सत्यमेव जयते
GOPAL SUBRAMANIUM

महा-सॉलिसिटर भारत
SOLICITOR-GENERAL OF INDIA

OPINION

Re: Central Electricity Regulatory Commission .... Querist/Ex-parte

1. Before the Electricity Act, 2003 was introduced the Electricity Supply Industry was being governed by the Indian Electricity Act, 1910, the Electricity Supply Act, 1948, and the Electricity Regulatory Commission Act, 1998. It became necessary to enact a new legislation for regulating the electricity supply industry in the country which would replace the existing laws, preserve its core features other than those relating to the mandatory existence of State Electricity Board and the responsibilities of the State Government and the State Electricity Board with respect to regulating licensees. There was also a need to provide for newer concepts like "power trading" and "open access".

2. The Electricity Act, 2003, hereinafter referred to as "the Act", came into force on 10th June, 2003. The Preamble of the Act suggests that the intention of the legislature, behind enacting the Act, was to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, and protecting interest of consumers and supply of electricity to all areas.

3. Central Electricity Regulatory Commission/ Forum of Regulators, the present querist, has raised a concern owing to the fact that the parallel distribution companies with independent distribution network as envisaged in the Act are yet to come up inspite of an enabling legal framework provided in the Act. It is brought to my attention that the consumers continue to buy power from the same utilities, which are enjoying monopoly, as there is no

choice of suppliers. The Querist contends that in order to encourage competition in retail supply of electricity, demand of a parallel distribution network should not be insisted upon second/subsequent distribution licensee in a given area. The Querist places reliance upon the electricity supply models of U.K., U.S.A., Australia etc., wherein, in order to achieve competition in retail supply multiple suppliers are allowed to supply through a common network, instead of parallel networks, as it is not economically viable to duplicate the existing distribution network due to sunk cost associated with it and the scale of economies derived from network operation.

4. In view of the above stated my opinion has been sought on the following queries:-

   i) Can a license be granted to a new entrant/applicant to distribute electricity within the area of an existing distribution licensee without requiring/mandating such an entrant/applicant to lay down its own distribution system within the same area?

   ii) If so, could the Appropriate Commission decide that there is no requirement of capital investment for distribution network in terms of Rules, 2005?

   iii) Could there be wheeling *dehors* open access so as to enable the new entrant to use the distribution system of the existing incumbent distribution licensee to wheel power but without seeking open access? In other words, does the 2003 Act envisage any means other than open access for separation of carriage and content in distribution business?

iv) To enable choice of supplier and competitive tariffs to the consumer/any person could it be inferred that such a consumer/any person could seek supply from a licensee or a generating company other than the distribution licensee within whose area of supply such a consumers'/any persons' premises are situated, on a basis other than open access for avoiding payment of cross subsidy surcharge mandated under the first and second provisos to sub-section (2) of section 42 of the 2003 Act?

v) If distribution and supply are separated should the existing consumers be made to pay full cross subsidy to cover the existing level of cross subsidy or allow them to pay cross subsidy at reduced rates and eliminate the cross subsidy over a given time frame?

vi) Is it mandatory for a distribution licensee to own the network as well as supply electricity to its consumers?

vii) Can distribution and retail supply business be separated under the existing provisions of the 2003 Act?

viii) Could two different types of distribution licenses be issued under the 2003 Act, one requiring the distribution licensee to be the network operator and the other requiring another entity to effect supply to its consumers?

ix) If retail supply is segregated from wires business, what should be the minimum area?

x) Does separation of supply from wire business to make retail supply competitive, necessarily require an amendment to the 2003 Act?

xi) Would the ratio in the judgment of Supreme Court in the case of Tata Power Co. v. Reliance Energy Ltd. be confined to said case or apply to similar situations in the electricity sector?

