

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 49 of 2008

In the matter of
Petition filed by M/s Pioneer Distilleries Limited for adjudication of dispute with
Maharashtra State Electricity Distribution Company Limited (MSEDCL)
regarding refusal of MSEDCL to grant permission for laying of 33 kV line
for connecting the generating plant with the sub-station

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

ORDER

Dated: October 22, 2008

M/s Pioneer Distilleries Limited (PDL) submitted a Petition under affidavit before the Commission on July 11, 2008 under Section 86 (1)(f) of the Electricity Act, 2003 (EA 2003) inter alia seeking adjudication of dispute with the Maharashtra State Electricity Distribution Company Limited (MSEDCL) regarding refusal on the part of MSEDCL to grant permission for laying of 33 kV line for connecting the generating plant with the sub-station.

2. PDL in its Petition prayed as under:
- a) *“issue a clarification that the Petitioner does not require a license for either laying a 33 KV dedicated transmission line from its power plant at Village Balapur, Dharmabad Taluk, Nanded District to the MSEDCL’s sub station at Dharmabad Taluk or for supply of electricity to Tata Power Trading Corporation Ltd., which is an inter –state trading licensee;*
 - b) *the Respondent No. 2 is directed to give permission to the Petitioner for laying of 33 KV line from its power plant at Village Balapur, Dharmabad Taluk, Nanded District to the MSEDCL’s sub station at Dharmabad in terms of the application / letter of the Petitioner dated 11.06.2006, being letter No. PDL/MSEB/1106/2008, being Annexure P/1 herewith.”*
3. PDL in its Petition submitted as under:
- a) PDL is in the process of setting up a 5 MW biogas based power plant at Balapur Village, Dharmabad Taluk of Nanded District, Maharashtra. PDL has executed a Power Purchase Agreement (PPA) with The Tata Power Trading Corporation Limited (TPTCL) dated April 28, 2008, being inter-State trading



- licensee. PPA executed is for an initial duration of ten (10) years, from the date of scheduled commercial operation of plant, i.e., September 2008, under which PDL is required to deliver the power at 33 kV sub-station of MSEDCL located at Dharmabad.
- b) PDL, vide its letter dated June 11, 2008, sought MSEDCL's permission for laying 33 kV line for connecting its power plant to MSEDCL's sub-station, however, MSEDCL vide its letter dated July 1, 2008 denied permission for laying the 33 kV line stating that PDL would be treated as Independent Power Producer (IPP) instead of Captive Power Plant (CPP). MSEDCL, under its letter, referred to Sections 12, 13, 14 and 15 of EA 2003 and submitted that the licence is mandatory for sale to third party except for CPP holders. MSEDCL further referred to Section 10 (2) of EA 2003 and the Commission's Order dated May 6, 2008 in the matter of Petition filed by M/s. Yash Agro Energy Ltd., for grant of permission for third party sale (Case No. 93 of 2007), and has asked PDL to obtain necessary clearance or licence from the Commission for the same.
- c) The Petitioner argued that in accordance with Sections 10 (duties of generating companies), 2(16) (definition of dedicated transmission line) and 39(2) (functions of the State Transmission Utility) of EA 2003, it is PDL's right to draw the line from its generating plant to MSEDCL's sub-station and supply power to TPTCL, which is undisputedly an inter-State trading licensee. The composite reading of aforesaid Sections clearly confirms that no licence is required either for laying a dedicated transmission line or for supplying power to a distribution/trading licensee.
- d) Further, in view of Section 39(2) of EA 2003, the transmission utility has a legal obligation to ensure that a generating station is able to evacuate the power generated by it. The provision of non-discriminatory open access has been made to ensure that the generating station is in a position to evacuate electricity through the grid.
- e) The Appellate Tribunal for Electricity (ATE), vide its various Judgments referred below, has clarified that a generating company is not required to obtain a licence for selling power to a licensee or a consumer:
- i) ATE Judgment dated June 2, 2006 in case of Small Hydro Power Developers Association and Others v/s Andhra Pradesh Electricity Regulatory Commission and Others (Appeal Nos 1, 2, 5, 6, 7, 8, 9, 10, 12, 15, 16, 17, 18, 19, 20, 21, 22, 34, 46, 47, 48, 49, 50, 52, 58, 67, 80 of 2005).
- ii) ATE Judgment dated May 11, 2006 in case of M/s Central Coalfields Ltd v/s Jharkhand State Electricity Regulatory Commission and M/s D.L.F Power Ltd. (Appeal No. 166 of 2005).
- f) As per the observations made by the Commission in its Order dated May 6, 2008 in the matter of Petition filed by M/s Yash Agro Energy Ltd. in Case No. 93 of 2007, there is absolutely no requirement of obtaining a licence for connectivity to the sub-station. MSEDCL has completely misunderstood the scope and purport of the said Order.
- g) Under Section 10 of EA 2003, there exist numerous generating companies, both owned by the State/Central sector and the private sector, which are



presently supplying electricity to distribution and trading licensees across the country, without obtaining any licence for such supply.

