

HARYANA ELECTRICITY REGULATORY COMMISSION
BAYS No. 33-36, SECTOR-4, PANCHKULA- 134112, HARYANA

CASE NO. HERC/PRO – X of 2010

DATE OF HEARING: 7/07/2010

DATE OF ORDER : 18/08/2010

IN THE MATTER OF: Review Petition of DHBVNL dated 06.10.2006 & application of M/s DLF Estate Developers Ltd. (DEDL) for grant of license for distribution of electricity in DLF City, Gurgaon dated 08.01.2010 in continuation to their petition dated 28.03.2005 filed under section 14 of Electricity Act, 2003 for grant of license for distribution of Electricity in Phase 1 to 5 of DLF city Gurgaon

Parties:

1. M/s Dakshin Haryana Bijili Vitran Nigam, Vidyut Nagar, Vidyut Sadan, Hisar, Haryana (DHBVNL).
2. M/s DLF Estate Developers Ltd. (DEDL), Shopping Mall, Arjun Marg, DLF City, Phase – 1, Gurgaon.

Present:

- | | |
|----------------------------|----------|
| 1. Shri Bhaskar Chatterjee | Chairman |
| 2. Shri Rohtash Dahiya | Member |

On behalf of DHBVNL / HVPNL

1. Shri M.B. Vashist, Director / OP, DHBVNL
2. Shri Neeraj Gulati, Director / Tech, HVPNL
3. Shri H.R. Satija, Chief Engineer / SO & Commercial, HVPNL

On behalf of DEDL.

- 1 Shri Shri Sanjay Sen, Advocate.
2. Shri B.D. Bhattacharya, Sr. Executive Director, DEDL
3. Shri Girish Rawat, Advocate

ORDER

This order disposes of the Review Petition of DHBVNL dated 06.10.2006 & application of M/s DLF Estate Developers Ltd. (DEDL) for grant of license for distribution of electricity in DLF City, Gurgaon dated 08.01.2010 filed in continuation to their application dated 28.03.2005 under section 14 of Electricity Act, 2003.

Brief Background of the Case

M/S DEDL had applied for a license under section 14 of Electricity Act 2003 for distribution of electricity in DLF City Phase 1 to 5, Gurgaon on 28.03.2005 to Haryana Electricity Regulatory Commission(HERC). The Commission in accordance with Regulation No. HERC/09/2004, issued public notice inviting objections / comments regarding grant of license to the applicant. In response to the public notice fifteen objections including those from the existing distribution licensee in the proposed area i.e. DHBVNL, the transmission licensee in Haryana i.e. HVPNL and residents as well as Residents Welfare Associations (RWA) of the area proposed to be covered under the applied license were received in the Commission.

The main objection of DHBVNL was non – compliance of statutory requirements by DEDL, not making arrangements for supply of requisite power and non fulfillment of the obligations to construct adequate electrical infrastructure as a developer as per the terms and conditions of the license granted to them by Director Town & Country Planning (DTCP), Haryana. While HVPNL submitted that besides inadequate distribution system, the existing HVPNL's transmission capacity is too congested and hence it may not be possible for them to provide connectivity / access to DEDL in the Gurgaon area. The RWA's, supporting grant of distribution license to DEDL, submitted that the supply position in DLF area was unsatisfactory. The existing distribution licensee i.e. DHBVNL was not attending to

their grievances and in the event of power failures / disruptions the DLF authorities come to their assistance. They further stated that distribution system is inadequate and none of the parties are making any efforts to upgrade the system commensurate with the load of the area. They desired that the Commission should decide one party who will be solely responsible for maintenance and upgradation of the distribution system. They further submitted that in case DHBVNL is not ready for the same. DLF may be given the distribution license as per their application.

Before finally deciding the case, the Commission heard the applicant and all the objectors at length on 4-4-2006 and 14-6-2006 and examined the documents submitted by the parties. The Commission thereafter passed an order on 18.08.2006 declining grant of license for distribution of electricity to DEDL. In the said order the Commission agreed with the submissions of RWA's with reference to their hardship as neither DHBVNL nor DLF owned up the responsibility of the same. Hence as an emergent step for redressing the grievance of the residents of the area, the Commission in its order directed DHBVNL to take over the electrical distribution system of DLF city Phase 1 to 5 within a period of three months as a custodian for performance of its duties as a distribution licensee. It was stipulated that DHBVNL was required to perform all the duties of the distribution licensee as per Electricity Act 2003 and comply with the Regulation / code / guidelines / directions issued by the Commission time to time and to act in accordance with terms of the license for distribution of electricity granted to it.

DHBVNL's Review Petition:

Aggrieved by the order of the Commission dated 18.08.2006 DHBVNL filed a review application on 06.10.2006. The main plea taken by DHBVNL was that the application of M/s DEDL before the Commission was only for grant of license and hence the issue of taking over of distribution system and augmentation thereof was not relevant to the application for license nor was it prayed for. Secondly the infrastructure provided by the developer was not as per the ultimate power

requirement. Consequently it was prayed that the order dated 18.08.2006 regarding taking over of distribution system by DHBVNL may be rescinded and to mitigate the hardship to the residents, they may be directed to take recourse to the provisions of 'Complaint Handling Procedure' of the licensee for redressal of their grievances, if any.

