

**Before the**  
**MAHARASHTRA ELECTRICITY REGULATORY COMMISSION**  
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**Case No. 24 of 2008**

**In the matter of**  
**Petition filed by BEST Undertaking seeking revocation of licence of M/s. Reliance Energy Ltd., for distribution of electricity in the suburban area**

**Shri A. Velayutham, Member**  
**Shri S. B. Kulkarni, Member**

Brihan Mumbai Electric Supply & Transport Undertaking  
BEST Bhavan, BEST Marg,  
Colaba  
Mumbai – 400 001

.... Petitioner

Versus

Reliance Energy Limited (renamed as Reliance Infrastructure Limited)  
Reliance Energy Centre  
Santa Cruz (East)  
Mumbai – 400 055

.... Respondent

**ORDER**

**Dated: October 20, 2008**

The Brihan Mumbai Electric Supply & Transport Undertaking (“BEST”) filed a Petition on 5.5.2008 seeking revocation of licence of M/s. Reliance Energy Ltd., (“REL”), now renamed as Reliance Infrastructure Limited, for distribution of electricity in the suburban area. Sections 19 and 24 of the Electricity Act, 2003 (“EA 2003”) and the provisions of MERC (General Conditions of Distribution Licence) Regulations, 2006, have been invoked in the petition. BEST has alleged that REL has failed to discharge their duties by not complying with certain directions passed by the Commission. It is averred in the Petition that even the general public have raised objections on REL’s various Petitions. It is submitted therein that during regulatory processes as well as by letters, the general public and institutions have requested



BEST to extend its operational area for providing electricity supply in the suburban area. BEST has pointed out certain specific non-compliances by REL, as under:

(i) *Execution of an agreement to ensure long term availability of power to Mumbai consumers:* It has been contended that no such agreement has been executed by REL. REL has not complied with Regulation 7.1.2 of the MERC (Terms and Conditions of Tariff) Regulations, 2005 (“Tariff Regulations”) requiring filing of application for approval of PPA within three months from the date of notification of the Tariff Regulations. REL has not complied with the directions of the Commission passed in its Order dated 9.12.2005 in Case No. 4 of 2003 requiring REL and The Tata Power Company Limited (“TPC”) to “*enter into an agreement within three months of this order to ensure long term availability of power to Mumbai consumers*”. It is also contended that in the Order dated 3.10.2006 in Case No. 25 of 2005 and Case No. 53 of 2005, the Commission has noted that no such agreement has been received by the Commission. Even in its Order dated 24.4.2007 in Case No. 75 of 2006, the Commission has noted that “*the Commission has not received any draft PPA between TPC-G and REL-D for approval till now*”. Similar directions have been given by the Commission in its Order dated 2.4.2007 in Case No. 72 of 2006. In its Order dated 6.11.2007, the Commission had directed REL to file long-term Power Purchase Agreements for procurement of power from generating Companies and other sources at the earliest. Also, REL-D was directed to submit Power Purchase Arrangement for procurement of power from its own generating unit REL-G, for the Commission’s approval, within one month of the passage of the said Order.

(ii) *Distribution Loss:* The Commission in its Order dated 24.4.2007 in Case No. 75 of 2006 came to the finding that:

***“6.3. Commission’s Ruling***

*The Commission has taken serious note that REL-D has not provided the breakup of distribution loss into technical & commercial losses for the control period. ..”*

It has been pointed out by BEST that no such analysis has been presented by REL in the recent APR petition for the Financial Year 2007 -08.

2. BEST has submitted that the above cases are aspects on which REL-D has repeatedly failed to comply with the Commission’s directives of signing of PPA since the year 2005 till date and in submitting analysis of distribution losses.

3. BEST has prayed as under:

*“It is, therefore, prayed that a notice for revocation of distribution of electricity licence be issued by Hon’ble Commission to M/s. REL-D as per the provisions under Sub-Section 1(a) and subsection 2 of Section 19 and Sub clause (c) of sub section 1 of Section 24 of the Electricity Act, 2003 and as per*



*the Regulation No. 8.2.1 and 8.3.3 of the MERC (General Conditions of Distribution Licence) Regulations, 2006 and under Regulation No. 7.1.2 under part B of MERC (Terms & Conditions of Tariff) Regulations, 2005”.*

