

MAHARASHTRA ELECTRICITY REGULATORY COMMISSION

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Case No. 6 of 2011

In the matter of

**Application of Maharashtra State Electricity Distribution Company Limited for grant
of Distribution Licence in the area of supply served by RInfra-D**

Shri V.P. Raja, Chairman
Shri Vijay L. Sonavane, Member

Maharashtra State Electricity Distribution Company Limited

Registered office:

Plot No. G-9, Prakashgarh,

Prof Anant Kanekar Marg

Bandra (East),

Mumbai – 400051,

Maharashtra, India

....Applicant

ORDER

Dated: August 11, 2011

Background

The Commission published an ‘Invitation for Expression of Interest for Distribution of Electricity in the Suburbs of Mumbai’, on October 6, 2010. This was in the backdrop of the date of expiry on August 15, 2011 of the licence of Reliance Infrastructure Limited (RInfra) to distribute electricity in the suburbs of Mumbai.

2. In response, by November 4, 2010, the Commission received Expressions of Interest (EoI) from the following eight applicants, namely, Maharashtra State Electricity Distribution Company Limited; Torrent Power Limited; DPSC Limited; Lanco Infratech Limited; GMR Energy Limited; Indiabulls Power Limited; Tata Power Company Limited; and Enzen Global Solution Pvt. Limited. Subsequently, the Commission advised all these applicants through separate letters to submit applications for grant of Distribution Licence before the Commission in accordance with the applicable Regulations of the Commission and the provisions contained in the Electricity Act 2003 (hereinafter referred to as the “2003 Act”).

3. Four out of the above eight applicants, namely, Lanco Infratech Limited (LITL), Indiabulls Power Limited, Torrent Power Limited (TPL) and Maharashtra State Electricity Distribution Company Limited (MSEDCL) applied for the Distribution Licence.
4. MSEDCL filed an application on January 17, 2011, registered as Case 6 of 2011, as per the provisions of Section 14 read with Section 15 of the 2003 Act and in accordance with the provisions of the MERC (General Conditions of Distribution Licence) Regulations, 2006. The prayer set out in the application are as follows:-

“The Hon’ble Commission may please to grant sole Electricity Distribution Licence from 16.08.2011 to Maharashtra State Electricity Distribution Company Ltd in the present M/s Reliance Infrastructure Limited area of Supply”

5. The application submitted by MSEDCL was analysed for data gaps. The Commission communicated these data gaps through letter dated February 2, 2011. The Technical Validation Session (TVS) for MSEDCL’s application was held in the presence of authorised Consumer Representatives on February 23, 2011 at the Commission’s office. MSEDCL submitted its response to the data gaps and additional queries raised during the TVS on April 11, 2011.

Admission of MSEDCL’s application and Public Notice

6. After having examined the data gaps, and holding the Technical Validation Session (TVS), the Commission admitted MSEDCL’s application for Grant of Distribution Licence on May 5, 2011 and directed MSEDCL to issue a Public Notice on or before May 10, 2011 in compliance with Section 15(2) of the 2003 Act read with Regulation 5.3 of MERC (General Conditions of Distribution Licence) Regulations, 2006.
7. MSEDCL informed the Commission that it published notice on May 10, 2011, of its application for grant of Distribution Licence in two (2) daily English newspapers (Business Standard & Indian Express) and in two (2) daily Marathi newspapers (Sakal and Navakal) in the proposed area of supply. A copy of the same was made available on the Commission’s as well as MSEDCL’s websites. MSEDCL invited suggestions and/ or objections on its application within thirty (30) days from the date of publication of notice.
8. In accordance with Section 15 (2) (ii) of the 2003 Act, and in order to ascertain whether the Central Government have any objection to the grant of licence, in the event the proposed area of supply included the whole or any part of any cantonment, aerodrome, fortress, arsenal, dockyard or camp or of any building or place in the occupation of the Central Government for defence purposes, the Commission issued letters to the concerned Ministries of the Central Government (Ministry of Defence, Ministry of Civil Aviation, and Ministry of Shipping) inviting objection(s), if any, with reference to the application of MSEDCL for grant of Distribution Licence. The Commission did not receive any objection in this respect within 30 days from the date of the issuance of the said letters.

Objections raised against application of MSEDCL

9. In response to the Public Notice published by MSEDCL of its application for grant of Distribution Licence, the Commission received several objections from various stakeholders and members of the public against the application submitted by MSEDCL. These objections have been classified broadly under the following heads depending on the reason for which such objections have been raised.

Objection 1: MSEDCL suffers from high political interference

It was anticipated that after the unbundling of the erstwhile MSEB into three independent entities viz. MSPGCL for generation, MSETCL for Transmission and MSEDCL for distribution it would lead to efficient management and good governance of these companies with least political interference thereby making these companies economically viable and efficient benefitting the consumers. However, MSEDCL failed on all counts with high level of political interference.

MSEDCL's response

MSEDCL submitted that though it is a fully owned Government Company, it is an independent legal entity as per the Companies Act and therefore there is no political interference in any event. All the decisions are made by the Board of Directors of the company in line with the Companies Act. Furthermore, the determination of tariff for various consumer categories falls within the purview of the Commission as per the provisions in the EA 2003 and does not fall under the jurisdiction of the State Government.

Commission's view

Having ownership of the Government does not constitute a relevant ground for rendering an applicant as not eligible. According to the Commission's view such allegation without proper substantiation cannot be sustained, and hence does not merit consideration.

Objection 2: MSEDCL may not be able to provide certain services to the consumers and there is a considerable Load Shedding in MSEDCL's present area of supply

Some objectors observed that past track record of MSEDCL has been very poor with respect to its modus operandi, and project implementation skills. It also lacks Customer Centric Focus and it cannot appoint experienced staff in the area of supply of RInfra. Some apprehended that MSEDCL may not be able to provide certain value added services presently provided by RInfra viz. round the clock availability of power, prior intimation through SMS in case of shutdown/outage, robust infrastructure with the

implementation of SCADA & DMS ensuring 24x7 power supply, easy & multiple payment options, quick response to complaints, Consumer Grievance Cell etc. Due to the Load Shedding implemented by MSEDCL in its area of supply, the consumers in the eastern suburbs viz. Bhandup & Mulund, and surrounding areas of Mumbai viz. Kalyan & Dombivali are facing long hours of power cuts. Furthermore the power shortage situation in rural Maharashtra is much worse than in the aforesaid areas of supply of MSEDCL. One of the consumers commented that in his area of residence, which is MSEDCL's area of supply, there is load shedding and in his area of work, which is in Mumbai region, there is uninterrupted power supply.

MSEDCL's response

In the reply letter it is mentioned generally that being a public utility, MSEDCL has been implementing various schemes to improve its effectiveness and efficiency in the rural areas as well. It has been carrying out APDRP Schemes wherein the major activities like erection of new 33kV Substations, 33kV lines, 11kV lines, New Distribution Transformer Centres and Capacitor Banks are almost completed. Furthermore at the technology front, various initiatives have been undertaken by MSEDCL whereby HVDS, feeder separation, Demand Side Management, Energization of pump set, Customer Care Centre, AMR Meters, SCADA etc has been implemented by MSEDCL. MSEDCL submitted that it possesses adequate experience in order to perform effectively and efficiently and is capable enough to serve the area of RInfra, Hence the apprehensions raised by the objectors need to be reviewed and reconsidered.

MSEDCL further submitted that it is making all the efforts to maintain continuity & quality of power to the satisfaction of the consumers in its area of supply and has been able to achieve a situation whereby MSEDCL is in the process of withdrawal of Zero Load Shedding Scheme as they are already in a position to cater to the demand of their consumers. This is due to additional capacity tie-up and various load management schemes undertaken by MSEDCL. Finally MSEDCL submitted that in case a distribution licence is granted to MSEDCL a proper arrangement will be undertaken to supply power 24 x 7 in the area of supply of RInfra Ltd. In its letter MSEDCL also mentioned about implementing the Gaothan Feeder Separation Scheme in rural areas which ensures restricted supply to agriculture load thereby extending nearly uninterrupted and quality power supply to the villages.

Commission's view

The Commission notes the objector's apprehension about the services of MSEDCL and MSEDCL's response in this matter.