DEDL on the other hand in compliance of Commission's order dated 18.08.2006 requested DHBVNL vide their letter dated 31.10.2006 to take over the system and further informed that they would be withdrawing their maintenance team and complaint centers w.e.f. 19.11.2006 and hence responsibility of electricity maintenance and strengthening and distribution system of the area would solely rest with DHBVNL. Further DEDL, in response to the review petition filed by DHBVNL submitted vide its reply dated 27-12-2006 that DHBVNL should immediately take over the distribution system.

The Commission examined the review petition of DHBVNL and vide their order dated 16.11.2006 allowed the status quo to be maintained by the parties till a final decision. The Commission held a hearing on 11.12.2006 and after examining all the connected documents found it necessary to seek further information from both the parties. A protracted correspondence followed to obtain the requisite information and clarifications. On receipt of some clarification / information a hearing was granted on 07.12.2007, wherein both the parties submitted, that before a final view was taken by the Commission on the review petition they may be allowed to mutually resolve the various issues. The Commission considered the request and asked them to come before the Commission with a joint minutes of agreement between the parties. As a sequel to this decision, a meeting was held between DEDL and DHBVNL on 16.02.2008 and as per the decision taken therein a joint survey was carried out to take cognizance of the ground realities. Both the parties submitted their comments to the Commission separately. While the case was pending before the Commission for final order and both the parties were trying to arrive at an understanding regarding the deficiencies in the

distribution system, DEDL submitted an application on 8.1.2010 for grant of distribution licence in the same area in continuation of their earlier application on the subject dated 28.3.2005. The main plea taken in the application was the failure of DHBVNL to implement the order of the Commission dated 18.8.2006 and the applicant on the other hand in principle fulfilling all the eligibility criteria for the grant of such licence. After hearing the parties on 15.4.2010, the Commission felt that some additional clarification/information was still required to finally decide the case , Consequently vide its order dated 16.04.2010 the Commission sought information on following points:-

Information sought from DHBVNL

- 1. DHBVNL should submit separate details of the electrical infrastructure gap and investments required as per the existing load and as required for meeting the ultimate load.*
- 2. Details of O&M including R&M charges recovered by DHBVNL from this area may be provided including the amount utilized for strengthening of the electrical system of the area.*
- 3. DHBVNL may submit their response to the fact that revenue in the form of tariff and other charges are being collected by them from the consumers of DLF City, Gurgaon, which includes operating cost (OPEX) as well as capital cost (CAPEX), hence why should DHBVNL be not made liable to make good the deficiency in the existing electrical infrastructure of the area.*
- 4. What suggestions DHBVNL has to offer to improve the satisfaction level of the electricity consumers in the present set up.*

Information sought from DEDL

- 1. Has any appeal been filed against the order of the Commission dated 18.08.2006?*
- 2. If any review petition has been filed, was it in time. If there is any delay, has any application for condonation of the same has been submitted.*
- 3. What were the terms and conditions relating to laying of the electrical system in Phase I to IV as per the license issued by DTCP?*

4. *Did DLF procure a completion Certificate from erstwhile HSEB that the electrical works were laid as per the terms and conditions of the license?*
5. *Was any change brought about in the layout plan subsequently which may have repercussions on the load?*
6. *As per record of the case there were pending issues relating to construction of two 66 KV sub-stations in the area. What is the latest position on the same?*
7. *DEDL may like to clarify the nature of distribution license sought by them i.e. whether in parallel or in exclusion of the existing distribution licensee.*
8. *Does the area qualify for grant of license as per the Electricity Act, 2003 and the rules framed there under?*
9. *What is DEDL's proposal for providing better electrical service to the residents of the DLF city, Gurgaon, in the existing set up?*

Both the parties submitted reply to the queries to the Commission within the stipulated date. The Commission before deciding the case on merit, considered it appropriate to refer to the position of Resident Welfare Association (RWA) who had preferred a Civil Writ Petition (CWP) No. 8529 of 2009 before the Hon'ble Punjab and Haryana High Court praying for quashing of the Commission's order dated 18/08/2006 and the DEDL's letter dated 31/10/2006 asking DHBVNL to take over the power distribution system. The Hon'ble High Court disposed of the matter on 23/11/2006 considering the CWP as pre – mature and directed the Commission to hear the petitioner's case and settle the objections raised by them. In compliance with the order of the Hon'ble High Court the Commission granted hearing to the said RWA on 23/04/2010. The representatives of the RWA of Phase 1 to 5 of DLF City Gurgaon collectively submitted that the power supply position in the DLF area was highly un-satisfactory. DHBVNL was not attending to their grievances and it was only the DLF that come to their assistance. They further stated that the distribution system was inadequate and neither DHBVNL nor DLF were taking up the responsibilities of augmenting the same. Hence in case DHBVNL was not willing to take over the system, DLF may be given the distribution license.

Before finally deciding the issue, the Commission again gave hearing to the concerned parties i.e. DEDL, DHBVNL and HVPNL on 7.7.2010 in the Commission's Office at Panchkula.

