

MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION, BHOPAL

Sub: In the matter of Suo-Motu Petition about the Commission's jurisdiction for determination of retail supply tariff for the consumers having requirement of power exceeding 1 MW and whether these consumers are now to be considered as deemed open access consumers.

ORDER

Date of public hearing 6th & 7th Aug., 2012

Date of order 05/09/2012

1. The MP Electricity Regulatory Commission (hereinafter referred to as the "Commission") received a communication dated 30.11.2011 from the Ministry of Power, Government of India, wherein, based on opinion obtained from the Attorney General of India, it was opined that all 1 MW and above consumers are deemed open access consumers and that the Commission has no jurisdiction over fixing energy charges for such consumers. Taking note of the huge ramifications of this surmise, the Commission decided to initiate Suo-Motu proceedings to solicit views from stakeholders as to (i) whether the consumers having load in excess of 1 MW be treated as deemed open access consumers and (ii) such consumers be mandated to source power through open access alone and (iii) whether or not the Commission has jurisdiction to determine retail supply tariff for such consumers. The issues involved in the Suo-Motu Petition are:

- (1) In accordance with the provisions of the Electricity Act 2003 (hereinafter referred to as the "Act"), exercising the powers conferred on it under Section 39 (2) (d), 40 (c), 42 (2) & (3), 86 (1) (c) read with Section 181 (c), the Commission has notified the MPERC (Terms & Conditions for Intra-State Open Access in MP) Regulations, 2005 on 16th June, 2005. Regulation 3.3 (iii) of the said Regulations provides that consumers having contracted power of 1MW and above may avail open access in the state from 1st October, 2007. Thus open access in the state is operational but option to avail open access remains with such consumers.
- (2) The issue whether the consumers requiring power in excess of 1 MW have to source their power independently through open access alone, has been under consideration for some time with the Ministry of Power (MoP), Forum Of

Regulators (FOR) and Planning Commission. The legal opinion in the matter was sought on three occasions by MoP in which different views were expressed. It has emerged from the latest legal opinion that :

- a. The State Electricity Regulatory Commissions do not have jurisdiction to determine retail supply tariff for consumers requiring power in excess of 1 MW and
 - b. All the consumers (existing or new) who require power in excess of 1 MW shall have to be treated as deemed open access consumers and that they shall have to arrange their power independently on mutually agreed tariff either from independent sources or from the distribution licensee.
- (3) The matter was discussed at one of the FOR meetings and it was decided that views of the stakeholders be obtained in the matter. A position paper on these issues was circulated by FOR giving details related to open access to consumers whose requirement of power exceeds 1 MW. The position paper discussed at length various provisions of the Act, opinion given by Solicitor General of India, Attorney General of India and views of the Planning Commission. The position paper also included the advice of the Ministry of Power in the matter that the consumers requiring power in excess of 1 MW be treated as deemed open access consumers and accordingly the steps be taken for implementation. The issues raised and decided in the judgment of APTEL in respect of obligation to supply were also included in the position paper.
- (4) The position paper had brought out the following specific issues in the matter for consideration and submission of views by stakeholders:
- (i) Competence to interpret the position of law.
 - (ii) Merits of interpretation of the Act by the Government of India about mandatory open access for consumers having load exceeding 1 MW.
 - (iii) Implementation aspects

(5) In addition to the above, the Commission pointed out the following issues :

- (i) Difficulty in determination of surcharge for OA consumers: Surcharge on OA consumers to compensate for the cross subsidies to the distribution licensees is determined by the Commission in accordance with the formula for levy of surcharge as provided at Clause 8.5.1 of the Tariff Policy. The formula is:

$$S = T - [C (1 + L / 100) + D]$$

Where

S is the surcharge

T is the Tariff payable by the relevant category of consumers

C is Weighted average cost of power purchase of top 5% at the margin excluding liquid

fuel based generation and renewable power

D is the Wheeling charge

L is the system Losses for the applicable voltage level, expressed as a percentage

It may be seen from the formula that “T” is the tariff payable by the relevant category of consumers. As per the contention mentioned earlier, the consumers with the distribution licensee shall be those whose power requirement would be 1 MW or below for which the Commission shall determine the tariff and for the consumers requiring power in excess of 1 MW no tariff will be determined by the Commission. Therefore, since there will be no tariff fixed for the category of consumers requiring power in excess of 1 MW, the value of T will not be known. The Commission therefore will not be in a position to determine the surcharge payable by such open access consumers.

- (ii) Increased burden of tariff on the remaining consumers of the Distribution Licensee. : If all the consumers requiring power in excess of 1 MW go out of the net of the Distribution Licensee then, in that case, the present LT/HT sale ratio would get adversely affected as the sale of HT category would get substantially reduced. Since the distribution losses are very low for HT consumers as compared to LT consumers, it will have adverse impact on the overall percentage level of distribution losses in licensees' area. The present level of normative distribution losses worked out on the basis of existing LT/HT sale ratio may have to be revisited. Normative loss levels prescribed now may require upward revision based on the changed scenario to make it reasonable/realistic. This may result in increased tariff burden on the consumers of the licensee.
- (iii) Change in allocation of power: The Distribution Licensee in such a scenario would be obligated to plan for procurement of power on long-term basis for consumers excluding the consumers requiring power in excess of 1 MW while at present power procurement planning is for all consumers including those with more than 1MW load. As sale of power will substantially reduce, consequent requirement of power for such sale would be much lower than at present. As a result, the Distribution Licensee may not require to avail power from long-term generators whose tariff is comparatively higher. However, since the PPAs with such generators have already been executed, the fixed cost to the generators might have to be paid. Will it be proper to recover this cost from consumers below 1MW?
- (iv) Viability of the Licensee: Present financial condition of the licensees is not satisfactory and they are struggling to contain their losses. If the consumers requiring power in excess of 1 MW go out of the net of Distribution Licensee, it would further adversely affect the financial viability of the Distribution Licensee resulting in poor services to the existing consumers.

2. The Commission registered a Suo-Motu petition and through a public notice issued on 18.5.2012 invited the comments/suggestions/objections from the stakeholders on the aforesaid issues by 30.6.2012. In response, the office of the Commission received written comments/objections/suggestions from 42 stakeholders. List of the stakeholders who filed their written submission is attached as Annexure – I. Brief details of the submissions made by the stakeholders are narrated in the following paragraphs:-

I. Government of Madhya Pradesh.

The Govt. of MP opined that views communicated by MoP, GoI of considering consumers having load of 1 MW and above as deemed open access consumers, appears to be contrary to the provisions of the Act. In terms of the Act, the distribution licensee has the universal obligation to supply electricity to the consumers in its area of supply including those who may seek connection for the first time. There is no distinction made between consumers having a demand of up to 1 MW or in excess of 1 MW or between the consumers availing of or entitled to avail open access and consumers who do not avail and who are entitled to open access. In this regard in its Judgment dated 11.07.06 (in Appeal no. 1 of 2006 between Indian Aluminum Co. Ltd. and WBERC and others) Hon'ble APTEL has held that when Appellant is not called upon to sever its existing consumer's relationship with licensee and continues its contractual relationship, the licensee is obliged to supply power and WBERC had proceeded on a wrong premise that it has no jurisdiction or power to determine tariff once open access is permitted and that this contention cannot be legally sustained. In another judgement (in M/s Bhushan Steel Limited V/s WBERC & other), Hon'ble APTEL held that WBERC has no justification nor any authority to direct the appellant to sever its status as consumers with WBSEB and such condition is not contemplated to be imposed while allowing an application for open access. These decisions are binding on the Commission and the distribution licensees until superseded by a judgment of the Hon'ble Supreme Court or reconsidered by the Hon'ble APTEL. Hence, the open access availability can not release the distribution licensee of its obligation to supply electricity and there is no requirement that a person seeking open access should forego its entitlement to receive electricity from distribution licensees and therefore MoP's contention that licensee have no universal service obligation to consumers having load in excess of 1 MW is without any basis and

contrary to the provisions and objectives of the Act. Any person having load in excess of 1 MW may opt for open access, however, it is always a choice and desire of the consumer concerned.

