No. 23/1/2008-R&R (Vol-IV)
Government of India
Ministry of Power
***

Shram Shakti Bhawan, Rafi Marg,
New Delhi, 30th November, 2011

To

1. Chairperson, Central Electricity Authority, New Delhi.
2. Principal Secretary/Secretary(Energy) of State Governments/UTs.
3. Registrar, Appellate Tribunal for Electricity, New Delhi.
4. Secretary, Central Electricity Regulatory Commission, New Delhi.
5. Secretary, State Electricity Regulatory Commissions/JERCs.
6. Chairmen, State Power Utilities/SEBs.
7. Chairmen, CPSUs under Ministry of Power.
8. Adviser to Dy. Chairman, Planning Commission, New Delhi.
9. CEO, POSOCO, New Delhi.
10. DG, BEE, New Delhi.

Subject: **Opinion from M/o Law & Justice on the Operationalization of Open Access in Power Sector.**

Sir,

The concept of open access in the electricity sector was introduced in the Electricity Act, 2003 with a view to promoting competition and providing the consumers a choice and was clearly perceived as a critical feature of power market development and competition.

2. 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.

3. 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.***

4. 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

..contd...2/-

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 DISCOM 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".**

5. **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.

6. In view of the above stated opinion of M/o Law & Justice in consultation with Ld. Attorney General of India, all concerned may note that all 1 MW and above consumers are deemed to be open access consumers and that the regulator has no jurisdiction over fixing the energy charges for them. It is requested that necessary steps for immediately implementing the provisions relating to open access in the Electricity Act, 2003 may be taken in the light of the above opinion.

Yours faithfully,

(Pranay Kumar)
Director
Tel: 2371 5250