Objection 3: MSEDCL has not met the requirement of minimum area of supply

One objector submitted that MSEDCL has not mentioned any minimum area requirement as specified in Rule 3 of the Distribution of Electricity Licence (Additional Requirements of Capital Adequacy, Creditworthiness and Code of Conduct) Rules, 2005.

MSEDCL's response

MSEDCL submitted that Commission in line with section 86(1)(d) read with EA 2003 vide its notice dated October 6, 2010 invited EoI for the Distribution of Electricity in the area of supply of RInfra. In line with this, MSEDCL along with other parties/bidders submitted the EOI application for the area of RInfra as featured in the EOI. Thus the Commission (i.e. MERC) is the appropriate authority to decide the minimum area in this case.

Commission's view

According to prayer made by MSEDCL, it has applied for grant of sole Electricity Distribution Licence in the present M/s Reliance Infrastructure Limited area of Supply. In the area of supply proposed by MSEDCL, RInfra and Tata Power Company Limited (TPC) are incumbent licensees. On the date of expiry RInfra's licence, TPC will continue to be the incumbent licensee in the same area. Therefore, the Commission does not find MSEDCL's prayer for an exclusive licence in the proposed area of supply tenable.

If a licence has to be granted to MSEDCL in its proposed area of supply, the issue of grant of licence to more than one person in the same area will arise. In such a situation, the sixth proviso to Section 14 of the 2003 Act, contemplates that an applicant must comply with the additional requirements relating to the Capital Adequacy, Creditworthiness, and Code of Conduct as may be prescribed by the Central Government. The criteria of minimum area of supply are specified in the Explanation to Rule 3 of the said Rules by the Central government. It states, "*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.*" MSEDCL's submission about requirement of minimum area of supply has been analysed in the subsequent portions of this Order (Para No. 20 and 21).

Objection 4: MSEDCL has high T&D Losses and it has proposed increasing AT&C Losses in its business plan

MSEDCL's Business Plan proposed increasing AT&C Losses wherein it was stated that the AT&C Losses for the proposed area of supply would increase from 11.15% to 11.67% in the next 5 years commencing after FY 2011 viz. FY 2012 to FY 2016. This will result

in tariff shock to the electricity consumers. This also reveals the inefficiency on the part of the organization as large as MSEDCL. It is failing to contain the losses, which should actually be reducing in order to support its claim of an efficient organization.

Some Consumers objected the high level of inefficiencies in Transmission and Distribution (T&D) system resulting in High level of T&D losses in the State and the issue of low level of collection by MSEDCL. They also pointed out that in many cases consumers are unmetered, resulting in low revenue for MSEDCL. Some of the consumers highlighted that the inefficiencies had risen to such an extent that MSEDCL had to bid some of its high losses areas & theft prone areas like Bhiwandi to private companies like Torrent Power and in case it had not done so then its overall losses would have been on the higher side, therefore in view of the above MSEDCL is not an apt choice to play the role of a distribution licensee in Mumbai City which is the nation's economic capital.

MSEDCL's response

MSEDCL submitted that in the Business Plan for the proposed area of supply submitted before the Commission there was an inadvertent error whereby the same AT&C Losses of the First Year got reflected for the rest of the period. Furthermore, it submitted that the technical and commercial loss shows a decreasing trend. However, it was wrongly presented in the Business Plan due to error in formula.

MSEDCL submitted that it has taken up steps for loss reduction and in 4 years reduced the distribution losses from 24% to 17%. This has been implemented using various drives and campaigns like Anti theft drive, wherein MSEDCL established 36 flying squads and 6 dedicated police stations functioning under the vigilance department to detect and handle power theft cases quickly. Furthermore it has been implementing some novel methods for accurate energy accounting, which include Photo Meter Reading, Feeder Metering and DTC Metering etc. MSEDCL further submitted that it has undertaken detailed tracking of doubtful consumers. Senior engineers pay personal visits to the premises of such consumers and initiate further action in case found guilty. MSEDCL has undertaken Mass Meter Replacement Project whereby all the meters which have been in service for last 10 years or more are being replaced, which has led to a better meter reading which in turn translates to a better billing and collection. As a result of all these initiatives the collection efficiency has improved from 89.2% to 97.3%. Also, the monthly revenues have increased from 1,100 Crore to Rs 2,300 Crore in past 5 years. The constant efforts of MSEDCL to curb power theft and to improve efficiency in operations has resulted in increase in collection efficiency and revenues which eventually has reduced the T&D losses by 6% in last 4 years.

MSEDCL further submitted that the EA 2003 mandates improvement in efficiency of electricity distribution through franchisees. Also, the National Electricity Policy provides for setting up of distribution franchisees in order to ensure electrification and ensuring that operation and maintenance is taken care of. Hence in line with the EA 2003 and NEP,

as a part of the distribution reform process, MSEDCL has awarded some areas for distribution franchisee with an intention to meet the reform objective. It also submitted that considering the vast area of MSEDCL, certain pockets in the State do have high T&D losses, where MSEDCL has already initiated action and brought the losses down from 24% to 17% in mere 4 years of time. However, for RInfra area of supply MSEDCL has submitted that a proper action will be undertaken to curb the prevalent losses in the RInfra area of supply and bring in efficiency improvement. Therefore, it submitted that implementing of distribution franchisee route cannot be construed as being inefficient as contended by some consumers.

Commission's view

The Commission noted the objector's apprehension about the performance of MSEDCL and MSEDCL's response in this matter.

Objection 5: Unrealistic assumption for Power Procurement

The power procurement plan submitted by MSEDCL was based on the assumption of procuring 200 MW power from Tata Power Company (TPC) for the next five (5) years. The Consumer's apprehension is that MSEDCL, in spite of having knowledge of the fact that TPC has stopped supplying power to RInfra from the April 1, 2011, has assumed that TPC will supply power to it. Therefore, it is a mistake on the part of MSEDCL to assume that it will be able to procure power from TPC for the next 5 years in order to provide uninterrupted supply of electricity to the consumers in the city of Mumbai. Furthermore, amongst the various comments/objections received, one of the consumers apprehended that if MSEDCL is planning to procure power from same or similar sources as RInfra then it may not lead to reduction in tariff for the consumers. The Consumers alleged that MSEDCL is trying to duplicate the existing power procurement structure of RInfra which will never lead to reduction in tariff.

MSEDCL's response

MSEDCL submitted that although TPC has stopped supplying 200 MW of power to RInfra, nevertheless, if MSEDCL is granted the Distribution Licence in the area of supply of RInfra, then in that scenario, it shall make all the necessary arrangements to ensure uninterrupted supply of power by inviting competitive bids from various developers including TPC. However with respect to the query whether the procurement of power from same/similar sources as RInfra or whether duplication of the existing power procurement structure of RInfra would lead to reduction in tariff to the consumers, it refrained from giving its comments.

MSEDCL submitted that it is making all the efforts to maintain continuity & quality of power to the satisfaction of the consumers in its area of supply and has been able to

achieve a situation whereby MSEDCL is in the process of withdrawal of Zero Load Shedding Scheme as they are already in a position to cater to the demand of their consumers. This is due to additional capacity tie-up and various load management scheme undertaken by MSEDCL. Finally, MSEDCL submitted that in case a distribution licence is granted to MSEDCL a proper arrangement will be undertaken to supply 24 x 7 power supply in the area of supply of RInfra.

Commission's view

In Case No. 13 of 2010, in the matter of Supply of Electricity from the generating stations of the Tata Power Company Ltd. to Reliance Infrastructure Ltd. for distribution to its consumers, the Commission has stated,

“The Commission clarified that as per the Electricity Act 2003 and the MERC (Terms and Conditions of Tariff) Regulation, 2005 the Commission has no power to interfere regarding the quantum of power for which each licensee needs to enter into a PPA. Hence, the Commission cannot advise the licensee on any issue on which the licensees has to enter into a PPA... ..

.....Further the Commission agrees with TPC that it is the responsibility of the licensee to procure its energy requirement and thus directs REL-D to make arrangements for procurement of its short term power purchase requirement.”

A PPA is a commercial contract between two entities. The scheme of 2003 Act does not empower the Commission to assign current PPA of the existing licensee to a new licensee(s). In addition, MSEDCL has not produced a firm substantiation indicating its arrangement to bring power from Dahanu plant. Therefore, the Commission does not find IPL's assumption on this matter tenable.

