

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 4 of 2011

In the matter of
Petition of Tata Power Company seeking clarifications with respect to EoI for
distribution of electricity in the RInfra area of supply

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

The Tata Power Company Limited
Bombay House,
24, Homi Mody Street,
Fort, Mumbai 400 001.

...Petitioner

ORDER

Dated: August 26, 2011

The Tata Power Company Limited (TPC), the Petitioner herein filed a Petition on affidavit on 14.01.2011, under Section 86 (1) (d) read with Section 14 of the Electricity Act, 2003 (“EA 2003”), and Regulation 92 of the MERC (Conduct of Business) Regulations, 2004. In the petition, TPC has sought certain clarifications in relation to the notice dated 6.10.2010 issued by the Commission inviting Expression of Interest (“EoI”) for grant of licence for distribution of electricity in the area of supply in suburban Mumbai covered under the distribution licence of Reliance Infrastructure Ltd., (“RInfra”) till 15.08.2011. Clarifications have also been sought in relation to the communication ref. no. MERC/EoI/RInfra/2010/1750 dated 25.11.2010 issued by the Commission calling for submission of application for grant of distribution licence in RInfra area of supply.

2. The prayers made in the Petition are as follows:
1. *Issue necessary clarification on the various issues raised in the petition.*
 2. *Pending issue of such clarification extend the deadline for submission*

of applications to be submitted pursuant to communication no. MERC/EoI/RInfra/2010/1750 dated 25.11.2010.”

3. TPC, in its Petition, submitted as under:
- a) That as per the licences held by it TPC is authorized to supply electricity to the public for all purposes in accordance with the provisions of the EA 2003.
 - b) That the present petition has been submitted to seek clarifications in response to the Commission’s letter dated 25.11.2010 on various issues relating to the procedure and methodology, including the evaluation criteria and selection process to be adopted by the Commission for the grant of distribution licence for RInfra-D area of supply. It has been further stated that these clarifications are necessary to enable any applicant including TPC to finalize its application for seeking distribution licence.
 - c) It has been submitted that the Commission in the discussion held on 29.11.2010 has indicated that the process under the EoI will proceed in parallel with the proceedings filed by RInfra for extension of its licence period. It has also been stated that, TPC can work out a concrete approach towards power purchase plan, revenue projections, and cash flow only after having a clear picture on the outcome of the said RInfra proceedings in regard to extension of its licence period as this will have a material impact on TPC’s business plan.
 - d) In view of the above, TPC in its petition has requested that necessary clarifications be issued on the following aspects:
 - A. Valuation for transfer**
 - (i) Whether the Commission will consider the valuation arrived between the parties for the assets for the purpose of fixation of tariff and whether it will allow RoE, depreciation and other expenses on the basis of such valuation?
 - (ii) The Commission will need to clarify its approach for determining the equity base of the new distribution licensee.
 - B. Regulatory Assets:** TPC submitted that the clarity with regard to regulatory assets is necessary so that this aspect can be appropriately reflected in the business plan and revenue projections to be provided by the applicant. It has also been submitted as follows-
 - (i) Clarification is required on the treatment of regulatory assets (RA) in the hands of the transferee distribution licensee and how such RA will be reflected in the consumer’s tariff, especially in view of the fact that the Commission in its meeting held on 29.11.2010 has expressed its concern

with regard to the increasing consumer's tariff in the RInfra-D area of supply.

- (ii) The Commission will be required to quantify the RA and the basis of their allocation if there is more than one licensee.
- (iii) The Commission will also need to similarly clarify the position with regard to other existing liabilities of RInfra-D with regard to its distribution business.

C. RInfra-D PPA's & Other Contracts: TPC stated that the definition of utility under the 2003 Act does not include the contractual rights under the PPA existing between the existing distribution licensee and generating companies/suppliers of power. The Commission will need to clarify the position regarding the existing PPAs between RInfra-D and generating companies/other suppliers of power (including the PPA for supply from Dahanu Power Station) and how the same will be assigned if the Commission decides to grant one or more licences to replace the incumbent licensee.

