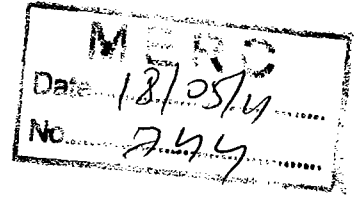


Buddy A. Ranganadhan

ADVOCATE

Our ref:

16-5-2011



Maharashtra Electricity Regulatory Commission,
13th Floor, Centre No. 1,
World Trade Centre,
Cuffe Parade,
Colaba,
Mumbai 400005

Kind Attn: Mr Khawarey
Secretary

Dear Mr Khawarey,

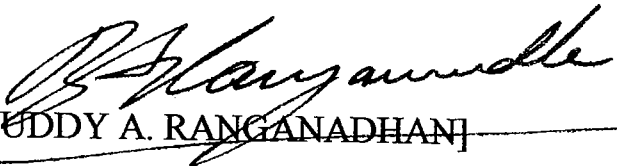
Re: Opinion of Mr Parag P. Tripathi, ASG on the
scope and applicability etc of Rule 3 of the
Electricity Rules 2005 vis a vis Section 14 of
the Electricity Act 2003

Please find enclosed the original opinion and original memoranda
of fees etc of Mr Tripathi in the above matter.

The same is for your kind information and necessary action.

Thanking you

Yours sincerely


[BUDDY A. RANGANADHAN]

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PARAG P. TRIPATHI
LL.M. (Harvard)

अपर महा-सॉलिसिटर

भारत

ADDITIONAL SOLICITOR-GENERAL
INDIA
19, Central Lane, Bengali Market
New Delhi- 110001
Tel No.23737387- 389

May 11, 2011

IN THE MATTER OF:

Maharashtra Electricity Regulation Commission

...Ex-parte Querist

1. The Querist is a statutory State Commission under Section 82 of the Electricity Act, 2003 (the 'said Act'). The Case for Opinion draws attention to the 6th Proviso to Section 14 of the said Act, which reads as follows:

"Provided also that the Appropriate Commission may grant a licence 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 licence within the same area shall, without prejudice to the other conditions or requirements under this Act, comply with the additional requirements [relating to the 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 licence on the ground that there already exists a licensee in the same area for the same purpose."

2. The Case for Opinion also further draws my attention to the Rule 3 of the Central Government Rules, 2005 (the 'said Rules'), which along with the Explanation thereto reads as follows:

"3. Requirements of capital adequacy and creditworthiness. – (1) The Appropriate Commission shall, upon receipt of an applicant for grant of licence for distribution of 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 licence 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 licence 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.”

3. It is in this background, my Opinion is sought on the following Queries:
- (A) Whether the introduction of concept of the “minimum area” for the grant of a licence introduced by the Explanation to Rule 3 of the said Rules is *ultravires* the scheme of the said Act and in particular, the specific language of the 6th proviso to Section 14 thereof?
 - (B) Whether in respect of an existing licensee, whose licence expires by efflux of time after the coming into force of the said Act, and where such an existing licensee has an existing licence is for an area less than the minimum area specified in the said Explanation to Rule 3, whether a fresh licence can be given to such an existing licensee in respect of the same area as held by it in the previous licence?

H. P. L.

(C) If the answer to Query 'A' is in the affirmative, whether the Querist can simply ignore the Explanation to Rule 3 of the said Rules while performing its statutory functions?

(D) Any other matter.

4. I have examined the Case for Opinion, as also the documents enclosed therewith. I have also had the benefit of a briefing by the learned counsels of the Querist. I now proceed to answer the Queries raised.