In a notification issued on December 9, 2010 by the Ministry of Power, Government of India, it was stated that the issue of competitive bidding route for PSUs/CPSUs beyond five years after the implementation of the paragraphs 5.1 and 7.1 of the Tariff Policy was discussed in the meeting of Group of Ministers on Power Sector Issues held on October 29, 2010 and the following decisions were taken:

“States should fully migrate to procurement of power by Discoms through tariff based competitive bidding both for public and private sector generation and transmission projects. For the sake of abundant clarity, MoP would issue a clarification regarding the permitted exemptions in the Tariff Policy for the expansion/upgradation of projects, excluding the hydro sector.”

Pursuant to the above, the notification stated that generation projects of PSUs/CPSUs and transmission projects of STUs/CTU, for which PPA(s)/ TSA(s) have been signed on or before January 5, 2011 are exempted from the tariff based competitive bidding route.

Therefore, power procurement by a distribution licensee, in the interest of consumers, would have to be done through competitive bidding.

Objection 6: Procurement Rate of Rs 3.50 per unit

The consumers expressed concern that whether MSEDCL will be able to procure short term or long term power at Rs 3.50/- per unit in the future for the consumers in the city of Mumbai when they have failed in the past to procure cheaper power for the rest of Maharashtra. Since last 10 years there has been a significant growth in captive power plants as rising cost of power and declining reliability has compelled the industry to move away from the MSEB/MSEDCL grid.

MSEDCL's response

MSEDCL submitted that the weighted average price of power transacted through the Power Exchanges viz. IEX and PXIL is Rs 2.47/- & Rs 2.99/- respectively as per the MMC report for the month of December 2010. Furthermore the Long Term PPA with Adani Power and India Bulls Power which has been approved by the Commission has been executed at the rate of Rs 3.28 per unit and at rate of Rs 3.26 per unit respectively. Considering the current market conditions, transmission charges and transmission loss, MSEDCL is of the opinion that they should be able to source power at the rate of Rs 3.50/- per unit for the consumers in the city of Mumbai.

Commission's view

In light of the Commission's views expressed in the context of preceding objections, power procurement by a distribution licensee, in the interest of consumers, would have to be done through competitive bidding. The Commission notes that the Business Plan submitted along with the application for grant of distribution licence is an important part of the application, which provides a bird's eye view of the proposed licensed business. However, the assumptions have effects on retail tariff, which the Commission deals with through a separate process under the provisions of its Tariff Regulations. The objector has not explained as to how this objection could be a ground for disqualifying an applicant from the grant of distribution licence. Therefore, such assumptions by MSEDCL, in relation to its Business Plan submitted for the purpose of grant of licence; do not adversely affect its eligibility for the grant of the distribution licence.

Objection 7: Cross Subsidy Burden

A common view expressed by some of the objectors is that if MSEDCL fails to contain its high level of T&D losses, low collection efficiencies in future then it might happen

that the cross subsidy burden of the rest of Maharashtra will be passed on to the consumers of Mumbai in order to subsidise the various classes of consumers in the rest of Maharashtra by charging a premium, eventually increasing the tariffs in the City of Mumbai.

MSEDCL's response

MSEDCL submitted that its tariff rates for various categories of consumers are lower than that of RInfra. Since it has a very large consumer base; the effect of cross subsidy in its case is minimized as compared to that of RInfra. It submitted that in case it is awarded the distribution licence of RInfra area of supply the consumer base will increase to a great extent with a varied consumer mix and as such the impact of Cross Subsidy will not be burdensome on the consumers. Hence, the consumers may not even face a tariff shock as well which they have experienced in the past.

Commission's view

The Commission notes the objector's apprehension about the performance of MSEDCL and MSEDCL's response in this matter.

Objection 8: There is no provision of total transfer of RInfra's assets & meeting the requirement under sixth proviso to section 14 of the 2003 Act

MSEDCL is proposing to apply for the Distribution Licence in the area of supply of RInfra under section 14 of the 2003 Act by total transfer of assets of RInfra at Net Book Value. There is no provision under the 2003 Act which provides for transfer of assets of an existing licensee to a new licensee when an application is made under Section 14 and Section 86(1)(d) of the 2003 Act. Accordingly there could be no provision relating to determination of any book value or any value on which assets could be so transferred. The sixth proviso to Section 14 of the 2003 Act clearly states that in case a licence is granted to a distribution utility for the distribution of electricity within the area of an existing distribution licensee then it would be through their own distribution system. MSEDCL's application fails to give details about the manner in which it plans to roll out its distribution network and funding of the same which will determine the capital adequacy requirement.

MSEDCL's response

MSEDCL submitted that RInfra has been catering to their consumers need through their distribution network in the licensed area. In relation to the roll out of the distribution network, MSEDCL opines that setting up of an entirely new distribution network may require additional Capital Expenditure in addition to what has already been commissioned in RInfra area. Further, it will be extremely difficult to assess the extent of investment

requirement at this stage to set up an independent duplicate distribution network. This additional capital expenditure will have to be recovered from the consumers in the form of high tariffs which may give rise to tariff shock to the consumers. Since, the Distribution Infrastructure has already been developed in the RInfra Distribution area, MSEDCL therefore propose to take over the entire fixed assets and will operate and maintain the same. However, MSEDCL submits that in relation to the continuous investment for the proposed area throughout the term of the licence period MSEDCL will assess the requirement for capital expenditure in the project area and will take suitable decisions after commencing its operations in the area. However, MSEDCL will invest in line with the investment undertaken by RInfra in the past. MSEDCL will identify areas of overloading and work to reduce technical losses, transformer failure rates & supply interruptions to serve the consumer better. This will help MSEDCL to achieve improvement in service quality and performance parameters for its consumers.

Commission's view

The sixth proviso to Section 14 of Electricity Act, 2003 is unambiguously clear on this matter. It gives power to the Commission to grant licences to two or more persons to distribute electricity within the same area, but only through their own distribution system. Accordingly, the applicant for distribution licence will have to supply electricity through its own distribution system.

The Commission has had the occasion to examine the opinion dated May 14, 2011 rendered by Shri. Gopal Subramaniam, the Learned Former Solicitor General of India, to the Forum of Regulators. A copy of this opinion as available on the website of the Forum of Regulators was made available to all applicants (including MSEDCL) for grant of licence pursuant to the aforesaid EoI, and uploaded on the website of the Commission. In the opinion, Learned Former Solicitor General of India examined the issue of economic viability of duplicating existing network due to sunk cost associated with it and economies of scale derived from network operation while examining the queries raised as follows:-

- (i) Can a licence 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 Rule 3(1) of the Rules, 2005?
- (iii) Could there be wheeling de hors open access so as to enable the new entrant to use the distribution system of the existing incumbent distribution licence 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 & 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 quoted above in the aforesaid judgment of Hon'ble Supreme Court in the case of Tata Power Co vs. Reliance Energy Ltd be confined to the said case or apply to similar situations in the electricity sector?

In a nutshell and to the extent relevant to the contention raised by TPL, Learned Former Solicitor General of India took the view that multiple distributors must come with the condition that each of the distributors supply electricity through their own distribution system in accordance with the sixth proviso to Section 14 of the 2003 Act, and therefore in accordance with Rule 3 of the Distribution of Electricity Licence (additional requirements of Capital Adequacy, Creditworthiness and Code of Conduct) Rules, 2005 it is mandatory for the Commissions to decide the capital investment for distribution network. The definition of "distribution licensee" under Section 2 (17) of the 2003 Act 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. Hence, retail supply and wires business cannot be segregated. However, as regards, the Supreme Court judgment in the case of Tata Power Co. Ltd vs. Reliance Energy Ltd., reported in (2008) 10 SCC 321, on a specific query as to whether the ratio in this case would be confined to the said case or apply to the similar situations in the electricity sector, Learned Former Solicitor General of India took the view that in the said case TPC was supplying electricity in an area for which the distribution licensee was BSES Ltd. This is not a case where TPC is a subsequent applicant to procure a distribution licence for an area for

which the existing licensee was BSES Ltd. TPC's licenses came to be granted long before BSES's licenses were granted. Since, Hon'ble Supreme Court held that "*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..*" the requirement of supplying electricity through one's own distribution system laid down in the sixth proviso to Section 14 need not be adhered to. These observations were made by Hon'ble Supreme Court in the 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 can use the distribution system of the distribution licensee for retail without owning a distribution system as expressly required under the sixth proviso to Section 14 of the 2003 Act. Hence, the ratio of the Hon'ble Supreme Court judgment in the case of Tata Power Co. Ltd vs. Reliance Energy Ltd., *Supra* is specific to the facts of the case.