Opening the arguments Shri Sanjay Sen, the learned Counsel for DEDL narrated in detail the background of the case and the development that had taken place so far. It was pointed out that the order dated 18.8.2006 of the Commission was only an interim arrangement to take immediate measures for redressing the problems of the residents of the area and this intent is abundantly clear from the order. While directing DHBVNL to take over the electrical distribution system of DLF City Phase I to 5, the Commission emphasized that the compliance of the order be made within a period of three months in order to mitigate the suffering of the consumers of the area.

The learned Counsel further submitted that the grounds cited by DHBVNL and HVPNL in the order dated 18.8.2006 for declining the grant of distribution licence to DEDL, at the relevant point of time, was not only inconsistent with the findings of the Commission contained in the order but also inherently incorrect. The argument put forth by HVPNL regarding its inability to wheel power is also faulty since even if a distribution licence was granted to DEDL at the relevant point of time, the total customer base or consumption of power by such consumers in DLF City Phase I to 5 would not have undergone a change. Thus, there was no question of wheeling additional power through the transmission system of HVPNL since the aggregate power to be wheeled through the system would have remained the same. Even otherwise also the argument of HVPNL cannot be a tenable ground for rejection of issuance of distribution licence to DEDL. HVPNL, as the state transmission utility is under obligation as per sub-section 'c' of Section 40 of the Act to provide non-discriminatory open access to its transmission system to any licensee or generating company on payment of transmission charges.

The learned Counsel further submitted that the Commission had clearly mentioned in its order that DEDL had fulfilled the requirement of minimum

area as per the National Electricity Policy,2005. Hence, the reasonableness of the area cannot be questioned or revisited again. In this context he pointed out that the sixth proviso to Section 14 of the Act was amended vide Electricity (Amendment) Act,2005 (57 of 2003) with effect from 27.01.2004 and the words 'including the capital adequacy, credit-worthiness, or code of conduct' in the sixth proviso to Section 14 of the Act was substituted by 'relating to capital adequacy, credit-worthiness, or code of conduct'. Hence, the scope of exercise of powers of the Central Government in respect of prescribing additional requirements for grant of distribution licence was made exhaustive instead of inclusive and was restricted to only the above mentioned three criteria. In view of the fact that a specific amendment was brought about only for the purpose of restricting the power of the Central Government in relation to such additional requirements, it is evident that the Central Government has clearly exceeded its scope of powers in inserting an additional criterion in respect of area under the Distribution of Electricity Licence (Additional Requirements of Capital Adequacy, Credit worthiness and Code of Conduct) Rules,2005. Hence the additional criterion prescribed by the Central Government in respect of area under the aforesaid rules is ultra-vires of the provisions of the Act and should be ignored by the Commission. To support his arguments he cited the decision of the Hon'ble Supreme Court in the case of **Bharathidasan University Vs. All India Council of Technical Education** reported in **AIR 2001 SC 2861**. The decision in the said order was followed by the Appellate Tribunal for Electricity in the case of Damodar Valley Corporation Vs. Central Electricity Regulatory Commission & Ors., bearing Appeal No.271, 272, 273 and 275 of 2006 and 8 of 2007.

The learned Counsel submitted that the idea under the Electricity Act,2003 is to promote competition while dissuading the second licensee from cherry picking in the incumbent licensee's distribution area. Since, DEDL is also willing to supply electricity to all rural areas that are contiguous to DLF Phase I to 5 so there arises no question of cherry picking. It was further argued that the issue with respect to the adequacy of the system has already been settled

by the Commission in favour of DEDL in its order dated 18.8.2006 and the contention of DHBVNL that the electrical distribution system was deficient, was rejected by the Commission.

He further submitted that the contention raised by DHBVNL that the electrical distribution system should be in accordance with the norms at any later point in time was found untenable and rejected by the Commission. It was also held by the Commission that the huge amount of operation and maintenance (O &M) charges recovered from M/s DLF Universal Ltd. towards maintenance of the electrical distribution system for the initial period of five years remained deposited with the licensee for a long period of more than a decade but the licensee (DHBVNL) did not care to maintain the electrical distribution system.

The learned Counsel further pointed out that the cost of grid substation is covered under External Development Charges (EDC) payable to the Director Town & Country Planning (DTCP) Haryana, which has already been paid by DLF- the holding company of DEDL. Hence the developer was only required to provide land for the grid sub-station. Though not under any legal obligation to construct the same, it has already constructed these grid sub stations as a goodwill gesture to expedite the electrification of this area at its own cost and expense and for the welfare of the residents of the said areas. However, merely on account of this goodwill gesture, DEDL cannot be put under an obligation to do more than what is required of it under the provisions of the licence granted to it.

The learned Counsel further submitted that the review application filed by DHBVNL is not maintainable since the scope of a review under the Act is limited to errors apparent on the face of the record. In the instant case, the primary contention being raised in the review application filed by DHBVNL is that the electrical distribution system of DEDL is inadequate and hence the same deserves to be dismissed. Concluding his arguments the learned Counsel prayed that licence for distribution of electricity in the DLF City Phase

1 to 5 Gurgaon be granted to them in pursuance of their application dated 28.3.2005.