Presently, the existing consumers are dealing only with distribution licensee for all their requirement and subsequent to operationalisation of the said provision, such consumers who will be required to source their power from generators / IPPs, also have to separately enter into contracts / agreements with transmission service providers and distribution companies for availing services of their network which is likely to result in undue complexity. Further, given the current power deficit scenario in the country, such consumers may find it difficult to source their power from IPPs. Further, there are about 500 consumers having load of 1 MW and above in the state who contribute about 80% of HT revenue and nearly 30% of total revenue receipts. It is stated that forcing existing consumers having load in excess of 1 MW to go in for mandatory open access would skew the revenue stream of the Discoms and would have adverse impact on their commercial viability. It would also result in disproportionate tariff hike for the subsidized category of consumers. The deemed open access consumers are likely to determine the cost of power on negotiable basis with Discoms of respective areas wherein Discoms may find difficulties in negotiating the same in view of their stressed financial condition.

Without determination of any tariff by the Commission for consumers having load of 1 MW and above, cross-subsidy surcharge for open access consumers can not be determined according to the formula provided in the tariff policy (as in the formula “T” is attributed as the tariff payable by the relevant category of consumers)

The right of the consumers to exercise their option to choose between the open access and retail supply route cannot be denied and enforcing mandatory open access to the consumers having load in excess of 1 MW would be contrary to the provisions of the Act. Further, the consumers who find open access route more beneficial may still switch over from retail supply route to open access route for which enabling provisions already exist in the Act. The Central Govt. has no authority to interpret the provisions of the Act. In terms of Section 183 of the Act even the power to remove difficulties through Orders can be exercised only for two years, a period which is long over. Further, the State Government has also specifically stated that the Central Govt. cannot issue policy directives to the State Commission under the Act in the matters of distribution and supply

of electricity to consumers. Therefore, there is no validity of the letter of the MoP. In any event, the views expressed by the Central Govt. are contrary to specific provisions of the Act. Otherwise also, the acceptance of the Central Govt. views will result in serious consequences both to the utility and the consumer and it is not in the interest of anyone.

II. MP Power Management Company Limited.

The MP Power Management Co. Ltd. referring to section 42(2) of the Act stated that a holistic consideration of the spirit, principles involved and the contexts available in the Act shows the intent of this particular stipulation, which simply, is that the Regulator has been entrusted with the responsibility of framing and giving effect to the Regulations, within the time limit of five years specified therein, for making available the facility of open access to the consumers having requirement of power in excess of 1 MW. The context clearly means that the stipulation in question has placed a time limit on the phasing of introduction of the facility of open access to the consumers, by specifying a time limit in respect of larger or bulk consumers (i.e. those exceeding 1 MW), rather than anything else. The phrasing, syntax or particular words used therein, leaves hardly any scope of interpreting this stipulation as making it mandatory to categorize and treat consumers requiring power above 1 MW as “open access” consumers. If interpreted in that way, this legislative stipulation would specifically “define” the consumers above 1 MW as “open access” consumers as opposed to the normal retail consumers. Actually, this would mean an unprecedented legislative turnaround through a circuitous route, which should customarily be achieved through a direct, express and transparent fundamental stipulation. Any legislation should not allow subsidiary provisions to override the primary stipulations, in any manner or context.

From another point of view of general importance, the Act postulates and upholds the primacy of the consumer. Any consumer situated in a particular licensed area of supply, cannot be bound by any subsidiary regulation to seek or avail supply only through the avenue of open access. By any means, the primary right of choosing the mode and source of supply should belong to the consumer.

There would be sudden drastic reduction in the high value consumer base of the Discoms and, consequently, in their revenue receipts. Further, the loss level (T&D as well as AT&C loss level) of Discoms, with the consumers above 1 MW left out, would

shoot up very substantially and would certainly necessitate upward revision of the loss trajectory, resulting in increased burden to be passed on to the “residual” retail consumers. It is very important to highlight, that, even without the consumers above 1 MW, the fixed operating costs of the Discoms and other associated entities would remain, more or less, the same. Moreover, these costs would have to be shared by a substantially lower value and even marginal subsidized consumer base.

The scheduling of long-term power in the Discoms may be totally dislocated, as, there would be a very large supply-demand differential. Also, in case of breakdowns and non-availability of power from the “open-access” sources, there cannot be a guarantee of supply availability to the open-access consumers.

The projections made for returns from many capital projects being implemented would need revision.

The determination of surcharges, as provided for in the Act- i.e. cross subsidy surcharge and additional surcharge(for meeting the fixed costs), would be a difficult proposition and a major bottleneck in the absence of a retail tariff for consumers exceeding 1 MW.

By referring to the Hon’ble APTEL’s judgments (same as referred to by the Govt. of MP), the MP Power Management Company Limited stated that the consumers of 1 MW and above cannot be considered as deemed open access consumers. Whosoever is willing to opt for open access, may be permitted to avail of this facility.

III. Distribution Companies of the State

The responses of the three Distribution Companies of the State viz. East Discom, Central Discom and West Discom are generally in sync with the views of the State Govt. and Power Management Co. Ltd. East Discom has elaborated the issues flagged as per following details:-

- a. For determination of cross subsidy charges, the average tariff for relevant category of consumer has to be known. If no tariff is determined by the Commission, it would not be possible to determine the cross subsidy surcharge. Further, amendment in the section 42(2) of the Act was purposely brought out to delete the terms “elimination of cross subsidy” and therefore intent of the Act is very clear and the cross subsidy is to be retained for the present. The Commission

- should continue to determine retail tariff for all categories of consumers so that cross subsidy surcharge may be determined as per provisions of tariff policy and Act till it progressively reduces. In the absence of determination of cross subsidy, Discom would not be able to generate enough revenue to make payment of power purchase even for the remaining consumers.
- b. Sale to consumers having demand of above 1 MW accounts for roughly 46% of the total sale in the company and the loss levels of these consumers are very low in comparison to the remaining consumer categories. Therefore, present level of normative loss level will have to be revised upwards resulting in significant increase in retail tariff across all remaining categories of consumers.
 - c. Power requirement of Discom is met generally through long term power purchase contracts with Generators and nearly 97% energy was procured through long term contracts during FY 2011-12. Further, the requirement of power will be reduced by nearly 40 to 45% in case consumers of demand above 1 MW go out. Since it may not be necessary that all these consumers will procure energy from Discom /Power management Co. Ltd through open access and in that case, fixed cost of generators with whom PPAs have already been executed will have to be loaded in the ARR resulting in exorbitantly high increase in retail tariff across all remaining categories of consumers.
 - d. Consumers having demand of 1 MW and above account for revenue to the tune of about 45% of the total revenue of the Discom. It is stated that the financial position of Discom is precarious at present and the Company is struggling hard to contain the losses by undertaking massive capital works. The Discom is required to repay the debt in the coming years for which regular stream of revenue is essential. It is stated that with the revenue of such high value consumers denied to Discoms, there is every likely hood of default in debt servicing.
 - e. Regarding competence for interpretation of law in the subject matter, the Company is of the view that only Judiciary can decide on the correct interpretation of the Act. The Company has stated that the Commission being a quasi-judicial body constituted under the provisions of the Act is not bound by the interpretation of the GoI and can draw their own interpretation of the provisions of the Act.