5. Query no. i): To opine upon the first query it is significant to see how the terms, "distribution licensee" and "distribution system" have been defined in the Act. Sub-section (17) of section 2 defines "distribution licensee" as follows:-

> *"Distribution licensee means a licensee authorised to operate and maintain a distribution system for supplying electricity to the consumers in his area of supply."*

"Distribution system" has been defined under sub-section (19) of section 2:-

> *"Distribution system means the system of wires and associated facilities between the delivery points on the transmission lines or the generating station connection and the point of connection to the installation of the consumers."*

6. An application for grant of a new license can be made to the Appropriate Commission under section 15 of the Act. The power to grant license is given to the Appropriate Commission under section 14 of the Act. The power to grant a distribution license to an applicant for an area where there already exists a distribution licensee is given under the sixth proviso to section 14. The sixth proviso to section 14 reads as follows:-

> *"Provided also that the Appropriate Commission may grant a license to two or more persons for distribution of electricity*

> *through their own distribution system within the same area, subject to the conditions that the applicant for grant of license within the same area shall, without prejudice to the other conditions or requirements under this Act, comply with the additional requirements [relating to capital adequacy, creditworthiness, or code of conduct] as may be prescribed by the Central Government, and no such applicant, who complies with all the requirements for grant of licence, shall be refused grant of license on the ground that there already exists a licensee in the same area for the same purpose:"*

This proviso gives power to the Appropriate Commission to grant licenses to two or more persons to distribute electricity within the same area, but through their own distribution system. Though the concept of multiple distributors for a given area is acknowledged, it comes with a condition that each of the distributors supply electricity through their own distribution systems. The sixth proviso expressly stipulates the requirement of supplying electricity through one's own distribution system for grant of a license to a subsequent applicant for supply of electricity within the area of an existing distribution licensee.

7. On a reading of the sixth proviso, quoted above, it seems that the applicant also has to comply with the requirements relating to capital adequacy as may be prescribed by the Central Government. The relevant line in the proviso reads as follows, "*...applicant for grant of license within the same area shall, without prejudice to the other conditions or requirements under this Act, comply with the additional requirements [relating to capital adequacy, creditworthiness, or code of conduct] as may be prescribed by the Central Government...*". Section 176(1) of the Act gives Central Government the power to make rules for carrying out the provisions of this Act. Clause (b) of sub-section (2) gives power specifically to frame rules for the additional

requirements relating to the capital adequacy, credit worthiness or code of conduct as contemplated under sixth proviso to section 14.

8. In exercise of powers conferred by sub-section (1) of, and clause (b) of sub-section (2) of, section 176 of the Electricity Act, 2003, the Central Government has framed the Distribution of Electricity Licence (Additional Requirements of Capital Adequacy, Creditworthiness and Code of Conduct) Rules, 2005, hereinafter referred to as the "Rules". Rule 3 of the Rules deals with the requirements of capital adequacy and creditworthiness. Rule 3 reads as follows:-

> *"Rule 3 - (1) The Appropriate Commission shall, upon receipt of an application for grant of license for distribution electricity under sub-section (1) of section 15 of the Electricity Act, 2003, decide the requirement of capital investment for distribution network after hearing the applicant and keeping in view the size of the area of supply and the service obligation within that area in terms of section 43.*
>
> *(2) The applicant for grant of license shall be required to satisfy the Appropriate Commission that on a norm of 30% equity on cost of investment as determined under sub-rule (1), he including the promoters, in case the applicant is a company, would be in a position to make available resources for such equity of the project on the basis of the networth and generation of internal resources of his business including of promoters in the preceding three years after excluding his other committed investments.*
>
> *Explanation-For the grant of a license for distribution of electricity within the same area in terms of sixth proviso to section 14 of the Act, the area falling within a Municipal Council or a Municipal Corporation as defined in the article 243(Q) of the Constitution of India or a revenue district shall be the minimum area of supply."*

Rule 3 gives the power to the Appropriate Commission to decide the capital investment for distribution network. The use of the word "*shall*" in sub-rule (1) of rule 3 makes it mandatory for the Appropriate Commission to decide the capital investment for distribution network. Under the sixth proviso, the grant of license to a subsequent applicant is subject to, amongst other conditions, compliance with the requirements relating to capital adequacy. The language of Rule 3 makes it clear that the requirement of capital investment is for distribution network. This leads one to the only conclusion that a license cannot be granted to a new entrant/applicant to distribute electricity within the area of an existing distribution licensee without requiring/mandating such an entrant/applicant to lay down its own distribution system within the same area.

