

BEFORE THE HIMACHAL PRADESH ELECTRICITY REGULATORY
COMMISSION, SHIMLA

M/s India Steel, Village Palhori,
Tehsil Poanta Sahib, Distt. Sirmour, H.P.

...Petitioner

V/s

- (1) The Himachal Pradesh State Electricity Board Ltd., Co.
through its Executive Director (Personnel)
Kumar House, Shimla-171004.
- (2) The Chief Engineer,
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. 51 of 2010
(Decided on 23rd 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 India Steel, Village Palhori, Tehsil Poanta Sahib, Distt. Sirmour (H.P.) (hereinafter referred as “the petitioner”) intending to set up an Industrial Undertaking for the manufacture of M.S. Bar (Saria)/ Flat /Angle/Channel/ Patra/Structure/ Pipe/Fero Silicon and Ferro Magneese etc. 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 20 MW, which was sanctioned on 25.06.2009. As a sequel to that sanction, the XEN Electrical Division Poanta Sahib, i.e. respondent No.3, asked the petitioner to deposit Rs.2,00,00,000/- (Rs.two crores) as advance cost share towards Infrastructure Development Charges (IDC) calculated @ Rs.1000/- per kW , as per the provisions of the HPERC Electricity Supply Code,2009 (in brevity hereinafter

referred as “Supply Code”), 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.20,00,000(Rs. twenty lakh) as non-refundable earnest money equivalent to 10% of the initial security @ Rs100/per kW (as specified in the HPERC (Security Deposit Regulations,2005 (in short “security deposit regulations”). The condition No.14 as contained in the XEN, Electrical Division Poanta Sahib’s letter dated 04.08.2009, clearly states that the power for 20,000 kW load can be made available at 132 kV supply voltage from 220/132 kV Sub-station Girinagar after its augmentation from 2x63 MVA to 2x80/100 MVA, likely to be done during March,2010, through 132 kV dedicated feeder on the cost sharing basis by tapping 132 kV Giri-Abdulpur existing line at suitable location in H.P. Boundary in view of the decision taken by the HPSEB in respect of feeding 28 MW load to M/s Jai Bharat Steel Industries.

2. The petitioner disputes the demand raised by the Board and states that the demand of Rs.2 crore as advance cost sharing towards IDC on adhoc basis is totally unjustified and this requirement of the Supply Code, should not be insisted upon and the connection be granted to prospective consumer on furnishing an undertaking that the applicant/consumer should pay the actual expenditure after the work has been completed, thus there should not be any question of advance payments as IDC on adhoc basis.

3. 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 submits that the demand for the advance cost share towards Infrastructure Development Charges, calculated @ 1000 per kVA/kW of the load applied for is in accordance with the provisions of the Supply Code, specified by this Commission, in exercise of the powers conferred under Section 50 and clause (x) of sub-section (2) of section 181 of the Electricity Act, 2003.

4 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 exercise 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.

5. 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”.

6. The functions of the State Commission are enumerated in section 86 of the Act. Clause (f) of sub -section (1) of section 86 specifically gives power to the State Commission to adjudicate upon disputes between 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 adjunction 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 10th 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 grievance have not been redressed by the Consumers Grievance 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.

7. 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.

8. The Supreme Court in the case of the **Lucknow Development Authority (LDA) Vs. M.K.Gupta (CA6237(1990) dated November,1993)**, the, 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' was a "potential user" and would be covered by the definition 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.

9. 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.

10. 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..

11. 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 5th 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-section (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.

12. 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.

13. 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.

14. 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.

15. In view of the above-cited judgments on the jurisdictional issue and adverting 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. 51 of 2010 is disposed of accordingly.

(Yogesh Khanna)
Chairman