

**Position Paper on  
Open Access**



**FORUM OF REGULATORS**

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## 1. INTRODUCTION

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1.1 The Electricity Act, 2003 aims at bringing about competition with the ultimate objective of ensuring efficiency gains resulting from competition for the consumers. Competition with regulatory oversight is the hallmark of the legislation - and it recognises the important role of the regulatory commissions in the wake of the challenges that opening of the sector poses for consumers and other stakeholders.

1.2 In the context of competition, open access is the corner-stone of the Act. Open Access has been conceived as an important tool of introducing competition in the electricity industry and ensuring choice to buyers and suppliers of electricity.

1.3 The Act envisages Open Access in transmission and distribution network. Open Access in transmission has been allowed from the very beginning and without any fetter. However, in so far as Open Access in distribution is concerned, the law envisages introduction of such Open Access in phases with due consideration of the operational constraints and existence of cross subsidy between consumer categories. This responsibility of phased introduction of open access in distribution has been bestowed on State Electricity Regulatory Commissions. Through an amendment in the Act, it has, however been provided that the State Commissions shall provide by January, 2009 open access to all consumers with load exceeding 1 MW.

1.4 The issue of open access for consumers with load exceeding 1 MW has been under discussion in recent past in view of the various interpretations floated in the context. The Government of India (Ministry of Power and Ministry of Law) in its latest interpretation on 30.11.2011 has articulated that Section 42 of the Act makes it mandatory for all consumers with load exceeding 1 MW to be open access consumers and that the tariffs for such consumers shall not be regulated by SERCs. It is in this context, that this discussion paper has been prepared.

1.5 The objective of the discussion paper is to generate debate and seek comments of the stakeholders on this issue. The paper outlines the relevant provisions of the Act, sequence of

interpretations and judicial pronouncements on the subject and solicits views and comments on the issues highlighted at the end of the paper.

## 2. LEGAL FRAMEWORK

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### 2.0 PROVISIONS ON OPEN ACCESS IN THE ELECTRICITY ACT, 2003

2.1 Section 2(47) of the Act defines “open access” to mean

*“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”.*

2.1.1 In this context it will be relevant to look at the definition of some other related terms.

- The term “**transmission lines**” is defined in Section 2(72) of the Act as follows:

*“ **transmission lines**” means all high pressure cables and overhead lines (not being an essential part of the distribution system of a licensee) transmitting electricity from a generating station to another generating station or a sub-station, together with any step-up and step-down transformers, switch-gear and other works necessary to and used for the control of such cables or overhead lines, and such buildings or part thereof as may be required to accommodate such transformers, switch-gear and other works”*

- “**distribution system**” is defined in Section 2(19) as follows:

*“ **distribution system**” means the system of wires and associated facilities between the delivery points on the transmission lines or the generating station connection and the point of connection to the installation of the consumers”*

- “**licensee**” is defined as a person who has been granted a licence under section 14;

- **“consumer”** is defined as “any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person, as the case may be”.

## 2.2 *Open Access in Transmission:*

- ✓ **Section 38 of the Act**, which deals with the CTU and its functions, provides as follows:

*“(1) The Central Government may notify any Government Company as the Central Transmission Utility:*

*Provided that the Central Transmission Utility shall not engage in the business of generation of electricity or trading in electricity:*

*Provided further ...*

*(2) The functions of the Central Transmission Utility shall be –*

*(a) to undertake transmission of electricity through inter-State transmission system;*

*(b) ....*

*(c) ....*

*(d) 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 the transmission charges and a surcharge thereon, as may be specified by the Central Commission:*

*Provided that such surcharge shall be utilised for the purpose of meeting the requirement of current level cross-subsidy:*

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

*Provided also that the manner of payment and utilisation of the surcharge shall be specified by the Central Commission:*

*Provided also that the manner of payment and utilisation of the surcharge shall be specified by the Central 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."*

✓ **Section 39 of the Act** deals with the STU and its functions and provides as follows:

*"(1) The State Government may notify the Board or a Government Company as the State Transmission Utility:*

*Provided that the State Transmission Utility shall not engage in the business of trading in electricity:*

*Provided further ...*

*(2) The functions of the State Transmission Utility shall be –*

*(a) to undertake transmission of electricity through intra-State transmission system;*

*(b) ....*

*(c) ....*

*(d) 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 the transmission charges and a surcharge thereon, as may be specified by the Central Commission:*