D. Arrears & Collections: TPC stated that the definition of utility under the 2003 Act appears to exclude meters provided on consumer premises. TPC submitted that the clarity with regard to regulatory assets is necessary so that this aspect can be appropriately reflected in the business plan and revenue projections to be provided by the applicant. It has also been submitted as follows-

- (i) The Commission will need to clarify the manner in which the past arrears and advances received from consumers will be treated for the subsequent licensee.
- (ii) The right of the new distribution licensee with regard to pending proceedings in relation to theft, consumer complaints, defective meter readings and such other matters and treatment thereof in terms of valuation of business will need to be clarified.

E. Binding nature of projections made by Applicants in the application: TPC submitted that the Commission in its letter dated 25.11.2010 has enquired as to how TPC would be able to meet the requirement of an economical power procurement plan for meeting unrestricted existing and future demand in the area served by RInfra-D. Simultaneously, an applicant seeking distribution licence is also required to provide its Business plan (with 5 years projection), projected profit and loss account, projected balance sheets, projected cash flow statements and projected important financial parameters and forecasts of costs, sales, revenue etc. In this regard it is therefore important for the Commission to clarify as to whether and to what extent the projections made by the applicants would be binding on the applicant in case it is selected for grant of distribution licence and

whether these projections will be part of evaluation criteria for selecting the new distribution licensee.

F. Other suggestions on the part of the Commission for multiple licensees: TPC submitted that information of below mentioned issues is required to work out expected consumer base, demand projection, viability of business, requirement of power for formulating business plan, cost estimates & revenue requirement:

- (i) How many successor licensees are being contemplated within the concerned area of supply?
 - (ii) Whether RInfra area of supply will be divided and licence granted to multiple parties for each of these areas?
 - (iii) How will the existing PPAs of RInfra be assigned among such multiple licensees?
 - (iv) Will each of the licensees be required to develop their own parallel network or use common existing network?
 - (v) Who will be responsible for the development & operation of the common system?
 - (vi) Whether the regulatory assets of RInfra be distributed among all the multiple licensees, and on what basis?
 - (vii) How will the tariff be fixed? Will it be determined on case to case basis or will the Commission only fix the maximum ceiling of tariff?
- e) TPC requested the Commission to take necessary steps to draw out and publish a clear plan of action for the application process after necessary consultation with stakeholders and public representatives to chalk out the modalities for the application process and also the transfer of RInfra-D distribution business/utility to the succeeding distribution licensee.

4. The Commission vide Notice dated 21.01. 2011, scheduled a hearing in the matter on 10.02.2011 and invited all aspirants for distribution of electricity in Mumbai Suburbs, M/s Reliance Infrastructure Ltd., M/s Lanco Infratech Ltd., M/s Torrent Power Ltd., M/s Indiabulls Power Ltd., and M/s Maharashtra State Electricity Distribution Company Limited, since the queries on which TPC has sought clarifications would be of interest to all. The Commission also directed TPC to serve copies of its clarification Petition along with its annexures on the 5 utilities mentioned above and to serve on 13 authorised Consumer Representatives.

5. Torrent Power Ltd (“TPL”) filed its affidavit in reply on 9.2. 2011. In its reply TPL stated that, the existing Rules and Regulations framed under the provisions of the Electricity Act, 2003 provide for the procedures to be followed by the Commission for issuing Distribution Licence. TPL submitted that the application seeking licence could be filed by the interested parties, independent of details/clarifications of proposed area as sought for by

TPC. TPL submitted that it believed that a consultative process would be carried out by the Commission with all the interested bidders and clarity on key parameters would emerge during Technical Validation Session and other discussions. TPL submitted that all the interested parties should have a level playing field in terms of availability of information in line with the principles of natural justice. If one particular entity is allowed to file its application after receiving the clarification on certain key parameters or given additional time, it may provide undue advantage to such entity amounting to discrimination. They further underlined the importance of the smooth switch over of the operations from the existing licensee to new licensee(s) and submitted that if any extension is granted to TPC for filing the application, it would delay the entire process of licensing and it would be against the interest of all the stakeholders including the consumers, and hence TPL has submitted that the Commission should not admit the petition filed by TPC.