- f. As regards the legal position in the matter, the Company opined that consumers whose demand is exceeding 1 MW and above in the state have already been provided open access with effect from 01.10.07. Any such consumer can seek open access permission which is required to be accepted within the provisions of the prevailing open access regulations.
- g. For implementing the mandatory open access for consumers having load exceeding 1 MW, all regulatory frame work would require to be revisited so as to protect the interest of the consumers at large as well as that of Discoms. The Company is of the view that preparedness is required in terms of change in Supply Code, consumers' grievance redressal mechanism, performance standards, energy accounting, scheduling and imbalance settlements etc.
- h. On the issue of requirement of change in filing ARR for embedded consumers, the Company is of the view that after mandatory open access is implemented, the Discoms cannot anticipate income from sale of power to OA customers in case of short term open access. Further, ARR can only be filed taking into account the anticipated firm income from retail supply of power and long term open contracts, if any. Another issue of fixed charges of spare capacity of Generators would require to be addressed. Spare capacity of Generators would be created because of going away of above 1MW capacity consumers; as such these consumers should be loaded with the burden of fixed charges of spare capacity of Generators. These charges can be recovered as additional surcharge as stipulated in the Act. In case, these charges are not recovered, it would result in exorbitant tariff hike for large sections of consumers which will definitely give rise to resentment.
- i. With regard to treatment of power purchase agreement and allocation of cost, the Discom stated that some mechanism must be developed so as to ensure that fixed cost of spare capacity of Generators is not passed on to the remaining consumers which comprise about 90% of the total consumers. These fixed charges should be recovered from all OA customers as additional surcharge on their power requirement irrespective of the fact that they source power from Discom or through any 3rd party so that the terms and conditions of existing power purchase agreements are fulfilled and remaining consumers may be protected from exorbitant tariff hike.

- j. Further, schemes of capital works are planned and executed keeping in view of the future level of consumer growth. With the going away of consumers of demand above 1 MW, the distribution planning and long term transmission planning would be required to be revisited. The issue of payment of long term transmission charges would also require to be settled as after going away of above 1 MW capacity consumers, Discom may not require present level of transmission capacity but would require to pay for full capacity on the basis of long term transmission agreement.

IV. MP Power Transmission Co.

The MP Power Transmission Co. Ltd. submitted that amendment in the 5th proviso of Section 42, only means that before amendment it was the discretion of the Commission to bring such regulations or not, within 5 years, whereas after amendment it has become obligatory for the Commission to bring such regulations by the specified time. However, the option of the consumers with requirement of power more than one megawatt, to go for open access or not is still intact, and until and unless a consumer gives an application / notice for open access, he remains a retail consumer of distribution licensee. The interpretation of the words “may” and “shall” in original and amended provisions of the Act under Section 42 of the Act does not mean that the inherent powers under the Act of the Commission to decide tariff for above one MW consumers are withdrawn but to specify time limit by which the Commission has to allow open access through regulations. The choice to avail open access remains with the consumer. To the extent power is availed by a consumer under open access, the Commission is not required to determine electricity charges but only Transmission / Wheeling charges. Whereas for power availed from distribution licensee, the tariff is to be determined by the Commission. Had it been the intention of the law makers to make all the consumers with the requirement of more than 1 MW as deemed open access consumers by changing “may” to “shall” in the fifth proviso of Section 42(2) of the Act, the contents of Section 43 would also have been amended by inserting a proviso that consumers having requirement of supply of more than 1 MW would not be covered under this Section 43 of the Act. Any change in this section (such that it is not applicable to consumers with

electricity requirement of above 1 MW) needs to be explained to the law makers and has to be brought in this section only.

A careful reading of Section 49 makes it clear that this is applied where appropriate Commission has allowed open access and not for negotiating terms and conditions with the distribution licensee. In this case the distribution licensee is purchasing power from generating sources and selling it to consumer by his own network. This is a distribution function and cannot be called open access.

Section 42(3) of the Act also mentions that question of wheeling arises only when consumer requires supply of electricity from a generating company or any licensee other than such distribution licensee.

In case the distribution licensee is allowed to sell power to different consumers at different rates (mutually negotiated) this may lead to complaints of discrimination and corruption.

V. M/s. Electricity Consumers' Society and others :

M/s Electricity Consumer's Society, All India Manufacturing Association and M.P. Textile Mills Association submitted that

- a) National Electricity Policy was published in the Gazette of India on 12-02-2005 and the tariff Policy on 6th January 2006. Both the Policies are due for revision. Thus, in the new policies to be issued, detailed guide lines on implementation of 'Open Access' could be incorporated. It may be recalled here that the Act stipulates that the policy is to be prepared in consultation with State Governments. Thus the New Electricity Policy and Tariff Policy could issue guidelines for implementation of 'Open Access' under provisions of the Electricity Act 2003. The matter could wait until then.
- b) Section 10(2) of Act 2003 stipulates that a generating company may subject to the regulations made under sub section (2) of section 42 supply electricity to any consumer. Thus it is submitted that the regulations ought to stipulate the conditions of supply besides wheeling charges and cross-subsidy surcharge for generating company supplying power to consumers.

- c) Section 52(2) of the Act in respect of trading of electricity provides that “every electricity trader shall discharge such duties in relation to supply and trading in electricity as may be specified by the appropriate Commission”. In this regard, rules for traders for directly supplying consumers under open access can be framed by regulators.
- d) Further, open access supply can be either by another licensee, generating company or a trading company. All these companies shall supply power under a ‘license’ except generating companies. As mentioned above the generating company is also bound by regulations framed under Section 42(2). Thus the regulator is fully authorized to make regulations for supply of power under open access.
- e) The regulations framed under Section 42(2) should cover not only determination of wheeling charges and Cross-subsidy surcharge but may also regulate the conditions of supply of power under Open Access.
- f) Clause 3.5 of MPERC (Terms and conditions for Intra State open access in M.P.) Regulation 2005 provides that the Commission may allow open access to consumers less than 1 MW at such time as it may consider feasible having regard to operational constraints and other factors. Thus while making Regulations, the possibility of all H.T. consumers getting covered under open access needs to be considered.
- g) Supply through open access is analogous to Section 62(1)(d) which provides that in case of distribution of electricity in the same area by two or more distribution licensees, the appropriate Commission may for promoting competition amongst distribution licensees, fix only maximum ceiling of tariff for retail sale of energy. In the context of the above, open access supplier can be treated as second supplier and tariffs of consumers above 1 MW be continued to be determined which could be a ceiling.
- h) In order to introduce competition, flexibility needs to be given to distribution licensees by invoking clause 8.1 (4) of Tariff Policy which is as under:

“Licensees may have flexibility of lower tariffs than approved by the State Commission, if competitive conditions require so without having a claim on additional revenue requirement on this account in accordance with section 62 of the Act”. This will enable the area’s distribution licensee not to lose their valuable customers.