*Provided that such surcharge shall be utilised for the purpose of meeting the requirement of current level cross-subsidy:*

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

*Provided also that the manner of payment and utilisation of the surcharge shall 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."*

✓ **Section 40 of the Act** reads as follows:

*"40. It shall be the duty of a transmission licensee -*

*(a) to build, maintain and operate an efficient, co-ordinated and economical inter-State transmission system or intra-State transmission system, as the case may be;*

*(b) to comply with the directions of the Regional Load Despatch Centre and the State Load Despatch Centre as the case may be;*

*(c) 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 the transmission charges and a surcharge thereon, as may be specified by the State Commission:*

*Provided that such surcharge shall be utilised for the purpose of meeting the requirement of current level cross-subsidy:*

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

*Provided also that the manner of payment and utilisation of the surcharge shall be specified by the Appropriate 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.*

### **2.3 Distribution Open Access:**

✓ Section 42 of the Act deals with the provision of open access to distribution and reads as follows:

*“(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 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*

*(4) Where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply.*

*.....”*

2.3 Section 49 of the Act deals with the agreements with respect to supply or purchase of electricity and reads as follows:

*"49. 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."*

2.4 Section 86 deals with the functions of State Commission and its sub-section (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:*

*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;"*

### 3. SEQUENCE OF INTERPRETATIONS – OPEN ACCESS

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#### 3.1 SOLICITOR GENERAL OF INDIA'S OPINION DATED 08-06-2010

3.1.1 The Forum of Regulators (FOR) sought legal opinion from the Solicitor General of India on the following questions:

Queries:

- Whether section 86(1)(a) 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?

3.1.2 The Solicitor General of India opined as under:

- There is no such mandatory obligation cast by the proviso.
- 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.
- 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.
- 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.

A copy of the opinion is **enclosed** as **Annexure I**.

#### 3.2 ATTORNEY GENERAL OF INDIA'S OPINION DATED 07-12-2010

3.2.1 Two separate references were made to the Attorney General of India. One was in relation to the case for opinion received from the Adviser to the Deputy Chairman, Planning

Commission and the other one was regarding a note from the Ministry of Power which set out the views of the Adviser to the Deputy Chairman, Planning Commission and the view points of the Ministry of Power. The questions framed in the note from the Ministry of Power and the opinion of the Attorney General of India thereon, are as under:

Queries:

- 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)?

Opinion

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

Queries:

- Whether the SERCs can continue to regulate the tariffs for supply of electricity to the aforesaid open access consumers after January, 2009 ?
- Whether the jurisdiction of SERC 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) ?

Opinion

- 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.

A copy of the opinion is **enclosed** as **Annexure II**.

### 3.3 PLANNING COMMISSION'S INTERPRETATION DATED 12-01-2011

3.3.1 Upon studying the opinion of the Attorney General (AG) of India dated 07-12-2010, the Adviser to the Deputy Chairman, Planning Commission provided some further explanations to the learned AG as outlined below:

- First proviso to section 42 (2) of the Electricity Act, 2003 (before amendment) was 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".*

- The said proviso has been amended with effect from 15.06.2007. The amended proviso reads as follows:

*"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."*

- Amended proviso has done away with the option of providing open access prior to elimination of cross subsidies.
- It has since been made mandatory for the SERC to allow open access on payment of a surcharge (in addition to wheeling charges).
- A conjoint reading of Section 42(2) along with its first and fifth provisos suggests that as a category, all consumers of more than 1 MW are to be treated as open access consumers who do not require any further permission or approval of the SERC to exercise their right of open access.

3.3.2 In light of the above explanations, opinion of the learned AG was sought for the following:

*Whether a state regulatory commission can continue to regulate the tariff for supply of electricity to any consumer of 1MW above.*

### **3.4 ATTORNEY GENERAL OF INDIA'S OPINION DATED 31-03-2011**

3.4.1 Taking notice of the letter by the Adviser to the Deputy Chairman, Planning Commission dated 12.01.2011, the AG submitted that in his opinion dated 7.12.2010, he had quoted the unamended proviso to Section 42(2) of the Electricity Act, 2003. The AG opined as under:

- The reference in my earlier opinion to Section 42(2) does not appear to have been appropriate to the issue of open access for consumers who require the supply of electricity of 1 MW and above.
- The better view appears to be that Section 42(2) read with the First and Fifth proviso is a self contained code with regard to consumers who requires the supply of electricity of 1 MW and above. In the premises, I reconsider my opinion dated 07.12.2010 and answer the query as follows:

Q. Whether a state regulatory commission can continue to regulate the tariff for supply of electricity to any consumer of 1 MW above.