4. The Commission, vide its Notice dated July 28, 2008, scheduled the hearing in the matter on August 20, 2008, and directed PDL to serve a copy of its Petition along with its accompaniments to MSEDCL and the four authorised consumer representatives. However, no authorised consumer representative was present during the hearing.

5. At the hearing held in the matter on August 20, 2008, Shri. Sanjay Sen, Advocate, appeared on behalf of PDL. Shri. Sanjay Sen referred to PDL's letter dated June 11, 2008 addressed to the Chief Engineer (Commercial), MSEDCL, whereunder permission was sought for laying a 33 kV line from PDL's power plant to MSEDCL's Dharmabad 33 kV sub-station and line connecting arrangement at sub-station in order to export power. Shri. Sanjay Sen further referred to a letter dated July 1, 2008 from the Chief Engineer (Commercial), MSEDCL whereunder it has been intimated that PDL would need to obtain a necessary clearance or licence from the Commission. Shri. Sanjay Sen submitted that MSEDCL's letter dated July 1, 2008 is the cause of the dispute and sought necessary clarification from the Commission because a generating company does not need to obtain any licence in accordance with Sections 7 and 10 of EA 2003.

6. Shri. Ravi Prakash, Counsel for MSEDCL sought clarification from the Commission in view of the Judgment dated April 4, 2005 passed by the Hon'ble High Court of Judicature at Bombay in the case of *The Maharashtra State Electricity Board (MSEB) vs. State of Maharashtra, Bhushan Steel and Strips Ltd. and others* as also in view of the Commission's Order dated May 6, 2008 in the matter of *M/s Yash Agro Energy Ltd. vs. MSEDCL and others*. Shri. Ravi Prakash submitted that in effect PDL has sought a review of the said Order of the Commission dated May 6, 2008. Shri. Ravi Prakash submitted that MSEDCL does not have any objection per se to the contentions raised in the Petition filed by PDL but also submitted that what is coming in the way are the aforesaid Judgment dated April 4, 2005 passed by the Hon'ble High Court of Judicature at Bombay and the Order passed by the Commission dated May 6, 2008. Shri. Ravi Prakash submitted that although there has been an amendment to Section 9 of EA 2003, the Sections relating to licensing namely Sections 12, 13, 14 and 15 have not been amended and those are the Sections that have been interpreted by the Hon'ble High Court. Therefore, requirement to obtain licence would still remain on a generator when it sells to any licensee or consumer. Even under the Order dated May 6, 2008 in Case No. 93 of 2007, the Commission was pleased to hold that there is no exemption to a generating company (not being a CPP) from the requirement to obtain licence to supply electricity to any licensee or consumer. Shri. Ravi Prakash also referred to Section 2 (70) and Section 12 of EA 2003 and submitted that any sale/supply without obtaining license by relying on Section 10 would defeat Section 12, which requires obtaining licence for any kind of transmission, distribution or trading activity, which all have the element of sale/supply.



7. Shri. Sanjay Sen submitted that the Hon'ble High Court's Judgment in the Bhushan Steel case has been put to rest in view of the amendment carried out to Section 9 of EA 2003. Further, provision for supply of energy by Generating Company already existed under Section 10 of EA 2003. There was no need to further amend Section 10, which in any case enabled supply by generator without license. After the anomaly created by the Judgment in Bhushan Steel case, the legislature intervened and amended Section 9 of EA 2003 to remove the anomaly. Shri. Sanjay Sen referred to paragraph 4 of the statement of objects and reasons of EA 2003 to contend that generation including supply thereof is a de-licensed activity.

8. Shri. Ravi Prakash submitted that perhaps it would be appropriate to seek clarifications from the Hon'ble High Court in view of its Judgment in Bhushan Steel case.

9. Shri. Sanjay Sen submitted that no such licence is required to be obtained by a generator and which position has been settled in terms of ATE's Judgment dated June 2, 2006 in the case of Small Hydro Developers; and Judgment dated May 11, 2006 in the case of Central Coal Fields Ltd vs. Jharkhand State Electricity Regulatory Commission and Others. Shri. Sanjay Sen further argued that the EA 2003 has not envisaged any licence for 'supply' activity by Generating Company, as provisions for licensing exist only for transmission, distribution or trading activities. If licence was required to be availed by Generating Companies for supply of generated electricity, generating companies like MSPGCL/NTPC would have been required to avail licence.

