

F. No. Dir (L) / DERC/ 2009-10 / Law / 633

Dated: 18th May, 2010

To

Shri Rajendra Kumar,
Secretary (Power)
GoNCTD, Delhi Secretariat
I.P. Estate, New Delhi- 110002

Sub: Direction under Section 108 - Ref: F.11 (27) / 2010/Power / 1192 dated 4th May, 2010 – regarding

The direction issued by GoNCTD under Section 108 of the Electricity Act (EA), 2003 has given rise to questions regarding extent and applicability having legal connotations. This matter was referred to the Solicitor General of India for giving his valuable opinion. **A copy of the opinion is enclosed.**

2. On the issue of direction given under Section 108 of EA 2003, the Solicitor General has noted that the communication dated 4th May 2010 from GoNCTD states that it is for the State Government to thoroughly consider the advice of the DERC on the representations made by the Discoms and thereafter give a go ahead for passing tariff orders. According to him 'this is without doubt a serious fetter on a quasi judicial function' of DERC and no such direction can be issued. He has opined that **such a direction is ultra vires and therefore void. He has advised DERC to proceed to issue the tariff orders.**

3. On the issue of furnishing statutory advice u/s 86(2)(v), he has opined that in furnishing the advice, it would be improper for the DERC to disclose details of its quasi-judicial activities or details of the tariff order that is about to be passed. He has, however, advised that the DERC will have to give its statutory advice on the approach in principle to the various issues without jeopardising its quasi-judicial function, which cannot be controlled by the State Government. As advised by the Solicitor General of India, the statutory advice is under preparation and will be sent separately.

4. The queries raised and the opinions of the Solicitor General are reproduced below:

Query	Opinion
<p>(i) DERC cannot answer the seven issues raised by the Government of NCT of Delhi without dealing with facts and figures relating to the three private Discoms, which are part of the tariff determination. Whether DERC in replying to the seven issues raised by the Government of NCT of Delhi vide the communication dated 04.05.2010, can or ought to disclose details of the tariff orders which although approved by the majority, are not yet issued?</p> <p>(ii) Further, whether DERC is bound to reply to the letter seeking "statutory advice", in view of the fact that:</p> <p>(a) Such reply would have a bearing on the tariff determination by DERC, which is a quasi-judicial function.</p> <p>(b) Some of the issues raised may even be pending adjudication before the Hon'ble Appellate Tribunal for Electricity.</p> <p>(c) The intent of the State Government appears to be able to use the reply to pass orders affecting tariff</p>	<p>(i) & (ii)</p> <p>Section 86(2)(v) of the Act requires the Querist to advise the State Government on any matter referred to it by the State Government. In doing so, however, it would be improper for the Querist to disclose details of its quasi-judicial activities or details of the tariff order that is about to be passed.</p> <p>Hence, the Querist must respond to the State Government's communication by identifying the aspects that it cannot offer any advice on, because they pertain to its quasi-judicial function of tariff determination, or are going to be covered by its tariff orders, or are otherwise pending adjudication before itself or the Appellate Tribunal. It will have to give its statutory advice on the approach in principle to the various issues without jeopardising its quasi-judicial function, which cannot be controlled by the State Government.</p>

<p>(iii)</p> <p>Whether, in view of :</p> <p>(a) Section 64(3) of the Electricity Act, 2003, which mandates that "The Appropriate Commission shall, <u>within one hundred and twenty days from receipt of an application</u> under sub-section (1) and after considering all suggestions and objections received from the public,--</p> <p>(a) Issue a tariff order accepting the application with such meditations or such conditions as may be specified in that order;</p> <p>(b) Reject the application for reasons to be recorded in writing if such application is not in accordance with the provisions of this Act and the rules and regulations made thereunder or the provisions of any other law for the time being in force :</p> <p>PROVIDED that an applicant shall be given a reasonable opportunity of being heard before rejecting his application."</p> <p>(b) section 86(2)(iv) of the Electricity Act, 2003, which mandates that "The State Commission shall advise the State Government on all or any of the following matters, namely :-</p> <p>.....</p> <p>(iv) matters concerning generation, transmission, distribution and trading of electricity or any other matter referred to the State Commission by that Government"</p> <p>(c) Hon'ble Supreme Court's judgement in the matter titled PTC India Limited vs. Central Electricity Regulatory Commission JT2010 (3) SC 1 which holds tariff determination as a quasi-judicial function</p> <p>the direction of the Government of NCT of Delhi "not (to) issue tariff order till the statutory advice given by the Commission as asked for, is thoroughly examined by the Government and the Government gives a go ahead for passing of tariff orders." Is not liable to be followed by DERC?</p>	<p>(iii)</p> <p>In view of the above analysis, the direction contained not to pass tariff orders unless a go ahead has been given by the State Government amounts to placing a fetter on a quasi-judicial function. Such a direction is ultra vires and therefore void.</p> <p>The Querist must therefore respond appropriately to the State Government and proceed to issue the tariff orders in respect of the three private Discoms.</p>
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<p>(iv)</p> <p>Whether in the facts of the case the direction given by the Government of NCT of Delhi can said to be in a “matter of policy involving public interest” including, inter alia, for DERC to await, for release of tariff orders, a through examination of the reply and hence binding on DERC? Would the fact that the Government of NCT of Delhi holds 49% equity shareholding in the three Discoms have any impact on the direction issued?</p>	<p>(iv)</p> <p>In light of the view I have taken on query (iii), this issue really does not arise. In light of the wide language of Section 108(2), the view of the State Government is final on whether the direction relates to a matter of policy involving public interest. However, even if this requirement is satisfied, the direction cannot be sustained.</p>
<p>(v)</p> <p>Whether the letter dated 04.05.2010 covers NDMC also and whether the tariff order in case of NDMC anyway be passed.</p>	<p>(v)</p> <p>Strictly speaking, the communication dated 04.05.2010 does not cover NDMC, since NDMC made no representation. The tariff order for NDMC may therefore be passed. However, this issue does not really arise, since in my view the tariff orders for all the Discoms must be issued.</p>

5. In view of the opinion of the Solicitor General that the tariff orders for all the Discoms must be issued, it is advisable to issue the tariff orders, in respect of the three Discoms as also in the case of NDMC, without any further delay.

6. In view of the above, GNCTD may like to take actions as deemed fit.

7. This issues with the approval of the Chairman, DERC.

Yours faithfully,

(Amarendra K. Tewary)
Secretary