9. In support of what has been concluded above, relevant portion of the National Electricity Policy, framed by the Central Government in compliance with section 3 of the Act, may also be reproduced:-

> *"5.4.7 One of the key provisions of the Act on competition in distribution is the concept of multiple licensees in the same area of supply through their independent distribution systems. State Governments have full flexibility in carving out distribution zones while restructuring the Government utilities. For grant of second and subsequent distribution licence within the area of an incumbent distribution licensee, a revenue district, a Municipal Council for a smaller urban area or a Municipal Corporation for a larger urban area as defined in the Article 243(Q) of Constitution of India (74th Amendment) may be considered as the minimum area. The Government of India would notify within three months, the requirements for compliance by applicant for second and subsequent distribution licence as envisaged in Section 14 of the Act."*
>
> (emphasis supplied)

The Central Government, in the National Electricity Policy framed by them, also seems to have acknowledged the requirement of own/independent distribution network by the subsequent applicant for a license for an area of an existing distributor.

10. Query No.ii): As discussed above, the new entrant or the subsequent applicant will have to supply electricity through its own distribution system. To own a distribution system such an applicant will have to make capital investment. Rule 3 of Rules, 2005 uses the word *"shall"*, implying that the Appropriate Commission is bound to decide the capital investment for distribution network after hearing the applicant and keeping in view the size of the area of supply and the service obligation within that area in terms of section 43. Hence, the requirement of capital investment for distribution system/network cannot be done away with. As a result the Appropriate Commission cannot decide that there is no requirement of capital investment for distribution network in terms of Rules, 2005.

11. Query No. iii): To deal with this query it is useful to see how the statute has defined the terms "open access" and "wheeling":-

> *"s. 2(47) – open access means the 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 ";*
>
> and,
>
> *"s. 2(76) – wheeling means the operation whereby the distribution system and associated facilities of a transmission licensee or distribution licensee, as the case may be, are used by*

another person for the conveyance of electricity on payment of charges to be determined under section 62".

A bare perusal of the above-transcribed definitions suggests that open access is the 'provision' given in the statute for non-discriminatory use of transmission lines or distribution lines, whereas wheeling is the 'operation' by way of which distribution system and associated facilities of a transmission licensee or distribution licensee are used by another person.

12. The Black's Law Dictionary, Eighth Edition, defines 'provision' as follows:-

"A clause in a statute, contract, or other legal instrument or a stipulation made beforehand."

The Oxford English Dictionary, Second Edition, defines 'operation' as follows:-

"Manner of working, the way in which anything works."

The meanings assigned above, somewhat, leads to an inference that 'open access' which is provided for in the statute is achieved by 'wheeling'.

13. At this juncture I shall refer to sub-section (2), (3) and (4) of section 42 which deal with open access:-

"s. 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 (57 of 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 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 a 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."

Sub-section (2), (3) and (4) of section 42 provides that open access shall be introduced in phases by the State Commission, having due regard to factors like cross subsidies etc. Such surcharge shall be utilised to meet current level of cross-subsidy, and shall be progressively reduced and eliminated. If any person, whose premises are situated within the area of supply of a distribution licensee, 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 the regulations made by the State Commission and the duties of such distribution licensee in respect of such supply shall be those of a common carrier providing non-discriminatory open access to its distribution system. It is quite clear that wheeling cannot take place unless a distribution licensee provides open access to his distribution system. Thus, there cannot be wheeling *de hors* open access so as to enable the new entrant to use the distribution system of the existing incumbent distribution licensee to wheel power without seeking open access.