The Commission has independently applied its mind on the aforesaid opinion dated May 14, 2011. The Commission is in agreement with the views of the Learned Former Solicitor General of India. A copy of this opinion as available on the website of the Forum of Regulators was made available to all applicants (including MSEDCL) for grant of licence pursuant to the aforesaid EoI, and uploaded on the website of the Commission, for their views.

MSEDCL's submission about requirement of its own network rollout have been analysed in the subsequent portions of this order (Para 47 to Para 54).

Salient features of MSEDCL's application

10. The salient features of MSEDCL's application are highlighted below (identified against each section of the data format of the application specified in the MERC (General Conditions of Distribution Licence) Regulations, 2006:

Part/Section	Description	Details provided
Part A: General Information	General information	MSEDCL has provided all the basic details as specified in this section of the application. Primary contact details, Registration number, date of incorporation and registration, address of registered office
Part A: 7	Ownership pattern	The ownership pattern was not provided in the application dated January 17, 2011. However, once the data gaps were communicated to MSEDCL, MSEDCL has provided these details. MSEDCL Holding Company Ltd (Government of Maharashtra Undertaking) holds majority

Part/Section	Description	Details provided
		of the shares.
Part B: 2 (d)	Relationship (including intending relationship, where applicable between the Applicant and key to the application for grant of Licence.	MSEDCL has mentioned that this is not applicable
Part B: 3, 4	Details of Income tax PAN/TAN; Details of import licence, if any	The details of the Income tax PAN and TAN are given. MSEDCL has mentioned that it does not have an import licence.
Part B: 5	Bank references asserting that the Applicant is financially solvent	Canara Bank has provided a credit information report and mentioned that MSEDCL has a networth of Rs. 4,694.4 crore as on 31-03-2009. MSEDCL also submitted the communication with Canara Bank regarding the working capital limits.
Part B: 8	Details of the actual or proposed location of the system of electric lines and electrical plant by means of which the applicant intends to enable distribution of electricity, indicating which plant and lines are to be constructed and which are existing plant and liens, and the area to which the application for Licence relates.	MSEDCL has provided the details of the RInfra distribution area with its application on January 17, 2011. In its letter dated June 9, 2011, MSEDCL submitted that it proposes to take over the entire fixed assets in the RInfra distribution area and will operate and maintain the same.
Part B: 9	Detailed electrical distribution map or maps of the proposed geographical area of supply, on a scale of not less than 10 centimetres to a kilometre, The map shall clearly distinguish between the existing system and new facilities.	MSEDCL did not submit this information with the application on January 17, 2011. The Commission highlighted this data gap. MSEDCL in its letter dated February 14, 2011 submitted that it does not have all the data of RInfra and propose to take over the distribution assets of RInfra at cost approved by the Hon'ble Commission.
Part B: 10	Business Plan details	MSEDCL has provided a Business Plan along with the application. The Commission highlighted data gaps in the Business Plan related to Load growth, Debt restructuring, rural electrification, cost reduction plan and network rollout plan. MSEDCL subsequently submitted the requisite information apart from the network rollout plan. With regard to the network rollout plan, MSEDCL submitted

Part/Section	Description	Details provided
		that it would provide the plan once the Commission grants MSEDCL the distribution licence in its applied area. The Commission further pointed out inconsistencies in the Business Plan vide letter dated May 27, 2011. MSEDCL responded to the same on May 30, 2011.
Part B: 12	Supporting information on compliance with the additional requirements prescribed by the Central Government, as may be applicable.	MSEDCL has provided the Code of Conduct requirement signed by a Chartered Accountant as well as another submission of the same signed by the Company Secretary through its letter dated May 30, 2011.
Part C	Format for assessing competence of applicant	MSEDCL had not submitted details of the proposed project (Business for which the licence is sought) Revenue Potential and Baseline information in the required format in its application dated January 27, 2011. This was informed to MSEDCL. MSEDCL submitted a reply to the data gaps on February 14, 2011.

Evaluation of MSEDCL's eligibility for grant of Distribution Licence

11. On the date of expiry of the present licence of RInfra, another Licensee viz., Tata Power Company Limited (TPC), would exist in the same area. Hence, the issue of grant of licence to more than one person in the same area will arise when grant of a distribution licence in the area of an existing licensee is considered. In such a situation, the sixth proviso to Section 14 of the 2003 Act, contemplates that an applicant where "there already exists a Licensee in the same area for the same purpose" must "comply with the additional requirements relating to the Capital Adequacy, Creditworthiness, and Code of Conduct as may be prescribed by the Central Government." This would be without prejudice to the other conditions or requirement, if any, under the 2003 Act. The sixth proviso to Section 14 of the 2003 Act is extracted 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 requirement under this Act, comply with the additional requirements relating to the Capital Adequacy, Creditworthiness, and 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:"

12. Accordingly, the provisions of the Distribution of Electricity Licence (Additional requirements of Capital Adequacy, Creditworthiness and Code of Conduct) Rules, 2005 notified by the Central Government as per the provisions of Section 14 of the 2003 Act, have been applied in the present case. The extracts thereof are as follows:-

“... 3. Requirements of capital adequacy and creditworthiness.-

(1) The Appropriate Commission shall, upon receipt of an application 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 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.

4. Requirement of Code of Conduct.-

The applicant for grant of licence shall satisfy the Appropriate Commission that he has not been found guilty or has not been disqualified under any of the following provisions within the last three years from the date of the application for the grant of licence:

(a) section 203, section 274, section 388B or section 397 of the Companies Act, 1956;

(b) section 276, section 276B, section 276BB, section 276C, section 277 or section 278 of the Income tax Act, 1961;

(c) section 15C, section 15G, section 15H or section 15HA of the Securities and Exchange Board of India Act 1992;

(d) clause (b), (bb), (bbb), (bbbb), (c) or (d) of sub-section (1) of section 9 of the Excise Act 1944;

(e) section 132 or section 135 of the Customs Act 1962,

and that the applicant is not a person in whose case licence was suspended under section 24 or revoked under section 19 of the Act, within the last three years from the date of application:

Provided that where the applicant is a company, it shall satisfy the Appropriate Commission in addition to provisions of this rule that no petition for winding up of the company or any other company of the same promoter has been admitted under section 443 (e) of the Companies Act, 1956 on the ground of its being unable to pay its debts.”

13. Apart from the above requirements, according to the sixth proviso to Section 14 of the 2003 Act, licence can be granted only to those applicants, who would distribute electricity through their own distribution system.
14. The Commission assessed MSEDCL's eligibility for grant of the distribution licence on the basis of the framework described above, and various information provided in MSEDCL's application and other submissions made by MSEDCL from time to time. Accordingly, the Commission used the following criteria to determine MSEDCL's eligibility for grant of distribution licence:
 - Minimum area of supply requirement (E1)
 - Capital Adequacy requirement (E2)
 - Creditworthiness requirement (E3)
 - Code of Conduct requirement (E4)
 - Requirement of own network rollout plan (E5)

Minimum area of supply requirement (E1)

