

**Appellate Tribunal for Electricity**  
**(Appellate Jurisdiction)**

**Appeal No. 158 of 2009**

**Dated: 15<sup>th</sup> March, 2011**

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam,  
Chairperson  
Hon'ble Mr. Rakesh Nath, Technical Member**

**In the matter of**

**Maharashtra State Electricity  
Distribution Company Ltd.  
Prakashgad, 5<sup>th</sup> Floor,  
Station Road, bandra (E),  
Mumbai-400 051**

**... Appellant**

**Versus**

- 1. Maharashtra State Electricity  
Regulatory Commission,  
Mumbai Centre-1, 13<sup>th</sup> Floor,  
World Trade Centre, Cuffe Parade,  
Mumbai-400 005**
- 2. M/S B.F Utilities Ltd,  
Mundhwa, Pune,  
Cantonment,  
Pune-411 036**
- 3. Prayas (Energy Group),  
Amrita Clinic, Athawale Corner,  
Lakdipool-Karve Road Junction,  
Deccan Gymkhana, Karve Road,  
Pune-411 004**

4. **Mumbai Grahak Panchayat  
Grahak Bhavan, Sant Dyaaneshwar Marg,  
Behind Hooper Hospital,  
Vile Parle (West),  
Mumbai-400 056**
5. **Thane Belapur Industries Association,  
Plot No.P-14, M.I.D.C,  
Rebale Village, PO Ghansoli,  
Navi Mumbai-400 701**
6. **Vidarbh Industries Association,  
1<sup>st</sup> Floor, Udyog Bhavan, Civil Lines  
Mumbai Centre-1, 13<sup>th</sup> Floor,  
Nagpur-440 001**
7. **Maharashtra State Electricity Transmission  
Com. Ltd.,  
Prakashganga,  
Bandra Kurla Complex,  
Bandra (E), Mumbai-400 051**
8. **State Load Dispatch Centre,  
Thane Belapur Road,  
PO- Airoli,  
Navi Mumbai-400 708** ....Respondents

**Counsel for Appellant(s): Mr. Vikas Singh, Sr.Adv  
Mr. Raunak Jain  
Mr. Ravi Prakash  
Ms. Puja Priyadarshini  
Mr. Varun Pathak,  
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**Counsel for Respondent(s):Mr. Buddy A. Ranganadhan,  
Mr. Saurabh Mishra,  
Mr. A K Mishra,  
Mr. Jaideep Gupta, Sr Adv.  
Mr. Chetan Sharma, Sr Adv.**

## **JUDGMENT**

**PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,  
CHAIRPERSON**

1. The Maharashtra State Electricity Distribution Company Limited (MSEDCL) is the Appellant herein. Maharashtra State Electricity Regulatory Commission (State Commission) is the first Respondent. M/S B. F. Utilities Limited (BFL), Wind Energy Developer, is the second Respondent.

2. Challenging the order dated 25.5.2009 passed by State Commission allowing the petition filed by the 2<sup>nd</sup> Respondent and directing the Appellant to ensure that the non-discriminatory open access is provided to the Respondent-2, the Appellant

has filed this Appeal. The short facts leading to the filing of this Appeal are as under:-

The Bharat Forge Limited set up a Wind Mill Project of 6.90 MW on 28.12.1999, at Satara, Maharashtra. The generation of Wind Power Project was self consumed at its plant at Pune. In the year 2001, due to scheme of demerger of Bharat Forge Ltd., the aforesaid wind mill project was transferred to M/S BF Utilities Limited, the second Respondent herein. However, M/s Bharat Forge Ltd., a consumer of the Appellant also continued to consume the power generated by the aforesaid wind mill under the third party sale provisions. The open access wheeling and transmission charges were duly paid to the Appellant, Distribution Company. The Distribution Company Appellant gave credit and energy bills of the wind mill. From the month of Jan, 2008, the Appellant did not issue credit notes on account of open access

charges. On 14.7.2008, the Appellant sent a letter to the Respondent No.2 demanding that the Respondent 2 is required to obtain license from the State Commission. Aggrieved by the same, the Respondent No.2 filed a petition before the State Commission praying for direction to the Appellant to ensure that the non discriminatory open access be provided to Respondent No.2 to enable supply of electricity from generating station to the consumers. Ultimately, on 25.5.2009, the State Commission passed the impugned order holding that the Respondent No.2 does not require to obtain a license and directing the Appellant to provide a non discriminatory open access to the Respondent-2.