Shri M.B. Vashist, Director (Operation) of DHBVNL who had preferred a review petition against the Commission's order dated 18.8.2006 submitted that decline to grant of distribution licence to DEDL is already settled and that cannot be revisited at this stage. The only point which is under consideration is the matter relating to transfer of distribution system to DHBVNL after removing the inadequacies. He submitted that the objection raised by them earlier on the basis of which the grant of licence to DEDL was declined stands even to day. Giving details as to why the applicant's licence is to be ignored, he pointed out that the application for grant of licence had been filed under section 15 of the Electricity Act; however, the procedure for filing the same has not been followed. It has been argued that the present application cannot be considered as a continuation of the earlier application for grant of licence and consequently the procedure mentioned therein cannot be ignored. It has been pointed out that DHBVNL had been making sincere efforts to get the system upgraded by DEDL in order to take over the distribution system from DEDL in compliance with the directions of the Commission. In this regard quite a number of meetings have also been held with the applicant. They have also approached the DTCP for encashing the bank guarantee of M/s DLF in order to fund the amount required to bridge the inadequacy in the distribution system. It was mentioned that even M/s DLF had also agreed vide their letter dated 22.5.2010(a copy of which has been attached alongwith their written submissions) that based on the peak load of the area there exists an

inadequacy in the system as per the ultimate load requirement and the estimated cost of system strengthening works as per their estimate works out to be Rs.9.80 crores. In the said letter they have expressed their willingness to share 50% of the cost of such augmentation keeping in mind the interest of the residents of the area. With regard to private participation in the power distribution it was submitted that DHBVNL has already initiated steps to implement power distribution through franchisee system in its jurisdiction and as a pilot project the same would be implemented in Gurgaon. The exercise is in advance stage and hence any step towards privatization of the electrical distribution system in the area is likely to jeopardize their effort. With regard to landholding to be eligible for grant of distribution licence, he brought to the notice of the Commission clause 5.4.7 of National Electricity Policy which states, "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." In the Commission's order dated 18.8.2006 DLF Phase I to 5 was mentioned as greater than the Municipal Council of Gurgaon. However, as on date the Municipal Council has been upgraded as a Municipal Corporation whose area is much larger than the license applied for. Hence they do not fulfill the minimum area criterion for issuance of distribution licence.

It was mentioned that M/s DLF has created the electrical distribution system in the area as per the duties of the developer in accordance with the terms of licence granted by DTCP, Govt. of Haryana. However, they have failed to comply with the terms and conditions by not constructing adequate electrical system as per the complete load requirement of even the existing consumers of the area leaving aside the consumers expected to come up in near future. They have also mentioned that entire area was developed including the electrical distribution system by the applicant by charging the amount in the cost of land which is evident as per the clauses incorporated in the grant of licence by DTCP. With regard to Operational and Maintenance (O &M) charges it was submitted that the assets created by DEDL in the developed area as part of electrical system have not been taken over by the licensee and hence do not reflect as an asset base in their account books. Consequently the licensee is not recovering repair and maintenance expenses (claimed as a normative percentage of gross fixed assets) on the assets in DLF area through the tariff from sale of power to consumers. The only maintenance charges deposited by the applicant were the O &M charges for initial 5 years for the period 1989-1993. Concluding his arguments the officer wanted the application filed by DEDL may be rejected and they may be directed to augment the existing electrical system after which the licensee may be in a position to take over the same.

Arguing the case on behalf of HVPNL Shri Neeraj Gulati, Director (Technical) submitted that the power system continues to evolve and expand in the area and as such the details submitted 5 years back i.e. on 28.05.2005 cannot hold good as on date and fresh applications in terms of the provisions of the Regulations is required to be filed by the petitioner. DLF has so far contributed for three 16 MVA 66/11 kV transformers at 66 kV Q block substation. In addition to 66 kV Q block substation, which has already been taken over by HVPNL, DLF is required to construct a 220 kV substation and two 66 kV substations for catering to the load of DLF and its anticipated load growth. DLF vide letter dated 20.2.2009 has informed HVPNL that their present load is 104 MVA which will ultimately grow to 208 MVA. According to the norms, a 66 kV or 132 kV substation is required for a load upto 75 MVA whereas a 220 kV substation is required if the load is more than 75 MVA. During a meeting of M/s DLF with DHBVNL & HVPNL on 12/13.06.2009 at Gurgaon, a site located in DLF Phase-V Part II was identified for creation of 220 kV substation by DLF subject to its suitability for laying transmission lines. However, nothing has been done by the DLF in this regard after the above decision. HVPNL time and again had been stressing upon DEDL to create transmission infrastructure in line with the load requirement. In latest meeting held on 12.06.2009 DEDL (DLF) agreed to develop the infrastructure but no progress was made thereafter. The developer (DLF) obtained license from the DTCP under which the development for infrastructure pertaining to electricity supply within the area and to establish connectivity with power transmission is the responsibility of the

developer. The development of transmission system is to be planned according to prescribed norms and as per provisions in the Haryana Grid Code. In addition according to terms of the transmission and distribution licensing regulation 2004 the licensee is to submit copies of PPA entered into with the generator for the development of transmission system. DEDL has not provided any such document. From the application for distribution license filed by DEDL, the source from which the power shall be procured by DEDL to supply to its consumers is not clear. This being very important issue in the interest of optimum planning of transmission system is required to be clearly specified by DEDL seeking distribution license. The observations raised by HVPNL regarding development of transmission infrastructure are yet to be addressed by DEDL(DLF). Concluding his argument the officer prayed for rejection of the application of the petitioner and issuing direction by the Commission for suitably augmenting the transmission system of the area commensurate with the existing load and likely future load and fulfill all the assurances given by them to HVPNL so far.

