

BEFORE THE HIMACHAL PRADESH ELECTRICITY REGULATORY  
COMMISSION, SHIMLA

M/s Jai Bharat Steel Industries  
C/O J.B. Rolling Mills P. Ltd.  
Trilokpur Road, Kala Amb,  
Distt. Sirmour, (H.P).

...Petitioner

V/s

- (1) The Himachal Pradesh State Electricity Board Ltd.,Co.  
through its Executive Director (Personnel)  
Vidyut Bhawan, Kumar House, Shimla-171004.
- (2) The Chief Engineer (Commercial),  
Himachal Pradesh State Electricity Board Ltd.,Co.  
Kumar House, Shimla-171004
- (3) The XEN, Electrical Division,  
Himachal Pradesh State Electricity Board Ltd.,Co  
Poanta Sahib, Distt. Sirmour,H.P.

...Respondents

Petition No. 210 of 2009  
(Decided on 28<sup>th</sup> August, 2010)

**CORAM**  
**YOGESH KHANNA,**  
**CHAIRMAN**

Petitioner represented by: Sh. P.C. Dewan,

Respondents represented by: Sh. Satyan Vaidya  
Advocate.

**ORDER**

(Last heard on 31.7.2010 and Order reserved)

M/s M/s Jai Bharat Steel Industries, Village Palhori, Tehsil Poanta Sahib, Distt. Sirmour (H.P.) (hereinafter referred as “the petitioner”) intending to set up an Industrial Unit for manufacturing of M.S. Flat/Angle/Channel/ Patra/Structure/ Pipes/Ferro Silicon and Ferro Magneese etc. (involving 6 induction furnace(s) and Rolling) at Village Palhori, Tehsil Poanta Sahib, Distt. Sirmour, (H.P.) applied to the Himachal Pradesh State Electricity Board

Ltd.,(hereinafter referred as the “Board”), for the Power Availability Certificate, for a load of 28 MW, which was sanctioned on 9.9.2008 subject to the condition that the power load will be made available at 132 kV supply voltage through dedicated feeder from 220/132 kV sub-station, Girinagar by Dec., 2009 and the petitioner will bear the entire cost of 132 kV feeder and augmentation of 220/132 kV, Girinagar including cost of transformer to be added at 220/132 Girinagar Substation. As a sequel to that sanction, the XEN Electrical Division Poanta Sahib, i.e. respondent No.3, asked the petitioner to deposit Rs.56,00,000/-(Rupees fifty six lacs) as advance cost share towards Infrastructure Development Charges (IDC) calculated @ Rs.200/- per kW, (i.e. at the pre-revised rates) which was to be adjusted against the actual expenditure, for allowing power to the petitioner per the HPERC (Recovery of Expenditure for Supply of Electricity ) Regulations, 2005 (for brevity hereinafter referred as “Recovery of expenditure regulations”). The petitioner was also asked to deposit Rs.28,00,000 (rupees twenty -eight lakhs) as non-refundable earnest money equivalent to 10% of the initial security @ Rs100/per kW (as specified in the HPERC (Security Deposits) Regulations,2005 (in short “security deposit regulations”). The XEN reiterated the said demand on 11.2.2009 and 7.5.2009. In the meanwhile the Chief Engineer (Transmission) of the Board, vide his letter dated 25.3.2009 sent an estimate of Rs. 216.66 lacs (including Rs. 23.83 lacs as Departmental charges) as expenditure for construction of 132 kV line from Tower No.59 of the existing 132 kV Giri- Abdulahpur line to the works of the petitioner. The petitioner states that he has paid the departmental charges on 28.3.2009, with an undertaking that the entire work has to be executed at the petitioner’s expense. He chose not to deposit the IDC amounting to Rs. 56.00 lacs stating that there is no rationale of depositing the advance share cost.