3. Having aggrieved by this order, in so far as the finding that the Respondent-2 is not required to obtain license for sale of electricity to third party is concerned, the Appellant has filed

this present Appeal. The following grounds were urged by the Appellant:

(i) The Petition filed by M/S BF Utilities Limited, the second Respondent was for grant of the open access u/s 42(3) of the Act, before the State Commission. The said Petition was not maintainable since Section 42 (3) of the Act confers the right of claiming open access only to the consumers and not to the generators like the Respondent-2. Further, the redressal against the refusal to grant open access has been provided u/s 42 (6) of the Act to an authority appointed by the State Commission to settle the grievances. Having failed to avail the said remedy, Respondent generator therefore, cannot maintain the Petition before the State Commission.

(ii) Section 2 (12) of the Electricity Act provides that the Distribution of the electricity is a license activity and when a person deciding to distribute the electricity, he is required to

obtain license u/s 14 of the Act. When the Respondent No.2 wants to supply electricity to the consumers like M/s Bharat Forge and other consumers, the Respondent-2 is obliged to obtain for the license before open access could be granted to the Respondent.

(iii) Section 42 (3) of the Act did not provide for generating Companies to seek open access. If generators are granted open access, the generators easily, would take over the distribution activity by wooing the consumers of any distribution licensee without obtaining a license u/s 42 of the Act. Further, section 9 (1) provides that no license shall be required for supply of electricity generating from captive generating plant to any licensee but Section 10 (2) of the Act does not incorporate those sentences. Therefore, the generating stations other than the captive generating plant will have an obligation to apply for a license for supply of electricity to the consumers.

(iv) The Electricity Act provides for non discriminatory open access to a generating Company only when it seeks to use the transmission facility either by central transmission utility or the State transmission utility u/s 39 of the Act. Sec 42 provides that the consumer of the Distribution licensee could seek open access. From the combined reading of these Sections, it is evident that so long as the generating company utilizes the facility of transmission utility to sell power to a consumer of the licensee, it is permitted to do so without license, but when the generating Company wants to supply the electricity to the consumers in the area, the generating Company would be required to obtain a license for the distribution before it supplies electricity for use of the distribution facility of the distribution licensee. Therefore, without the license, the State Commission could not direct the Appellant to grant open access to the Respondent.



4. On these grounds, elaborate arguments were advanced by the Learned Counsel for the Appellant. In reply to the above submissions, the Learned Counsel for the State Commission as well as the Learned Senior Counsel appearing for the Respondent No.2 made detailed submissions in support of the findings rendered by the State Commission in the order. In addition to above, the Learned Counsel appearing for the second Respondent had raised preliminary objection with regard to maintainability of the Appeal contending that the impugned order was passed on 25.05.2009 and the declaration by the Appellant was made in the affidavit filed along with Appeal on 26.8.2009 and as such the Appeal must be construed to have been filed only at a later date without a petition to condone delay. It is noticed that the Appeal has been presented on 8.7.09 as against the order dated 25.5.2009 but only on 26.8.2009, the Appellant made declaration in the affidavit. As correctly pointed out by the Learned Counsel for the Respondent, it must be construed that the Appeal had been presented only on 26.08.2009 though it was presented on

8.7.2009 itself. However, we do not propose to reject the Appeal on this technical ground particularly when the Appeal has been admitted on 6.10.2009 itself. Thereafter, the Appellant and Respondents were heard on merits on the main grounds urged in the Appeal. Therefore we think it appropriate to deal with merits of the Appeal instead of rejecting the Appeal on the said technical ground. Let us now refer to the main questions raised in this Appeal.

(i) Whether the Petition for open access before the State Commission could be filed by the generator when law provides that the Petition for open access could be filed only by the consumers ?

(ii) If open access is granted to the generator on its Petition, would it not amount to allowing the generator to undertake the work of distribution of electricity which it could not do without license?