IN RE. QUERY 'A':

5. An examination of the substantive provisions of Section 14 shows that a licence can be granted by the Commission in respect of "any area", as may be specified in the licence. The substantive provision therefore, makes it clear that there is no limit in respect of the extent or nature of the area for which a licence may be granted.
6. There are nine provisos to Section 14 in the said Act. Normally a proviso is in nature of an exemption clause. The Sixth Proviso adds certain conditions for the grant of licence. This proviso makes it clear that the Commission may grant licence to "two or more persons for distribution of electricity through their own distribution system within the same area." The said proviso then specifies additional requirements relating to capital adequacy, credit-worthiness or code of conduct. It would be seen that the additional requirements relate to the eligibility criteria of the applicants for the grant of licence. These do not deal with the area of the licence.
7. The scheme of the said Act is therefore clear. The said Act provides for the grant of licence to two or more persons in respect of the same area, subject to the fact that the applicant meets with the eligibility criteria. It is significant that prior to the amendment of the sixth proviso, the expression reads as follows:

“... additional requirements including the capital adequacy, creditworthiness or code of conduct...”

8. This was substituted by the Amending Act 57 of 2003 by “additional requirements relating to the capital adequacy, creditworthiness or code of conduct”. Thus, the open-ended expression “including” was done away with and the eligibility criteria were specified by the sixth proviso itself, by using the expression ‘relating to’.
9. Rule 3 by the Explanation in a sense expands the scope of the sixth proviso to Section 14 by putting an additional condition in respect of the area for which the licence can be given by prescribing a minimum geographical area which broadly speaking is the area of a Municipal Council or Municipal Corporation, or as the case may be, a Revenue District.
10. It is submitted that this appears to be at variance to the scheme of the said Act. What should be the area for which a licence is to be granted is left to the discretion of the Appropriate Commission taking into account the scheme, drift and tenor of the said Act. This cannot be changed by recourse to Rule making power.
11. In my view, Section 176(2)(b) under which the said Rules have been made, is also specific and indicates that the rules may, [without prejudice to the generality of Section 176(1)] provide for:

“The additional requirements relating to the capital adequacy, creditworthiness or code of conduct under sixth proviso to Section 14.”

12. In my opinion the Explanation to Rule 3 cannot be read as laying down any additional condition or limitation in the exercise of statutory functions of the concerned Commission. In my view therefore, there is a strong case for contending that if in the alternative, the said Rule 3 is so interpreted as laying down an eligibility condition in respect of grant of licence, the said Explanation to Rule 3 would be open to a serious challenge that it is *ultravires* the said Act.
13. The Query is answered accordingly.

A. P. N.

IN RE. QUERY 'B':

14. The said Act does not contemplate any specific provision for renewal of a licence on the expiry of an existing licence by efflux of time. The scheme of the said Act is that there has to be a fresh issuance of licence.
15. In view of what I have stated in reply to Query 'A' above, it would be inappropriate to read in the Explanation to Rule 3 a fetter on the exercise of statutory powers by the Appropriate Commission.
16. In my view in respect of an existing licensee whose licence expires by efflux of time, there is no embargo under the said Act to issue a fresh licence under Section 14 of the said Act in respect of the entirety of the area over which it had a pre-existing licence even if the said area does not meet the requirement of "minimum area" under the Explanation to Rule 3. This is subject to the condition that such existing licence fulfills all the requirements for the grant of licence under the Act, including the eligibility criterion prescribed in the sixth proviso to Section 14 of the said Act.

IN RE. QUERY 'C':

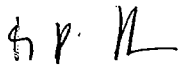
17. I have been shown a judgment of the Apex Court, which seems to support the view that if a Rule or other instrument of delegation is prima facie *ultravires* the Act, the same can be ignored by the statutory authority concerned. Reference in this connection may be made to the judgment reported as *Bharathidasan University vs. All India Council for Technical Education*, (2001) 8 SCC 676, (para 14, page 688).
18. I would however, as a matter of propriety not advise the adoption of such a course, as the Querist is a statutory body and enjoys high statutory authority. In my view, it would be appropriate for the Querist to make a representation bringing this anomaly to the notice of the Rule Making Authority so that the anomaly is rectified.

J. R. N.

19. I am sure that the recourse to the other remedy available, i.e. to challenge the validity of the Rule may not be required to be gone into, if the representation is vigorously pursued and corrective steps are taken.

IN RE. QUERY 'D':

20. I have nothing further to add.



(PARAG P. TRIPATHI)