4. A reply has been filed by REL on 30.6.2008. Admission of the present petition has been opposed thereunder on the following grounds:

- (i) The Petition does not disclose any cause of action whatsoever entitling BEST to approach the Commission for invocation of its powers under Sections 19 and / or 24 of the EA 2003;
- (ii) The Petition is devoid of any particulars, material;
- (iii) The Petition is not bonafide and has been filed with ulterior motives;
- (iv) Various articles in newspapers suggest that BEST has made categorical statements that they are interested in supplying electricity to the suburbs of Mumbai, which is in REL's area of supply;
- (v) Sections 19 and 24 do not confer any right on BEST to file the present petition;
- (vi) Issues raised in the present petition are *sub judice* before the Hon'ble Supreme Court of India in Civil Appeal No.s 3510-3511 of 2008 filed by TPC challenging the final judgment and order dated 6.5.2008 passed by the Appellate Tribunal for Electricity (“ATE”) to which BEST is also a party. BEST is an appellant in Civil Appeal No. 3598 of 2008 pending before the Hon'ble Supreme Court in a statutory appeal filed under Section 125 of the EA 2003 challenging the said final judgment and order dated 6.5.2008 passed by the ATE in Appeal No. 143 of 2007;
- (vii) Since, the Petition has been filed both under Sections 19 as well as 24 of the EA 2003, BEST is not clear as to which of the provision of law it proposes to invoke. No case has been made out for invocation of Section 24;
- (viii) BEST has no *locus standi* to file the present petition.

REL has submitted that any action proposed to be taken under Section 19 including commencement of inquiry is a very drastic action and even admission of the petition of the nature filed by BEST, requires BEST to give all material particulars and substantiate its allegations even before a notice is issued for admission of the petition. REL has denied that it has failed to discharge its duty as alleged. REL has submitted that any such request or purported desire to extend BEST's operational area cannot be by way of the present petition and such practice ought to be deprecated. As regards the issue relating to PPA, it is REL's contention that the ATE by its judgment dated 6.5.2008 set aside the Commission's Order dated 6.11.2007 and has remanded the matter back to the Commission. The issue is *sub judice* and the Supreme Court has stayed the ATE's judgment until further orders. In the circumstances there is no



question of there being any failure on the part of REL to enter into any agreement as alleged or for reasons alleged. REL has, in the proceedings relating to the approval of BEST and TPC-G's PPA and the arrangements between TPC-D and TPC-G, submitted the reasons for non-execution of the PPA with TPC and the willingness of REL to enter into the same on an equitable allocation of TPC-G's capacity.

5. With reference to the break-up of distribution loss into technical and commercial losses, it is REL's contention that there has not been any default on the part of REL to supply the details as alleged. The Order referred to by BEST was the subject matter in Annual Performance Review and considered in the present year, i.e., Financial Year 2008-09, the effect of which has been given in the Tariff Order for Financial Year 2008-09 issued on 4.6.2008. In any case these aspects do not entitle BEST to invoke Section 19 of the EA 2003.

6. REL has submitted that it has been supplying electricity to the suburbs in Mumbai in an uninterrupted manner for the past 82 years. REL has set up extensive infrastructure at huge costs and has never failed in its universal service obligation to supply electricity to its consumers. REL has submitted that it has always complied with the MERC (Standards of Performance of Distribution Licensees, Period for Giving Supply and Determination of Compensation) Regulations, 2005. REL has denied that there has been any failure on its part to comply with any directions of the Commission or that any case has been made out for the issuance of notice for revocation of the distribution license of REL as alleged or at all.

7. The Bombay Small Scale Industries Association, by its application filed on 11.7.2008, Shri. Jude Tandon, by his application filed on 21.7.2008, and Shri. N. Ponrathnam by his application filed on 4.8.2008, have sought intervention in the matter. The intervenors have submitted that:

- (i) The tariff at which REL supplies power is high, however, there is no other option available to consumers but to procure power at such higher rates;
- (ii) REL is not authorised to distribute electricity by using the name 'Reliance Infrastructure Limited';
- (iii) REL could not produce any distribution license in the name of REL to sign the PPA with TPC-G and therefore, has been trying other methods to procure electric energy from TPC-G;
- (iv) Though, REL has paid annual license fees but they have not been issued any distribution license under section 12 of EA 2003;
- (v) The ruling given by the Commission in the year 2004-05 that there has been a mere change in name of BSES Limited does not make it clear as to whether fresh license is required under the EA 2003;
- (vi) Consumers of suburbs should get electricity at a rate at par (uniform tariffs) with other consumers of Mumbai;



- (vii) The Commission should direct BEST or MSEDCL or TPC to take over REL's assets to supply electricity in the suburban area.