6. Reliance Infrastructure Ltd filed its reply under affidavit on 9.2.2011. RInfra submitted that it is filing its reply for the limited purpose of opposing the admission of TPC's petition. RInfra submitted that TPC is an existing distribution licensee for the whole of Mumbai, and cannot file an application under Section 14 read with Section 86(1)(d), as TPC's licence would be in force till August 15, 2014. Also, TPC is already supplying power to many consumers in the same area of supply. RInfra further stated that question does not arise for issuing any clarifications on the issues purportedly raised in the present petition to pre-judge the matter and therefore the present petition is liable to be dismissed.

7. During the course of hearing, Counsel appearing for TPC reiterated the submissions made in the petition and the issues on which clarifications have been sought by TPC. TPC submitted that, it was seeking clarifications as the wire and supply businesses would be separated and the wires will be used by various licensees based on their area of distribution licences. TPC pleaded that the Commission should admit the petition and provide suitable guidance.

8. Having heard the Petitioner and others, and by considering materials placed on record, the Commission notes that certain clarifications have been sought in the present petition in relation to the notice dated 6.10.2010 issued by the Commission inviting Expression of Interest ("EoI") for grant of licence for distribution of electricity in the area of supply in suburban Mumbai and in reference to MERC letter dated 25.11.2010. The Commission is of the view that the present Petitioner viz., TPC Ltd., is a distribution licensee in the area of supply in suburban Mumbai which is also being served by Reliance Infrastructure Ltd., ("RInfra"), in terms of Hon'ble Supreme Court's judgment dated 8th July 2008 as follows:-

".....under the terms and conditions of the licences held by it, Tata Power Company Ltd. is entitled to effect supply of electrical energy in retail directly to consumers, whose maximum demand is less than 1000 KVA, apart from its entitlement to supply energy to other licensees for their own purposes and in bulk, within its area of supply as stipulated in its licences

Pursuant to the above EOI, the petitioner TPC Ltd did not apply for grant of distribution licence. And rightfully so, as it is a distribution licensee. It does not need to apply until expiry of its term. Hence, it appears that, most of the clarifications sought by TPC at the time of filing the present petition was contemplating to submit an application to seek a distribution licence are infructuous now as TPC did not file an application seeking distribution licence. The Commission is also of the view that many of these issues presuppose a situation that there will be a transferor distribution licensee and a transferee distribution licensee. However, as no such event has taken place, these issues become irrelevant. The events that have taken place are explained as follows. The Commission had published an "Invitation for Expression of Interest for Distribution of Electricity in the Suburbs of Mumbai", on October 6, 2010. In response, by November 4, 2010, the Commission received Expressions of Interest (EOI) from eight applicants, namely, Maharashtra State Electricity Distribution Company Limited; Torrent Power Limited; DPSC Limited; Lanco Infratech Limited; GMR Energy Limited; Indiabulls Power Limited; Tata Power Company Limited; and Enzen Global Solution Pvt. Limited. Subsequently, four out of the above eight applicants, namely, Lanco Infratech Limited, Indiabulls Power Limited, Torrent Power Limited and Maharashtra State Electricity Distribution Company Limited submitted their respective applications for grant of licence to distribute electricity. RInfra has also submitted its Distribution Licence application. By Order dated August 11, 2011 in Case No. 65 of 2011 the Commission in exercise of the powers vested under Section 14 of the EA 2003, granted Distribution Licence to RInfra to supply electricity in the proposed area of supply for a period of 25 years from August 16, 2011. As the other applicants viz., Lanco Infratech Limited, Indiabulls Power Limited, Torrent Power Limited and Maharashtra State Electricity Distribution Company Limited were found not meeting the eligibility criteria and their applications did not conform to the provisions of the EA 2003 as well as the aspects relevant to grant of licence, their respective applications were rejected by orders dated August 11, 2011 in Case No.s 5 of 2011 (Indiabulls Power Limited), 6 of 2011 (MSEDCL), 7 of 2011 (Torrent), and 8 of 2011 (Lanco). Liberty was however granted to all these applicants to apply afresh for grant of distribution licence keeping in view the statutory requirements of eligibility. Hence, most of the clarifications that have been sought at the time of filing of the present petition when TPC was perhaps contemplating to submit an application to seek a distribution licence are infructuous now qua TPC as TPC did not file an application seeking distribution licence. These issues are also infructuous because the only licence that has been granted is to RInfra-D and the other applications had to be rejected because they were disqualified. Some of the issues have been raised on the presumption that the wire and supply businesses will be separated and the wires will be used by various licensees based on their area of distribution licences. As the Commission has held in the aforesaid orders that a distribution licence will have to supply electricity through its own distribution system and that Network Rollout Plan is a mandatory requirement for grant of distribution licence in the proposed area of supply, the presumption of TPC Ltd do not call for further deliberation.