5. Now let us deal with these questions one by one.

6. To deal with the first questions, it would be worthwhile to refer to the relevant provisions of the Act. According to the Appellant, since the Petition filed by the Respondent for grant of open access was filed u/s 42 (3), the said application can not be entertained by the Commission in as much as of 43 (3) confers the right to only to the consumers to seek open access and not to the generator the Respondent. Definition of Sec 42 (3 ) is quoted as below:

*“(3) Where any person, whose premises are situated within the area of supply of a distribution licensee, (not being a local authority engaged in the business of distribution of electricity before the appointed date) requires a supply of electricity from a generating company or any licensee other than such distribution licensee, such person may, by notice, require the distribution licensee for wheeling such electricity in accordance with regulations made by the State Commission and the duties of the distribution licensee with*

*respect to such supply shall be of a common carrier providing non-discriminatory open access”*

7. The above provisions does not provide that a Petition for open access shall be filed only by the consumers desiring to buy electricity nor prohibit application for open access by a generator. Now let us quote the definition of Sec 2 (47) of the Act which is as under:-

*“ Open access” means the non-discriminatory provision for “the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission”.*

8. This definition would make it clear that open access means the non-discriminatory provisions for the use of transmission lines or distribution system or associated facilities by any

licensee or consumer or a person engaged in generation in accordance with the Regulation.

9. This itself gives the right to a person engaged in generation to seek open access in accordance with Regulation framed by the appropriate Commission. As referred to in section 42 (3), this provision deals with such situation that:

(a) Any person requires a supply of electricity from a generating company or any licensee;

(b) Such a supply is required from other than the Distribution licensee within whose area of supply, the premises of the applicant is situated

(c) Such person may by notice require the Distribution licensee for wheeling such electricity in accordance with the Regulation made by the State Commission. As per this provision, the consumer-applicant may require the

Distribution licensee in his area to make available open access to this distribution system for wheeling of electricity from any generator of his choice. While supplying the electricity, the generator does not need to obtain any license under the Electricity Act, 2003.

(d) It is true that the Sec 42 (3) does not deal with non discriminatory provisions for the use of transmission lines etc by a person engaged in generation of electricity but it is noticed that the main provisions based on which the State Commission has to introduce and this open access would be u/s 42 (2) of the Act. 42 (2) is a provision where the non-discriminatory provisions for use of transmission lines or distribution system or associated facilities which lines or system by a person engaged in generation should be specified.

10. On the basis of the above, Sec 42 (3) of the Act can not be utilized to curtail the active right of the person engaged in

generation to seek the non discriminatory provisions for use of the transmission lines or distribution system etc. In other words, it is pointed out that there is nothing in Section 42(3) which either expressly or impliedly bars the Petition for open access by a generator. There is also nothing in the Sec 42 (3) of the Act which indicates that the generators application for the open access is not consistent with the right of the consumer to require open access.

11. U/S 42 (2) of the Act, the State Commission shall introduce the open access scheme by framing the suitable Regulation. In pursuant to the same, the State Commission has framed the Distribution Open Access Regulation, 2005. The Regulation 3 of this regulation provides for the eligibility of the consumers who will be entitled to seek the open access. Clause 4.4 of the Regulation deals with the Petition for open access by consumers. Similarly, Clause 4.4 deals with the application for open access by the generator. So the clause 4.4 which is

more relevant is extracted as under:-

*“4.4 “ Application **by Generating Company** or Licensee*

*4.4.1 **Where a Generating Company** or a Licensee is connected or intends to be connected to the distribution system of a Distribution Licensee **and intends to give supply of electricity** to an eligible consumer or to an eligible person as specified in 3.1, using such distribution system, the Distribution Licensee shall, within a period of thirty (30) days from the receipt of application for open access, intimate such Generating Company or licensee of the technical requirements, details of works to be carried out, charges to be paid and estimated time period for completion of works in order to provide or enable such Generating Company or Licensee to give such supply: Provided that the Distribution Licensee shall be entitled to recover all expenses reasonably incurred to provide open access under this Regulation 4.4 from such Generating company or Licensee....”*



12. The perusal of the above Regulation read with Section 42 would make it clear that these provisions permit a generator also to apply for the open access. As indicated above, the definition of open access as contained in Sec 2 (47) of the Act also provides that open access facilities can be applied for by any licensee or consumer or a person engaged in generation in accordance with the Regulation framed by the Commission.