Ans. No, for the reasons set out hereinabove.

A copy of the opinion is **enclosed** as **Annexure III**.

### **3.5 MINISTRY'S LETTER DATED 30.11.2011:**

3.5.1 The Ministry of Power in its letter dated 30.11.2011 stated as under:

- ✓ An issue arose regarding the interpretation of several clauses pertaining to Open Access, such as section 42, 45, 49, 62 & 86 of the Electricity Act, 2003.
- ✓ The question was whether as per the provisions of the Electricity Act, bulk consumers (above 1 MW) shall be deemed to be open access consumers w.e.f. January 2009 in terms of the proviso of section 42(2) or whether the Act provides that Open Access shall be given to consumers who exercise a choice.

- ✓ It is quite clear that once a consumer becomes an Open Access consumer, the State Commission shall no longer fix the energy charges to be paid by him but will continue to fix the wheeling charges and surcharges in accordance with the provisions of the Act.
- ✓ Due to ambiguity in the interpretation of these provisions the matter was referred to the Ministry of Law & Justice by the Ministry of Power.
- ✓ Ministry of Law & Justice in consultation with Ld. Attorney General of India on 13.4.2011 opined that Section 42(ii) read with the first and fifth proviso is a self-contained code with regard to consumers who required the supply of electricity of 1MW and above and accordingly the State Electricity Regulatory Commissions cannot continue to regulate the tariff for supply of electricity to any consumer of 1 MW and above.
- ✓ Further, on the issue of Universal Service Obligation (USO) of distribution licensee as per the provisions of Section 43(1) of the Act and on the issue of serving of notice under section 42(3) of the Act the M/o Law & Justice in consultation with the Ld. Attorney General of India vide note dated 4.11.2011 has clarified that  
*“The provisions of section 42 need to be analyzed in relation to the duties of the distribution licensees and open access. While sub-section (2) requires the State Commission to introduce open access within one year of the appointed date the fifth proviso makes it mandatory for the State Commission to provide open access to all consumers who require supply of electricity where the maximum power to be made available at any time exceeds 1MW. The fifth proviso was introduced by Act 57 of 2003 with effect from 27th January, 2004. The first issue is if open access is made obligatory whether the distribution licensees will continue to have the responsibility of universal service obligations with regard to consumers whose requirements are in excess of 1MW.*
- ✓ An analysis of the various provisions (particularly section 49 of the Act) shows that if certain consumers want to have the benefit of the option to buy power from competing sources, then it is logical that DISCOMS do not have an obligation to compulsorily supply power to such consumers. If such consumers want power from the DISCOM then the terms and conditions of the supply would be determined in terms of section 49 of the Act also. Such an interpretation is logical and is in conformity with the Statement of Objects and Reasons of the Electricity Act, which encourages open access. Para 3 of the Statement

of Objects and Reasons states that the Act recognizes the need to provide newer concepts like power trading and open access”.

- ✓ Ministry of Law & Justice has further opined that “There is no conflict between the aforesaid conclusion and the provisions of section 42(3) of the Act which provides that a person requiring supply of electricity has to give notice in respect thereof. If the consumer intends to use the network of the DISCOMS, he has to give notice and upon such notice to DISCOM (it) is duty bound to provide non-discriminatory open access to its network. Section 42(3) cannot be construed to mean that giving of a notice is a pre-condition for the implementation of open access.” It would thus mean that the requirement of notice is only to communicate the open access consumer’s intention of using the DISCOM’s network as per the relevant regulations and not to seek its permission for the same.

3.5.2 Further, the letter of the Ministry of Power stated that:

- Steps may be taken for "immediate implementation" of the provisions relating to open access in the Electricity Act, 2003.

A copy of the communication dated 13.04.2011 from Ministry of power is **enclosed** as **Annexure IV**.

### **3.6 APTEL’S JUDGMENT ON UNIVERSAL SERVICE OBLIGATION (USO) IN CASE OF OPEN ACCESS**

3.6.1 APTEL’s judgment dtd. 11/7/2006: in the matter of universal service obligation Hindalco v/s WBERC (1 /2006)

In the above referred APTEL Judgment dealt with following questions of law

- Whether SERC ceases to have powers to determine the tariff once open access is permitted?
- Whether Open Access consumers cease to be consumers of local licensee?
- Whether the Discom continues to have USO for OA consumers?