- i) The Society wonders whether through regulations, the Open Access supplier can be made a franchisee of the licensee under ambit of Section 14 provision 7 of the Electricity Act 2003 which permits a licensee to appoint Franchisee in his area of supply.
- j) The common consumer is a conservative consumer and will only opt for change of supplier for his benefit only, if the tariffs, rules and regulations are transparent. Section 49 of the Act 2003 creates a veil of secrecy, which generally is unlikely to be easily acceptable. In the definition of consumer in Electricity Act 2003, it is stated that electricity supplied by a licensee or Govt. or any other person authorized under the Act. Thus an open access supplier is one authorized by the Act, his tariffs and conditions of supply have to be transparent and publicly available. Provision to this effect has to be made in the regulations.
- k) Open access and competition will remain a distant dream unless the regulations for working out cross-subsidy surcharge are made on realistic and factual basis. There is a blatant violation of provision 4 of section 42 (2) which states “Provided also that such surcharge and Cross sub-sides shall be progressively reduced in the manner as may be specified by the State Commission”. If competition has to come the cross subsidy has to be as minimum as possible.
- l) It is essential to carry out a survey of existing open access consumers in the State. It will be seen that most of these consumers avail short term open access. This is because of uncertainties both in the supplier’s rates, and the cross-subsidy surcharge. Unless there is stability in both the rates long term open access will not come up.

m) In view of above , following is suggested -

- i. It is necessary to earmark generators, traders, licensees, who would be open access suppliers and grant them license under section 12 and make their working transparent. The universal supply obligation of the licensee has to remain but the licensee has to have flexibility in fixing tariffs.
- ii. Regulator may fix ceiling tariffs. There has to be healthy competition between the various suppliers and the licensee. The applicants do not see any change in the Supply Code. No extra charges need to be levied on consumers retained by licensee and extra costs will have to be borne by all consumers. Open access rates with price variation will have to be available for three/five years.
- iii. It is necessary to fix cross-subsidy surcharge and tariffs for three years so that the consumers are able to choose their supplier judiciously. It is anticipated that large amount of short term purchases will happen with open access consumers and hence the total mechanism of such short term transactions needs a detailed study and rules framed to facilitate such transactions. This will pave way for competition.
- iv. There has to be an option to come back to the licensee from outside supplier. Universal supply obligation of the licensee has to remain.
- v. The financial health of Discoms is important to the country. Just for the sake of competition the existing systems cannot be abruptly disrupted. Additional period of 2/3 years be asked for implementation.
- vi. Irrespective of the legal position the stakeholders/ consumers are not reconciled to unguaranteed open access supply. It is necessary for the Regulator to name suppliers as open access suppliers and grant them licensee under sec 12 of the Act.

VI. Shri R.C. Somani & Shri R.S. Goyal & others (some industries) :

They have offered following comments:-

- a) The state Commission should determine the tariff for the consumer having load of 1 MW and above. The tariff determined for other consumer may be the tariff for all consumer having the load above 1 MW subject to the followings conditions –
 - (i) The consumer above 1 MW will be free to avail the supply from distribution company or elsewhere.
 - (ii) The distribution company should not charge the rate over and above the charges (Tariff rate) fixed by the Commission for other consumers.
 - (iii) The distribution company will be free to charge less than the charges fixed by the Commission.
 - (iv) Deemed open access consumers shall have to arrange their power independently through mutually agreed tariff either from independent sources or from the distribution company from which they are presently drawing power on rate not more than the tariff rate fixed by the Commission for other consumer.

- b) If the tariff is fixed by the Commission then difficulty in determination of cross subsidy surcharge for OA consumers will not arise and surcharge will be determined by the Commission in accordance with the formula for levy of surcharge as provided at Section 8.5.1 of the tariff policy. However, if the tariff will not be fixed by the Commission then the cross subsidy surcharges and wheeling charges cannot be determined by the Commission and distribution company will charge the rate as per their will and consumer will be in trouble.

- c) Due to difficulties in arranging short term power by consumers requiring power in excess of 1 MW, it is not likely that all the consumers requiring power in excess of 1 MW go out of the net of the distribution licensee. Further, as short term power is not available easily such consumers are not in position to enter into long term power procurement agreements. Further, the rate of short term power vary hour to hour and are not fixed hence 80% consumers are not in position to avail power from other sources in near future. Therefore, the present LT/HT sale ratio

will not get adversely affected as the sale of HT category would get reduced marginally.

- d) The rules, regulation and guide lines for the distribution companies as well as for open access consumers need to be framed so as to avoid hardship to the consumers. The open access cannot be implemented unless all the operational constraints are removed.
- e) In order to frame the terms and condition and regulation for open excess consumer, following should be considered -
- i. *The method of calculation of rate of cross subsidy and wheeling charges.*
 - ii. *The Distribution licensee is free to give the supply not more than the tariff rate fixed by the Commission.*
 - iii. *The power purchase cost for short term power.*
 - iv. *The terms and condition to utilize the network of Distribution Company.*
 - v. *The applicability of various rules and regulation and Supply code 2004 on open access consumers also.*
 - vi. *To determine the cross subsidy surcharges and tariff for at least three years.*

VII. Shri Pankaj Bansal, M/s. Shivangi Rolling Mills P. Ltd, Indore and other industries:

The submission made by them is as given below:

- a) It is not mandatory for the Commission to follow the directions of the Government in the matter and the Commission may continue to determine the bulk supply tariff for 1 MW and above consumers. However, before implementation of mandatory open access for the consumers having load 1 MW and above, following issues need consideration
- i. Specifying specific conditions of license with regard to supply of quality and reliable power and signing of agreement u/s 49 of the Act;
 - ii. Re-determination of wheeling and cross subsidy surcharge in lieu of commercial tariff which may be applied by Licensee to OA consumers;

- iii. Amendment in MYT, cross subsidy surcharge regulation;
 - iv. Amendment in Supply code and miscellaneous charges regulations for charging the expenses for release of power connections U/S 43, 45 and 46 of the Act.
- b) Unless the power tariff throughout the country is uniform and power is in surplus, open access concept may not be successful. Till level playing field is created, open access concept and deeming open access consumer may be kept in abeyance for 3-4 years.

VIII. M/s. Anant Spinning Mills, Mandideep, Distt. Raisen

- a) The Ministry of Power and Advocate General have expressed their opinion based on different provisions of the Act, leaving aside the actual condition of Generation, Transmission & Distribution conditions i.e. actual ground conditions prevailing in respect of Generation Capacity, Transmission lines, both EHT, HT, & Distribution Lines (networks). Implementation of deemed Open Access to 1 MW and above consumer shall be a set back to the existing / new industries.
- b) The consumers of 1 MW and above, if permitted Open Access & shall not be permitted to avail supply from the distribution company; a situation will arise where he is left with no options, but forced to avail supply from other than the distribution company, who in turn will dictate its own terms & conditions. This will adversely affect the industry. In that case the distribution company does not provide supply in light of termination of agreement, the private player will try to take advantage of the situation by increasing the rate of electricity abnormally high which will defeat the very purpose of the Act.
- c) Under Section 3 (2) (4) of the Act, the Central Govt. shall publish National Electricity Policy and tariff policy from time to time. The National Electricity Policy and tariff policy were published in the Gazette on 12.02.2005, and 06.07.2006 respectively. Both these policies are due for revision. Thus, in the new policies to be issued, detailed guidelines on implementation of open access could be incorporated. It may be recorded here that the Act stipulates that the policy is to be prepared in consultation with the State Govts. Thus, the new Electricity Policy & tariff policy

could issue guidelines for implementation of open access under provisions of the Act. The issue of deemed open access consumer of 1 MW and above could be postponed till such time.