13. It is, therefore, clear that the Regulations framed by the State Commission in this regard are completely in keeping with provisions related to concept of open access in terms of Electricity Act, 2003. Thus, so far as the first question is concerned, we answer accordingly in favour of Respondent No.2 holding that the generators also can apply for the open access.

14. Let us deal with the second question.

15. The question in the second issue is as to whether act of supplying the electricity by the generator to a number of

consumers using open access would amount to distribution as defined in the Electricity Act, 2003. The term “Distribution” has to be understood on a conjoint reading of Sec 2 (17) and 2 (19) of the Electricity Act, 2003. Let us quote Sec 2 (17) of the Act which is as under:-

*“(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”*

16. As per Sec 2 (17), the distribution licensee is required to operate and maintain a distribution system for supplying electricity to the consumers in its area or his area of responsibility.

17. Let us now quote Sec 2 (19) of the Act, which is as under:-

*“(19) **Distribution system**” means **the system of wires and associated facilities** between the delivery points on*

*the transmission lines or the generating station connection and the point of connection to the installation of the consumers;*

18. As per Sec 2 (19), the distribution system is the system of wires and associated facilities between delivery points on transmission lines or generating station connection and the point of connection to the installation of the consumers.

19. As per Sec 2 (3) of the Act, the area of supply means the area within which a distribution licensee is authorised by its license to supply electricity. In this case, the Respondent is not entitled to have any area of supply, where it is authorised to supply electricity. Similarly, the Respondent is not laying down distribution system and selling electricity to the consumers through such distribution system.

20. A generator selling electricity to a consumers using open access can not be termed as a distributor as per the

definition. In the present case, the generator Respondent would only be using the distribution system of the Distribution licensee while seeking open access for the supply of electricity and not setting up the Distribution system by itself.

21. Sec 2 (29) of the Act, refers to the term 'Generate'. It means to produce electricity from the generating station for the purpose of giving supply to any premises or enabling a supply to be so given. The activities of producing electricity for the purpose of giving supply to any premises do not require generating station/generating Company to obtain any license under the Act.

22. As a matter of fact, Sec 7 of the Act expressly exempts a generating company from the requirement of obtaining a licence under the Act to operate a generating station. Therefore, the activity to operate a generating station and to generate in order to produce electricity for the purpose of giving supply to any premises or enabling a supply to be so given,

does not require the Respondent to obtain a license under the Act. In other words, generator selling electricity, using open access to a consumer or a number of consumers can not be called as a distribution. It is also to be pointed out in this context that where a distribution licensee gives open access to the generator, such a distribution licensee is entitled to charge and recover open access charges as well as surcharge. The entire cost of infrastructure, etc; is also borne not from the Annual Revenue Requirement of the Distribution Company. Hence, by granting open access a Distribution Company does not suffer any loss.

23. The Appellant has contended that the difference in language of the Section 9 and Section 10 of the Act would indicate that the generating Company other than a captive generating plant will have the obligation to obtain a licence as and when necessary to sell the electricity to the consumers wherever the licensing requirement is mandatory. We are

unable to accept this concept. Section 10 (2) of the Electricity Act, 2003 provides that:

*“a Generating company may supply electricity to any licensee in accordance with this Act and the rules and regulations made there under **and may, subject to the regulations made under sub-section (2) of Section 42, supply electricity to any consumer”.** (underlining and bold added).*

24. It is further contended that for the supply of electricity by the generator to a consumer, the generator has to seek open access under Section 42 (2) of the Act. The mere omission of the words “without requiring any licence” in Section 10 (2) of the Act would not make a generator to supply electricity to any consumer subject to regulations made under Section 42 (2) a licensed activity.

25. Section 12 defines the types of licences that can be granted under the Act. The only type of licences recognised by the Act are (i) Distribution (ii) Transmission and (iii) Trading.