10. It is in the above perspective that the present petition needs to be dealt with, in respect of the following:-

- (a) That the present petition has been submitted to seek clarifications in response to the Commission's letter dated 25.11.2010 on various issues relating to the procedure and methodology, including the evaluation criteria and selection process to be adopted by the Commission for the grant of distribution licence for RInfra-D area of supply. It has been further stated that these clarifications are necessary to enable any applicant including TPC to finalize its application for seeking distribution licence. The Commission is of the view that since TPC never applied for distribution licence there was neither any question then, nor there is any question now to issue clarifications on the evaluation criteria and selection process to be adopted by the Commission for the grant of distribution licence for RInfra-D area of supply.
- (b) TPC has submitted that it can work out a concrete approach towards power purchase plan, revenue projections, and cash flow only after having a clear picture on the outcome of the said RInfra's application seeking extension / renewal of licence / grant of licence, as this will have a material impact on TPC's business plan. RInfra filed a Petition on November 1, 2010 (amended subsequently and finally submitted on March 4, 2011), registered as Case 78 of 2010, with the following prayers:
- “a) The Distribution Licence of RInfra be extended for a period of 25 years with effect from June 10, 2003 or in the alternative with effect from August 16, 2011 under the provisions of Section 15 (8) read with Section 18 of Electricity Act 2003 and Regulation 5 of Specific Conditions Regulations and be amended accordingly.*
- b) In the alternative to (a) above, the Hon'ble Commission may be pleased to renew and/or grant Distribution Licence to RInfra for a period of 25 years with effect from August 16, 2011 under the provisions of Section 14 read with Section 16 of the Electricity Act 2003.*
- c) For such further and other reliefs as the nature and circumstances of the case may require.”*

As regards RInfra-D's aforesaid petition in Case 78 of 2010, the Commission passed an Order dated April 1, 2011, wherein, while the prayers were not granted, it was held that for grant of licence, RInfra-D needed to comply with Section 15 of the EA 2003, read with the requirements under the Maharashtra Electricity Regulatory Commission (General Conditions of Distribution Licence) Regulations, 2006 for applying for grant of licence to distribute electricity. Consequently, on April 25, 2011, RInfra-D submitted an application for grant of licence to distribute electricity in the area of supply as mentioned in 'Maharashtra Electricity Regulatory Commission (Specific conditions of Distribution Licence applicable to Reliance Energy Limited) Regulations, 2008' (i.e. the Mumbai suburban area excluding

Bhandup and Mulund), plus the areas of Chene and Varsova. As Distribution Licence to RInfra-D to supply electricity in the proposed area of supply came to be granted for a period of 25 years from August 16, 2011, vide Order dated August 11, 2011 in Case No. 65 of 2011 there should be no uncertainty in regard to grant of distribution licence in the suburbs of Mumbai so as to deter TPC to plan its power purchase, revenue projections, cash flow etc. In view of the above, the following issues on which clarifications have been sought do not arise for the reasons explained below:

A. Valuation for transfer

(i) As there is no transfer of assets of RInfra, there is no question of valuation for the same.