- d) In the absence of energy charges for 1 MW and above consumers, the calculation of cross subsidy surcharge will not be possible, as the same are the basic rate to be applied in the formula, provided by the tariff policy. In case deemed open access consumers i.e. 1 MW and above, start availing power from other sources, the distribution company shall be left only with consumers of high losses, which will ruin the financial position of the distribution company, because an abnormal hike in the tariff will not be sustainable to recover from the remaining consumers.
- e) In light of the above, the open access consumers should have option to avail power supply either from the distribution company or through open access, based on his requirement and financial viability.

IX. Shri M.C. Bansal, Bhopal

The stakeholder has submitted that it appears that on one side it is assumed that Discoms will suffer, if open excess is allowed while on other side, it is apprehended that consumers will suffer at the hand of Discoms. The consumers of 1 MW and above and Discoms are capable enough to negotiate the best terms under open access and it is in the interest of State that more and more new consumers of 1 MW and above should come to start functioning. However, Commission has to take care of interest of existing consumers during the transit period.

X. Indian Energy Exchange (IEX)

IEX has submitted that

- a) Section 2(15) of the Act provides definition of “consumer” specifying that any person who is connected to a licensee for the purpose of receiving electricity is a consumer. The deemed open access consumer is connected to the network of the licensee; therefore, the status of such consumers is still “consumer” of the licensee for wheeling of electricity and as per section 42(2), for the purpose of supply he is free to choose its source of supply. Para 4 of Ministry of Power letter dated 30.11.2012 also

clarified that “Discom do not have obligation to compulsorily supply power to such consumers”.

- b) On the issue whether all consumers of 1 MW and above could be deemed to be Open Access customers, it is stated that that all such consumers who are eligible to avail open access become deemed open access consumers by virtue of the amendment in the Act. As per the provisions of the Act, Section 42(2) first proviso has been amended by Section 7 (i) of the Electricity Amendment Act, 2007 where the words “such open access may be allowed before the cross subsidies are eliminated on payment of a surcharge” have been substituted with the words “such open access shall be allowed on payment of a surcharge”. As such a deeming intention has been cast upon the Act with the substitution of the word “may” with the word “shall.” This is also the view of the Ministry of Power as can be seen from its letter dated 30.11.2011 where it has clarified that all 1 MW and above consumers are deemed to be open access consumers.
- c) With regard to interpretation of Section 43(1) of the Act providing for universal supply obligation of the Distribution Licensee, it is stated that the APTEL judgment dated 11.7.2006 has clearly held that open access consumers availing open access still continue to be consumers and that in law and as per statutory provisions so long as the consumer desires to continue its relationship with area distribution licensee and agrees to abide by the terms and conditions for supply, there can be no direction or compulsion to sever its contractual relationship as a consumer. As such the universal supply obligation under Section 43(1) of the Act continues to prevail. In this manner the consumer will not lose the benefits of being a consumer of the Discom and at the same time be able to avail open access.
- d) On the issue whether the Commission has jurisdiction to determine tariff for such consumers, IEX opined that Section 86(1)(a) proviso of the Act unequivocally and clearly provides 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.” This has also been reiterated by the Ministry of Power in its letter dated 30.11.2011 that “once a consumer becomes 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.”

- e) On the issue whether distribution licensee be allowed to determine the rate and terms and conditions of supply to such consumers, it is stated that such consumers will have to procure power under Section 49 of the Act under which they may enter into an agreement with the Discom for supply or purchase of electricity on such terms and conditions (including tariff) as may be agreed upon by them. Therefore Discom is free to determine energy rate at which they want to sell their power to such open access consumers. In addition, the Commission may issue guidelines in accordance with Section 45(2) for determination of such energy charges and prescribe a ceiling rate so that the open access consumer will not suffer as the Discoms enjoy a virtual monopoly in the market.
- f) On the issue whether the above proposal is in contradiction with the agreements between the distribution licensee and the consumers, and what are the legal implications of violation / termination of such agreements, IEX opined that “any agreement that is contrary to statutory provisions or applicable law or by virtue of a subsequent amendment to the law become unenforceable and is to that extent voidable at the option of the parties. Furthermore, any action taken by the State Commission in accordance with its powers under the Act would apply to all contracts or consumers as per law”.
- g) On the aspect whether such deemed open access customers are liable to pay cross subsidy surcharge and additional surcharge, it is stated that such deemed open access customers are liable to pay cross subsidy surcharge and additional surcharges as may be determined by the State Commission as per provisions of Section 42(2) .Till the tariff policy is revised, the determination of surcharge should be in accordance with the formula given in tariff policy.
- h) The following is suggested for implementation -
 - 1) Tariff Regulations Amendments:
 - a) The tariff petition shall be filed in two parts. Part-A shall contain requirements of total ARR and retail supply tariff for consumers requiring power up to 1 MW and rate for standby supply to open access consumers. Part-B shall

contain proposal for wheeling tariff and cross subsidy surcharge, including additional surcharge, fixed charges, if any.

- b) Discoms should be directed to raise two bills for such consumers, one containing the energy charge under Section 45 (2) or Section 49 and the other containing the network charge.
 - c) An objective, transparent and equitable mechanism for intra-state supply of surplus power to open access consumers as per Section 49 of the Act and a transparent and competitive mechanism for disposal/sale of surplus power outside the State be evolved by the Commission.
 - d) Period of metering arrangements and wheeling agreements including supply agreement shall be stipulated by the Commission. The principles for determining rate of supply may be laid down by the Commission in accordance with Section 45(2) of the Act.
- 2) Open Access Regulations related suggestions:
- a) It could clearly be stipulated that those deemed open access consumers need only give notice under the provisions of Section 42 prior to availing open access after necessary technical requirement.
 - b) FOR model intra-state open access regulations may be adopted which provides for requirement of ABT meter for 10 MW and above consumers only. For the purpose of Energy accounting existing ToD meters may be allowed up to a load of 10 MW.
 - c) Wheeling charges may be determined on the basis of voltage wise network related costs in accordance with principles contained in National Tariff Policy.
 - d) The Commission may consider to implement the provisions with respect to deemed open access in the current year and may consider the revision of ARR in truing up exercise for FY 2012-13 in the next year.
 - e) The Commission may direct capacity enhancement of SLDC as required to handle the additional work of open access.
 - f) A list of deemed open access consumers could be put up on the website of the Commission.