26. As indicated above, the distribution is the activity of laying down a distribution system therefore, distribution licence can not be given since the generator is not engaging or intending to engage any set-up of Distribution System. Equally a transmission licence can not be given since the Generator is neither setting up nor intending to set up any transmission system. Similarly, the generator is not intending to undertake any "Trading" activity as per the definition and therefore no trading licence also can be given to it.

27. According to the Appellant, Sec 42 being complete code provides for a consumer alone can seek for open access and not a generator. We are unable to accept this as it cannot be held that Sec 42 is a complete code on the following

reasons:

(i) Sec 42 (2) itself leaves it upto the State Commission to introduce open access and the terms and conditions for the same.

(ii) Section 42 does not, in itself, contain a definition of open access and terms open access is defined in Sec 2 (47) of the Act.

(iii) The said provision does not purport to contain all the various facets of the open access and hence the above provision does not come anywhere being a complete code.

28. As indicated above, Section 42 clearly mandates that the terms and conditions of the open access have to be framed by the State Commission Regulations framed by the State Commission specifically provides for open access to the generators as well as also to the consumers.



29. As mentioned earlier, the supply by the Generator would not be held to be an activity akin to distribution which will be prejudicial to the distribution licensee, on the following reasons:

(a) The Electricity Act does not recognise any activity which is akin to distribution.

(b) Distribution is a defined activity. Any activity which does not strictly come within the definition contained in the Act would not be a 'Distribution' as contemplated by the Act.

(c) Even if a generator were to supply to several consumers using open access, it is to be stated that the life blood of the Act is open access. The entire Act revolves around the harnessing of the generation and the freedom of the generator to sell to any person of his choice and the liberty of the consumer to choose.

30. By this process, as referred to earlier, there is no loss or prejudice to the distribution licensee, especially when the Distribution licensee is compensated by means of open access charges and cross subsidy charges. Further, the entire cost of the infrastructure incurred by the distribution licensee is borne out from the annual revenue requirement by means of return on equity, interest on loan, depreciation, etc. Hence distribution licensee is not at all prejudicially affected by a Generator using open access to sell the electricity to the consumers at a time. Therefore, this contention with reference to this issue also has not merit at all.

**31. Summary of Our Findings:**

**(i) With regard to the first question, the contention of the Appellant is, the Petition filed by the Generator Respondent for grant of open access can not be entertained by the State Commission in as much as Section 42 (3) of the Act confers the**

**right only to the consumers to seek open access and the said right has not been conferred upon the generator Respondent. This is not correct. Section 42 (3) of the Act does not provide that the application for open access shall be filed only by the consumers. In other words, it does not prohibit such Petition being filed by the generator. Section 42 (2) of the Act confers the powers to the State Commission to introduce the open access scheme by framing the Regulations. The State Commission has framed the Distribution open access Regulation 2005 and Regulation 3 has been provided for the consumers who intend to seek open access and Clause 4.4 deals with the Petition seeking for open access by the generator. Therefore, the relevant regulations read with Sec 42 of the Act would make it clear that these provisions permit the generator to apply for the open access. So the contention that the application by the**

**generator under section 42 (3) of the Act seeking for open access is not maintainable, could not be sustained.**

**(ii) Second question is as to whether a generator supplying electricity to the number of consumers through the open access would amount to Distribution? Distribution licensee has been defined under section 2 (17). The Distribution system has been defined under section 2 (19) of the Act. As per these definitions, the generators selling electricity to the consumers using open access can not be termed as distributor. In the present case, the Respondent generator would only be using the distribution system of the distribution licensee and not setting up the distribution by itself. Further, where a distribution licensee grants open access to the generators, such a distribution licensee is entitled to collect open access charges**

**as well as the cross subsidy charges. By this process, there is no loss or prejudice to the distribution licensee.**

32. In the light of our above findings, we hold that the contentions urged by the Learned Counsel for the Appellant can not be accepted. As such there is no merit in this Appeal. Consequently, the Appeal is dismissed. However, there is no orders as to cost.

**(Rakesh Nath)**  
**Technical Member**

**(Justice M. Karpaga Vinayagam)**  
**Chairperson**

Dated: 15<sup>th</sup> March, 2011

REPORTABLE/NON-REPORTABLE