

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 7 of 2010

Dated: 6th April, 2011

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

IN THE MATTER OF

**M/s NOIDA Power Company Limited,
Commercial Complex
H Block, Alpha II Sector
Greater NOIDA**

... Appellant

Versus

**1. Paschimanchal Vidyut Vitran Nigam Ltd,
Urja Bhawan, Victoria Park
Meerut (UP)**

**2. Uttar Pradesh Electricity Regulatory
Commission,
Kisan Mandi
Bibhuti Khand
Lucknow**

....Respondent(s)

**Counsel for Appellant(s): Mr. Shanti Bhushan Sr.Adv.
Mr. M.G.Ramachandran
Mr. Visal Gupta**

**Counsel for Respondent(s):Mr. Pradeep Misra,
Mr. Daleep Kumar Dhyani
Ms Sugandha Somani
Mr. Amit Kapur
Mr. Manoj Kumar Sharma
Ms Poonam Verma**

JUDGMENT

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

1. M/S Noida Power Company Ltd is the Appellant. The 1st Respondent is Paschimanchal Vidyut Vitaran Nigam Ltd. U.P. Electricity Regulatory Commission (State Commission) is the 2nd Respondent. By the order dated 11.12.2009, the State Commission, granted a parallel/second distribution licence to the Respondent No.1 (Paschimanchal Vidyut Vitaran Nigam Limited, Meerut), in the Greater NOIDA area which is the

licenced area of M/S Noida Power Company Limited, the Appellant.

2. Aggrieved by the said order, the Appellant has filed this Appeal. The short facts which are relevant are as follows:

(i) The Greater Noida Industrial Development Authority promoted the M/S Noida Power Company Ltd, the Appellant, as the 'Special Purpose Vehicle for the specific purpose of undertaking distribution and supply of electricity to the consumers in the Greater Noida area.

(ii) On 30th August, 1993, the Appellant was granted a licence by the Government of Uttar Pradesh under Section 3 of the Indian Electricity Act, 1910 for the distribution and retail supply of electricity in the Greater Noida area.

(iii) On 15.11.1993, an agreement was entered into between the Appellant and UP State Electricity Board by which the Electricity Board agreed to supply power upto 45 MVA to the Appellant operating as a licensee of the Government of UP on the basis of the licence already issued to the Appellant for distribution and retail supply of electricity to the consumers of its area.

(iv) There was some dispute between the Appellant and the State Electricity Board relating to the various aspects including the supply of power in bulk to the Appellant to enable distribution and retail supply of electricity. Therefore, the Appellant filed a writ petition before the Allahabad High Court. In pursuance of the interim order passed by the High Court, the State Commission fixed the tariff which was ultimately approved by the High Court by order dated 10.11.2005. When further dispute arose in regard to the termination of agreement, the Appellant filed a Writ Petition in the High Court of Allahabad which in turn,

directed the State of UP to approach the State Commission seeking for revocation of the distribution licence granted to the Appellant.

(v) Accordingly, on 17.11.2008 the State of UP filed a petition before the State Commission for the revocation of the licence granted to the Appellant. By the order dated 13.1.2009, the State Commission rejected the said petition and dismissed the same.

(vi) At that stage, the 1st Respondent (the Paschimanchal Vidyut Vitran Nigam Ltd) on 21.1.2009 filed a petition before the State Commission under section 15 of the Electricity Act seeking for grant of parallel/second distribution licence to it in the Greater Noida area. The State Commission (R2) directed the Respondent 1 to publish a public notice. Accordingly, a public notice was published. The Appellant being a licensee, filed a detailed

objections to the grant of parallel licence to the Respondent-1 in respect of its licenced area.

(vii) However, through the impugned order dated 11.12.2009, the State Commission, after rejecting the objection raised by the Appellant, granted second/parallel licence in favour of the Respondent-1 in the Greater Noida area.

3. Aggrieved by this impugned order dated 11.12.2009, the Appellant (M/S Noida Power Company Ltd), has filed the present appeal before this Tribunal.

4. The Learned Senior Counsel appearing for the Appellant would urge the following grounds while assailing the impugned order to substantiate his plea that the grant of parallel licence is illegal.

(i) The first Respondent has not satisfied the State Commission any of the requirements specified in the sixth Proviso of Section 14 of the Electricity Act, the Second Licence Rules (The Distribution of Electricity Licence (additional requirement of capital adequacy, credit worthiness and code of conduct) Rules, 2005), and the applicable Regulations notified by the State Commission which govern the grant of second/parallel licence in the area of supply of licence. In the absence of the fulfilment of these requirements, the parallel licence should not have been granted.

(ii) The State Commission has wrongly proceeded on the basis of a letter given by the Department of Energy, the Government of UP as a fulfilling requirement of capital adequacy, credit worthiness and code of conduct of the Respondent -1 without considering the various other salient features such as dismal financial position of the Respondent-1 to undertake the distribution and retail

supply business and without following the requirements of Rule 3 (2) of the Second Licence Rules which provides that the Company shall be in a position to make available the resources on the basis of network and generation of internal resources in the preceding three years.

(iii) The State Commission has committed wrong in granting five years time period to Respondent-1 to develop the network for supply of electricity in the area, which is contrary to the universal service obligation under the provisions of the Electricity Act, 2003, the UPERC (General Conditions of Distribution Licence) Regulations, 2004 and the UP Electricity Supply Code, 2005.