8. An admission hearing was held on 6.8.2008. Shri. Ramji Srinivasan, Advocate appeared for BEST. Shri. J.J. Bhatt, Senior Advocate appeared for REL. The aforesaid intervenors also appeared. Shri. Ramji Srinivasan, submitted that the Commission can revoke REL's distribution license under Section 19(1)(a) of the EA 2003, which provides as under:

*“(a) where the licensee, in the opinion of the Appropriate Commission, makes wilful and prolonged default in doing anything required of him by or under this Act or the rules or regulations made thereunder”.*

It is his further contention that REL has defaulted in complying with directions given by the Commission under the EA 2003. This is a ground on which the Commission may suspend REL's distribution licence under the provisions of Section 24(1)(c) of the EA 2003. The Commission at its discretion has the power either to revoke or suspend REL's distribution licence. He submitted that the Commission can, under Section 24 suspend, for a period not exceeding one year, the licence of REL which is a distribution licensee and appoint an Administrator to discharge the functions of the distribution licensee in accordance with the terms and conditions of licence. The Commission is required to, within one year of appointment of the Administrator, either revoke the licence in accordance with the provisions contained in Section 19 or revoke suspension of the licence and restore the utility to the distribution licensee, as the case may be. For taking any action under Section 19 or Section 24, the Commission would need to, firstly, form an opinion, based on the materials available, and secondly, follow principles of natural justice by giving an opportunity of hearing to REL-D. The opinion could be based on such facts that has been brought to the notice of the Commission or that REL-D has been in persistent default of compliance of its directions. It is the Counsel's contention that the Commission would be required to form a *prima facie* opinion to come to the finding that that there has been consistent default, disobedience or non-compliance with the provisions of the EA 2003 or the rules or the regulations made thereunder. However, it would be mandatory on the Commission to give to REL-D not less than three months' notice, in writing, stating the grounds on which it is proposed to revoke the licence, and to consider any cause shown by the licensee within the period of that notice, against the proposed revocation.

9. Shri. J.J. Bhatt, read out certain provisions of the EA 2003, as under:

*“19. (1) If the Appropriate Commission, after making an enquiry, is satisfied that public interest so requires, it may revoke a licence in any of the following cases, namely: -*



*(a) where the licensee, in the opinion of the Appropriate Commission, makes wilful and prolonged default in doing anything required of him by or under this Act or the rules or regulations made thereunder;*

*24. (1) If at any time the Appropriate Commission is of the opinion that a distribution licensee –*

*.....*

*(c) has persistently defaulted in complying with any direction given by the Appropriate Commission under this Act;*

*and circumstances exist which render it necessary for it in public interest so to do, the Appropriate Commission may, for reasons to be recorded in writing, suspend, for a period not exceeding one year, the licence of the distribution licensee and appoint an Administrator to discharge the functions of the distribution licensee in accordance with the terms and conditions of licence:*

*Provided that before suspending a licence under this section, the Appropriate Commission shall give a reasonable opportunity to the distribution licensee to make representations against the proposed suspension of licence and shall consider the representations, if any, of the distribution licensee.”*

He submitted that for invoking the provisions of Sections 19 or 24 what is important is that there should be a consistent pattern of conduct. He argued that for invoking Sections 19 or 24, it is necessary to show that there have been prolonged and persistent defaults. This is absolutely necessary and is a pre-requisite. He contended that the language used in Section 19(1)(a) is “*wilful and prolonged default*”. Therefore, it is not any one default, which automatically leads to revocation of licence but there has to be a certain pattern of conduct, which has to be established and which should be evident on the basis of records.

10. Counsel for BEST submitted that the defaults that are being pointed out are not something which BEST has created but it is evident over a period of time during which the Commission has had the occasion to remark upon adversely on such non-compliances on the part of REL. This should not send a wrong signal regarding the wilful behaviour to other licensees who also may start disregarding their mandatory obligations and orders and directions passed by the Commission. It is necessary that all licensees must subject themselves to discipline and the jurisdiction of the Commission.