2. On the petitioner’s request letters dated 7.2.2009; 9.3.2009; 6.4.2009; 6.7.2009 and 1.9.2009; the extensions in time to deposit the requisite amount were given four times, finally upto 6.11.2009, with the clear cut condition that no further extension shall be allowed and in case requisite amount is not deposited within the stipulated period, commitment regarding supply of power shall be forfeited and cancelled. Ultimately the Chief Engineer (Commercial) of the Board i.e. respondent No.2, vide his letter dated

9.4.2010 cancelled the demand notice and withdrew the commitment for supply of power to the petitioner. However, this Commission vide its interim Order dated 15.05.2010 held in abeyance the cancellation/withdrawal of commitment of supply of power to the petitioner , till 31<sup>st</sup> May, 2010, so that, if the petitioner so chooses may deposit the amount in question by that date. The petitioner sent the demand draft worth Rs. 5.00 lacs dated 28.5.2010, but the respondent No.2, refused to accept the same, being the short of the payment asked for in the demand notice.

3. The petitioner disputes the demand raised by the Board and states that the demand of Rs. 56 lacs, as advance cost sharing towards IDC on adhoc basis is totally unjustified and this requirement of the recovery of expenditure regulations and other related regulations, should not be insisted upon and the connections be granted to the prospective consumer on furnishing an undertaking that the applicant/consumer should pay the actual expenditure after the work has been completed, so there should not be any question of advance payments as IDC on adhoc basis.

4. In response to the petition, the respondent Board submits that the present petition is not maintainable in the eyes of law, as the petitioner has not approached the available appropriate authority i.e. the Forum for Redressal of Grievances of the Consumers, set up by the Board. On merits, it is stated that there is a procedure for the issuance of the PAC that the prospective consumer shall deposit non-refundable security @ Rs. 100.00 per kW and Advance Cost share @ Rs. 200 per kW, (which has now been increased to be the amount assessed @ 1000.00 per kW as per the Himachal Pradesh Electricity Code,2009 ( hereinafter referred as “ Supply Code”), on the power demand and thereafter the course of load sanction is followed. In the instant case of the petitioner, the PAC has not been issued due to non-deposit of the requisite amount of Rs. 56,00,000(rupees fifty six lacs) towards Advance cost share and an amount of Rs. 28,00,000 towards non-refundable security. To meet with the power requirement of 28 MW of the petitioner, the up-gradation of system of the order of 220/132 kW is required by way of augmentation of 220/132 kW system at Girinagar, so the demand of Rs. 56 lacs as advance cost share towards the proportionate cost of augmentation of 220/132 kV Sub-station at Girinagar is justified and is rightly raised to the petitioner, in accordance with

the provisions of the regulations framed by this Commission under section 181 of the Electricity Act.

5. When the matter came up for hearing, Sh. J.P.Kalta, C.E.(Commercial) i.e. respondent No 2, explained that the demand of Rs.56 lacs on account of advance cost share calculated at the pre-revised rate of Rs.200 per kW, is not in violation of the provisions of the Supply code regulations in force. He further affirmed that the petitioner himself, by not depositing the requisite amount, as stated in the demand notice, within stipulated period, is adopting the delaying tactics. Even stipulated period, at the requests received from the petitioner on 07.02.2009, 09.03.2009, 06.04.2009, 06.07.2009 and 19.09.2009, had time and again been extended up to 06.11.2009, with the direction that no further extension will be allowed and the commitment for supply of power will be forfeited and cancelled. Thus according to him the withdrawal of the impugned demand notice, can in no way be taken as defiance either of the Commission's orders or of any regulations in force.

6. Before proceeding further to discuss the merits of the contentions, the Commission considered it appropriate to decide "in-limne" the jurisdictional issue, which has been vehemently challenged by Sh. Satyan Vaidya, the Learned Counsel appearing for the respondent Board. Without considering the basic question of jurisdiction and maintainability, the consideration on merits would be fallacious. It has been held in **Suresh Kumar Bhikam Chand Jain Vs. Pandey Ajay Bhushan (1998)/SCC205**, the plea of jurisdiction can be raised at any stage. It is also the settled law that no Statutory Authority or Tribunal can assume jurisdiction in respect of the subject matter which the statute does not confer, if the Court or Tribunal exercises the jurisdiction then the order is vitiated. Moreover in **Shrist Dhawan (Smt) V/s Shaw Bros (1992)/SCC5334** it has been laid that error of jurisdictional fact renders the order ultra vires and bad in law.