5. The Learned Counsel for Respondent -1, while refuting the above grounds, would justify the grant of licence in its favour by the State Commission by pointing out the findings of the State Commission, to the effect that all the criteria fixed for grant of parallel licence have been fulfilled and only on being

satisfied with compliance of all the requirements, the State Commission has exercised its discretion to grant second distribution licence in favour of the Respondent No.1 which is perfectly legal.

6. The short question which arises for consideration in the present appeal is this: Whether Paschimanchal Vidyut Vitaran Nigam Ltd, the first Respondent herein, has satisfied all the mandatory requirements as provided in Section 14 of the Electricity Act read with the provisions of the Distribution of Electricity Licence (additional requirement of capital adequacy, credit worthiness and code of conduct) Rules, 2005, the UP Electricity Regulatory Commission (General Conditions of Distribution License) Regulations, 2004 and the UP Electricity Supply Code, 2005 so as to become entitled to the grant of second/parallel Distribution License in Greater NOIDA ?

7. On this question, the arguments at length were advanced by both the parties.

8. We have carefully considered their rival contentions and given our anxious consideration to the question framed as above.

9. According to the Appellant, none of the mandatory requirements contemplated under the Act, Rules and Regulation and Supply Code have been fulfilled by the first Respondent and despite this the parallel/second licence has been granted by the State Commission to the 1st Respondent on the basis of the wrong findings. On the contrary, it is submitted by the Respondent, refuting the above contention that all the requirements contemplated and provided in the Act, Rules, Regulations and Supply Code have been fulfilled and as such the impugned order is perfectly justified.

10. In order to deal with this contention, it is necessary to quote the relevant provisions of the Act as well as the Rules and Regulations which empower the State Commission to grant parallel/second licence. Let us first see the sixth proviso of Section 14 of the Act, 2003 which is quite relevant to consider this issue:

“14. Grant of Licence: The appropriate Commission may, on an application made to it under Section 15, grant a licence to any person-

.....

Provided also that the Appropriate Commission may grant a license 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 license 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, or code of conduct as may be prescribed by the Central Government, and no such applicant, who complies with all the requirements for grant of license, shall be refused grant of license on the ground that there already exists a licensee in the same area for the same purpose:”

11. The above provision contains three parts:-

(i) The first part confers the discretionary powers to the Appropriate Commission to grant second/parallel licence in the same area of supply to the Applicant.

(ii) The second part deals with the specific requirements to be satisfied by the applicant for the second licence in addition to the conditions and requirement which are otherwise to be satisfied by any applicant for licence. These additional requirements are:

- (a) Capital Adequacy;
- (b) Credit worthiness;
- (c) Code of Conduct

These additional requirements are to be prescribed by the Central Government.

(iii) The third part deals with the situation that only after the above requirements are duly satisfied, the Appropriate Commission will then consider the grant of licence on merits with reference to the other

specified conditions. While considering the matter on merits, the Appropriate Commission shall not reject such a grant merely on the ground that there is already existing licensee in the area of supply. This means that the satisfaction of additional requirements specified will not automatically lead to the grant of second or parallel licence. In the same way, the State Commission can not reject the application merely on the ground of existence of the first licensee.

12. These three parts would indicate, that the applicant for second licence has to duly satisfy the additional conditions namely Capital Adequacy, Creditworthiness and Code of Conduct as may be prescribed by the Central Government and only on being satisfied about the additional requirements, the Appropriate Commission can proceed to consider the merits of the matter on the basis of the other aspects before granting the second licence.

13. It is relevant to note in this context that the Electricity Act, 2003 has provided only for the Central Government to prescribe such specific requirements and not for the State Commission. Thus, it is clear that once a precondition relating to the Capital Adequacy, Creditworthiness, Code of Conduct prescribed by the Central Government are satisfied, the State Commission or the Appropriate Commission can consider the other relevant aspects to decide also whether to grant parallel licence or not.

14. Whether to grant a parallel licence or not, purely lies with the discretion of the Appropriate Commission which has to be exercised judicially and judiciously for the reasons to be recorded. This does not mean that the Appropriate Commission is bound to grant a parallel licence, the moment the pre-conditions like Capital Adequacy, Creditworthiness, etc., are duly satisfied. In other words, even if these pre-conditions are satisfied, the Appropriate Commission is bound to consider all other relevant factors before granting the parallel/second

licence. While exercising the discretion for granting the parallel/second licence, the Appropriate Commission, can not go beyond or act in contravention to its Rules and Regulations framed in accordance with the provisions of the Electricity Act, 2003.

15. The Central Government is empowered to frame second licence Rules and notify the same under section 176 of the Electricity Act. Accordingly, the Central Government has notified “The Distribution of Electricity Licence (additional requirements of Capital Adequacy, Creditworthiness and Code of Conduct) Rules, 2005.” Rule 3 (1) and 3 (2) of the said Rules are relevant for the present case, are as under:-

“3. Requirements of Capital Adequacy and Creditworthiness:

(1) The Appropriate Commission shall, upon receipt of an application for grant of license 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 license 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 license 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”.

16. The above Rules clearly indicate what all are the conditions to be satisfied for grant of licence. It cannot be debated that the Central Government alone is competent to frame these Rules to decide on the nature and the extent of each of the conditions like “Capital Adequacy, Creditworthiness and Code of Conduct to be satisfied cumulatively, alternatively and individually.