15. Till 1985, BSES Ltd's licensed area included the area of Municipal Council of Mira Bhayandar (as it was known then). Thereafter, the Government of Maharashtra (GoM) by a notification dated January 10, 1990 revised the area of Mira Bhayandar Municipal Council to include the areas to the East covered by the revenue villages of Chene and Varsova (additional area).
16. By notification in Gazette Extra Ordinary dated December 1, 2001, the Govt of Maharashtra ("GoM") declared that the whole of the local area comprising the Mira Bhayandar Smaller Urban Area should cease to be a Municipal Area from February 28, 2002. In the same Extra Ordinary Gazette, the said area was further notified as larger urban area as a municipal corporation by the name of Mira Bhayandar Municipal Corporation with effect from the same date.
17. It is important to note that MSEDCL, in its application, submitted, *"The H'ble Commission may please to grant sole Electricity Distribution Licence from 16.08.2011 to Maharashtra State Electricity Distribution Company Ltd in the present M/s Reliance Infrastructure Limited's area of supply."* An exclusive licence in favour of the Applicant

herein cannot be granted as it would either entail reducing the licensed area of supply of the existing incumbent distribution licensee or by carving out the proposed area of supply of the Applicant from the licensed area of supply of the existing incumbent distribution licensee and because the same would be contrary to the overwhelming aspect of “promoting competition” expressly stipulated in the pre-amble of the 2003 Act as well as the same would run contrary to the expression “*grant licence to two or more persons for distribution of electricity*” as expressly stated in the sixth proviso to Section 14 which also stipulates that “*there already exists a licensee in the same area for the same purpose*”. Thus, the Commission is mandated to follow the object of the 2003 Act stated in the pre-amble as well as the enabling powers vested in the Commission under the sixth proviso of Section 14 of the 2003 Act to grant a licence to two or more persons where there already exists a licensee in the same area for the same purpose. Giving an exclusive distribution licence to the Applicant in the proposed area of supply to the exclusion of the existing incumbent distribution licensee would not be in conformity / consonance with the pre-amble of the enactment as well as the sixth proviso to Section 14 of the 2003 Act. Furthermore, the pre-amble of the 2003 Act requires “protecting interest of consumers” and therefore, grant of exclusive licence in the area of supply in favour of the Applicant would retard availability of choice to the consumers of the said area which would be contrary to “protecting interest of consumers”.

18. In the area of supply proposed by MSEDCL, RInfra and Tata Power Company Limited (TPC) are incumbent licensees. On the date of expiry RInfra’s licence, TPC will continue to be the incumbent licensee in the same area. Therefore, if a licence has to be granted to MSEDCL in its proposed area of supply, the issue of grant of licence to more than one person in the same area will arise. In such a situation, the sixth proviso to Section 14 of the 2003 Act, contemplates that an applicant must comply with the additional requirements relating to the Capital Adequacy, Creditworthiness, and Code of Conduct as may be prescribed by the Central Government. The criteria of minimum area of supply are specified in the Explanation to Rule 3 of the said Rules by the Central Government. It states, “*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*”.
19. MSEDCL has sought a licence to distribute electricity in and around suburbs of Mumbai (the area of the existing distribution licensee of RInfra-D). The Commission vide letter dated June 15, 2011 advised MSEDCL to consider amendment/ modification of its proposed area of supply in view of the said Rules, 2005 and proposal of other applicants, if it so desired. In its reply through letter dated June 21, 2011, MSEDCL submitted that the villages of Chene and Varsova of Mira Bhayandar Municipal Corporation are already included in the MSEDCL area. MSEDCL submitted that if it was granted a licence in the area of supply of RInfra (existing licensee), it shall cover the entire Municipal Corporation of Mira Bhayandar. Thus, automatically the minimum area criteria will be

complied with. Therefore, MSEDCL submitted that it did not find any reason to modify its already submitted application in respect of proposed area of supply.

20. **The Commission notes that MSEDCL has applied for a separate licence. The grant of such licence shall be independent of its existing distribution licence.** The area of supply proposed by MSEDCL, in its present application, covers a part of Mumbai Sub-urban Revenue District. It excludes Mulund and Bhandup, which is a part of the Mumbai Sub-urban Revenue District. Therefore, the proposed area of supply does not cover a Revenue District completely. Alternatively, the proposed area of supply does not include any Municipal Council or Municipal Corporation completely. It covers a part of the Municipal Corporation of Greater Mumbai (MCGM). It does not include the villages of Chene and Varsova which is a part of Mira Bhayandar Municipal Corporation (MBMC). Therefore, the proposed area of supply does not cover a Municipal Corporation completely.
21. The Commission is of the view that since the area of supply, as proposed by MSEDCL in its application for grant of Distribution Licence, does not cover an entire Municipal Corporation or an entire Revenue District. MSEDCL's proposed area does not conform to the minimum area of supply in terms of the Explanation to Rule 3 of the Distribution of Electricity Licence (Additional requirements of Capital Adequacy, Creditworthiness and Code of Conduct) Rules, 2005. Therefore, the prescription that "*the area falling within aMunicipal Corporation shall be the minimum area of supply,*" is not fulfilled. Therefore, the Commission is of the view that in totality the minimum area of supply requirement in terms of the Explanation to Rule 3 of the Distribution of Electricity Licence (Additional requirements of Capital Adequacy, Creditworthiness and Code of Conduct) Rules, 2005 is not complied with.

Capital Adequacy requirement (E2)

22. To comply with the Capital Adequacy requirement laid down in the said Rules 2005 of the Central Government, MSEDCL was required to satisfy the Commission that it has the ability to make available equity to the extent of 30% of the capital investment requirement for distribution in the proposed area of supply. It is also specified that such ability is to be assessed based on the Networth and Internal Resource Generation of business and promoters in the preceding three years after excluding other committed investment.
23. MSEDCL was asked to submit a certificate providing computation details about its financial parameters namely Internal Resource Generation and Networth. For the purpose of computation of these parameters, only audited annual accounts were to be considered. Such accounts include all the assets and liabilities owned by the applicant entity. In other words, if the applicant owns distribution assets existing in the proposed area of supply, the value of those assets would anyway get captured in such computations. In such case, even if the capital investment requirement may be incremental, the Capital Adequacy

cannot be assessed in incremental manner. Because, it is not possible to obtain the audited Annual Accounts, which exclude the value of distribution assets existing in the proposed area of supply. Therefore, the Commission found it appropriate to consider audited annual accounts, which include all assets and liabilities. And accordingly, it proceeded to determine the capital investment required for rolling out a new distribution system in the proposed area of supply.

24. It is specified in the Rules that the Commission needs to determine requisite capital investment based on the size of area and the universal service obligation. The Commission is of the view that accurate estimation of capital investment requirement is not a necessary exercise for the purpose of grant of licence. The central idea is to have a fair estimate of such capital investment requirement. After hearing the applicant and considering the area for which licence is sought for, the Commission arrived at an estimate of capital investment requirement based on publicly available information and other material in the possession of the Commission. According to such estimate, the capital investment requirement shall be to the tune of Rs. 4,511 crore. However, in view of the observation made in Para 21, this amount pertains to the proposed area of supply, which falls short of minimum area required in accordance of Central Government Rules, 2005.
25. Therefore, on a norm of 30% equity, the total equity investment required is about Rs. 1,353 crore. The Commission feels that under the dynamics of capital markets, a company may choose not to invest all the equity/ share capital from its own resources. It is reasonable to expect that the company shall invest at least 26% of the total equity requirement from its own resources to have sufficient control in terms of controlling stake and voting rights in the said licensed business. Therefore, MSEDCL needs to invest a minimum equity capital of Rs. 352 crore.
26. The Central Govt. Rules, 2005 states, “..... *satisfy the Appropriate Commission that... a company, would be in a position to make available resources for such equity of the project...*” Accordingly, the applicant may opt to raise the equity for the required capital investment through multiple avenues along with its own resources. It may dilute its ownership in this distribution business to raise equity from outside sources to fund capital investment. Therefore, it is assumed that the applicant will form a Special Purpose Vehicle (SPV) for the proposed distribution business. Even if the applicant may decide not to form such SPV, the Commission, for the purpose of evaluation of eligibility of the applicant and to give effect to the provisions of the said Rules, 2005, has assumed such SPV while assessing Capital Adequacy and Creditworthiness requirements.
27. If other investors infuse significant equity in the proposed distribution business, they may get representation in the Board of Directors. For the decisions regarding capital investment in the proposed distribution business, the applicant has to obtain approval from its Board of Directors. If the investments are in the interest of the business, the

Board would support decisions for such investments. Therefore, major hurdles in getting Board's approval for such investments are not anticipated.

28. However, it is possible that the applicant's share in equity reduces substantially due to external infusion of equity. It would still be fair to assume that the applicant continues to hold its primary interest in the distribution business and therefore in holding the Distribution Licence. Hence, it will ensure its control over the critical decisions regarding this business. Therefore, it shall hold minimum 26% of total equity in proposed distribution business, so that, independently it can block special resolutions, which are not in the interest of the company. Therefore, the minimum equity requirement from the applicant at any point in time shall not be less than 26% of total equity.
29. According to the Distribution of Electricity Licence (Additional requirements of Capital Adequacy, Creditworthiness and Code of Conduct) Rules, 2005 the Capital Adequacy has to be assessed based on Networth and Internal Resource Generation of preceding three (3) years. As the 2003 Act or the Rules of the Central Government do not specify any method of computing Networth and Internal Resource Generation, the Commission adopted the method specified by the Central Government in the Standard Bidding Documents for procurement of power through tariff based Competitive Bidding under Case 2.