XI. Essar Power:

Essar Power, Mumbai submitted the following views:-

- a) With regard to competence for interpretation of the position of law, it is stated that SERCs are to be guided by directions given by the Central Govt. in accordance with Section 107 and 108 of the Act and hence MoP is competent to interpret the provisions of the Act upon advice of Solicitor General of India, Attorney General of India and other highest legal dignitaries.
- b) In respect of merits of interpretation of the Act by the GoI about mandatory open access for consumers having load exceeding 1 MW, it is opined that based on the legal opinion of Solicitor General of India and Attorney General of India, all consumers with requirement of power more than 1 MW should be deemed to be open access consumers.
- c) On implementation aspects, it is opined that implementation of open access to all consumers with requirement of power more than 1 MW will create some difficulties in initial stages. This will be due to lack of awareness amongst the consumers. However, as time passes, level of awareness will increase and market will become mature. Moreover, when all consumers with requirement of open access will approach generators for contracting power, initially there will be difficulties but in the long run, distribution licensees having long term PPA with generators will also sell their power to consumers under open access at negotiated tariff. This will initiate competition in the market which will be beneficial to the power market as a whole.
- d) In respect of difficulties for determination of surcharge for OA consumers, it is stated that this difficulty will have to be solved to establish cross subsidy surcharge by adopting some other method or formula.
- e) On the issue of increased burden of tariff on the remaining consumers of the distribution licensee, it is stated that such open access consumers shall pay cross subsidy surcharge to distribution licensees of the area hence the distribution licensee shall not be adversely affected. Further, when distribution licensees also sell their power under open access to consumers at negotiated tariff under Section 49, distribution licensees might be able to earn more under changed circumstances, which eventually may result in lower burden of tariff on the remaining consumers of the distribution licensees.

- f) On the issue of anticipated change in allocation of power, it is opined that in absence of untied power available in market, it is likely that open access consumers will be buying power from the distribution licensees of the area under open access. In this case, the distribution licensees will be entering into agreement with the consumers directly at negotiated tariff. Hence distribution licensees will not be left with unutilized power such that it has to pay fixed charge to Generators under PPA without utilizing power resulting payment of fixed charges to generators without actually utilizing power available.
- g) On the issue of viability of the licensee, it is stated that deemed open access consumers, will have to enter into agreement for purchase of power at generating source. Since not much untied generation capacity is available, bulk consumers will have to enter into agreement with distribution licensees who have entered into long term PPA with generators. The rate at which the bulk consumers will procure power from the distribution licensees will be the negotiated rate between consumer and distribution licensees without regulatory intervention. This rate will be determined in pure commercial and competitive environment. Under this scenario, the distribution licensees with cheaper source of power will be able to sell such power at market determined price resulting in improved viability of the licensees.

3. The Commission held Public Hearing in the matter on 6th and 7th August 2012. List of the persons who attended hearing is attached as Annexure – II. Brief on the main suggestions made during the course of hearing by the respondents are given below:-

- (i) In the present scenario even if the consumers having load in excess of 1 MW are mandated for open access, there is uncertainty of availability of power for such consumers. The industries require continuous and quality long term power. The distribution licensee alone can provide continuous power to the industries in the present circumstances. The availability of power through open access is volatile in terms of availability, quantity and price. It is therefore proposed that the National Electricity Policy and tariff policy may be revised appropriately so as to accommodate the simultaneous availability of power for the consumers having load in

excess of 1 MW from distribution licensees and also through open access. The Commission is requested to not make any change in the present tariff structure and may continue to decide the tariff for the consumers having load in excess of 1 MW.

- (ii) The benefit of competitive prices to the consumers can only be available, if there is enough availability of power. However, in the present scenario of deficit power, it would only result in gaming and extortion from the hapless mandatory open access consumers if the propagated provisions are enforced.
- (iii) The Commission is not bound to follow the advice of the Central Government under the prevailing provisions of the Act. Hence, the Commission should deal with the issue independently and the proposal may be rejected.
- iv) In accordance with Section 62 of the Act, the tariff has to be determined by the Commission only and for the consumers above 1 MW there is no different provision or policy.
- v) Most of the stakeholders stated that they would prefer to remain consumers of the licensees and the Commission should continue to determine the tariff for consumers having load exceeding 1 MW. Simultaneously open access should also be made effective to the extent that if any consumer desires to opt for it, he should be able to avail of it without hurdles.
- vi) The distribution company should be available for supply to the open access customers in the event of failure of delivery of power through open access due to any reason.
- vii) The suppliers who supply to open access customers cannot be left free to operate at their will and should be regulated by the Commission in a manner similar to a licensee.
- viii) The representative from the Indian Energy Exchange supported the proposed mandatory open access by stating that the unsold generation

capacity should be made available through Indian Energy Exchange to the open access customers.

- ix) The system for settlement of the grievances should also be in place for open access consumers.

4. A meeting of the State Advisory Committee of the MPERC was held on August 09, 2012 to discuss the matter. List of the members who attended the meeting is attached as Annexure – III. The member's views were as under:-

- (i) The provision of mandatory open access for consumers having connected load of 1MW and above is neither beneficial to consumers of the state nor to the distribution licensees as consumers having load of 1 MW and above contribute nearly 30% of the revenue against 15% of consumption thus cross subsidizing LT consumers to a large extent.
- (ii) In the absence of adequate generation in the country and the state, there would be a mismatch between demand and supply and therefore competitive environment cannot be envisioned for enabling mandatory open access. In such a scenario, purchase of power from private players would be a costly affair. It would be difficult for such open access consumers to manage their power requirement from other sources in the absence of distribution licensees.
- (iii) In the larger interest of consumers of the state, the Commission should continue to determine the retail supply tariff for such OA consumers. Regarding competence for interpretation of the position of law in the matter, the issue may be left to the Judiciary to decide.
- (iv) The circular issued by MoP in the matter merely conveys the opinion of the Attorney General of India and is not notified in appropriate manner through either amendment of law or publication in the Gazette of the GoI to give it effect. Further, any such interpretation cannot be binding upon a statutory organization like a State Commission. The provision of mandatory open access cannot be enforced upon such OA consumers by

the MoP through merely circulating the opinion of the Ministry of Law unless relevant provisions of the Act are amended suitably.

- (v) The provisions under Section 107 (Directions by the Central Govt.) of the Act stipulate directions to the CERC and not to the SERC. The advice of the Central Govt. is not binding on the Commission. Present provisions of the Act do not mandate forcing open access on any consumer and the choice has to remain with the consumers. If such condition is forced under the present circumstances, it will lead to chaotic conditions for such consumers who may be subjected to exorbitant pricing and suffer at the hands of suppliers in a power deficit scenario. Hence the State Commission should continue to determine the tariff for all categories of consumers including consumers having load in excess of 1 MW and may also continue to determine the cross subsidy and wheeling charges as per prevailing regulations of the Commission.
- (vi) One of the members was of the opinion that the HT consumers should not be compelled to pay for in-efficiencies of distribution licensees and the cross subsidy surcharge be reduced.

5. The Commission observed that a majority of the stakeholders were of the view that the present system of optional open access should continue and the Commission should continue with determination of tariff for the consumers having the load / demand in excess of 1 MW. Also, that the obligatory open access for the consumers of load in excess of 1 MW may not be enforced. The Commission noted that stakeholders are also clear that the advice sent by the Ministry of Power, Government of India is not binding on the Commission. The Act does not stipulate any obligation on the State Electricity Regulatory Commissions to follow the advice of the Central Government. The State Government, under Section 108 of the Act may issue directions to the State Commission. However, in the present case the Government of Madhya Pradesh has categorically stated that *the right to the consumers to exercise their option to choose between the open access and retail supply route cannot be denied and enforcing mandatory open access to the*