17. The above Rules have been notified by the Central Government specifying mandatory pre-conditions only for the grant of the second licence and not for the first licence. In other words, it is to be stated that the Act has not chosen to provide these conditions to be satisfied in the case of first licence.

18. As provided in Rule-3, the first step to be taken by the Appropriate Commission on receipt of an application for second licence is to determine the requirement of 'Capital Investment' for distribution network to be established. Such a distribution network has to be established by the Applicant for a second licence independent of the existing distribution network.

19 The extent of the capital investment required is to be determined by Appropriate Commission with reference to the obligation envisaged in Section 43 of the Electricity Act, 2003. Section 43 of the Electricity Act provides as under:

“43. Duty to supply on request:

(1) *Every distribution licensee, shall, on an application by the owner or occupier of any premises, give supply of electricity to such premises, within one month after receipt of the application requiring such supply;*

Provided that where such supply requires extension of distribution mains, or commissioning of new sub-stations, the distribution licensee shall supply the electricity to such premises immediately after such extension or commissioning or within such period as may be specified by the Appropriate Commission.

Provided further that in case of a village or hamlet or area wherein no provision for supply of electricity exists, the Appropriate Commission may extend the said period as it may consider necessary for electrification of such village or hamlet or area.

(2) *It shall be the duty of every distribution licensee to provide, if required, electric plant or electric line for giving electric supply to the premises specified in sub-section (1):*

Provided that no person shall be entitled to demand, or to continue to receive, from a licensee a supply of electricity for any premises having a separate supply unless he has agreed with the

licensee to pay to him such price determined by the Appropriate Commission.

(3) If a distribution licensee fails to supply the electricity within a period specified in sub-section (1), he shall be liable to a penalty which may extend to one thousand rupees for each day of default”

20. This section clearly provides that there is a universal service obligation provided for the licensee to serve every consumer seeking electricity in its area of supply within one month of the receipt of the application. This necessarily implies that the capital investment cannot amount to be progressively determined for meeting the supply obligations.

21. Once this capital investment is determined, the Appropriate Commission is required to decide on the funding/financing of the capital investments in accordance with the relevant debt equity ratio. The Appropriate Commission has to decide on the total amount of the equity capital to be contributed by the applicant and its promoter which should be 30% normative. Accordingly, the Appropriate Commission has

to make a detailed inquiry into the capital investments required and the means of financing by the applicant and satisfy itself before proceeding further.

22. The Appropriate Commission has not only to verify whether there are available resources for the capital investment of the project, but also to satisfy that such availability of resources has been shown solely based on the track record of the preceding three years of the applicant and its promoter. The networth and generation of internal resources of his business as determined based on the three preceding years, has to be adjusted further by reduction of all the committed investments outside the area of supply for which the second licence is made.

23. As indicated above, the Central Government has specifically chosen to provide Capital Adequacy, Creditworthiness, etc., the requirements to be fulfilled based on the three years past performance and not otherwise.

24. 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.

25. The applicant for a second licence is required to satisfy the State Commission the following pre conditions:

(a) The applicant with his promoter, based on their track record of the preceding three years has the requisite Capital Adequacy namely at least the provision of 30% of equity on the total project cost/capital investments required in the distribution network in the entire Greater Noida area.

(b) Based on the track record of the preceding three years, the applicant and its promoters are in a position to arrange debt borrowings to meet the balance project capital cost or capital investments mentioned above.

(c) The application for the license is for the minimum area as specified in the Explanation to Rule 3 of the above Rules.

26. In terms of provisions of the Act and the second license Rules, there cannot be a phased development of the distribution network in the case of the second license. The Applicant for the second license should establish the capital adequacy and creditworthiness to meet service obligation for the entire area under Section 43 first in the manner mentioned above before this second licence is made effective. Otherwise, the purpose of granting second license, to provide level playing field and competition to the existing licensee in the interest of the

consumer will never be achieved. In this context the relevant provisions of the National Electricity Policy 2005 is relevant:

“5.4.7.....With a view to provide benefits of competition to all section of consumers, the second and subsequent licensee for distribution in the same area shall have obligation to supply to all consumers in accordance with provisions of section 43 of the Electricity Act, 2003. The SERCs are required to regulate the tariff including connection charges to be recovered by a distribution licensee under the provisions of the Act. This will ensure that second distribution licensee does not resort to cherry picking by demanding unreasonable connection charges from consumers”.

27. The reading of the above clause would make it clear that the Applicant for the second license should not be allowed to resort to cherry picking few areas in the beginning at the cost of existing licensee and it shall have the obligation of supply to all consumers in accordance with the provisions of Section 43 of the 2003 Act.