The formula for Networth computation adopted by the Commission is as below:

Networth = Equity Share Capital + Reserves and Surplus - Revaluation Reserves - Intangible assets - Miscellaneous Expenditure to extent not written off and carry forward losses

The formula for Internal Resource Generation computation adopted by the Commission was as below:

Internal Resource Generation = Profit after Tax + Depreciation and Amortization + Decrease in Net current Assets (Excluding cash) + Any other non-cash expenditure (including deferred tax) - Scheduled loan repayments and increase in net current assets (excluding cash)

The following two tests were considered, while assessing capital adequacy of the applicant. It is important to note that both the below-mentioned tests had to be separately passed.

Test 1: Is the maximum of (NW1, NW2, NW3) – CE ≥ CIC

AND

Test 2: Is five (5) times the maximum of (IRG1, IRG2, IRG3) – CE ≥ CIC

Where:

IRG1: Internal Resource Generation for the last audited financial year

IRG2: Internal Resource Generation for the year before the last audited financial year

IRG3: Internal Resource Generation for two years before the last audited financial year

CE: 26% of the Committed Equity investments elsewhere

CIC: 26% of (30% of Capital Investment Criteria) as estimated from capital expenditure requirement

NW1: Networth for the last audited financial year

NW2: Networth for the year before the last audited financial year

NW3: Networth for two years before the last audited financial year

The multiplying factor for Internal Resource Generation (IRG) is taken as 'five (5)', which reflects the number of years needed to setup the distribution system in the applied licence area.

30. MSEDCL was asked to submit the computation of Networth and Internal Resource Generation (IRG) certified by the Managing Director/ Chief Executive Officer/ Manager (authorized through a board resolution), being a full time director on the Board of the Company and the statutory auditor as per the formula specified above, through MERC letter dated June 17, 2011. MSEDCL vide its letter dated June 21, 2011, submitted the computation of Networth and Internal Resource Generation for the company which is shown below.

Table 1 : MSEDCL - Networth and IRG

(Rs. crore)	FY 2008-09	FY 2009-10	FY 2010-11
Networth	5,051.9	5,408.2	5,455.9
IRG	(1,247.2)	213.3	13.1

31. However, MSEDCL's computation of Networth and IRG was certified by the Director (Finance) and was not certified by a Statutory Auditor as required by the Commission. Hence, the Commission considers such submissions incomplete to rely upon. Hence the Commission is of the view, that incomplete submissions of MSEDCL shows that, it has not met the Capital Adequacy Criteria.
32. However, if the Commission considers the submission made by MSEDCL as reliable, the Capital Adequacy of MSEDCL would be computed as explained here. The Networth as on March 31, 2011 is Rs. 5,455.9 crore, which is the maximum in the preceding 3 years. The maximum IRG over the last 3 years was Rs. 213.3 crore in FY 2010-11. MSEDCL had negative IRG in FY 2008-09.
33. To assess whether the applicant has committed investments tied up in other projects, MSEDCL was asked to submit this information through letter dated May 25, 2011. As per

the Distribution of Electricity Licence (Additional requirements of Capital Adequacy, Creditworthiness and Code of Conduct) Rules, 2005, such commitments need to be excluded while deriving Capital Adequacy. MSEDCL vide its letter dated June 9, 2011 submitted only the capital investments planned in its present distribution area in the last 3 financial years. MSEDCL did not submit the other committed investments and also the proposed funding of the other committed investments as required by the Commission in accordance of Central Government Rules, 2005.

34. Therefore, according to the test determined by the Commission, the Networth and Internal Resource Generation of MSEDCL, adjusted for the committed equity investments elsewhere, could not be assessed.
35. In view of the above, the Commission concludes that MSEDCL's submission is incomplete which shows that, it has not met the eligibility requirement for Capital Adequacy for both Networth and Internal Resource Generation.

Creditworthiness requirement (E3)

36. The Distribution of Electricity Licence (Additional requirements of Capital Adequacy, Creditworthiness and Code of Conduct) Rules, 2005, do not elaborate on the method of Creditworthiness assessment. However, in the Judgment of the Hon'ble Appellate Tribunal for Electricity in Appeal No. 7 of 2010 is being referred for the purpose of evaluation of Creditworthiness requirement. In this judgement, the Hon'ble Tribunal observed as follows:-

“The Capital Adequacy is determined on the above basis; and on the basis of the Capital Adequacy so determined the ability of the Applicant to raise finances and funds has to be determined. The creditworthiness of the Applicant will have to be tested by considering whether external borrowings from Banks or Financial institutions will be available to the Applicant based on the fulfilment of the Capital Adequacy norms”

37. The MERC (General Conditions of Distribution Licence) Regulations, 2006 (in Point 5 of Part B of Annexure 1 of the Application format) require the applicant to submit “Bank references asserting that the Applicant is financially solvent”. The solvency assesses the ability of an organisation to meet its long-term fixed expenses and to accomplish long-term expansion and growth. Moreover, as part of additional information, MSEDCL was asked to submit the latest available Credit Rating report. The Credit Rating report provides a credit rating, which represents the rating agency's opinion on the likelihood of a rated debt obligation being met in full and on time. A simple alphanumeric symbol is normally used to convey a credit rating. In contrast to a credit bureau, which provides information on past debt repayments by borrowers, a credit rating agency provides an opinion relating to ability of the borrower to repay a debt in future. Since a credit rating report takes into consideration past repayments record and future likelihood of repayment

of a debt, the Commission, in the absence of any other tool, found it appropriate to consider latest available credit rating report for assessing Creditworthiness of MSEDCL.

38. MSEDCL, vide its letter dated June 9, 2011 provided a solvency certificate from Canara Bank. Canara Bank, in the solvency certificate has mentioned MSEDCL to be solvent to the extent of Rs. 5,102 crore. Canara Bank was contacted to verify the authenticity of the certificate. No response has been received from the Canara Bank regarding the same.
39. The Commission, vide its letter dated June 3, 2011 directed MSEDCL to submit its credit rating report. MSEDCL, in reply to the letter submitted that it had approached CARE for rating of Bank Loans/ Facilities aggregating to Rs. 2787.5 crore, in the year FY 2008-09. However, MSEDCL submitted that the final rating given by CARE was not accepted and has not submitted a credit rating report.
40. The debt requirement of MSEDCL in the proposed business is 70% of the total capital investment requirement, which is about Rs 3,158 crore. The applicant should be in a position to raise this debt. However, in view of the observations made in Para 21, this amount pertains to the proposed area of supply, which falls short of minimum area required.
41. According to the solvency certificate provided by Canara Bank, MSEDCL can be treated as solvent to the extent of Rs. 5,102.16 crore. Based on this certificate, the Commission is satisfied that MSEDCL meets the requirement of Creditworthiness. However, MSEDCL is not eligible for grant of a distribution licence because of non-fulfilment of other requirements of the said Central Government Rules, 2005.

Code of Conduct requirement (E4)

42. As provided in Rule 4 of the Distribution of Electricity Licence (additional requirements of Capital Adequacy, Creditworthiness and Code of Conduct) Rules, 2005, the MSEDCL was required to meet the Code of Conduct requirements as per the provisions of the following Acts:

- Companies Act, 1956
- Income Tax Act, 1961
- Securities and Exchange Board of India Act, 1992
- Excise Act, 1944
- Customs Act, 1962

The relevant sections of the Central Government Rules are highlighted below:

“4. Requirement of Code of Conduct.- The applicant for grant of licence shall satisfy the Appropriate Commission that he has not been found guilty or has not been disqualified under any of the following provisions within the last three years from the date of the application for the grant of licence:

(a) section 203, section 274, section 388B or section 397 of the Companies Act, 1956;

(b) section 276, section 276B, section 276BB, section 276C, section 277 or section 278 of the Income tax Act, 1961;

(c) section 15C, section 15G, section 15H or section 15HA of the Securities and Exchange Board of India Act 1992;

(d) clause (b), (bb), (bbb), (bbbb), (c) or (d) of sub-section (1) of section 9 of the Excise Act 1944;

(e) section 132 or section 135 of the Customs Act 1962,

and that the applicant is not a person in whose case licence was suspended under section 24 or revoked under section 19 of the Act, within the last three years from the date of application:

Provided that where the applicant is a company, it shall satisfy the Appropriate Commission in addition to provisions of this rule that no petition for winding up of the company or any other company of the same promoter has been admitted under section 443 (e) of the Companies Act, 1956 on the ground of its being unable to pay its debts.”