11. Counsel for REL referred to certain portion of Regulation 7.1.2 of the Tariff Regulations as under:



*“Provided that an application for approval of such power purchase agreement or arrangement shall be made by the Generating Company or the Distribution Licensee to the Commission within a period of three (3) months from the date of notification of these Regulations:”*

Counsel submitted that the word used in the above quoted provision is “*arrangement*”. The arrangement of power supply by TPC-G to REL-D is age old and the same has been submitted during various regulatory processes before the Commission. Counsel submitted that as regards the direction relating to the PPA is concerned it cannot be that the PPA must be executed even when the terms thereof cannot be agreed between REL-D and TPC-G. It is not that the Commission does not have powers of enforcement including by way of imposing penalty and that it would be only judicious to invoke Section 19 or Section 24. These Sections require an act, which would be so glaring that would require taking the drastic steps stipulated therein. These Sections are not to be invoked for day-to-day matters. The Commission also requires to naturally protect the other side while following the principles of natural justice. Ultimately, it is the Commission’s discretion and judgment to verify whether or not the material placed before it is such that it demonstrates or establishes prolonged default.

12. Counsel for BEST submitted that the period of three months specified under Regulation 7.1.2 of the Tariff Regulations were mandatory for REL-D to comply with. It is in public interest to verify as how REL-D would procure electricity. Counsel argued that jurisdiction of the Commission under Sections 19 and/or 24 is independent of the matter relating to the Commission’s approval to the PPA between REL-D and TPC-G. It is the contention of Counsel for BEST that even if the issues raised in the present petition are *sub judice* before the Hon’ble Supreme Court of India it does not take away the Commission’s jurisdiction to invoke Sections 19 or 24 for defaults committed by REL. It is only that whether or not there was a default in complying with the Commission’s directions, is to be determined. For example, if Regulation 7.1.2 requires that within three months REL-D were supposed to submit for approval their arrangement or agreement, and if no such agreement or arrangement has been submitted to the Commission, the Commission will be required to go into the question as to whether there has indeed been default on the part of REL-D. Counsel submitted that there has been a recalcitrant attitude on the part of REL-D in complying with the said Regulation 7.1.2, which demonstrates *prima facie* that there has been persistent default or refusal to comply with the Commission’s regulations and directions. REL-D could not justify as to whether they were disabled in any manner from contacting any other generator within or outside Maharashtra. REL-D could not justify as to whether they have taken any steps to tie up long-term power procurement because the requirement specified by Regulation 7.1.2 is not only of execution and submission of PPA for approval.



13. Having heard the parties and after considering the materials placed on record, the findings of the Commission are as under:

(i) With reference to the break-up of distribution loss into technical and commercial losses, the Commission is of the view that in its Orders dated 24.4.2007 passed in Case No. 75 of 2006 that is in the matter of Approval of Annual Revenue Requirements for the Control Period from FY 2007-08 to FY 2009-10 & Retail Tariff For FY 2007-08 for REL-D as well as Order dated 4.6.2008 in Case No. 66 of 2007 that is in the matter of Annual Performance Review for FY 2007-08 and Tariff Determination for FY 2008-09 for REL-D, the Commission has already examined these aspects of Distribution Losses and Collection Efficiency in detail. It is not that there is a vacuum on these aspects. The Commission had, in its said Order dated 24.4.2007 passed in Case No. 75 of 2006 at paragraph 6.3, directed REL to conduct a detailed study of the technical losses in the system at feeder level and DTR level and submit a report on the same within six months of the issue of the said order. A detailed technical loss study report was submitted by REL in the context of assessment of distribution losses in REL-D's distribution system. REL-D had assessed the technical distribution losses as 10.45% based on its in-house study, and submitted that since the overall distribution losses are 12.10%, the balance losses of 1.65% are commercial losses. In its Order dated 4.6.2008 in Case No. 66 of 2007, the Commission had directed REL as under:

2.19. "... In the meantime, within two months of issue of this Order, REL-D should submit a break-up of number of consumers residing in slums and the consumption and the number of consumers classified as 'non-slum' areas and their consumption, since REL has submitted that the commercial losses of these two groupings are significantly different.