28. Let us now refer to the relevant Regulations framed by the State Commission stipulating that the period within which the Distribution network needs to be developed. The following are the relevant extracts:

“UPERC (General Conditions of Distribution Licence) Regulation, 2004:

“25. Obligation to Connect Consumers

*25.1. Subject to the other provisions of the Licence, the Licensee shall have the obligation to provide connection to Licensees’ Distribution System to the owner or occupier of any premises within its Area of Supply within one month of receipt of the application requiring such supply of electricity. Provided that where such supply requires extension of distribution mains, or commissioning of new substations, the Licensee shall supply the electricity to such premises **immediately after such extension or commissioning or within such period as may be specified by the Commission in the Electricity Supply code.** Provided further that in case of a village or hamlet or area where there is no provision for supply of electricity, the Commission may extend the said period as it may consider necessary for electrification of such village or hamlet or area.*

*25.2 Where the owner or occupier of any premises requires connection under the terms of this Clause 25.1, the form of application to be made, and **the procedure for responding to that application shall be in accordance with the procedure specified in the Electricity Supply Code**".*

29. The perusal of the Regulations would show that the Commission can stipulate the period within which the distribution of network to be commissioned under the supply code. The Uttar Pradesh Electricity Supply Code, 2005 stipulates a minimum period of one year within which the distribution network should be developed.

30. Thus, it is clear while considering the Application filed by the Applicant seeking for the grant of parallel/second licence, the Appropriate Commission is bound to follow the relevant provisions as referred to above as contained in the Act, Rules, Regulations and the Supply Code.

31. In the light of the these provisions, contained in the Act, Rules, Regulations and Policy providing various procedures, we

have to now find out whether these mandatory procedures contemplated have been followed by the State Commission while granting second/parallel licence in favour of the First Respondent.

32. While dealing with this aspect, it would be appropriate to refer to the reasonings and findings rendered by the State Commission in the impugned order on the compliance of these procedures while granting second licence in favour of Respondent-1. They are as follows:

(a) On the mere strength of its own balance sheet, the Paschimanchal Vidyut Vitran Nigam Limited (applicant for the second license) can not meet the requirement of capital adequacy and credit worthiness as laid down under the Rules 2005. However, the Applicant is a 100% subsidiary of Uttar Pradesh Power Corporation Ltd., which is a Government of UP Company. By virtue of its special status, the Applicant would be able to

obtain funds for various capital works from the Government of UP and raise funds as required from time to time from the financial institutions. Therefore, erecting a distribution network with the support of the Government in the Greater Noida which is much smaller in size can not be the problem for the Applicant. As per the relevant Rules 2005, the financial strength of the applicant i.e Capital Adequacy and Creditworthiness has to be assessed keeping in view the financial strength of its promoter also. As long as the State Government's support as a promoter, is available to the Applicant, its capital adequacy and creditworthiness cannot be questioned.

(b) The letter of commitment has been given by the State Government. This would reveal that the said letter is more than an assurance from the Government as it has been written in a specific context with specific knowledge that the Applicant's Application for grant of

second licence was pending with the Commission. Accordingly, the letter of Government dated 22.4.2009, which was in favour of the Applicant during the pendency of its application before the Commission should be construed as a firm commitment by the Government to develop as well to strengthen the system. Therefore, in the light of the said sovereign guarantee for the distribution system development, there is no reason to raise any doubt over the capital adequacy and credit worthiness of the applicant to develop and maintain the distribution system in the Greater Noida area.

(c) It is important to note that a multiple licensee in the same area of operations is an enabling provision of the 2003 Act for promoting competition in the distribution. Therefore, wherever possible, the second licence system, should be introduced in accordance with the spirit of the Act. The requirement of a minimum area

for grant of distribution license is not specifically provided under 6th proviso of Section 14, it merely uses the term only “within the same area”. The requirement of minimum area for grant of distribution licence finds mention only in the explanation of Rule 3 (2) given in the Rule 2005. Since under the provisions of the Electricity Amendment Act, 2003, scope of application of prudence has been restricted only to defining additional requirements of capital adequacy, credit worthiness and code of conduct. Therefore, the requirement of “Minimum Area” as specified under Rules 2005 apparently runs contrary to the spirit of the main Act. The National Electricity Policy also only provided that the competition must be permitted while preventing the second licence from cherry picking in the distribution licensee’s area. Since the Applicant which has been managing entire Western Region of the State of UP, is seeking the distribution licence for the entire NPCL

area, the question of cherry picking by the Applicant does not arise.

(d) The Applicant, being a Government Company is within the meaning of "State" as per Article 12 of the Constitution of India. Therefore, as a "State", it is obliged to carry out the social responsibility towards the public welfare. Applicant has indicated that at the initial stage, it would be investing an amount of Rs.55.75 Crores towards the Distribution network in Greater Noida area and thereafter the Distribution network will be expanded gradually in the entire area of Greater Noida. This contention of the Applicant is acceptable. Accordingly, the Commission direct that the Applicant shall immediately start laying out distribution network after issue of licence and shall cover the entire area within a time span of five years.

(e) As far as the relative performance of these two Companies is concerned, the Commission is in receipt of news paper cuttings submitted by both the parties which indicate pitfalls in the performance of either of the parties. However, if we compare the performance of both the Companies, performance of the Applicant almost matches with that of M/S Noida Power Company Limited. Therefore, the Commission grants the Distribution licence to the Applicant for the Greater Noida area and licence shall continue to be in force for a period of 25 years.

33. Let us now go into the main question framed in this case for finding out as to whether findings by the State Commission for the grant of second licence are legally valid or not.

34. The fundamental statutory requirements for determining the capital investments required for establishing the distribution network shall be consistent with Section 43 of the Electricity Act,

2003. In terms of the above statutory provisions, Respondent No.1 was required to satisfy the capital adequacy norms. The capital adequacy to be satisfied should be based on the total capital investment for the distribution network consistent with satisfying universal service obligations as provided under section 43 of the Electricity Act, 2003. It should be on the norms of 30% equity on the total investments to be determined by the State Commission.