Commission's observation and order:

After hearing the parties as well as examining all their written submissions including the original petition dated 28/03/2005 filed by DEDL for grant of distribution license, the Commission's order dated 18/08/2006 declining grant of distribution license to DEDL, review petition dated 6/10/2006 filed by DHBVNL against the Commission's order dated 18/08/2006 as well as the views of the RWA of the DLF City area for which the distribution license was sought, the following issues have been framed, namely:-

1. Whether, as averred by the Learned Counsel for DEDL, the Commission's order dated 18/08/2006 was an interim order and not final disposal of their petition for grant of distribution licensee in Phase 1 to 5 of DLF city, Gurgaon.
2. Whether the application of DEDL, in the present context, satisfies the condition of minimum area of supply with reference to the findings of the Commission's order dated 18/08/2006.
3. Whether the electrical distribution system in the DLF City area is adequate. In case not what is the quantum of investments required in view of existing load and the ultimate load requirement.
4. Whether DLF or DHBVNL is responsible for making the requisite investments for upgradation of the system in view of license and agreement executed between DLF and DTCP.
5. Whether DHBVNL should take over the distribution system as it exists today.
6. Whether the review petition filed by DHBVNL is sustainable.

The Commission has carefully considered the written as well as oral submissions of the parties and various provisions of the Electricity Act,(EA) 2003 including policies / rules framed by the Central Government under the enabling provisions of the said Act and decide as under:

ISSUE NO.1:

Section 86(1)(d) of the EA, 2003 vests the power to issue a license in the State Electricity Regulatory Commission and in this case the Haryana Electricity

Regulatory Commission. Further, Part IV of the Act (Section 12 to 24) deals with various aspects of license i.e. who are the persons authorized to transmit, distribute or undertake trading in Electricity (Section 12), grant of a license (Section 14), procedure for grant of license (Section 15) etc. Additionally, the Central Government while exercising its power under sub – section (1) and clause (b) of Sub – section (2) of Section 176 of the Act, have made the ‘Distribution of Electricity License (Additional requirement of capital adequacy, creditworthiness and code of conduct) Rules, 2005. **The Commission considers these as an important legal obligation and an onerous responsibility to ensure that the person applying for a license fulfill all the conditions required before being considered eligible for the same.**

The learned Counsel of the petitioner laboured hard to convince the Commission that the order dated 18.8.2006 was only an interim one and that their application for grant of licence dated 28.3.2005 has not been finally disposed of. In support of this argument two observations have been quoted from the said order,’ the one referring to the applicant as a prospective licensee’; and using the word at present in the penultimate para of the order. As per his arguments the order addressed only the problem faced by the local residents and issue of grant of distribution license was kept open to be decided later.

This argument assumes significance in view of the submission of another application on 8.1.2010 by the petitioner for the same purpose ostensibly as a continuation of the earlier application on the subject. It would be important to reproduce below the relevant portion of the application:-

“It is reiterated that disposal of the application dated 28.03.2005 filed by DEDL under Section 14 of the Act for grant of distribution licence, was kept in abeyance by the Learned Commission under its order of 18.08.2006 only to take emergent steps for redressing the grievances of the residents of the above area. Therefore, taking into consideration that the solitary purpose of the order dated 18.8.2006 stands frustrated and there is no mitigation in the grave hardship being faced by the residents of that area, DEDL has been constrained to move the

present application for passing final order on its application dated 28.03.2005 for grant of distribution licence to it, which is pending consideration before the Ld Commission.”

The Commission has examined the argument and checked all the relevant documents and correspondence carried out between the parties. In order to refresh the memory it would be relevant to mention the operating part of the Commission’s order dated 28.3.2005 at this stage which reads as under:-

“We are of the considered view that as soon as O & M charges for 5 years, were recovered from the developer of the area, way back during the year 1989-90 to 1992-93, the system was required to be taken over immediately and maintained by the HSEB and subsequently by the DHBVNL. Any minor discrepancy in amount of O & M charges could have been settled during that period. The huge amount of O & M charges paid by the developer remained deposited with DHBVNL and it kept on releasing new connections and collecting revenue from the consumers of the area, at the approved tariff, which also includes the expenses for Operation & Maintenance of the system allowed by the Commission. However, the DHBVNL had not been maintaining the electrical system since its inception, thereby causing great hardship to the consumers for such a long period.

Keeping in view the strong opposition by the DHBVNL and HVPNL to grant of licence to M/s DEDL and further HVPNL declining to allow usage of its transmission system as the transmission is fully loaded and is incapable to wheel power to be arranged by M/s DEDL for the area proposed to be fed by it, and the final prayer of the applicant, the Commission, at present, declines to grant the license for distribution of electricity to M/s DEDL.

