

DELHI ELECTRICITY REGULATORY COMMISSION
Viniyamak Bhawan, 'C' Block, Shivalik, Malviya Nagar, New Delhi – 110017

Ref. F.11(354)(1))/2007-08/DERC/

Petition No. 36/2008

In the matter of: Complaint against DVB' Successors.

And

In the matter of:

Single Point
Agency Holder Association,
Through: Praveen Choudhary, President,
J- 43, Bhagat Singh Park,
G.T. Kernal Road, Siraspur,
Delhi-110042.

...Petitioner

VERSUS

1. BSES Rajdhani Power Limited
Through its: **CEO**
BSES Bhawan,
Nehru Place,
Delhi-110019.
2. BSES Yamuna Power Limited.
Through its: **CEO**
Shakti Kiran Building,
Karkardooma,
Delhi-110 092.
3. North Delhi Power Limited,
Through its: CEO
Sub-Station Building,
Hudson Lines, Kingsway Camp,
Delhi-110 009

...Respondents

Coram:

Sh. Berjinder Singh, Chairman & Sh. K. Venugopal, Member

Appearance:

1. Sh. B. S. Choudhary, Advocate for Petitioner;
2. Sh. Parveen Choudhary, President, Single Point Agency Holder Association;
3. Mr. K. Datta, Advocate, NDPL;
4. Sh. Mansoor Ali, Advocate for BRPL;
5. Sh. Rahul Dhawan, Advocate for BRPL;
6. Sh. Pankaj Kumar, L. R., BRPL;
7. Sh. R. R. Panda, BM BRPL.
8. Sh. Ajay Kalsie, Company Secretary, NDPL;
9. Sh. Anurag Bansal, HOG NDPL;

ORDER

(Date of Hearing: 07.08.2008)

(Date of Order: 22.08.2008)

1. The Petitioner is stated to be Single Point Agency Holder Association comprising of number of SPD Contractors involved in distribution of electricity in various parts of Delhi in terms of the provisions of agreements executed between each of the contractor with the erstwhile DVB.
2. The SPD Agency Holders Association have approached this Commission with certain grievances against all the three DISCOMs i.e. NDPL, BRPL and BYPL on the following grounds:
 - a) In terms of Clause 4 of the written contract executed between the Petitioner and Respondents, the Petitioner shall have to pay minimum revenue for 75% of the electricity energy as recorded in the meter provided by the erstwhile DVB for measurement of the bulk energy, irrespective of the fact that the T&D and theft losses in the area of SPD contractors were about 50%.
 - b) It is alleged that the DISCOMs successors of erstwhile DVB are not following the terms and conditions of the agreement pertaining to AT&C loss which is inherent and mandatory during the supply of electricity energy as per analysis of highly skilled technicians.
 - c) It is further alleged that the Respondents themselves are availing the facilities of T&D loss and AT&C losses upto 47% to 58%. While the Petitioners are being denied the said benefits.
3. The NDPL submitted that the present applications are not maintainable under the Electricity Act, 2003. The Commission is a creation of Statute and its powers flow from the Statute. The powers which are not specifically provided in the statute cannot be exercised by the Commission.
4. The NDPL submitted that on receiving several complaints from the consumers of the said area regarding low voltage, flickering, fluctuation and over all poor quality of the supply of electric energy by the Petitioners, they have issued notice to the Petitioners for termination of their contract. The NDPL cited a judgment of Hon'ble High Court of Delhi passed on 02.11.2007 in FAO (05) No. 250/2007 titled as Raj Electricals Vs.

BRPL whereby one of the Petitions was dismissed having the same issues in question. The relevant para of the judgment is reproduced hereinbelow:

"Suffice it to say that the claim made by the appellants that the agreements executed between them and the erstwhile DVB have a statutory flavour and may be interpreted to constitute licences in their favour under Part II of the Indian Electricity Act, 1910 has no juristic basis. A sanction order was necessary in view of the prohibition contained under Section 28 of the Act against any one engaging in the business of supplying energy to the public except with the previous sanction of the State Government and in accordance with such condition as the State Government may fix in that behalf. The grant of sanction by the Government to the Single Point Delivery System on the terms and conditions stipulated by the Government, therefore, did not constitute a licence in favour of the appellants. The relationship between the erstwhile DVB and the respondents who stepped into its shoes remained contractual in nature. This implied that the contract could be terminated by the Respondent company without any limitation on its powers to do so. It would also mean that the contract was a commercial contract in which the sub-contractor or the agent had undertaken an activity for a monetary consideration. If the termination was, for any reason, illegal, unjustified and incompetent, the remedy of the appellants would lie by way of a claim for payment of damages as compensation for the loss, if any suffered by them."