35. The Capital Adequacy of 30% equity on the project cost is to be satisfied by the Applicant for the second licence and/or its promoter. The satisfaction to be met is that they will be in a position to make available resources for such equity based on the networth and generation of internal resources in the preceding three years. Therefore, the capital adequacy of the norms of 30% of the capital investment is to be objectively determined based on the annual accounts of the Applicant and his promoters of the preceding three years. This can not be left to be decided on the basis of the various other aspects such as

arrears, guarantee, etc., that may be provided either by the Applicant or its promoter at the time of the application for grant of licence.

36. To make it clear, the second licence Rules specifically provide for determination of the capital adequacy through actual networth and generation of internal resources in the preceding three years so that there can not be any uncertainty or ambiguity over the satisfaction with reference to the subjective criteria. Bearing this in our mind, if we look at the case on hand, it is evident that the track record of the Respondent-1 and his promoter, Uttar Pradesh Power Corporation Limited, as per the admitted financial accounts does not show the existence of networth or internal resources to make available of 30% equity on project cost.

37. Admittedly, the Financial Statement enclosed along with the Application for licence by Respondent No.1 were not audited and on the other hand, it shows the negative net with the

accumulated losses of huge amount. Thus, it became clear that the conditions mentioned in Rule 3 (2) of the second licence licence with regard to networth and internal resources for establishing capital adequacy norms have not been fulfilled by the Respondent No.1.

38. It is contended on behalf of the 1st Respondent that once the capital adequacy and credit worthiness are satisfied, then State Commission has no jurisdiction to go into other aspects and refuse the second license on that basis. This contention is not tenable for two reasons. (i) The discretion vested in the Appropriate Commission as per the opening part of the sixth proviso and opening part of section 14 itself with the use of the expression 'may': (ii) The expression used in the last part of the Proviso to the effect 'shall not be refused on the ground that there already exists a Licensee in the same area' would clearly indicate that Appropriate Commission cannot refuse the second licence merely on the ground of the existence of the licence but it can refuse the grant of second license on other grounds. In

other words, the very fact that the Sixth Proviso contains the words “shall not be refused” on the ground of the existence of the another license instead of using the words “shall be granted license” would reveal that Appropriate Commission in its discretion is empowered to refuse the grant of second licence on any other ground other than the ground of the existence of another licensee.

39. According to the Respondent No.1, the State Commission can give time to the Applicant to full fill the requirements such as Capital Adequacy, Creditworthiness after granting parallel/second license as post facto. This contention is totally untenable.

40. As indicated above, the wordings contained in sixth proviso to Section 14 clearly show that prior satisfaction of the requirements before the grant of second license is mandatory. In other words, the requirements of pre-conditions are condition precedent for grant of licence and they can not be treated as a

conditions subsequent to be satisfied during the actual operation of the said license. The Learned Counsel for the 1st Respondent has cited the following authorities to substantiate his plea of ex post facto approval for grant of licence:

(i) Mysore State Road Transport Corpn V Gopinath, AIR 1968 SC 464 paras 2-4;

(ii) UP State Electricity Board – V- City Board, Mussoorie (1985) 2 SCC 16 at para 7;

(iii) LIC –V-Escorts (1986) 1 SCC para 61 to 63

(iv) Puravankara projects Ltd –V-Venus International (2007) 10 SCC 33 Para 18, 19, 22, 24, 30, 37;

(v) Atlas Cycle Industries Ltd-V-State of haryana (1979) 2 SCC 196 Paras 19-22, 32.

(vi) Mysore State Road Transport Corpn V Gopinath AIR 1968 SC 464 paras 2-4;

41. These decisions would deal with the approval for the transaction between the two contracting parties. But in the present case, the relevant provisions in the Act deal with the

grant of licence and not for any approval or permission for transaction between the two contracting parties. The grant of licence is the statutory function of Appropriate Commission and exercise of the Appropriate Commission is dependent on satisfaction of the conditions specified. If the conditions specified as per the provisions are not fulfilled before granting the said licence, there can not be any grant of such license with the stipulation that the conditions may be subsequently full filled by giving time frame. Therefore, these decisions cited by the Counsel for the Respondent have no application to the present case.

42. In this case the State Commission has granted 5 years time period to develop the network for the supply of electricity in the area, which is contrary to the very intent of prescribing the time lines for meeting Universal Service Obligation under the provisions of Act, 2003, the Regulations and the Supply Code.