- Whether the Discom is obliged to supply standby energy and if so under what condition?

### **3.6.2 APTEL in its judgment dtd. 11/7/2006 held as under:**

- *The Commission has proceeded on a wrong premise that it has no jurisdiction or power to determine tariff once open access is permitted and therefore any consumers seeking such open access should cease to be a consumer of area distribution licensee.*
- *This view of WBERC cannot be legally sustained*
- *Such a conclusion has been arrived at on an erroneous interpretation of Sec. 86 (1)(a)/42 and Sec. 49 of the Act as well as losing sight of the object behind the same provisions.*
- *Neither Sec. 38 (2)(d) nor Sec. 39 (2) (d) nor Sec. 42 (2) which provides for Open Access warrants or stipulates that existing consumers who seek an open access shall cease to be consumers of an area Discom.*
- *In law and as per statutory provisions so long as Appellant desires to continue its relationship with area distribution licensee and agrees to abide by the stipulation, there can be no direction or compulsion to sever its contractual relationship as a consumer*
- *Sec. 49 provides for an agreement being entered into when open access is allowed to consumers for supply or purchase of electricity on such terms and conditions including tariff as may be agreed upon. We do not find any justifiable reason for the direction issued by the Commission in this respect.*
- *So long as an open access consumer abides by the subsisting terms and conditions as are applicable to identical industries the Discom is obliged to supply and the standby energy has to be supplied subject to terms to be agreed between Discom and the OA consumers.*

#### 4. ISSUES FOR DISCUSSION/COMMENTS

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1. Competence for interpretation of the position of law - competence of Government of India (Ministry of Power and Ministry of Law in the instant case) vs. competence of regulator or of judiciary.

- One view is that once a law has been enacted, interpretation of the provisions rests with the judiciary or the appellate tribunal or the regulator which also has the powers of civil court in matters of its proceedings. Interpretation by any other authority including the Attorney General of India could at best be treated as an advisory and not binding. Further, the Electricity Act, 2003 provides that the Regulatory Commissions are to be 'guided by' the national electricity policy and tariff policy and the interpretation as in the instant case not being part of any policy - in fact, interpretation of the Act does not generally form part of the policy - the regulators cannot be required to be guided by any such interpretation.

- The other view is that the Ministry of Power being responsible for administration of the Electricity Act, 2003 as per the allocation of business of the Government of India, it can interpret the provisions of the law. Further, with due regard to the spirit of the provision in the Act requiring the Regulatory Commissions to be guided by the policy, it is incumbent on the part of the regulators to follow the instruction contained in the Ministry of Power's letter dated 30.11.2011.

In the light of the above, comments are invited on

- a. Competence for interpretation of the law; and
- b. Whether it is mandatory for the regulatory commissions to follow the interpretation by the Government of India?

2. Merits of interpretation of the Act by Government of India about mandatory open access for consumers having load exceeding 1 MW.

- The Government of India (Ministry of Power and Ministry of Law) has interpreted various provisions of the Act relating to open access to conclude that

- o(i) all consumers having load exceeding 1 MW are mandatory open access consumers (based on interpretation of the first and fifth provisos to section 42 of the Act);
- o(ii) the area distribution licensee does not have any universal service obligation for such consumers (based on interpretation of section 49 of the Act);
- o(iii) the regulator shall no longer fix the tariff (energy charge) for such consumers (based on interpretation of section 42 read with proviso to section 86 (1)(a) of the Act; and
- o(iv) the price of purchase of energy by such open access consumers from the area distribution licensee shall be mutually agreed between the distribution licensee and the open access consumers (based on interpretation of section 49 of the Act).