5. NDPL and other DISCOMs in a similar matter submitted that the agreement/contract between DISCOMs and SPD contractors was commercial in nature in which the sub-contractor or the Agent had undertaken an activity for supply of electricity to consumers for monetary consideration. Further, it was submitted that upon termination of such a contract which is purely commercial, the only remedy available would be by way of a claim for payment of damages as compensation for the loss, if any, suffered by the Petitioners.
6. In compliance of the Commission's order the BRPL has filed written submissions wherein, it has been reiterated that the present Petitions are not maintainable under the Electricity Act, 2003. BRPL submitted that the conjoint reading of Section 86 (1)(f) and 158 shows that only those matters/disputes can be adjudicated upon and/or referred to the arbitration under Section 158 by this Hon'ble Commission which arise between the Licensee and the generating companies. In the present Petitions the Petitioners are neither the Licensees, nor the generating company. They have also referred to a recent judgment of the Hon'ble Supreme Court titled Gujarat Urja Vikas Nigam Ltd. Vs Essar Power Ltd. Wherein, the provisions of Section 11(5), and Section 11(6) of the

Arbitration and Conciliation Act, 1996 have been elaborated and discussed in context with Section 86, 158, 173 and 174 of the Electricity Act, 2003 and it was held that:

"Section 86 (1)(f) is a special provision and hence will override the general provision in Section 11 of the Arbitration and Conciliation Act, 1996 for arbitration of disputes between the licensee and generating companies. It is well settled that the special law overrides the general law. Hence, in our opinion, Section 11 of the Arbitration and Conciliation Act, 1996 has no application to the question who can adjudicate/arbitrate disputes between licensees and generating companies, and only Section 86 (1)(f) shall apply in such a situation."

7. Sh. B. S. Chaudhary, Advocate for the Petitioner, submitted that they have approached this Commission for the enforcement of their rights which were conferred upon them by an agreement executed between the SPD contractors and the erstwhile DVB. The Commission while hearing the Petition earlier vide its Order dated 21.11.2007 had observed that:

"Without going into the merits of the case and the prayers made by the Petitioner, it is felt that the moot question before this Commission is whether the application and Petition fall within the jurisdiction of this Commission or not. The Counsel for the Petitioner states that he is desirous to file a written submission on the issue of maintainability of the present Petition with this Commission. Liberty is granted."

8. Sh. B. S. Chaudhary, Advocate, submitted that in terms of Section 2(39) of the Electricity Act, 2003, the Petitioners are the Licensee and have *locus-standi* to maintain the present Petition before this Commission.
9. Sh. Krishanendu Datta, Counsel for the Respondent, pleaded that the Petitioners are not Licensees under the Electricity Act, 2003, and also under the provisions of previous laws. They were distributing the electricity in terms of a contract which was purely commercial in nature. He further submitted that the Petitioners are not entitled to maintain the present Petition because the jurisdiction of the Commission cannot be invoked to enforce the contractual obligations. Moreover, he further submitted that the Association as such does not have *locus-standi* to approach this Commission.
10. The Commission has considered the rival contentions of the parties and is of the considered view that the present petitions of SPD contractors are not maintainable before this Commission as the Petitioners are not the

licensees under the Electricity Act, 2003 nor under the previous Electricity laws enforceable at the relevant time. The Petitioners were assigned the business of distribution of electricity for specific areas by separate commercial agreements and to enforce these commercial contacts/agreements, is outside the purview of the Commission.

11. The Commission vide its Order dated 14.08.2008 in 17 cases titled United Electricals Engineering Company and others versus BSES Rajdhani Power Ltd. (Petition No. 33 to 51 of 2008) held that the Petitioners are not the Licensees, therefore, not entitled to maintain the Petitions before the Commission as under Section 158 of the Electricity Act, 2003, it is only the Licensee/Generating Companies who can approach this Commission for the adjudication of disputes and none else (The order dated 14.08.2008 is available on the Commission's Website **www.derc.gov.in**). Further, Section 86(1)(f) clarifies that only the disputes between the Licensees and the generating companies can be referred for arbitration. In the present cases there is a clear provision in the bipartite agreements that either the owner or his nominee would have to work as a sole Arbitrator. Further Sh. Mansoor Ali, Counsel for the BRPL has brought to the notice of the Commission that in number of cases already the arbitrator has been appointed for adjudication of disputes and in some of the cases even awards have been passed. The present Petition, therefore, cannot be entertained by the Commission for lack of jurisdiction.
12. Moreover, the Ld. Counsel for the Petitioner Association could not satisfy the Commission as to under which provision of law the Commission can entertain the present petition apart from Section 158 which has been discussed above.
13. In view of the above, the Petition is dismissed.
14. Ordered accordingly.

Sd/-
(K. Venugopal)
MEMBER

Sd/-
(Berjinder Singh)
CHAIRMAN