10. In response to a query raised by the Commission regarding the powers of the Commission that are being invoked for dealing with the Petition filed by PDL, Shri. Sanjay Sen submitted that PDL may need to modify the Petition by removing the reference to a dispute for adjudication under Section 86(1)(f) and instead approach the Commission under Section 86(1) (e) for seeking connectivity with the grid as PDL has proposed to install renewable energy based generation unit and are covered under Section 86(1)(e) of EA 2003. Shri. Sanjay Sen requested that PDL's Petition should be treated as a Petition under 86(1)(c) read with 86(1)(e), and 86(1)(k), subject to formal amendment being filed.

11. Shri. Ravi Prakash sought two weeks time for MSEDCL to reply on the amended Petition so filed by PDL. Accordingly, the Commission granted two weeks time to MSEDCL to file its reply in the matter.

12. PDL, vide its affidavit dated August 22, 2008, submitted an application for amendment of the Petition filed before the Commission on July 11, 2008 so as to bring the Petition also within the mandate of Section 86 (1)(e) of EA 2003. PDL submitted that MSEDCL's letter dated July 1, 2008 constitutes a denial of grid connectivity in the manner envisaged under Section 86(1)(e) of EA 2003, and in view of the same, the Commission has the jurisdiction to entertain the Petition filed by PDL and consider the reliefs prayed therein. PDL added that it is admittedly generating electricity from renewable sources and as such is fully covered under the mandate of the Section 86(1)(e) of EA 2003.



13. Subsequently, MSEDCL submitted its reply and confirmatory affidavit to the Commission on September 17, 2008 in line with the directions of the Commission during the hearing held on August 20, 2008 in response to the amended Petition filed by PDL on August 22, 2008. Under its counter-affidavit, MSEDCL submitted that after going through the contents of the present amended application, it has no difficulty if the present amendment application is allowed, as there is no substantial change made out by PDL, and submitted as under:

- a) Prima facie from the plain reading of EA 2003, it appears that PDL may be correct, however, the Commission should consider below referred provisions while passing its Order in the matter:
 - Provisions of Section 12, 13, 14 and 15 of EA 2003;
 - Hon'ble High Court's Judgment dated April 4, 2005;
 - Order passed by the Apex Court dated May 17, 2005;
 - The Commission's Order dated May 6, 2008
- b) The Commission may clarify the legality with regards to the requirement of licence in the matter.
- c) The Commission should close the proceedings in the matter and pass an Order in the matter.

14. Having heard the parties and after considering the material placed on record, the Commission hereby rules as under:

15. MSEDCL has contended that it is the Commission's Order dated May 6, 2008 in the matter of Petition filed by M/s. Yash Agro Ltd (Case No. 93 of 2007), that poses difficulty in interpretation although *per se* there is no objection by MSEDCL to the putting up of dedicated transmission line by PDL. MSEDCL has in this regard referred to one specific portion of the said Order, which is reproduced below:

".....There is no exemption to a generating company (not being a captive generating plant) from the requirement to obtain license to supply electricity to any licensee or consumer."

It is necessary to distinguish the above Order passed by the Commission. Most importantly, the correct interpretation to the Commission's aforesaid finding is that a licence is required while a generating company wishes to sell electricity to a distribution licensee for which it needs to connect up to the intra State transmission system by laying down lines. This licence would be a transmission licence because it would involve transmission of energy. Similarly, when a generating company wishes to sell electricity to consumer(s) by laying down distribution lines/putting up distribution system, then in that event, the generating company would need a distribution licence for setting up such lines. To this extent, the aforesaid finding under the last sentence of Paragraph 19(6) of the Order dated 6th May, 2008 is correct. However, this ruling is not relevant to the case of PDL, since PDL is desirous of selling to an inter-State Trading Licensee, viz. TPTCL and is basically seeking connectivity with the grid of MSEDCL. As explained subsequently, ensuring connectivity with the grid is the prime responsibility of MSEDCL and PDL should not have to lay its own lines, unless it is desirous of laying down dedicated lines for the purpose of supply to TPTCL.



16. In this context, the Commission observes that Section 10 of EA 2003 lays down the duties of Generating Company and has clearly dealt with two aspects of establishment of generating station by Generating Company and undertaking 'supply' of electricity from such generating station, separately thereunder, as reproduced below:

“ (1) Subject to the provisions of this Act, the duties of the generating company shall be to establish, operate and maintain generating stations, tie-lines, sub-stations and dedicated transmission lines connected therewith in accordance with the provisions of this Act or the rules or regulations made thereunder.

(2) A generating company may supply electricity to any licensee in accordance with this Act and the rules and regulations made thereunder and may, subject to the regulations made under sub-section (2) of Section 42, supply electricity to any consumer.” (Ref. Section 10 (1) and (2) of EA 2003).