- The other interpretation in the context as emerging from the opinion of the Solicitor General of India, first opinion dated 07.12.2010 of the Attorney General of India and the judgment of the APTEL is that

- (i) open access is a choice and not a mandatory obligation based on combined reading of section 49, section 42 and section 86 (1)(a) of the Act;
- (ii) Statement of objects and reasons (SOR) to the Electricity (Amendment) Act, 2007 through which the first proviso to section 42(2) was amended reads as under :

*“3. Sections 38, 39, 40, 42, 61, 178 and 181 of the Act, inter alia provide for reduction and ‘elimination’ of cross subsidies. There has been a concern that though the cross subsidies may be reduced but elimination of such subsidies may not be feasible for the present. It is, therefore, proposed to amend the said sections so as to do away with the ‘elimination’ of cross subsidies. However, reduction of cross subsidies will continue.”* It is clear from the above that the basic objective of the amendment was to omit the word ‘elimination’. Deletion of the word ‘elimination’ of cross

subsidies has nothing to do with changing the character of open access from being an option to an obligation.

- (iii) the regulators are required under fifth proviso to section 42 (2), to 'provide by regulations' open access to all consumers having load exceeding 1 MW by January, 2009. This implies that enabling framework must be created through regulations by the regulators for exercising the option of open access by such consumers, and this proviso does not impose any condition, requirement or obligation on the open access consumers to mandatorily seek open access;
- (iv) the distribution licensee is under an obligation to supply electricity as and when requested to do so by consumers including open access consumers having load exceeding 1 MW (based on interpretation of the definition of 'consumer', universal service obligation under section 43, interpretation of Solicitor General of India, APTEL judgment dated 11.07.2006); and
- (v) in the event of consumers opting for open access, the SERCs shall fix only the wheeling charges and surcharge for such consumers.

In view of the above, comments are invited on the following:-

- a. Legal position as understood by the stakeholders, regarding open access for consumers having load exceeding 1 MW;
- b. How to reconcile the position as spelt out by APTEL and the legal opinion of Ministry of Law on the question of Open Access and Universal Service Obligation?

3. Implementation aspect:

- One view is that while open access is essential for encouraging competition, the operational constraints need to be factored to make open access possible.
  - o If it is interpreted that on grant of Open Access to a category of consumers, all consumers belonging to that category will be mandated to get power through Open Access route, they will be forced to contract power (electricity component) from other sources. Given that there is hardly any long-term surplus power available in the

country for open access consumers to source power from, they will be at cross roads with uncertainty about supply. Even if such consumers are able to contract power (possibly on short-term basis) there is no certainty about such contracted power reaching them without interruption, if they are connected to a meshed network along with embedded consumers (non-open access consumers). In the event of load shedding resorted to by the distribution licensee for a feeder where both open access consumers and embedded consumers (non-open access consumers) are connected, open access will be rendered infructuous.

- The other fall out could be that the consumers would be forced to buy the electricity component from the local licensee (not at regulated price) but at any arbitrary price dictated by the local discom. Given the aforesaid constraints, the local discom would definitely be in a dominant position to dictate terms.
  - Then there are questions of treatment of existing power purchase agreement - whether the embedded consumers bear the cost towards such power purchase (:an undue burden for such consumers!) or whether the cost is to be recovered from the open access consumers as stranded cost by way of additional surcharge (:open access charges in that event will be too cumbersome!).
  - There are issues regarding determination of cross-subsidy surcharge, standby charges, treatment of open access and embedded consumers in the ARR of the distribution licensee and more importantly the impact on tariff for embedded consumers. The issues relating to imbalance settlement, more so for consumers with varying load pattern also need to be addressed.
  - Independence of SLDC is a big question on implementation of open access today. Non-impartial role of SLDCs has already made open access a non-starter in many States. What happens to mandatory open access consumers in the face of the biased and non-cooperative attitude of SLDCs or for that matter the challenges posed by invoking of section 11 by States to restrict export of power.
  - FOR examined various aspects on implementation of OA for bulk consumers, including the impact analysis for discoms and consumers. Details are **enclosed** as **Annexure- V**.
  - A brief note on the developments in different States, following the letter dated 30.11.2011 of the Ministry of Power is enclosed as **Annexure-VI**.
- The other view is that these are implementation issues which must have been /must be sorted out by the regulators, and existence of these constraints cannot be cited as reasons for non-implementation of the provision of the Act.

In view of the above, comments are invited on the following:

- a. Challenges of mandatory open access for consumers having load exceeding 1MW, and the way forward;
  - b. Preparedness required in terms of changes in Supply Code, consumer grievance redressal mechanism, performance standards, energy accounting, scheduling, imbalance settlement, etc.;
  - c. Requirements of change in filing Annual Revenue Requirement for embedded consumers;
  - d. Treatment of Power Purchase Agreements - allocation of costs.
4. Any other related aspect.