14. Query No. iv): A consumer/any person could seek supply from a licensee or a generating company other than the distribution licensee within whose area of supply such a consumer's/any person's premises are situated under sub-section (3) of section 42 of the Act. Sub-section (3) enables a consumer or any person to require, by way of a notice, the distribution licensee of that area for wheeling electricity through his distribution system in order to obtain the supply of electricity from a generating company or any licensee other than the distribution licensee for that area. A reading of the said sub-section, quoted above, makes it clear that the duties of the distribution licensee for

such an area, with respect to such supply, shall be of a common carrier providing non-discriminatory open access. Hence, it is clear that operation of sub-section (3) requires open access from the distribution licensee of that area. Thus, if a consumer or any person requires a supply of electricity from a generating company or any licensee other than the distribution licensee of that area, he can achieve so by virtue of sub-section (3) of section 42, wherein the distribution licensee of that area will be required to provide open access to his distribution system. The Act does not contemplate any other provision other than open access, by which the above can be achieved. Since the distribution licensee has to provide open access under sub-section (3), such a consumer will have to pay the cross subsidy surcharge mandated under the first and second provisos to sub-section (2) of section 42.

15. Query No. v), vi), vii), viii), ix) and x): Queries v) to x) are relative to each other and can be opined upon jointly. Query viii) poses a foremost question, "Could two different types of distribution licenses be issued under the 2003 Act, one requiring the distribution licensee to be the network operator and the other requiring another entity to effect supply to its consumers?". Under section 14 of the Act the Appropriate Commission may, on an application made to it under section 15, grant a license to any person to distribute electricity as a distribution licensee. Distribution licensee has been defined in the Act under section 2(17) :-

> *"Distribution licensee means a licensee authorised to operate and maintain a distribution system for supplying electricity to the consumers in his area of supply."*

The definition clearly explains that a distribution licensee is one who has to maintain and operate the distribution for the purpose of supply of electricity to the consumers in his area of supply. The definition does not leave a scope

for two different types of licensees i.e. one who operates the distribution system/network and the other who supplies electricity. The use of the word 'means' indicates that the definition is exhaustive and no additional category of distribution licensee can be created.

16. Sub-section (1) of section 42 of the Act lays down the primary duty of a distribution licensee:-

> *"Section 42(1) – It shall be the duty of a distribution licensee to develop and maintain an efficient co-ordinated and economical distribution system in his area of supply and to supply electricity in accordance with the provisions contained in this Act."*

On reading the above-mentioned sub-section one can see that according to the Act, it is the duty of a distribution licensee to develop and maintain the distribution system and also to supply the electricity in accordance with the Act. The Act confers a duty on the distribution licensee to be the distribution system/network operator and to supply electricity at the same time. The Act does not contemplate two different types of distribution licensees or distribution licenses. The distribution licensee, as defined, has to operate and maintain the distribution system for supply of electricity to his consumers. Even the duties of the distribution licensees suggest that he will have to develop and maintain his distribution system and supply electricity as per the Act. The dual role of the network operator and of a supplier has been assigned to the distribution licensee, hence, the two cannot be separated. The retail supply and the wires business cannot be segregated. Both the businesses have to be taken care of by a distribution licensee. There cannot be two different types of distribution licenses under the present framework of the Act.

17. In order to have two different types of distribution licenses, the power granted to the Appropriate Commission, under section 14 to grant a distribution license, will have to be amended to the effect that it can grant two different types of distribution licenses. The definition of the term 'distribution licensee' as given under section 2(17) will also have to be amended and two different definitions, i.e. one for the distribution licensee as the operator of distribution system/network and the other for the distribution licensee as a supplier of electricity, will have to be added. Even the duties of the distribution licensee, given under section 42(1) of the Act, will have to be amended and a clear demarcation, of the role and duty of the two different types of distribution licensees, will have to be set out.

18. Query No. 11: This query relates to the ratio of a Supreme Court judgment in the case of *Tata Power Co. Ltd. v. Reliance Energy Ltd.*, reported in (2008) 10 SCC 321. The query posed is whether the ratio in this case would be confined to the said case or apply to the similar situations in the electricity sector? The said case finds its genesis in a dispute that arose between the appellant, Tata Power Co. (TPC) and respondent's predecessor in interest, Bombay Suburban Electricity Supply (BSES), regarding the retail supply of electricity in the area which was also covered by the license granted to BSES. The point of dispute was whether or not TPC was authorised for retail distribution of electricity to the consumers having annual consumption below 1000 kVA. It was contended by BSES that TPC was making available retail supply in breach of its licensing conditions.