43. The only representation made by the Respondent -1 on the capital adequacy before the State Commission is that the State Government has guaranteed the availability of capital required for the project. Before the State Commission, reliance was placed by the Respondent No.1 on the letter dated dated 22.4.2009, sent by the Secretary, Department of Energy, Government of Uttar Pradesh, directly to the State Commission stating that the State Government would consider making available the funds to Respondent No.1 for distribution of business in the event of the grant of second licence to the 1st Respondent. This letter has been given due credence by the State Commission in order to conclude that this letter is a sovereign guarantee assuring for the capital cost for the project. Let us see, the relevant observations made by the State Commission for relying upon this letter:

“...However, it must be understood that the above letter is more than an assurance from the Govt as it has been written in a specific context with the specific knowledge that PVVNL’s application for grant of distribution license is pending with the Commission. As the Government is well aware that at the moment there is no distribution network of PVVNL existing in

Greater Noida area, therefore, a harmonious reading of both the paras together would show that the Government is committed to carry out not only the strengthening of the network but also the development of new distribution network in Greater Noida area. Otherwise also, it is a known maxim that Ex antecedentibus et consequentibus fit optima interpretation i.e a passage is best interpreted by reference to what precedes and what follows it. It is an important rule of construction that the meaning of the instrument should be taken collectively Ex antecedentibus et consequentibus i.e. to say that every part of it should be brought into action, in order derive from the whole one uniform and consistent meaning. Accordingly, the letter of the Government should be construed as commitment to develop as well as strengthen the system because otherwise a narrower construction would mean a commitment for only system strengthening, which is meaningless because presently no system of PVVNL exists in Greater Noida area. Therefore, in presence of the sovereign guarantee for system development & strengthening and keeping in view the fact that the petitioner on its own is managing system development and extension, in an area which is several times larger than the Greater Noida area, there is no reason to raise any doubt on capital adequacy and credit worthiness of PVVNL to develop and maintain the distribution system in greater Noida area”

44. According to the State Commission, the letter dated 22.4.2009, is a 'Sovereign Guarantee' issued by the State Government. We will now refer to the said letter which is written in Hindi by the Secretary to the State Government and translation of which has been given below:-

English Translation

No.206(U(NN)P/24-09-163/09

From

Navneet Sehgal,
Secretary,
Government of U.P.

To,

Secretary,
U.P. Electricity Regulatory Commission,
Kisan Mandi Bhawan, Gomti Nagar,
Lucknow

U(NN) Section

Lucknow Dated 22.04.2009

Sub: Regarding grant of parallel licence for distribution of electricity in the Greater Noida Area

Sir,

Kindly take reference of the above mentioned subject. In this regard it is to inform you that in case of parallel licence is granted to Paschimanchal Vidyut Vitran Nigam Ltd., for Greater Noida Area, out of the amount sanctioned by the U.P Government for strengthening the distribution network, the work

of strengthening the distribution network in Greater Noida will also be done.

In this regard, it is also to inform you that in case of grant of parallel licence to Paschimanchal Vidyut Vitran Nigam for Grater Noida Area, the Government will consider to provide financial help for establishing/strengthening distribution network as per the need to Paschimanchal Vidyut Vitran Nigam Ltd.,

Yours faithfully,

*(Navneet Sehgal),
Secretary,*

Copy to following for information and necessary action:

- 1. Additional Managing Director, U.P. Power Corporation Ltd., Lucknow,*
- 2. Managing Director, Paschimanchal VVNL, Meerut*

*(Navneet Sehgal),
Secretary*

45. On perusal of the letter dated 22.4.2009 sent by the Secretary, who is also said to be holding the post of Chairman, UPPCL, the Promoter Company of the Respondent No.1, would indicate that in case the parallel licence is granted to the Applicant (PVVNL), the State Government will consider to

provide financial help for establishing and strengthening the distribution network. It does not indicate that the sovereign guarantee has been given by the State Government for providing the entire funds to the Applicant. "Will Consider" can not be construed to be a "Sovereign Guarantee". So the conclusion arrived at by the State Commission to the effect that the above letter shall be considered to be a Sovereign Guarantee and as more than an assurance by the Government for the development and strengthening the distribution network, is totally wrong as the same is contrary to the contents of the letter dated 22.4.2009. On the other hand, as referred to above, the said letter only expresses that the State Government may consider providing funds to the Respondent No.1. This letter does not show that the State Government has made any budgetary allocation for providing equity capital to Respondent No.1 to the extent of 30% of the capital investment.

46. As a matter of fact, the State Commission has given too much of importance to the so called guarantee letter dated

22.4.2009 issued by the Secretary to the Government by construing the said letter as sovereign guarantee issued by the State Government. Admittedly, as mentioned above, this is not a decision of the cabinet of the State Government. Merely because the Respondent No.1 and UPPCL happened to be the Government Companies, it cannot be concluded that it has satisfied the capital adequacy norms. In other words, the fact that the Company is a Government Company would not be construed to be sufficient to fulfil the mandatory requirements of capital adequacy and creditworthiness. The Respondent No.1 or its promoter is a mere Company which is like any other company promoted by a large Company in the country. No exception can be carved out for the Respondent No.1 or its promoter merely because the Company is owned by the State Government. Neither, the Electricity Act, 2003, nor the Regulations framed by the State Commission make any exception for the Companies owned by the Government.

47. Thus, it is clear that the satisfaction of capital adequacy and credit worthiness have to be established through past performance with preceding three years and not by any external assurance or guarantee, etc. Hence, the so called guarantee as assurance given by the State Government which has been wrongly construed as sovereign guarantee, is not at all relevant if the capital adequacy and credit worthiness are not otherwise established as required by the Rule 3 (2) of Second License Rules. In other words, the said letter dated 22.4.2009 cannot be a fulfilment of Rule 3(2) of the second licence Rule. As per the Rules as mentioned above, the capital adequacy and credit worthiness shall be determined based on the networth and the internal resources for the preceding three years in the business of the Applicant or its promoter. Admittedly, this has not been done.