The electrical system of the area has neither been developed nor augmented by DHBVNL, still we allow the DHBVNL to use the electrical distribution system of the area as a custodian, for performance of its duties

as a distribution licensee. This system will remain with DHBVNL as a custodian, till such time it is maintained by it. The DHBVNL is required to perform all the duties of the Distribution Licensee as per the provisions of the Electricity Act, 2003 and comply with the regulations/codes / orders/ guidelines/directions issued by the Commission from time to time and shall act in accordance with the terms of the license for distribution of electricity granted to DHBVNL.”

The Commission is of the considered view that if the order dated 18.8.2006 was only an interim nature, then there should have been some indication of roadmap either in the order itself or subsequently by different orders as to how the application dated 28.3.2005 would be finally disposed of. The order of the Commission is conspicuously silent on this point. Moreover to address the petitioner as a prospective licensee does not automatically confer them the title of a licensee. Infact till finally any licence request is agreed to legally there is no harm in treating the applicant a prospective licensee.

The subsequent conduct of the parties clearly shows that both of them agreed with the order as rejection of the prayer of the petitioner. The letter from DEDL dated 31.10.2006 is significant as the petitioner on their own requested DHBVNL to take over the distribution system admitting the latter to be the distribution licensee of the area. There are a plethora of documents available in the case file to show that both the parties were trying sincerely to make a realistic estimate of the deficiencies in the system so that the suffering of the consumers would be meaningfully mitigated. In fact the Commission was surprised to receive the licence application from the petitioner dated 8.1.2010 with the plea that it should be treated as a continuation of the earlier one of 2005 which has not been finally decided as yet.

In view of the clear finding in the order of the Commission dated 18.8.2006 and subsequent conduct of the parties including the petitioner, the Commission finds it difficult to agree with the argument of the petitioner. The Commission is of

the considered opinion that the word “at present” used in the order has been given undue importance to support the arguments

As far as the other party i.e. DHBVNL is concerned, being aggrieved by the Commission’s order dated 18/08/2006 they filed a review petition dated 6/10/2006. Hence, the matter surviving before the Commission is the review petition of DHBVNL on which status quo was ordered vide order dated 16/11/2006. The review order passed by the Commission clearly stated that status quo should be maintained by the parties till final decision on the review petition of DHBVNL is taken. **Consequently, there is no ambiguity in the mind of the Commission regarding the status of the order dated 18/08/2006 with respect to grant of distribution license to DEDL. Thus the plea of DEDL is accordingly dismissed.**

ISSUE NO.2

The Commission has deliberated the submission of DEDL regarding reasonability of the area. Any applicant desirous to obtain a license for distribution and retail supply of electricity under the Electricity Act, 2003, it is essential to fulfill the conditions laid down under 6th proviso to Section 14 of the Electricity Act, 2003 which reads as under:-

“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 condition that the Applicant for grant of license within the same area shall, without prejudice to the other conditions or requirements under this Act, comply with the additional requirements (relating to capital adequacy, credit worthiness, 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 licence on

the ground that there already exists a licence in the same area for the same purpose”.

The Central Government while exercising its powers under sub-section (1) of, and clause (b) of sub-section (2) of section 176 of the Electricity Act, 2003, made Rules under the 6th proviso to Section 14, namely, the Distribution of Electricity Licence (Additional Requirements of Capital Adequacy, Credit Worthiness and Code of Conduct) Rules, 2005. In the explanation to these Rules, the condition of minimum area of supply for grant of a distribution licence in the same area of supply, has been laid down, which reads as under:-

“Explanation – For the grant of a licence 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 Indian or a revenue district shall be the minimum area of supply”.

There is no provision for giving exemption to any class or category of persons, from this mandatory requirement of the minimum area of supply which is atleast a Municipal Corporation wherein it exist. Further, the rules, aforesaid, do not qualify the grant of distribution licence on the basis of the quantum of electricity consumed but it is the geographical area where the network of the new licence would be established.

The learned Counsel of the petitioner argued elaborately to prove that inserting additional criterion in respect of area under the distribution of Electricity Licence (Additional Requirement of Capital Adequacy, Credit worthiness and Code of Conduct) Rules,2005, by the Central Govt. is much beyond the scope of power conferred to it under the sixth proviso of Section 14 of the Act and this is contrary to the provision of the Act. Hence, the additional criterion presented by the Govt. of India is ultra-vires to the provisions of the Act. It was argued that the delegation of power by the legislative to the executive has to be exercised within the scope of such delegation and not beyond. The Commission has examined the argument and

also taken note of the findings of the different Courts on the subject. The Commission agreed with the principles elaborated in all the ruling. Nevertheless it finds extremely difficult to apply those principles in the present context and take a view that the Central Government has indeed exceeded the mandate. This point was never agitated earlier before any national forum. Suddenly this Commission jumping into such an important conclusion as prayed for by the learned Counsel is neither warranted nor appropriate. The Commission does not have all the details of the deliberations of the Central Legislature (Parliament) to arrive at any definite conclusion in this regard. Hence a policy guidelines issued by the Central Government under the delegated power of legislation of a Central Act cannot be called illegal by this Commission. The Commission is of considered view that the petitioner cannot take advantage of the criteria of landholding vis-à-vis Municipal Council as it existed in Gurgaon at that point of time as incorporated in the order dated 18.8.2006 totally ignoring the subsequent changes that have been brought about. It is an admitted fact that at present the urban Local Govt. of Gurgaon City is the Municipal Corporation and the petitioner does not hold land to cover the entire area of the local body.