43. MSEDCL, in its original application dated January 17, 2010, submitted, “*Supporting information if applicable will be submitted as and when asked by Hon’ble Commission*”. The Commission, vide email dated May 27, 2011 directed MSEDCL to submit a declaration, under affidavit, as required under the 2005 Rules. MSEDCL, in response to this, submitted the said affidavit to the Commission vide letter dated May 30, 2011.

44. Based on the information submitted by MSEDCL, the Commission is satisfied that MSEDCL is not in violation of the Code of Conduct and meets the requirement of the Rule 4 of the Distribution of Electricity Licence (Additional requirements of Capital Adequacy, Creditworthiness and Code of Conduct) Rules, 2005. However, MSEDCL is not eligible for grant of a distribution licence because of non-fulfilment of other requirements of the said Rules.

Requirement of own network rollout plan (E5)

45. The sixth Proviso to Section 14 of the 2003 Act provides that two or more licensees can distribute electricity within the same area, but through their own distribution system. Accordingly, the applicant for distribution licence will have to supply electricity through its own distribution system. Therefore, Network Rollout is a mandatory requirement for grant of distribution licence in the proposed area of supply. The plan should give an overview of timelines required to set up the network and the way the applicant proposes to meet the Universal Service Obligation of a Distribution Licensee.

MSEDCL's Network Rollout Plan

46. MSEDCL did not submit a network roll-out plan as part of the Business Plan. The applicant was asked to submit a roll-out plan for the complete distribution network over the proposed area of supply vide letter dated May 25, 2011. It was also asked to submit a geographical roll-out plan for the same.
47. MSEDCL, in its response to the same in its letter dated June 9, 2011, has submitted that it has planned to take over the assets of the existing distribution licensee. The applicant has proposed to take over the entire fixed assets and operate and maintain the same. However, in the matter of purchasing the existing licensee's assets, as proposed in the Business Plan, the applicant has not produced a firm substantiation in the form of a mutual agreement reached between the concerned entities. It is clear from MSEDCL's submissions that it does not intend to build its own network to distribute electricity in the proposed area of supply. Although, the Electricity Act, 1910 has been repealed in terms of Section 185(1) of the 2003 Act, it may be relevant to note that Section 3(2)(e) of the 1910 Act provides that "*the grant of a licence under this Part for any purpose shall not in anyway hinder or restrict the grant of licence to another person within the same area of supply for a like purpose*". The requirement that the applicant for distribution licence should have its own distribution system in order to distribute electricity is an express provision added in the sixth proviso to Section 14 of the 2003 Act. It would also be relevant to take a note of the comments of the Standing Committee on Energy (2002) that the area of supply for a new entrant should necessarily include a mix of urban and rural or any composite remunerative and un-remunerative clusters having mixed load, so that it is ensured that both the rural and urban areas get equal opportunities in the development of infrastructure, including power [Para 6.37 of the Report of the Standing Committee on Energy (2002)]. This provision also clarifies the intention of the Parliament that new incumbent applicants/distribution licensees are supposed to make capital investment and lay down distribution system/network in the area of supply with regard to which they would seek a distribution licence under the sixth proviso to Section 14 of the 2003 Act.
48. The new licensee in the area of an incumbent licensee has to establish its own distribution system. The sixth proviso to Section 14 of Electricity Act, 2003 is unambiguously clear on this matter. It gives power to the Commission to grant licences to two or more persons to distribute electricity within the same area, but only through their own distribution systems. Accordingly, the applicant for distribution licence will have to supply electricity through its own distribution system.
49. Sub-section (1) of Section 42 of the 2003 Act mandates the duty of a distribution licensee to develop and maintain an efficient, coordinated and economical distribution system in his area of supply. There is no exception contained in this provision from the duty of a distribution licensee, be it a new entrant or an existing incumbent distribution licensee, to develop distribution system in his area of supply.

50. A distribution licensee (irrespective of whether he is a new entrant or an existing incumbent distribution licensee) is required to operate and maintain a distribution system comprising of wires and associated facilities. The term “distribution licensee” defined in Section 2(17) is extracted below:

“(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;”

51. The term “operate” is defined as follows in the Law Lexicon by P Ramanatha Iyer [2006 edn.]:

“To put in action and supervise the working of; to perform a work of labour; to effect any result; to bring about a specified result; to produce the proper or intended effect. The word ‘operate’ means to put into or to continue in operation or activity, to work as to operate a machine and is distinct from maintaining or keeping in repair. 1. To take effect; 2. to be in activity; 3. to work.”

52. The term “maintain” is defined as follows in the Law Lexicon by P Ramanatha Iyer [2006 edn.]:

“Webster’s International Dictionary defines “maintain” to mean to hold or keep in any particular state or condition; to support; to sustain; to uphold; to keep up; to keep possession of; not to surrender; to continue; not to suffer to cease or fail; to bear the expense of.

The word “maintain” does not mean to provide or construct, but means to keep up; to keep from change; to preserve.

“maintain” also means to bear the expense of; to support; to keep up; to supply with what is needed.”

53. Although, a distribution licensee is required to operate and maintain a distribution system in terms of the definition contained in Section 2(17), the 2003 Act in sub-section (1) Section 42 thereof has expressly specified the mandatory duty of a distribution licensee to develop and maintain distribution system in its area of supply.

54. MSEDCL does not have any action plan in terms of geographical coverage and time frame for rolling out its own distribution network in the area of supply for which the licence is sought for. It has admittedly not submitted a separate network rollout plan since its Business Plan assumes complete takeover of the existing licensee’s assets. However, in the matter of purchasing the existing licensee’s assets, as proposed in the Business Plan, the applicant has not produced a firm substantiation in the form of a mutual agreement reached between the concerned entities. The Commission is of the view that such a stipulation on the part of MSEDCL is contrary to the Sixth Proviso to Section 14 of the 2003 Act. For these reasons, MSEDCL’s contentions are not sustained in law.

Therefore, the Commission found that MSEDCL's application does not conform to the provisions of the 2003 Act as well as the aspects relevant to grant of distribution licence.

55. Considering all the material on record, the Commission is of the view that MSEDCL's application for grant of a Distribution Licence has not complied with additional requirements as specified by the Central Government in the Distribution of Electricity Licence (additional requirements of Capital Adequacy, Creditworthiness and Code of Conduct) Rules, 2005. Further, MSEDCL's application did not fulfil a mandatory requirement specified under the 2003 Act, which is to lay out its own distribution system in the proposed area of supply.

56. The Commission decided to assess MSEDCL's application in terms of the benefits it may bring to the consumers in and around Mumbai suburban areas. Based on various information provided in the application and other submissions by MSEDCL from time to time, the Commission assessed MSEDCL's application for its

- Power Procurement Plan (S1); and
- Management and Technical Expertise (S2)

Power Procurement Plan (S1)

MSEDCL has submitted that the objective of its Business Plan is to ensure the long-term viability of MSEDCL for the project area (proposed area of supply) such that as a licensee, it is self-sufficient and is able to supply quality power to the consumers, and make timely payment for procuring power from alternate sources. Since the power will be supplied to consumers of Mumbai suburban area, one of the responsibilities of MSEDCL would be to provide 24 hours uninterrupted power supply.