*REL should also submit the basis for the statement made by REL in the proceedings before ATE that 65% customers come under the category of non-slum dwellers and 35% are slum dwellers, and that the distribution losses of non-slum consumers is less than 1% while losses in slum areas varies between 15% to 70% with an average of 22%."*

Since, the Commission has already examined these aspects of Distribution Losses and Collection Efficiency in detail and that it is not that there is a vacuum on these aspects, the Commission is of the further view that on this account it would not be justified to either revoke REL's licence or to suspend the same. The Commission is of the view that the giving of break-up of distribution loss into technical & commercial losses is not a matter that should be considered at this stage for invoking Section 19 or Section 24 of the EA 2003. It will not be in public interest to do so. There are other mechanisms available to the Commission to ascertain the break-up of distribution loss into technical and commercial losses, which the Commission would exercise at the appropriate time. There are powers available to the Commission in this regard while determining the annual revenue requirements and tariffs of REL-D.



(ii) As regards the aspects of PPA, in the Judgment and Order dated 6.5.2008 passed by the Hon'ble ATE in Appeal No.41/07 & IA Nos. 70/07 & 28/08, Appeal No. 143/07 & IA No. 70/08, Appeal No. 159/07 and Appeal No. 14 of 2008, inter alia against the Commission's Order dated 6.11.2007 in Case No. 87 of 2006, Case No. 88 of 2006 and Case No. 30 of 2007, it has been held as under:

*"102. We note from the above regulations that the Commission itself recognizes an agreement or an arrangement for long-term power procurement by a Distribution Licensee. Regulations require prior approval of the Commission for any change to an existing arrangement or agreement for long term procurement. When an arrangement for power procurement between TPC and BEST as also between TPC and REL does exist, how the Commission failed to consider the claim of REL."*

Since, the said Judgment and Order dated 6.5.2008 passed by the Hon'ble ATE, have been challenged before the Hon'ble Supreme Court and further the said judgment has been stayed, passing of any enforcement orders on the aspect of execution of PPA between REL-D and TPC-G by the Commission will not be in judicial propriety. Such a course under Section 19 or 24 of the EA 2003 as indicated by BEST cannot be adopted at this stage while proceedings are *sub judice* before the Hon'ble Supreme Court in Civil Appeal No.s 3510-3511 of 2008 filed by TPC challenging the final judgment and order dated 6.5.2008 passed by the ATE to which BEST is also a party. BEST is an appellant in Civil Appeal No. 3598 of 2008 pending before the Hon'ble Supreme Court in a statutory appeal filed under Section 125 of the EA 2003 challenging the said final judgment and order dated 6.5.2008 passed by the ATE in Appeal No. 143 of 2007. It is hardly necessary to emphasize that considerations of judicial propriety and decorum require that if the Apex Court is hearing a matter to reconsider the ATE's judgement dated 6.5.2008 in which the Commission's Order dated 6.11.2007 in Case No. 87 of 2006, Case No. 88 of 2006 and Case No. 30 of 2007 has merged in accordance with the '*Doctrine of Merger*', and in fact set aside by the ATE, the Commission should not embark upon an enquiry relating to the PPA between REL-D and TPC-G. That is the proper and traditional way to deal with such matters and it is founded on healthy principles of judicial decorum and propriety.

(iii) As regards the submission of the arrangement of power procurement by REL-D from REL-G, the same has been submitted by REL-D, and is currently being processed by the Commission.

14. As regards the issues raised by the Interveners, the same are dealt hereinunder:

- (i) Every distribution licensee has its own costs and other parameters based on which the Commission fixes the retail tariffs for such distribution licensee under Section 62 of the EA 2003 and tariff matter do not come within the ambit of present petition filed under Section 19 or 24 of the EA 2003;



- (ii) The Commission has notified the MERC (Specific Conditions of Distribution Licence applicable to Reliance Energy Limited) Regulations, 2008, on August 20, 2008, wherein the Commission has noted the change of name of Reliance Energy Limited to Reliance Infrastructure Limited consequent to the issue of fresh Certificate of Incorporation by the Registrar of Companies, Mumbai. Therefore, the contention that REL is not authorised to distribute electricity by using the name 'Reliance Infrastructure Limited', is not relevant;

With the above, BEST's Petition in Case No. 24 of 2008 and the applications filed by the intervenors, are hereby disposed of.

Sd/-  
(S.B. Kulkarni)  
Member

Sd/-  
(A. Velayutham)  
Member



(P.B. Patil)  
Secretary, MERC