), clearly states that the objective behind amending section 42(2) was to address the apprehension that the State Commission could unduly delay the introduction of open access. Thus, the proviso seeks to specify a time-frame for phased introduction of open access. This is also evident from the Parliamentary Debates which have been appended to the Statement of Case placed before me. The fifth proviso to section 42(2) does not, in any manner, curtail the powers of the State Commission to introduce open access for any category of consumers. It merely makes it incumbent on the Commission to introduce open access for a certain defined category of consumers (whose demand exceeds one MW) by a specified date. Thus, instead of leaving the introduction of open access entirely in the hands of the State Commission, the Act now statutorily binds the respective State Commissions to introduce open access (for select defined consumers) by a specified date. This only seeks to expedite the introduction of open access for bulk consumers – it does not abridge the powers of the Commission to introduce open access for other consumers (i.e. retail consumers) in such manner and subject to such conditions as the Commission may specify. The main clause of section 42(2) must be interpreted on its own terms, and in light of the statutory scheme and objectives. Section 42(2) empowers the Commission to introduce open

access for any category of consumers. The fifth proviso goes further, and makes it mandatory for the Commission to do so by a specified date, insofar as bulk consumers (demand exceeding one MW) are concerned. The mandatory nature of the proviso cannot constrict the empowering provision contained in the main clause of section 42(2). State Commissions, therefore, are at liberty to introduce open access for any category of consumers, subject to conditions specified by the State Commission. Introduction of such open access would be in furtherance of the statutory objective of promoting competition in the electricity sector.

Therefore, interpretation (ii) as set forth in the Statement of Case is the correct interpretation to be placed on the fifth proviso to section 42(2) of the Electricity Act, 2003.

I opine accordingly.

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