7. In the Supply Code para 1.2.13. which defines the expression consumer and para 3.2. which made provisions for the issuance of the Power Availability Certificates read as under:-

"1.2.13, "consumer" means any person who is supplied with electricity for his own use by a licensee or by the Government or by any other person engaged in the business of

supplying electricity to the public under the Act or any other law for the time being in force and includes bulk supply consumer, any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person, as the case may be and shall also include-

- (a) the consumer whose installation has been temporarily disconnected;
- (b) prospective consumer i.e. any person who has applied for an electricity connection and whose supply has not commenced; and
- (c) in case of death of a consumer, his legal heirs or representatives;

### **3.2.Power Availability Certificate. –**

3.2.1 Where the new or additional load exceeds 100 kW, the applicant will submit the feasibility clearance i.e. Power Availability Certificate (PAC) along with the Application and Agreement form. The form of application for feasibility clearance/PAC will be available free of cost in the designated offices of the licensee and on its website.

3.2.2. The consumer shall apply, for grant of Power Availability Certificate, on payment of –

- (i) the earnest money equivalent to the 10% of the initial security as specified in the Himachal Pradesh Electricity Regulatory Commission (Security Deposit)Regulations,2005; and
- (ii) advance cost share, towards infrastructural developmental charges, calculated @ Rs.1000 per kW/kVA of the load applied for.

3.2.3 The licensee will grant the Power Availability Certificate within forty five days of the receipt of

request or such extended period as approved by the Commission.

3.2.4 The Power Availability Certificate mentioned in para 3.2.3 shall be valid for a period as may be mutually agreed by the licensee and the applicant, but not exceeding three years:

Provided that the validity period may be extended from time to time as may be mutually agreed upon the applicant and the licensee.

3.2.5 The applicant may, after grant of Power Availability Certificate mentioned in para 3.2.3, submit the application to give supply of electricity to the premises and the licensee shall adjust the amount of the earnest money towards initial security payable under the Himachal Pradesh Electricity Regulatory Commission (Security Deposit) Regulations, 2005 and the advance cost share towards initial estimated amount payable under the Himachal Pradesh Electricity Regulatory Commission(Recovery of Expenditure for Supply of Electricity) Regulations,2005.

3.2.6 Where, the applicant who has been granted the Power Availability Certificate(PAC) fails to submit the application for supply within the validity period of the PAC or declines to take the supply-

(i) the earnest money paid shall be forfeited ;  
and

(ii) the advance cost share received from the applicant shall be refunded, within thirty days, after deducting therefrom 10% of the deposited advance cost share”.

8. The functions of the State Commission are enumerated in section 86 of the Act. Clause (f) of sub -section (1) of section 86 (ibid) specifically gives

power to the State Commission to adjudicate upon disputes between the Licensee and Generating Companies. The Act conspicuously deprives the Commission of any power to adjudicate upon a dispute between a consumer and a licensee including a distribution licensee. The Act makes special provisions for adjudication of such disputes. Section 42 inter alia, prescribes that the distribution licensee appoints, within six months of the appointed date (the date of when the Act came into force namely 10<sup>th</sup> June,2003), a Forum for Redressal of the Grievances of the Consumers. The same section requires the State Commission to appoint an Ombudsman to hear representations of a consumer whose grievances have not been redressed by the Consumers Grievances Redressal Forum. Thus, the Act makes specific provision regarding the mode of redressal of a grievances of a consumer. Relying upon these provisions the Hon'ble APTEL in its recant decision dated 23.12.2009 rendered in **UP Power Corporation Ltd., and another V/s Premier Ispat (Pvt.) Ltd. And one other 2010** ELR(APTEL)0124, has ruled that the Electricity Act deprives the Commission of any power to adjudicate upon a dispute between a Consumer and a licensee including a distribution company.

9. By virtue of the provisions contained in clause (b) of para.1.2.13 of the Supply Code, a prospective consumer i.e. any person who has applied for a electricity connection is a consumer.

10. The Supreme Court in the case of the **Lucknow Development Authority (LDA) Vs. M.K.Gupta (CA6237(1990) dated November,1993)**, interalia interpreted the question as to whether a person who applied for a house from the Locknow Development Authority could be treated as a consumer and observed that a person who 'applies' is a "potential user" and would be covered by the definitions of the words 'service' and 'consumer' in the context of the Consumer Protection Act,1986.Per the provisions of Sections 173 and 174 of the Electricity Act,2003, the Consumer Protection Act,1986 has been given precedence over the Electricity Act,2003. In view of the above cited verdict of the Apex Court a potential user could be treated as a consumer and that interpretation would also stand extended to the consumer of electricity to the extent the question of protection of consumer's interest against deficiency of service is concerned.