19. The dispute was initially considered by Maharashtra Electricity Regulatory Commission (MERC) and then by Appellate Tribunal for Electricity. MERC on review of the terms and conditions of licenses as modified from time to time held that TPC was authorised to offer retail distribution also because

such an interpretation was consistent with the promotion of competition, but the Commission added a new dimension to the controversy by requiring both the parties, TPC and BSES, to hire a consultancy firm for studying the issues relating to section 42 and 14 of the Act of 2003, so that the level playing field between the parties could be created. However, the Appellate Tribunal returned a contrary finding that the TPC was not authorised to offer retail distribution.

20. The contention of the Counsel for respondent is recorded in para 81 of the judgment, as reported in SCC, wherein he has relied on the definition of a "distribution licensee", and submitted that TPC had not even set up a distribution system, which a distribution licensee is required to operate and maintain as per the definition, therefore the appellant, TPC, cannot be described as a distribution licensee as defined in the Act and hence, is not in a position to supply electricity to any consumer on demand as required under section 43 of the Act.

21. The Counsel for the respondent also contended that section 42 of the Act is relevant to the interpretation of licenses held by TPC. The Supreme Court held:-

> *"99. ..... It is no doubt that section 42 empowers the State Commission to introduce a system of open access within one year of the appointed date fixed by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling having due regard to the relevant factors, but the introduction of the very concept of wheeling is against Mr. Venugopal's submission that not having a distribution line in place, disentitles TPC to supply electricity in retail directly to consumers even if their maximum demand was below 1000 kVA.*

> *100. The concept of wheeling has been introduced in the 2003 Act to enable distribution licensees who are yet to install their distribution lines to supply electricity directly to retail consumers, subject to payment of surcharge in addition to the charges of wheeling as the State Commission may determine. We, therefore, see no substance in the said submissions advanced by Mr. Venugopal."*

22. The query posed to me is whether the ratio of the judgment in *Tata Power Co.* is confined to the facts of the case or will it apply to similar situations in the electricity sector? In the said case TPC is supplying electricity in an area for which the distribution licensee is BSES. This is not a case where TPC is a subsequent applicant to procure a distribution licensee for an area for which the existing licensee was BSES. In fact, TPC was granted three licenses for that area long before a separate license was granted in favour of BSES. The observations made by the Hon'ble Bench in this regard may be quoted below:-

> *"92. MERC also appears to have lost sight of the fact that the first three licenses had been granted to Tata Power long before a separate license was granted in favour of BSES. There is sufficient material on record to establish that Tata Power had been supplying energy to domestic consumers on retail basis within areas which subsequently came to be included in BSES' (and subsequently REL's) area of supply and no objection was raised in that regard till TPC submitted its proposed Tariff for domestic retail consumers for approval in September 1998....."*

As it can be seen that this was not a case where TPC was a subsequent applicant for a distribution license under the Electricity Act, 2003, the requirement of supplying electricity through one's own distribution system, as expressly laid down in the sixth proviso to section 14, need not be adhered to. The licenses, pertaining to the area in question, held by TPC were granted prior to 1926, the year in which BSES was granted a license for the said area.

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Hence, requirement of possessing an own distribution system has not been adjudicated upon at all in this judgment. Therefore, the Supreme Court's observation in the said case that concept of wheeling has been introduced in the 2003 Act to enable distribution licensees who are yet to install their distribution lines to supply electricity directly to retail consumers, subject to payment of surcharge in addition to the charges of wheeling as the State Commission may determine, should not be seen as condoning the non-compliance with the requirement laid down in the sixth proviso to section 14. These observations were made in light of the facts of the case in hand, and not while deciding an issue whether a subsequent licensee for an area or multiple licensees for an area, under the Act of 2003, can use the distribution system of the existing licensee for retail without owning a distribution system as expressly required under sixth proviso to section 14. Hence, the ratio in this judgment is specific to the facts of the case.

I opine accordingly.

[GOPAL SUBRAMANIUM]

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