consumers having load in excess of 1 MW would be contrary to the provisions of the Act. The consumers who find open access route more beneficial may switch over from retail supply route to open access route for which enabling provisions already exist in the Act. The Central Govt. has no authority to interpret the provisions of the Act. In terms of Section 183 of the Act even the power to remove difficulties through rules can be exercised only for two years, which is long over. The Central Govt. cannot even issue policy directives to the State Commission under any of the provisions of the Act in the matters of distribution and supply of electricity to consumers. The stakeholders further went on to state that the opinions obtained by the Ministry of Power from the Solicitor General of India and Attorney General of India cannot replace or change the provision/intent of the Act. For implementing the propagated changes the Act may have to be amended. In the present scenario the interpretation of the Act and further advice by the Central Government are not binding on the State Commission. Some of the stakeholders stated that if open access has to be implemented successfully it is necessary that there are identified long term open access suppliers with adequate availability of power to get competitive rates and that such suppliers need to be regulated in the manner in which a licensee is regulated. In any case, option to the consumers to remain with the licensee has to be retained to avoid supply uncertainty and the choice should remain with the consumers. Extant provisions of the Act do not envisage withdrawing the option from the consumer to choose open access. In addition, if open access is forced it will have an adverse impact on the development of industries in the state. Implementation of mandatory open access would also have operational difficulties as the consumers would not be geared to deal with the number of agencies involved in facilitating open access. The consumers, in general, demanded that before any such provision is forced the tariff likely to be charged under open access may have to be declared and there has to be accountability and transparency in the function of open access suppliers, who may have to be duly regulated.

6. A reading of the Statement of Objects and Reasons of the Act reveals that the Government intended (paragraph 4(iv)) “that there would be open access in transmission from the outset with provision for surcharge for taking care of current level of cross

subsidy with the surcharge being gradually phased out.” Further, (paragraph 4(vi)) “that the State Electricity Commissions may permit open access in distribution in phases with surcharge for –

(a) current level of subsidy to be gradually phased out along with cross subsidies; and

(b) obligation to supply.”

It is evident from the above that the open access in distribution would be available on payment of surcharge for obligation to supply and that such obligation to supply shall continue to be with the distribution licensee of the area.

7. Para 4 (x) of the Statement of Objects and Reasons of the Act mentions that only when there is direct commercial relationship between a consumer and a Generating Company or Trader price of power would not be regulated. This, interalia, implies that when a consumer is receiving power from a distribution licensee of the area, price of power would be regulated.

8. Parliament examined and enacted the law with this clear intent of the Government of India in mind. The learned law makers did not anticipate that these clearly stated purposes would later be misconstrued to exclude from the ambit of the distribution licensees consumers with a load in excess of an arbitrarily fixed limit.

9. It would be necessary at this stage, to refer to some of the specific provisions of the Act, relevant to the issue at hand. These are reproduced in the succeeding paragraphs-

Section 2(15) of the Act defines “consumer” 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”.

Section 2(39) of the Act defines “licensee” as “a person who has been granted a licence under section 14”.

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”.

Section 42(2) of the Act deals with open access and 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.

(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.....”

Section 43 of the Act describes the duty of the licensee to supply electricity on request and reads as follows:-

“43(1) Save as otherwise provided in this Act, every distribution licensee, shall, on application by the owner or occupier of any premises, give supply of electricity to such premises, within one month after receipt of the application requiring such supply.”

43(2) It shall be the duty of every distribution licensee to provide, if required, electric plant or electric line for giving electric supply to the premises specified in sub-section (1) :

Provided that no person shall be entitled to demand, or to continue to receive, from a licensee a supply of electricity for any premises having a separate supply unless he has agreed with the licensee to pay to him such price as determined by the Appropriate Commission.

43(3) If a distribution licensee fails to supply the electricity within the period specified in sub-section (1), he shall be liable to a penalty which may extend to one thousand rupees for each day of default.

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.”

Section 61 of the Act deals with the Tariff Regulations:

“61. (Tariff regulations):The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-

- (a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;
- (b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;
- (c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;
- (d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;
- (e) the principles rewarding efficiency in performance;
- (f) multiyear tariff principles;
- (g) that the tariff progressively reflects the cost of supply of electricity and also, reduces cross-subsidies in the manner specified by the Appropriate Commission;

(h) the promotion of co-generation and generation of electricity from renewable sources of energy;

(i) the National Electricity Policy and tariff policy:

Provided that the terms and conditions for determination of tariff under the Electricity (Supply) Act, 1948, the Electricity Regulatory Commission Act, 1998 and the enactments specified in the Schedule as they stood immediately before the appointed date, shall continue to apply for a period of one year or until the terms and conditions for tariff are specified under this section, whichever is earlier.”

Section 62 of the Act deals with the determination of tariff and reads as follows:

“62. (Determination of tariff): --- (1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for –

(a) supply of electricity by a generating company to a distribution licensee:

Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;

(b) transmission of electricity ;

(c) wheeling of electricity;

(d) retail sale of electricity:

Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity.

(2) The Appropriate Commission may require a licensee or a generating company to furnish separate details, as may be specified in respect of generation, transmission and distribution for determination of tariff.

(3) The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required.

(4) No tariff or part of any tariff may ordinarily be amended, more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified.

(5) The Commission may require a licensee or a generating company to comply with such procedures as may be specified for calculating the expected revenues from the tariff and charges which he or it is permitted to recover.

(6) If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee.”

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:

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;"

Section 107 deals with the directions by the Central Government and **section 108** with the directions by the State Government. These read as follows:

“107. Directions by Central Government : (1) In the discharge of its functions the Central Commission shall be guided by such directions in the matters of policy involving public interest as the Central Government may give to it in writing.

(2) If any question arises as to whether any such direction relates to a matter of policy involving public interest, the decision of the Central Government thereon shall be final.

108. Directions by State Government : (1) In the discharge of its functions the State Commission shall be guided by such directions in the matters of policy involving public interest as the State Government may give to it in writing.

(2) If any question arises as to whether any such direction relates to a matter of policy involving public interest, the decision of the State Government thereon shall be final.”

10. The Commission has also studied the Hon’ble APTEL’s Order in the matter of Appeal No.1 of 2006, which has been referred to in the position paper sent by the FOR and also by some of the stockholders in their submissions. The issues involved in the Appeal which are pertinent to the issues before the Commission are :

“(A) Whether the direction of the West Bengal State Electricity Regulatory Commission that the appellant shall cease to be a consumer of CESC limited as a condition for availing open access is sustainable? Whether in terms of The Electricity Act, 2003 a consumer who applies for open access should disassociate itself with the area DISCOM?

(B) Whether the appellant has to sever its existing consumer relationship with CESC Limited, the area DISCOM for grant of open access?

(C) Whether the area DISCOM is obliged to supply standby energy to the appellant and if so, under what conditions?

(D) Whether appellant is liable to pay additional surcharge on the charges for wheeling in terms of Section 42(4) of The Electricity Act, 2003 on being

permitted to receive supply from a person other than the distribution licensee of the area?

Hon'ble APTEL in its judgment dated 11th July 2006 had decided on the above issues as follows:

“

- (I) On point 'A', we set aside the direction of WBSERC and hold that the appellant should continue its contractual relationship as a consumer of CESC and it need not cease its consumership status.
- (II) On point 'B', we set aside the direction of WBSERC and hold that the appellant is not called upon to sever its existing consumer relationship with CESC.
- (III) On point 'C', we hold that so long as the appellant 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 the terms to be agreed between CESC and the appellant.
- (IV) On point 'D', we hold that the appellant is liable to pay additional surcharge on the charges for wheeling in terms of Section 42(4) of The Electricity Act, 2003.....”