The responsibilities of a distribution licensee are vast and extensive under the Electricity Act, 2003. The Central Government has kept these responsibilities in mind while framing the Distribution of Electricity Licence Rules, 2005. The National Electricity Policy notified by the Central Government on 12 February 2005 at para 5.4.7 also enunciates the intention and what shall be the broad National Policy governing the issue of second distribution license in the same area of supply. The said provision is reproduced as under:

“One of the key provisions of the Act on competition in distribution is the concept of multiple licensees in the same area of supply through their independent distribution systems. State Governments have full flexibility in carving our distribution zones while restructuring the Government utilities. For grant of second

and subsequent distribution licence within the area of 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 the Constitution of India (74th Amendment) may be considered as the minimum area. The Government of India would notify within three months, the requirements for compliance by applicant for second and subsequent distribution license as envisaged in Section 14 of the Act. 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”.

The impact of the National Electricity Policy and the Distribution of Electricity licence (Additional requirements for capital adequacy, credit-worthiness and code of conduct) Rules, 2005, is very apparent. The State Commissions are given the responsibilities to analyse the application for second and subsequent distribution license with abundant caution so that the purpose of the Electricity Act, 2003 to provide conducive environment for achieving system improvements, efficiency gains in various parameters and sustain system viability are met. A Distribution Licensee has a key role to play. On one hand, it has to discharge the responsibility of providing for safety, quality service and reliability of power supply to the consumer and on the other hand, to orchestrate and organize its efforts to a large arena of providing stability to the entire Grid discipline and upstream upto the generating stations. It is the responsibility of the distribution licensee to act as a lifeline between the

consumer and the generating stations and constantly provide the financial support and add to the technical health of the system. **The grant of distribution license is, therefore, to be seen in the overall perspective, whether or not the applicant would be able to contribute to the reliability and stability of the power sector.**

The Commission has been vested with responsibility under the Electricity Act, 2003 for taking measures conducive to the development of electricity industry, promoting competition; protect interests of consumers and supply of electricity in all areas etc. The Commission has been vested with functions under clause (d) of sub-section (1) of section 86 to “issue licence to persons seeking to act as transmission licensees, distribution licensees and electricity traders with respect to their operations within the State”. This function has to be executed within the framework of the Act and the Rules and Regulations framed thereunder. In the provisions of the Distribution of Electricity Licence (Additional Requirements for Capital Adequacy, credit worthiness and Code of Conduct) Rules, 2005, there are unambiguous provisions as to what will be the minimum area of supply, which the Applicant has to satisfy. The Electricity Act 2003, under section 173 only engraves an exception in favour of Railways Act 1989, and not in favour of the Applicant. The Applicant will have to fulfill the conditions as laid down by the Act, Rules and Regulations like any other applicant who applies for the grant of a distribution license. The condition prescribed under the Rules for the minimum area of supply is incorporated to avoid a situation of cherry picking and is, therefore, based on sound logic and principle.

The Commission, therefore, is unable to accept the request of DEDL for grant of a distribution and retail supply license on the grounds mentioned above. However, we would like to mention that the DEDL is at liberty to approach the Commission as and when they satisfy the requirements of the Electricity Act, 2003 and the rules made thereunder, as amended from time to time.

ISSUE NO.3 & 4

The fact that the electrical distribution system in the DLF City is inadequate has been admitted by all parties including the Resident's Welfare Association (RWA) of the area. The Commission on the basis of DEDL's reply to the queries posed to them, notes that only minor variations were made by them in the original lay out plan. DEDL provided no details along with lay out plan old and the new. This strengthens the point raised by DHBVNL about inadequacy of the Local Distribution system. DHBVNL has estimated the cost of augmentation of Local Distribution System in the DLF City area as Rs. 10.07 crore as per the present load requirement and Rs. 20.57 crore to cater to the ultimate load requirement of the area. **The commission also takes note of letter dated 22.05.2010 from the applicant to the MD, DHBVNL in which it has been admitted that the distribution system was deficient and they have estimated the fund requirement as Rs. 9.80 crore for making up of the deficiency and DEDL's offer to share 50% cost of such augmentation by DHBVNL, keeping in mind the interest of the resident of the DLF city. In this very letter it is also mentioned that 66KV substation in Phase 5 would be ready by the end of the year. Thus in line with the admitted position the Commission directs DEDL to pay Rs. 4.90 Crore to DHBVNL within one month of the date of this order.**

The Commission is convinced that creation of two additional 66 Kv substations for block 'U' and 'F' and one 220 KV substation which has already been agreed between the parties is necessary to cater to the ultimate load requirement of DLF City. **DEDL will provide required land for above substations and the disputes of funding for construction of substations thereon, shall be sorted out by DTCP Haryana.**

ISSUE NO.5 & 6:

Regarding taking over of the distribution system and maintainability of DHBVNL's review petition, the Commission is of the view that since the local distribution system in the DLF city area has already been energized by the DHBVNL and they are collecting revenue from the consumers, it is their duty to maintain the system as well. The Commission has considered the submission of DHBVNL that DEDL's petition before the Commission was only for grant of a distribution license in DLF City area (Phase I to 5) which was disposed of by the Commission vide its order dated 18/08/2006 i.e. the grant of license to DEDL was declined. Consequently, the Commission has gone beyond the scope of the petition by passing an order that DHBVNL should take over the distribution system in the DLF City area. The Commission has examined DHBVNL's contention and taken into account the Acts and Rules on the subject. It is relevant to mention that the Commission, in exercise of the powers conferred on it by Section 14 (Order dated 04/11/2004 in Case No. HERC/PRO-2/99, HERC/PRO 3/99, HERC/PRO 4/99) granted a License to DHBVNL for Distribution and Retail Supply of electricity to any premises in the Area of Supply set out in Schedule 1 of the License.

The Schedule – 1 specifies the area, ***“The DHBVNL's area of Distribution and Retail Supply shall comprise the Circles of Hisar, Sirsa, Bhiwani, Narnaul, Faridabad and Gurgaon – all in the State of Haryana”***. It is therefore evident that the DLF City area too is included in the license granted to DHBVNL. Regulation 4 - Part II (General Conditions) of the License provides, ***“The Licensee shall comply with the regulations / codes / orders / guidelines / directions issued by the Commission from time to time and shall act in accordance with the terms of this license, except where the licensee obtains the approval of the Commission for any deviation of such regulations / codes / orders / guidelines / directions and terms”***. Further Part II of the regulations 3.1 to 3.3.4 (Regulation No. HERC/12/2005 dated 26th July 2005 with respect to Duty to Supply Electricity

on Request, Power to Recover Expenditure incurred in Providing Supply and Power to Require Security” imposes universal responsibility on the existing licensee to supply electricity in its licensed area within the time frame specified in the regulations.

In the light of the above and in line with Section 43 of the Electricity Act, 2003 i.e. ***“Save as otherwise provided in this Act, 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”***, the Commission holds that since grant of distribution license has been declined to DEDL and hence no second distribution licensee exists in the area it is the duty of DHBVNL the existing licensee to take over the distribution system of the DLF City area, maintain it as well as augment the same as per load requirement of the area. **Therefore the review application of the DHBVNL is devoid of any merit and hence dismissed. DHBVNL is directed to take over the Local Distribution system of DLF city (Phase 1 to 5) in “as is where is” condition within one month from date of this order.** During this period of transition of one month the present arrangement of maintenance of system and attending to complaints will continue. DHBVNL will make adequate arrangement of man power for maintenance of the system in DLF city area so that consumers are not made to suffer in any manner.

It is relevant to mention here that DHBVNL and HVPNL are the licensees of the Commission whereas licence for the development of the colony (Phase I to Phase V of DLF City Gurgaon) to M/S DLF has been issued by DTCP. The Commission does not possess the details of the license condition of the developer including the contractual obligation signed between them and the Govt. This assumes importance considering the fact that on some of the points, for giving views the Commission must have access to the documentation which are available only in DTCP’s office. This is further illustrated as under.

With regard to increase in the connected load over the years a pointed question was raised by the Commission as to whether there has been any change in the layout plan of the area at a subsequent stage which will have a bearing on the density of population and consequently increase in the load. In reply DEDL admitted that there has been some change though categorized them as minor one. It is essential to examine the layout plan of the area to examine in detail the changes brought about subsequently including conversion of any area from residential to commercial after obtaining the completion certificate for electrical installation from erstwhile HSEB more than a decade back. The Commission is however, more than convinced at this stage after going through all the documents in the case and specially after hearing the RWA of the area that the present distribution network is hopelessly inadequate to meet the demand. The Commission has passed order on payment of Rs.4.90 crores on the basis of the agreed sum by DEDL. If more is needed, let DTCP sort out this issue and they have sufficient fund available with them as advance security from the colonizer for the purpose. Similarly for the first time after years of correspondence between the parties suddenly in 2010 a new plea has been taken that construction of sub station has already been accounted for in the External Development Charges (EDC) paid by developer to the government, though some of the sub-stations constructed/funded by them in the meantime, is more as gesture of goodwill keeping in view the sufferings of the local consumers and not out of any legal obligation. The detail breakup of costing of EDC is available only with the DTCP and the Commission does not have any information on this. Hence, the Commission has confined itself only with the transfer of land for construction of 220 kV and 66 kV sub stations leaving the funding of construction thereon to be decided by DTCP on the request of HVPNL. There has been no dispute between the parties that keeping in view present and future likely load of the area the transmission system need adequate strengthening.

After hearing the parties and specially RWA, the Commission is of the considered opinion that the present system cannot continue for indefinite

period and earlier it is brought to an end, the better. Because of dual control and vague over-lapping jurisdiction it appears that no agency is fully responsible for supply of power in the area and maintenance of electrical equipment and in case of a breakdown, the hapless consumers are left to fend for themselves.

This order is signed, dated and issued by the Haryana Electricity Regulatory Commission on 18th August, 2010.

Date: - 18/08/2010

Place: - Panchkula

(Rohtash Dahiya)
Member

(Bhaskar Chatterjee)
Chairman