11. On the above analysis, the petitioner, who is the prospective consumer, is as 'consumer' for the purpose of approaching the Forum for Redressal of Consumers, set up by the distribution licensee under the Act.

12. The Commission, while discharging the adjudicatory functions, is to interpret the regulations as exist and cannot question their validity. The Apex Court in its latest decision dated 15.03.2010 rendered in **Appeal No.3902 of 2006-P.T.C. India Ltd., Vs. Central Electricity Regulatory Commission,2010 ELR(SC)0269**; has concluded that in the hierarchy of regulatory powers and functions under the Electricity Act,2003, section 178 (corresponding to section 181) which deals with making of regulations by the Central Commission, under the Authority of Subordinate legislation, is wider than section 79(1) (corresponding to section 86(1)) of the Electricity Act,2003, which enumerates the regulatory functions of the Central Commission, in specified areas, to be discharged by orders (decisions). If a dispute arises in adjudication on interpretation of a regulations made under section 178 (corresponding to section 181) an appeal would certainly lie before the Appellate Tribunal under Section 111, however, no appeal to the Appellate Tribunal shall lie on the validity of regulation made under section 178 corresponding to section 181 . The Appellate Tribunal has no jurisdictions to decide the validity of the regulations framed by the Commission. The validity of the regulations may ,however be challenged by seeking judicial review only, before the High Court under Article 226 of the Constitution of India..

13. The Hon'ble Appellate Tribunal for Electricity, had the opportunity to consider the scope of the provisions of section 42(5) to (8) of the Electricity Act, 2003 in various cases i.e. **Reliance Energy Limited V/s Maharashtra Electricity Regulatory Commission and Maharashtra State Electricity Distribution Company V/s Prayas, Kerve Road Pune (Appeal Nos. 30 of 2005, 164 of 2005 and 25 of 2006) decided on 29.3.2006 (2007 APTEL 543); Dakshin Haryana Bijli Vitran Nigam Ltd V/s Princeton Estate Condominium Association, DLF Universal Ltd (Appeal Nos 105 to 112 of 2005) decided on 29.3.2006; (2007 APTEL 356) and Dakshin Haryana Bijli Vitran Nigam V/s DLF Services Ltd (Appeal No. 104 of 2005) decided on 29.3.2006.) (2007 APTEL 764); and Reliance Energy Ltd. V/s K.H. Nadkarni & Others (Appeal No. 11 of 2005) decided on 26.5.2006**

**(2007 APTEL 298) and CSEB Vs. Raghuvir Singh Ferro Alloys Ltd. & Others (Appeal Nos. 125, 126 & 127 of 2006) decided on 28.11.2006 (2007 APTEL 842); Himachal Pradesh State Electricity Board V/s M/S Emm Tex Synthetics Ltd. Jagat Khana Nalagarh & other (Appeal No. 117 of 2007, decided on 5<sup>th</sup> November, 2007; BSES Rajdhani Power Ltd. V/s Delhi Electricity Regulatory Commission (Appeal No. 181/08, decided on 30.3.2009, [2009 ELR (APTEL) 0352] and U.P. Power Corporation Ltd. V/s Premier Ispat (Pvt.) Ltd. in appeal No. 42 of 2006 decided on 23.12.2009 (2010 ELR (APTEL) 0124.** In the aforesaid decisions the Hon'ble Appellate Tribunal, has concluded that the relation between a consumer and a distribution licensee is governed by Part VI – Distribution of Electricity-Sub-sections (5) to (8) of section 42-provides with respect to Forum for Redressal of Grievances and the Appellate forum i.e. Ombudsman as well. When a Forum has been constituted for redressal of grievances of consumers by the mandate of section 42, no other forum or authority has jurisdiction. The State Electricity Regulatory Commission, being a regulatory, the highest State level authority under the Electricity Act, 2003, as well as rule making authority has to exercise such functions as are provided in the Legislative enactment and it shall not usurp the jurisdiction of the Consumer Redressal Forum or that of the Ombudsman. The special provision excludes the general is also well accepted legal position. The Regulatory Commission being a quasi-judicial authority could exercise jurisdiction, only when the subject matter of adjudication falls within its competence and the order that may be passed is within its authority and not otherwise. It follows that the State Regulatory Commission has no jurisdiction or authority to decide the dispute raised by individual consumers or the Consumer Association. The consumers have a definite forum to remedy their disputes under section 42(5) and further representation under section 42(6). Further section 42 (8) also saved the rights of consumer to approach any other forum such as the forums constituted under the Consumer Protection Act, 1986 or other Courts as may be available to him.

