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Ex parte

Central Electricity Regulatory Commission ... Querist

1. My opinion is sought on two questions relating to interpretation of Section 42 of the Electricity Act, 2003.
2. At the time the Electricity Act was introduced, concerns were expressed in Parliament that introduction of open access without any time-frame could be unduly delayed by the State Electricity Commissions or State Governments. The then Minister of Power agreed with the suggestions made in respect of Clause 42 of the Bill. He also agreed that a time frame of 3 to 5 years should be given for bringing open access in the distribution of power.
3. In order to answer the queries raised in the opinion it becomes necessary to analyse Section 42 of the Act which reads as follows:

“42. (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 utilized 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."

4. The scheme of Section 42 is clear.

- (A) It casts a duty on the distribution licensee to develop and maintain an efficient, coordinated and economical distribution system under Section 42(1).
- (B) The State Commission is required to introduce open access within one year of the appointed date in such phases and subject to such conditions as may be prescribed.

(C) The fifth proviso brings in the required time frame and provides that the State Government shall, no later than five years from the date of the commencement of the Electricity (Amendment) Act, 2003, provide by regulations 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.

5. In this background I shall proceed to answer the queries.

Q.(i) Whether incorporation of fifth proviso to section 42(2) of the Act can be construed to mean that powers of the State Commissions 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;

Ans. In my opinion, the incorporation of the fifth proviso does not restrict the powers of the State Commissions. The mandate given to the State Commissions under Section 42(2) subsists. It is bound to introduce open access in such phases and subject to such conditions as may be specified within one year of the appointed date. All that the fifth proviso does is to introduce a time frame in relation to consumers who require a supply of electricity where the maximum power to be made available at any time exceeds one megawatt.

In law the meaning of a proviso is clear. It only limits the operation of the main section to the extent specified therein. A proviso cannot be read beyond its literal scope.

In **Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subhash Chandra Yograj Sinha** AIR 1961 SC 1596, Hidayatullah,

J. enumerated the general rule of construction of a proviso in the following words:

“As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment, and ordinarily, a proviso is not interpreted as stating a general rule”

In **Haryana State Cooperative and Development Bank Ltd. v. Haryana State Cooperative Land Development Banks Employees Union and Another (2004) 1 SCC 574**, it was held that:

“The normal function of a proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment...The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined to that case.” (para 9)

The effect of the fifth proviso, therefore, cannot be read to mean that it does away with the obligation cast on the State Commission to introduce open access. That obligation continues under Section 42(2) and is untouched. Therefore, for all other consumers whose requirements are less than one megawatt, the State Government continues to be charged with the duty of providing open access in such phases and subject to such conditions as it deems fit. In my opinion, incorporation of the fifth proviso does not restrict the powers of the State Commissions. The State Commission can make regulations for introduction of open access to consumers whose demand is one megawatt and less.

Q.(ii) Whether incorporation of fifth proviso to section 42(2) of the Act should be interpreted to mean that the State Commission have unhindered powers on introduction of open access to 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.

Ans. Yes. The State Commissions have unhindered powers to introduce open access to all consumers. This is subject only to the condition that for consumers whose demand exceeds one megawatt, open access has to be introduced within five years from 27 January 2004.

6. I have nothing further to add.



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