MSEDCL has adopted a bottom-up approach for projecting the Energy Input Requirement for proposed area of supply. The Energy Input Requirement is as below:

Particulars	FY 11	FY12	FY13	FY14	FY15	FY16
Sales (MU)	7,874.6	8,228.8	8,600.7	8,991.3	9,401.8	9,833.4
T&D Loss (%)	10.25%	10.00%	9.75%	9.55%	9.35%	9.15%
Input Energy (MU)	8,774.0	9,143.1	9,529.9	9,940.6	10,371.5	10,823.8

Based on the above input requirement, MSEDCL has submitted that the MW requirement of the proposed area of supply would increase from 1550 MW to nearly 2000 MW. MSEDCL has proposed that it will continue to procure power from the sources with which the existing licensee has tied up. The balance power will be procured through long term sources to be tied up. The Power Procurement Plan proposed by MSEDCL is summarized as under:

Power Procurement	Rate (Rs./kWh)	Units	FY12	FY13	FY14	FY15	FY16
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Total Power Purchase Requirement		MW	1,730	1,800	1,880	1,960	2,040
Dahanu	2.63	MW	500	500	500	500	500
TPC	3.51	MW	200	200	200	200	200
KSK Wardha	4.85	MW	320	320	320	-	-
Abhijeet MADC	4.80	MW	150	150	150	-	-
Reliance Power	4.80	MW	-	384	384	-	-
Short/LongTerm Power Procurement	3.50	MW	560	246	326	1,260	1,340

The power purchase cost of Dahanu, TPC and Short/Long Term Power Procurement has been escalated at a rate of 5% annually. The medium term contract signed with KSK Wardha, Abhijeet MADC and Reliance Power is a firm price contract for 3 years and hence no escalation has been considered. Average power purchase cost proposed by MSEDCL is summarized as below:

Source	FY12	FY13	FY14	FY15	FY16
Power Purchase Cost (Rs cr)	3,431.41	3,883.57	4,135.13	4,160.68	4,570.73
Power Purchase Quantum (MU)	9,143.1	9,529.9	9,940.6	10,371.5	10,823.8
Power Purchase cost per unit (Rs/unit)	3.75	4.08	4.16	4.01	4.22

Management and Technical Expertise (S2)

From the information provided in the application, following can be summarised about MSEDCL's application.

Expertise of key personnel

MSEDCL's senior management possesses relevant expertise in the areas of strategy and planning, risk management and change management. The key personnel has experience in the power sector in areas such as O&M of electrical apparatus and systems, commercial aspects, project management, regulatory affairs, network development and management, consumer services and grievance handling.

Experience of management in handling businesses with large number of consumers and employees

The number of consumers and employees for the past three years is as under:

Particulars	Units	2007-08	2008-09	2009-10
Consumers	Number (in millions)	15.70	16.81	17.92
Employees	Number	75,572	88,984	89,976

Experience in the last 3 years in the value chain of electricity

MSEDCL has submitted that as a distribution licensee, it is carrying out the retail supply of power to the end users as well as maintaining the wire business of supply for such power. The primary aim of MSEDCL is to provide continuous and quality power supply to the end consumers. In line with this, MSEDCL is engaged in the process of tying up the capacity for long/medium/short term power from the competitive sources and developing the distribution infrastructure to meet the load growth and maintain the supply of power to the consumers.

MSEDCL has further submitted that it is engaged in improving its technical and financial performance with reference to national benchmarks by adopting the best available practices and absorbing the best available technologies. MSEDCL, in an endeavour to improve operational efficiencies, and the quality of services provided to its consumers, seeks to bring in management expertise through public private participation, in the distribution of electricity.

MSEDCL has also highlighted that it intends to achieve operational efficiency and better consumer satisfaction. The major achievements by MSEDCL are Energization of Agricultural Pumps wherein 30 lakh pump sets have been energized. MSEDCL has also taken up loss reduction measures and in 5 years reduced distribution losses from 35% to 17%. Further, MSEDCL has undertaken Mass Meter Replacement Project whereby all the meters which have been in service for the last 10 years are being replaced, which will lead to improved meter reading and billing and collection.

MSEDCL has submitted that it operates a vast network comprising of lakhs of transformers and kilometres of lines as well as thousands of substations spread over 3.08 lakh sq. km. geographical area of Maharashtra covering 41095 villages and 457 towns. Presently, MSEDCL has the following distribution network in the State of Maharashtra:

S.No.	Particulars	March 31, 2009	March 31, 2010
1	Details of Lines (in kms)		
a.	33 kV	30,061	32,042
b.	22 kV	23,789	25,619
c.	11 kV	1,97,955	2,13,609
d.	LT Lines	5,06,288	5,21,513
2	Distribution Transformers (No.s)	3,27,314	3,51,243
3	33/11 kV, 22/11 kV substations and switching stations commissioned	1,947	2,033
4	HV Feeders	10,240	
5	Transformer Capacity		
a.	33/11 kV, 33/22 kV and 22/11 kV (MVA)	15,022.5	16,389.15
b.	33/0.4, 22/0.4 and 11/0.4 DTC (MVA)	30,494.65	32,697.72

MSEDCL has submitted that the Commission awarded MSEDCL the distribution licence of MPECS after analyzing the requisite parameters vide its order dated January 27, 2011 (Case No. 85 of 2010). Further, during the floods of July 26, 2005, certain technical constraints arose and MSEDCL assisted the existing licensee in dealing with those constraints. As per MSEDCL, it possesses adequate experience in order to perform effectively and efficiently.

Experience in rolling-out advanced technologies in utility-like business

On the technology front, various initiatives have been undertaken by MSEDCL whereby HVDS, feeder separation, Demand Side Management, Energization of pump set, Customer Care Centre, AMR Meters, SCADA, etc. have been implemented by MSEDCL.

57. Since, the Commission found that MSEDCL's application does not conform to the provisions of the 2003 Act as well as the aspects relevant to grant of licence, the proviso to clause (b) of Section 15(6) of the 2003 Act was required to be complied with.
58. In terms of the proviso to clause (b) of Section 15(6) of the 2003 Act, an opportunity of being heard was granted by the Commission to MSEDCL on August 2, 2011 before rejection of its application. During the course of the hearing, the Commission communicated its intention to reject the application of MSEDCL for grant of licence after explaining the grounds, as described in the preceding Para No. 20, 21, 31, 33 to 35 and Para No.54.
59. Consumer Representatives authorized under Section 94(3) of the 2003 Act to represent the interest of the consumers in the proceedings before the Commission, expressed that the application should be rejected. Shri Rakshpal Abrol and Shri Ponrathnam expressed their satisfaction about the conclusions reached by the Commission.
60. During the hearing, Shri. C. A. Gadre, General Manager appearing for MSEDCL said that he had no comments on the Commission's intention on behalf of MSEDCL.
61. The Commission is of the view that the application filed by MSEDCL for grant of licence does not fulfil the requirements for grant of licence on account of the following:-
 - a. The minimum area of supply requirement in terms of the Explanation to Rule 3 of the aforesaid Distribution of Electricity Licence (Additional requirements of Capital Adequacy, Creditworthiness and Code of Conduct) Rules, 2005 has not complied with;
 - b. MSEDCL has not met the eligibility requirement for Capital Adequacy.
 - c. On account of lack of action plan in terms of geographical coverage and time frame for rolling out its own distribution network in the area of supply for which the licence is sought for the requirement laid down in the sixth proviso to Section

14 of the 2003 Act of having its own distribution system have not been complied with by MSEDCL.

- d. An exclusive licence being contrary to the 2003 Act as well as the same would run contrary to the expression “*grant licence to two or more persons for distribution of electricity*” as expressly stated in the sixth proviso to Section 14 which also stipulates that “*there already exists a licensee in the same area for the same purpose*”.

62. Thus, the additional requirements as specified by the Central Government in the Distribution of Electricity Licence (Additional requirements of Capital Adequacy, Creditworthiness and Code of Conduct) Rules, 2005 and the requirement laid down in the sixth proviso to Section 14 of the 2003 Act of having its own distribution system have not been complied with by MSEDCL apart from seeking an exclusive licence being contrary to the 2003 Act.

63. Therefore, the application filed by MSEDCL is rejected as it does not conform to the provisions of the 2003 Act required for grant of distribution licence as discussed above. However, the statute enables the making of application for grant of distribution licence at any time and enables the Commission to consider at any time the grant of two or more licenses in the same area.

64. In view of the above, the application of Maharashtra State Electricity Distribution Company Limited for grant of Distribution Licence in and around suburbs of Mumbai in Case No. 6 of 2011 stands dismissed. Liberty is granted to apply afresh for grant of distribution licence keeping in view the statutory requirements of eligibility.

Sd/-
Vijay L. Sonavane
(Member)

Sd/-
V. P. Raja
(Chairman)