(ii) As the other applicants viz., Lanco Infratech Limited, Indiabulls Power Limited, Torrent Power Limited and Maharashtra State Electricity Distribution Company Limited were found not meeting the eligibility criteria and their applications did not conform to the provisions of the 2003 Act as well as the aspects relevant to grant of licence, their respective applications came to be rejected by orders dated August 11, 2011 in Case No.s 5 of 2011 (Indiabulls Power Limited), 6 of 2011 (MSEDCL), 7 of 2011 (Torrent), and 8 of 2011 (Lanco). Therefore, the Commission is of the view that clarifications on the approach for determining the equity base of the new distribution licensee does not arise.

B. Regulatory Assets: This issue was raised on the assumption that the incumbent distribution licensee will not be granted a licence. It pre-supposes a situation that there will be a transferor distribution licensee and a transferee distribution licensee. However, as no such event has taken place, this issue becomes irrelevant. The Commission is also of the view that since TPC never applied for distribution licence, there was neither any question then, nor there is any question now to issue clarifications with regard to regulatory assets/ treatment of regulatory assets in the hands of the transferee distribution licensee / other existing liabilities of RInfra-D with regard to its distribution business. These issues also do not survive as there is no transferor distribution licensee and no transferee distribution licensee.

C. RInfra-D PPA's & Other Contracts: These issues do not survive as there is no transferor distribution licensee and no transferee distribution licensee. For the reasons as stated above, there is no question of issuing clarifications on the position regarding the existing PPAs between RInfra-D and generating companies/other suppliers of power or how the same will be assigned if the Commission decides to grant one or more licenses to replace the incumbent licensee. As the incumbent licensee has not been replaced, this issue does not survive.

D. Arrears & Collections: These issues do not survive as there is no transferor distribution licensee and no transferee distribution licensee. For the reasons stated above, there is no question of issuing clarifications on the manner in which the past arrears and advances received from consumers will be treated for the subsequent licensee. As the incumbent licensee has not been replaced, these issues do not survive. The right of the new distribution licensee with regard to pending proceedings in relation to theft, consumer complaints, defective meter readings and such other matters and treatment thereof in terms of valuation of business do not therefore need to be clarified as there is no transferor distribution licensee and no transferee distribution licensee.

E. Binding nature of projections made by Applicants in the application: The Commission is of the view that since TPC never applied for distribution licence these issues do not survive.

F. Other suggestions on the part of the Commission for multiple licensees: Firstly, TPC never applied for license. TPC does not need to apply for license as it is already a distribution licensee in suburban Mumbai. The issues that TPC has raised for clarifications do not need to be answered *qua* TPC. Also, many of these issues have become infructuous as distribution licence has been granted to RInfra-D. At the moment, there are only two distribution licensees in suburban Mumbai (excluding MSEDCL's area of supply), viz., TPC and RInfra-D. The question of successor licensees, division of area of supply of RInfra-D, assignment of PPAs of RInfra-D, do not survive. There are certain other issues on which TPC has sought clarifications viz on development of parallel distribution network and fixation of ceiling tariff. These issues do not arise for clarification in the present matter. However, these issues may be relevant for power sector in Maharashtra and the Commission will deal with the same at the appropriate time and proceedings. These do not call for issuance of clarifications at present.

Accordingly, the present petition stands disposed of.

Sd/-
(Vijay L. Sonavane)
Member

Sd/-
(V. P. Raja)
Chairman