



केन्द्रीय विद्युत विनियामक आयोग
CENTRAL ELECTRICITY REGULATORY COMMISSION



Dr. Pramod Deo
Chairperson

D.O. No. 2/8/Policy(Statutory advice)/2009-CERC

Dated the 18th May, 2010

Dear *Shri Uma Shankar*,

Please refer to the advice of the Central Commission to the Government conveyed vide our letter dated 27th April, 2009 (copy enclosed) suggesting legal action to remedy the situation arising out of orders by various State Governments under Section 11 of the Electricity Act, 2003. Briefly, various State Governments starting with Karnataka have issued orders under Section 11 or Section 108 of the Act mandating the generating companies to supply electricity only to the utilities of that State. In other words the export of electricity outside the State has been prohibited.

2. The whole scheme of the Electricity Act is built on the foundation of open access and accordingly Section 10(2) of the Act gives a statutory right to generating companies to choose buyer of its electricity. Section 11 only provides for directions regarding operation and maintenance of generating stations in extraordinary circumstances. If these powers are allowed to be used to direct supply of power and in that process forcing breach of existing contracts for supply, the whole scheme of open access would collapse and it would be disastrous for efforts being made to mobilize private investment in power sectors. Taking this view, CERC had issued orders ruling that open access has to be granted in accordance of the regulations under the Act and the same cannot be interfered by SLDCs on the basis of orders under Section 11. These orders of CERC were stayed by Karnataka High Court. We had contested these cases.

3. We had requested in our advice as referred above that Central Government should intervene and move the Supreme Court for vacation of these stay orders in order to uphold the spirit and act in public policy.

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4. We are not aware of any legal intervention made by the Central Government in a court of law. However, we are aware that, based on the legal advice of the Law Ministry, the Minister of Power has written to Chief Ministers stating that the provisions of Section 11 of the Act do not permit restricting or prohibiting open access.

5. However, the High Court of Karnataka has upheld the orders of the Karnataka Government under Section 11 and also quashed the orders of CERC. A brief detail of these Court cases and the orders of the Karnataka High Court is enclosed. This ruling by the Karnataka High court has created an environment of huge uncertainty to the generating companies in the country because now various State Governments can, and in fact are passing, orders under Section 11 to prohibit open access to the generators and thereby taking away the statutory right available under Section 10(2).

6. CERC has filed SLPs in the Supreme Court against the judgement of the Karnataka High court (details given in the Annexure). Our SLPs are challenging the judgement mainly on the ground that executive orders by the State Government under the Act cannot override the statutory regulations framed by the Commission and also that if flow of electricity is prohibited in this manner into inter-state grid, this may cause grid collapse and other serious problems in grid management. These SLPs are now listed for hearing in July, 2010.

7. We are sure that Central Government would appreciate that successful implementation of open access is a key reform measure and any hindrance to open access would be serious threat to national endeavours for mobilizing larger private investment for setting up new generation capacities. Therefore, there is an urgent need to settle correct legal position of such directions by the States under Section 11 or 108 or any other provisions of the Act otherwise the progress made so far in mobilizing private investments would suffer a major setback.

8. Though, CERC is contesting these cases in the Supreme Court, a separate intervention by the Ministry of Power would be extremely necessary because the Central Government has an important stake in the development of power sector and in mobilizing private sector for attaining the national goal "Power for all".

9. I would specially like to draw the attention of the Central Government to the fact that interpretation given by the Karnataka High court to phrase 'Appropriate Government' in the Act means that a State Government in whose territory an Ultra Mega Power Project is located can issue order under Section 11 and prohibit export of power to all other States. You would agree that such a legal interpretation would be disastrous to the efforts being made by the Central Government for mobilizing private investment through UMPPs.

10. CERC has statutory function of advising Central Government, inter-alia, on promotion of investment in electricity industry under Section 79(2)(iii) of the Act. Accordingly, The Commission has decided to hereby advise the Central Government to take urgent steps for moving the Supreme Court in order to get correct legal position settled that directions by Government cannot impede or prohibit open access which is a key-feature of the Electricity Act.

Best regards,

Yours sincerely,

Pramod Deo
(Dr. Pramod Deo)

Encl : As above.

Shri P. Uma Shankar
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