14. The Hon'ble APTEL in its decision dated 11.9.2009 rendered in **appeal No. 78 of 2007 - the Himachal Pradesh State Electricity Board V/s M/S Himalaya International Ltd and another**, has clearly concluded

that the words “any dispute” appearing in clause (f) of sub-section (1) of section 86 of the Act cannot be given such wide meaning as to include dispute between a licensee and a consumer. The dispute raised by a consumer cannot be dealt with under the said provisions.

15. The Hon’ble Supreme Court in its verdict given in **Maharashtra State Electricity Distribution Co. Ltd V/s Lloyds Steel Industries Ltd JT 2007 (10) SC 365** approving the decision of the Delhi High Court in **Suresh Jindal Vs. BSES, Rajdhani Power Ltd & Others and Dheeraj Singh Vs BSES Yamuna Power Ltd 132 (2006 DLT 339 DB)** has also concluded that complete machinery has been provided in section 42(5) and 42(6) of the Electricity Act, 2003, for redressal of grievances of individual consumers. Hence wherever a Forum/ Ombudsman have been created/appointed the consumer can only resort to these bodies for redressal of their grievances. The Hon’ble Supreme Court in its another decision dated 14.8.2007 in **Civil Appeal No. 2846 of 2006 Maharashtra Electricity Regulatory Commission Vs Reliance Energy Ltd & Others JT 2007 (10) SC 365**, has also not interfered with the decision of the Appellate Tribunal in First Appeal Nos. 30 and 164 of 2005 and 25 of 2006 (2007 APTEL 543) and has ruled that the adjudicatory function of the Commission is limited to the matters prescribed in section 86(1)(f) i.e. adjudication of disputes between the licensees and the generating companies and as such the Commission cannot adjudicate disputes relating to grievances of individual consumers.

16. Keeping in view the above discussion, it can be safely concluded that the specific provisions of section 42(5) and 42(6) of the Electricity Act, 2003 provide for setting up Forum for redressal of grievances and further representation to the Electricity Ombudsman. Thus the Forums for redressal of grievances set up by the licensees/distribution companies are to decide the individual cases received by them after giving a fair opportunity to the consumers. The consumers who still feel not satisfied with the order passed by the licensee/distribution companies can approach the appropriate Forum constituted under section 42(5) of the Act and, if still not satisfied, with the order passed by the appropriate forum to approach the Ombudsman under section 42(5) of the Act. The Commission, therefore, lacks jurisdiction to entertain and dispose of the complaint/application because such consumer

disputes fall within the purview of the Forum set up under section 42(5) and the Ombudsman appointed under section 42(6) of the Act.

17. In view of the above-cited judgments on the jurisdictional issue and advertent to the averments made by the rival sides, this Commission concludes that this Commission lacks jurisdiction to go into the questions relating to validity of the regulations and has no jurisdiction or authority to adjudicate the disputes i.e. the disputes other than the disputes arising between the licensees and the generating Companies; and as such Commission cannot adjudicate disputes relating to grievances of individual consumers. Therefore, in the result the Commission dismisses this petition with the liberty to the petitioner to work out its remedies before the competent forums or other Courts as may be available to it. It is further made clear that the Commission has not gone into merits of the various contentions advanced by either side in other respect, and, therefore, the Commission's decision on the jurisdictional issue should not prejudice any further course of action that may be pursued by the petitioner in this case.

In view of the above the petition No. 210 of 2009 is disposed of accordingly.

(Yogesh Khanna)  
Chairman