17. The above Sections of EA 2003 do not envisage any requirement to obtain licence for supply of electricity from a generating station unless such supply entails laying down of transmission or distribution lines at which time the provisions of Sections 12 to 15 which deal with Licensing would be attracted for undertaking transmission, distribution or trading, which are licensed activities as per Section 12 to 15 of EA 2003. Further, provisions of Section 7 would need to be kept in view:

“7. Any generating company may establish, operate and maintain a generating station without obtaining a licence under this Act if it complies with the technical standards relating to connectivity with the grid referred to in clause (b) of section 73.”

18. As regards connectivity of generating station to the grid is concerned, the Commission has stipulated under Regulation 4.4 of MERC (Distribution Open Access) Regulations, 2005, the procedures for enabling open access and connectivity to Generating Company for accessing distribution system of distribution licensee as reproduced below:

4.4 Application by Generating Company or Licensee:

4.4.1. Where a Generating Company or a Licensee is connected or intends to be connected to the distribution system of a Distribution Licensee and intends to give supply of electricity to an eligible consumer or to an eligible person as specified in 3.1, using such distribution system, the Distribution Licensee shall, within a period of thirty (30) days from the receipt of application for open access, intimate such Generating Company or Licensee of the technical requirements, details of works to be carried out, charges to be paid and estimated time period for completion of works in order to provide or enable such Generating Company or Licensee to give such supply”.

19. Thus, it is evident that distribution licensee is obliged to ensure grid connectivity for the generating station and arrange for evacuation of power from such generation station. Further, Regulation 5 and Annexure-II of MERC (Distribution



Open Access) Regulations, 2005 have clearly outlined conditions and Form of Agreement (namely, Connection and Use Agreement) for access and use of distribution system of distribution licensee by Generating Company. The Commission observes that under the said Connection and Use Agreement, the 'Connection Point' is defined as the physical point at which the premises of the Connector are connected to the distribution system. As per the MERC (Distribution Open Access) Regulations, the distribution licensee is not only obliged to provide access to its distribution system but is also duty bound to undertake necessary works to ensure connectivity for generating stations to its distribution system in a timely manner.

20. Thus, Distribution Open Access Regulations notified by the Commission has in terms of Section 2(47) of the EA 2003 enabled non-discriminatory "open access" for the use of transmission lines or distribution system or associated facilities with such lines or system by a person engaged in generation in accordance with the said regulations specified by the Commission. These provisions enable a Generating Company to access the distribution system of a distribution licensee for undertaking such supply to any other licensee (including trading licensee) or eligible consumer subject to payment of applicable charges for access and use of such distribution system. In this regard, it is relevant to refer to Section 2(47) as under:

"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.

21. As regards MSEDCL contentions about applicability of Hon'ble Mumbai High Court's Judgment in Bhushan Steel case, which is the case of captive power plant undertaking sale to third party, the EA 2003 has since undergone an amendment and Section 9 has been specifically amended to allow a CPP to sell surplus power without a licence. The Commission is of the view that with the Electricity (Amendment) Act, 2007 removing the requirement to obtain licence by captive generating plant for sale to licensee or consumer by amending Section 9 of the EA 2003, the aforesaid Judgment of the Hon'ble High Court is rendered infructuous. In any case, the reference to the said Judgment is wholly inapplicable to the present case where the Petitioner is not a Captive Generating Plant within the meaning of Section 2(8) of the EA 2003, while the Hon'ble High Court's Judgment applied to a Captive Generating Plant. Further, several Generating Companies such as MSPGCL and NTPC continue to undertake supply to licensees without need to avail licence, even pursuant to Hon'ble High Court's Judgment in Bhushan Steel case, a fact which has not been denied by MSEDCL. MSEDCL has also not raised this issue in case of any other Generating Company until issuance of Commission's Order dated May 6, 2008 in Case No. 93 of 2007.

22. In view of the above, the Commission rules that no licence is required to be availed by Petitioner as Generating Company for undertaking supply from its generating station. In addition, the Commission observed that the proposed



generating station of the Petitioner being renewable energy based generating station, as per provisions under Section 86(1)(e) of EA 2003, the Commission is mandated to promote and ensure suitable measures for connectivity to Grid for supply from such generating sources. Accordingly, the Commission directs MSEDCL to establish and ensure connectivity and access to its distribution system for Petitioner's Generating station, expeditiously. In case, PDL desires to lay 33 kV line in terms of its Petition, MSEDCL is directed to give permission to the Petitioner for laying of 33 kV line from its power plant at Village Balapur, Dharmabad Taluk, Nanded District to the MSEDCL's sub-station at Dharmabad in terms of the application/letter to the Petitioner dated 11.06.2006, being letter No. PDL/MSEB/1106/2008 (Annexure P/1 to the Petition).

Accordingly, PDL's Petition is Case No. 49 of 2008 stands disposed of.

Sd/-
(S. B. Kulkarni)
Member

Sd/-
(A. Velayutham)
Member



(P.B. Patil)
Secretary, MERC