48. One more surprising feature is to be noticed in this context. During the proceedings in this Appeal before this Tribunal, the Respondent No.1 has produced another letter sent

by the Secretary to the State Government dated 19.2.2010 which was issued after the impugned order was passed. The translation of the said letter is given as below:

“Kindly take reference to my letter No.206/E/(NN)/24-09-163/09 dated 22.4.2009 by which the Government had granted consent to consider to make available financial help to Paschimanchal Vidyut Vitran Nigam Ltd., Meerut in case of grant of parallel license in Greater Noida area.

Since now parallel license has been sanctioned to Paschimanchal Vidyut Vitran Nigam Ltd., Meerut for Greater Noida Area hence the State Government is agreeable to make available financial help for development of infrastructure in this area and also to give guarantee as required for the loans to be taken by Meerut Discom for development of infrastructure for any financial institution”.

49. Admittedly, the above letter was not produced before the State Commission to consider the same for granting second licence. The above letter was issued on 19.2.2010; much after the impugned order dated 11.12.2009 was passed by the State Commission. Thus, Respondent No.1 has attempted before

this Tribunal to justify the impugned order passed by the State Commission by producing the letter obtained later. This letter, also in our view, does not in any way, help the Respondent No.1 since the expression used in the first part of the letter dated 19.2.2010 merely confirms the earlier letter dated 22.4.2009 by stating that the State Government had granted consent only to consider to make available financial help. This letter also can not be construed to be the sovereign guarantee for network service.

50. The other point urged by the Respondent No.1 is that the Greater Noida Authority will develop the network. Just because the Greater Noida Authority has been developing the primary electrical network, it can not be taken as a ground for fulfilling the capital adequacy norms. It should be viewed independently to enable any of the licensees in the area to avail of the same. It is not open to Respondent No.1 to treat such development cost incurred by the Greater Noida Authority as exclusively for them. Further, the above plea is contrary to 6th proviso of

Section 14 which speaks about the Applicant for the Second Licence developing its own distribution network. Therefore, this plea also can not be accepted.

51. The Respondent No.1 has relied upon the transmission network of the Transmission Company of Uttar Pradesh for development of the network. This also can not be accepted since such a transmission network is available to the Appellant in view of the statutory mandate of non-discriminatory open access to be provided of the transmission net work as referred to in Section 39 of the Electricity Act, 2003. In any event, the finances of the Respondent No.1 and its Promoter for the relevant preceding 3 years before the application for grant of licence did not show any surplus available resources for meeting the above requirements as envisaged in Rule 3 of the Second Licence Rule. Thus, it has to be held that the State Commission has given a wrong finding that the requirement as envisaged in Rule 3 of the Second Licence has been satisfied by the Respondent No.1.

52. According to the Learned Counsel for the Appellant the Second License Rules in the explanation given under Rule 3 defines the minimum area of supply for which second licence can be given. Accordingly, the minimum area of supply should be the area of Municipal Council or a Municipal Corporation or a revenue district. The licensed area of the Appellant is neither a Municipal Council nor a Municipal Corporation or a revenue district.

53. In this context, it is proper to find out the intention of the legislature for envisaging a condition of minimum area supply for the grant of parallel licence. The intention can be gathered from the clause 5.4.7 of the National Electricity Policy, 2005. Let us quote the said clause which refers to the minimum area requirement in case of parallel licence which is as under:-

“5.4.7.....For grant of second and subsequent distribution license within the area of an incumbent distribution licensee, a revenue district, a Municipal

Council for a smaller urban area or a Municipal Corporation for a larger urban area as defined in the Article 243 (q) of Constitution of India & 74th Amendment) may be considered as the minimum area”

54. Thus, this Clause provides for the provision of minimum area supply, is to ensure that the parallel/second distribution licensee would not resort to cherry picking.

55. Let us now refer to the findings given by the State Commission on this issue:-

“The requirement of minimum area for grant of distribution license finds mention only under the explanation given in the Rules, 2005. Since under the provisions of the Electricity (Amendment) Act, 2003 the scope of application of proviso has been restricted only to defining the additional requirement of capital adequacy, credit worthiness and code of conduct, the requirement of minimum area as specified under the Rules, 2005, apparently runs contrary to the spirit of the Act, 03”

56. We do not agree with the observation of the State Commission that the condition of minimum area can be ignored.

The interpretation by the State Commission is patently wrong as it would be against the spirit of the scheme and spirit of the statutory provisions due to misunderstanding of the scheme of the Act as well as the other provisions contained in the Rules and the Policy. However, in this case as the entire licensed area of the Applicant is proposed for second licence; we feel that this issue is irrelevant.

57. Let us now come to the next issue with reference to the non compliance with various regulations by the Respondent. The State Commission has notified the Uttar Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations 2004. These Regulations stipulate the documents and the details to be enclosed along with the application for grant of licence. These include the draft licence, map of the prescribed area, nature of land, its description and mode of acquiring the land, etc. These documents and details are required to be submitted to the State Commission to enable the Commission to get satisfied with the details given by the Applicant seeking for

grant of a licence to show that the Applicant will be in a position to carry out its obligations under the Electricity Act, 2003.

58. According to the Appellant, the Respondent No.1 has totally failed to supply these documents and details despite being requisitioned by the State Commission and even then, the State Commission has gone ahead to grant parallel licence to the Respondent No.1 even without those relevant documents required to be furnished by the Respondent.