11. In view of the foregoing narration, the following issues arise before the Commission for deliberation:

- (i) Whether this Commission has the jurisdiction to determine the tariff for consumers having load in excess of 1 MW under the prevailing law?
- (ii) Whether the consumers having loads in excess of 1 MW be treated as deemed open access consumers and mandated to seek open access?
- (iii) Whether the obligation of the distribution licensee ceases when consumers avail open access?
- (iv) Whether the Commission is bound to follow the legal opinion / advice issued in the matter by the Attorney General / MoP?

These issues are further deliberated in the following paragraphs.

12. Section 42 of the Act deals with the duties of the distribution licensees and open access. Section 42(1) provides for obligation of the distribution licensee for developing and maintaining an efficient coordinated and economical distribution system in its area of license. Section 42(2) provides for introduction of open access by the appropriate Commission in such phases and subject to such conditions as may be specified through regulations within one year of the appointed date. The first proviso of Section 42(2) has been amended, wherein the phrase “such open access may be allowed before the cross subsidies are eliminated on payment of a surcharge” has been substituted by “such open access shall be allowed on payment of surcharge”. The intent of the amendment does not mandate compulsory open access. The emphasis is on allowing open access on payment of surcharge and that such open access shall be governed by such conditions as may be specified through regulations. The word “may” has been substituted by “shall” which implies that any eligible consumer desirous of availing open access shall be allowed open access. Further, amendment to the third proviso of Section 42(2) of the Act has the consequence that the cross subsidies will not be eliminated but shall be progressively reduced. The fifth proviso of Section 42(2) of the Act has enabling provisions for providing open access to consumers who require supply of electricity where the maximum power to be made available at any time exceeds one megawatt. The emphasis is on specifying the time lines for permitting open access and not on making open access mandatory for the consumers requiring power in excess of 1 MW. Section 42(3) and 42(4) are again enabling provisions for facilitating non-discriminatory open access. The Commission notes that nowhere do these provisions require mandating open access for consumers requiring power in excess of 1 MW. Section 43 of the Act casts obligation on the distribution licensees to provide supply of electricity. Subsequent amendments have not done away this obligation of the licensee to provide supply to any class of consumers on request and no differentiation has been made between consumers requiring power in excess of 1 MW and others. In sum and substance, as per Section 42 of the Act, the Commission is required to introduce nondiscriminatory open access within the time lines as stipulated through notification of the appropriate regulations within one year from the appointed date. This Commission had notified the regulations in this regard and accordingly open access for consumers having load of 1 MW and above has been in place

from 01/10/2007. Further, Section 42 does not envisage mandatory open access for consumers having load in excess of 1 MW.

13. Section 49 of the Act provides that consumers who have been allowed open access may enter into an agreement with any person on mutually agreed terms and conditions including tariff. By virtue of this provision such transaction will not be governed by regulatory oversight.

14. Now let us examine the provisions related to the distribution licensee. Section 43 of the Act casts an obligation on the distribution licensee to give supply to a person requiring it through an application within one month. Further, as per Section 45 of the Act, in pursuance of Section 43 of the Act, the prices to be charged by distribution licensee shall be as fixed. Section 43 (2) (a) specifies that these charges shall be fixed in accordance with methods and principles to be specified by the Commission. Section 62 of the Act deals with the determination of the tariff by the Commission. Particularly Section 62(3) provides for restriction on the Commission in respect of showing undue preference to any consumer of electricity. However, the Commission may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required. No discrimination is permissible based on maximum power to be made available at any time. It is for this reason that the Commission broadly determines tariff based solely on the nature of supply and purpose for which the supply is required. The quantum of load at any given time does not impact the tariff for the different categories. In this view of the legal position any idea that the appropriate Commission may not fix tariffs based on any arbitrary floors of maximum loads at any given time appears to be wholly misplaced.

15. Section 86(1)(a) provides as the function of the Commission the task of determination of tariff within the state. These provisions cogently mandate that distribution licensee cannot determine or decide the charges to be recovered by them from consumers and that by virtue of being a licensee, all sale of power by them would

have to be at rates to be determined by the Commission. They can not enter in to a transaction with a consumer as per Section 49 unless specifically allowed to do so by their license conditions. We, therefore, hold that for all consumers receiving power from distribution licensee, tariff is to be determined by the Commission.

16. Para 4 (x) of the Statement of Objects and Reasons of the Act refers to deregulating price only when there is direct commercial relationship between the consumer and a Generating Company or Trader which is distinct from such relationship between a distribution licensee and a consumer of his area. Provisions of Section 49 of the Act apply only when the supply is availed from a source other than a distribution licensee. The distribution licensee, on account of other express restrictive provisions can not enter into an agreement under Section 49. More so, as it would be violative of its assigned duties as licensee.

17. Now, the implementation issues involved. If we consider mandating open access for the consumers requiring power in excess of 1 MW, it would not be possible to work out the surcharge in accordance with the formula provided in the Tariff Policy at clause 8.5.1. As per the formula, the surcharge cannot be determined if there is no tariff determination for that consumer category. Further, the Commission has to follow the provisions of Section 61 of the Act for framing and notifying appropriate regulations for determination of the tariff by the Commission. The section clearly indicates that for specifying the terms and conditions for determination of the tariff, the Commission shall be guided by, among other items, the National Electricity Policy and tariff policy. Since, there has not been any amendment in Section 61 of the Act, the cross subsidy surcharge cannot be determined if the tariff for the consumers of load in excess of 1 MW is not determined.

18. Finally, on the issue of the competence of the Central Government to issue directions to the State Commission. A review of the provisions of the Electricity Act under Section 107 indicates that the Central Government can issue directions to the CERC in matters of policy involving public interest and Section 108 contains similar provisions for State Government directions on matters of policy involving public

interest to the State Electricity Regulatory Commissions. These provisions do not give powers to the Central Government to issue any directions to the SERCs. The opinions of the Solicitor General/Attorney General circulated by the Ministry of Power are mere opinions not binding on the Commission under any of the provisions of the Act. As a matter of fact, the established legal position, as at present, is the verdict by Hon'ble APTEL mentioned earlier. In reply to this Suo-Moto petition, the State Government has specifically mentioned that right of consumer not to opt for open access can not be taken away and they cannot be compelled to necessarily obtain their power through open access. The State Government has also opined that MoP's communication is not valid and that views expressed therein are contrary to specific provisions of the Act.

19. The foregoing analysis of the various prevailing relevant provisions reveals that the Act does not mandate consumers requiring power in excess of 1 MW to necessarily avail open access. Quite clearly, therefore, the option of availing open access, or not, remains with the consumers.

20. We therefore decide on the questions raised under para 11, as follows:

- (i) That this Commission has the jurisdiction to determine the tariff for all consumers including those having load in excess of 1 MW under the prevailing laws.
- (ii) That the consumers having loads in excess of 1 MW cannot be treated compulsorily as deemed open access consumers and be forced to necessarily seek open access.
- (iii) The obligation of the distribution licensee does not cease for the consumers who avail open access and if such consumers wish to remain with the distribution licensee they have to be so allowed; similarly open access consumers shall always retain the right to obtain standby power from the distribution licensee.
- (iv) The Commission is not bound to follow the legal opinion / advice issued in the matter by the Attorney General / MoP. The Commission is guided

only by the policy directions of the State Govt. as also by the interpretation of the provisions of the Act by the competent courts.

The petition stands disposed of in terms of the foregoing decisions

Ordered accordingly.

(C.S. Sharma)
Member

(Rakesh Sahni)
Chairman