59. The Uttar Pradesh Electricity Regulatory Commission (General Conditions of Distribution Licence) Regulation, 2004 requires the satisfaction of the State Commission regarding the technical and financial ability of the Applicant to undertake the business. The relevant provisions are extracted below:

“5.12 The Commission may grant a Licence to another person for distribution of electricity through its own distribution system within the Area of Supply provided that the person applying for grant of subsequent Licence.

(a) Complies with the additional requirements (including the capital adequacy, creditworthiness, or code of conduct) prescribed by the Central Government;

(b) Satisfies the Commission of its ability (technical and financial) to undertake the Licensed Business; and

(c) Complies with all Regulations, performance standards, guidelines, and norms specified”

60. Admittedly, the State Commission has failed to consider as to whether Respondent No.1 is a financially able to undertake the licensed business or not.

61. The Learned Counsel for the Applicant has argued that grant of second or parallel licence by the State Commission to the Respondent No.1 without fulfilling all the conditions and requirements before such grant, is in contravention of the provisions of the conduct of business Regulations regarding notifying the filing of the application. However, Respondents have submitted that all the requirements were fulfilled. Hence

we are of the view that we need not go into these procedural infirmities, since in our opinion as referred to above, the main requirement regarding capital adequacy and creditworthiness have not been fulfilled by Respondent No. 1.

62. As it is clear that the Respondent No.1 has not complied with any of the mandatory requirements contemplated under the Act, 2003 as well as the Rules, Regulations and National Electricity Policy we are constrained to hold that grant of parallel/second licence in favour of the first Respondent is not legally valid and the same is liable to be set aside.

63. SUMMARY OF FINDINGS

(A) The 6th proviso of Section 14 of the Act, 2003 contains three parts. The first part confers discretionary powers to the Appropriate Commission to grant second/parallel licence in the same area of supply to the Appellant. The second part deals with the specific requirements to be satisfied by the Applicant for the second license namely

(1) Capital Adequacy (2) Credit Worthiness and (3) Code of Conduct as may be prescribed by the Central Government. The third part deals with the situation that only after the above conditions are duly satisfied, the Appropriate Commission will consider the grant of licence on merits with reference to the other specified conditions. In order to meet the obligation to supply as per Section 43 of the Electricity Act, 2003, the Applicant is required to satisfy the Capital Adequacy and creditworthiness norms and the same should be based on the total capital investments for the distribution network. It should be on the norms of 30% equity on the total investments to be determined by the State Commission. In this case, these requirements as contained in Section 14 as well as in Section 43 of the Act have not been satisfied.

(B) The Second Licence Rules specifically provide for determination of capital adequacy through actual networth and generation of internal resources in the preceding three

years. But in this case, the track record of the Respondent No.1 and his promoter i.e. Uttar Pradesh Power Corporation Limited as per admitted financial accounts does not show the existence of the networth or internal resources to make available of 30% of the capital project cost . Admittedly, the financial statement enclosed along with the application for licence which were not audited shows the negative net with the accumulated losses of huge amount. Thus, it became evident that the conditions mentioned in Rule 3 (2) of the second licence have not been fulfilled. According to the Respondent No.1, the State Commission is empowered to give time to the Applicant to fulfil the requirements such as capital adequacy, credit worthiness etc after granting parallel/second licence as ex post facto. There is no basis for this contention. The wordings contained in sixth proviso of Section 14 clearly shows the prior satisfaction and the compliance of the requirements on these pre conditions by the State Commission is a must and mandatory. In other words, the

requirements relating to pre conditions are condition precedent for grant of licence and the same cannot be treated as condition subsequent to be satisfied during the actual operation of the said licence. In this case, admittedly, the second licence has been granted without insisting for the compliance for the requirements of pre-conditions but granted the said licence directing the Applicant to fulfil those requirements within a period of five years by giving a wrong interpretation.

(C) The first Respondent relied upon a letter dated 22.4.2009 addressed to the State Commission sent by the Secretary of the Department of Energy, State Government to show the State Government has given a guarantee assuring for the capital cost for the project. The contents of the said letter can not be considered to be a 'sovereign guarantee' especially the said letter would not amount to satisfy the mandatory pre-conditions. Just because the

first Respondent as well as the Promoter is a Government Company, no exception can be carved out since neither the Electricity Act, nor the Regulation framed by the State Commission make any such exception for the Companies owned by the State Government. The satisfaction of the capital adequacy and creditworthiness have to be established through past performance in the business of the Applicant and its promoter in the preceding three years and not by any external assurance or guarantee etc. This has not been done in this case.

(D) The Uttar Pradesh Electricity Regulatory Commission (General Conditions of Distribution Licence) Regulations 2004 requires the satisfaction of the State Commission regarding the technical and financial ability of the Applicant to undertake the business. In the present case, the State Commission has failed to consider as to whether the Respondent No.1 is financially able or not.

64. In view of our above findings, the order impugned which suffers from various infirmities referred to above is set aside. Thus, Appeal is allowed. However, there is no order as to costs.

(Justice P.S.Datta (Rakesh Nath) (Justice M. Karpaga Vinayagam)
Judicial Member Technical Member Chairperson

Dated:6th April, 2011

REPORTABLE/NON-REPORTABLE