

In the Appellate Tribunal for Electricity, New Delhi
(Appellate Jurisdiction)

Appeal No. 254 of 2013

Dated: 29th May, 2015

Present: HON'BLE MR. JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER
HON'BLE MR. T MUNIKRISHNAIAH, TECHNICAL MEMBER

In the Matter of:

- 1. Dakshin Haryana Bijli Vitran Nigam Ltd.,**
Through Its Chairman & Managing Director,
C-Block, Vidyut Sadan, Vidyut Nagar,
Hisar, Haryana – 125 005 **... Appellant(s)**

Versus

- 1. M/s Toshiba Corporation**
Through Its Smart Community Division
1-1, Shibaura 1-Crome, Minato-Ku
TOKYO 1058001, Japan **... Petitioner/Respondent**
- 2. Haryana Electricity Regulatory Commission**
Bays Nos. 33-36, Sector-4,
Panchkula – 134 112.
- 3. Haryana Vidyut Prasaran Nigam Ltd.**
Through its Managing Director/Authorised Representative
Shakti Bhawan, Sector-6,
Panchkula, Haryana.
- 4. Delhi Mumbai Industrial Corridor Development Corp.**
Room No. 341-B, 3rd Floor,
Hotel Ashoka, Diplomatic Enclave,
50B, Chanakyapuri,
New Delhi – 110 021 **... Respondent(s)**

Counsel for the Appellant(s) : Mr. G. Saikumar, Mr. Varun Pathak, Ms. Soumya Sai Kumar, Mr. Nitish Gupta, Mr. Gauri Shankar Sai Kumar, Mr. Akhil Sibal and Mr. Salim Inamdan

Counsel for the Respondent(s) : Mr. Vishal Gupta, Mr. Avinash Menon, Mr. Kumar Mihir,

J U D G M E N T

PER HON'BLE JUSTICE SURENDRA KUMAR, JUIDICIAL MEMBER

This is an appeal filed by Dakshin Haryana Bijli Vitran Nigam Ltd. (in short distribution licensee) under section 111 of the Electricity Act, 2003 challenging the judgment and order dated 29.07.2013 passed by the Haryana Electricity Regulatory Commission (in short State Commission) in Case No. HERC/PRO-23 of 2012, M/s Toshiba Corporation Vs. Managing Director, Dakshin Haryana Bijli Vitran Nigam Ltd. and Ors. whereby the learned State Commission held that the respondent/petitioner M/s.Toshiba Corporation can supply power from its proposed generating plant to the industrial consumer through dedicated transmission line considering the load centre as a consumer under section 10(2), read with Section 42(2) of the Electricity Act 2003 and shall be liable to pay cross subsidy surcharge to the distribution licensee and additional surcharge as applicable under the

Regulations of the State Commission. The State Commission vide impugned order further ordered as under:

- “i) The voltage of supply i.e. 11 kV or above from the Generator’s bus-bar up to the consumers premises shall remain the same i.e. there ought not to be any transformation of voltage level in between.*
- ii) No line beyond the switching station (to be owned by the Generator) shall serve more than one consumer i.e. each line going to a consumer / load centre shall be a dedicated line.*
- iii) AMR compatible ABT meter shall be installed by the Generator at its switching sub-station to enable the SLDC to certify the quantum of energy injected by the Generator for onward supply to a Consumer/ group of consumers through dedicated transmission lines.*
- iv) Open access may be sought by consumers collectively or the Generator for the limited purpose of energy accounting to facilitate levy of cross – subsidy surcharge and additional surcharge.*
- v) The Consumer getting supply through the dedicated transmission line shall not indulge in further distribution of power received from the Generator to other Consumer(s) from its load centre.*
- vi) Cross – subsidy surcharge and additional surcharge as decided by the Commission for relevant years shall be payable by the Consumers / Generator to the distribution licensee(s) of the area.”*

- 2) Appellant, Dakshin Haryana Bijli Vitran Nigam Ltd. herein, is a distribution licensee in the proposed area of the project proposed by the respondent Petitioner.
- 3) M/s Toshiba Corporation (petitioner), respondent No.1 herein, is a company registered in Japan which had filed the aforesaid petition under section 66, 86(2) and 10 of the Electricity Act 2003 for appropriate directions, approval and necessary orders before the State Commission for setting up 15-20 MW power plant based on gas engine centered power generation with battery system and energy management for stabilization of electric power and further for supply of such power through the dedicated transmission lines to the industrial consumers in IMT Manesar, Haryana (India).
- 4) The respondent No.1, petitioner, is a lead company of a consortium of Japanese Companies that were entrusted with carrying out the said feasibility study in the State of Haryana. Haryana State Industrial and Infrastructure Development Corporation (in short HSIIDC), a Haryana Government company is the nodal agency for the State of Haryana in so far as DMIC project is concerned.
- 5) The Memorandum of Understanding was entered into between DMICDC, HSIIDC and the respondent/petitioner M/s Toshiba Corporation on 30.04.2010 at New Delhi for implementation of the project.

- 6) Respondent No.2 is the State Electricity Regulatory Commission empowered to discharge various functions provided under the Electricity Act, 2003. Respondent No.3, Haryana Vidyut Prasaran Nigam Ltd. is a transmission licensee/State transmission utility which also operates the State Load Despatch Centre (SLDC) in the State of Haryana.
- 7) The respondent No.4 is the Delhi Mumbai Industrial Corridor Development Corporation (in short DMICDC), a company promoted for developing Delhi Mumbai Industrial Corridor (DMIC) which had given its full support to the proposed project. The DMIC project i.e. Eco-city(smart community) is a joint venture between the Government of India (GoI) and Government of Japan (GoJ), wherein, the Ministry of Economy, Trade and Industry of Japan (METI) selected consortiums to implement feasibility studies for developing Smart Communities in States, that are part of DMIC region.
- 8) That the respondent/petitioner filed the petition in Case No. HARC/Pro-23 of 2012 before the State Commission submitting as under:
 - i) that the energy management system with high efficient gas co-generation system is being evolved by Toshiba in the pilot project in IMT Manesar, Haryana, India.
 - ii) that the respondent No.1 has been in discussion with the Gas Authority of India Ltd. (GAIL) for allocation of

domestic natural gas and have met local industrialists for high quality and stable electricity supply.

- iii) that since the industries in IMT Manesar, Haryana are facing acute problems of stable power, a consortium led by the respondent No.1 (petitioner) has proposed a concept of generation of power through gas engine based micro grids that will be inter-connected and supply stable electricity and heat to industries and the consortium, together with DMICDC and with the cooperation of HSIIDC is planning a small scale pilot plant in IMT Manesar to supply electricity and steam to several medium and large industrial consumers.
- iv) that the electricity will be supplied at 11 kV to 4-5 industries with loads varying from less than 1 MW to 5 MW through dedicated transmission lines.
- v) that the respondent No.1/petitioner sought the following reliefs in the aforesaid petition :

“(a) Declare that the petitioner herein can supply power from its proposed 15-20 MW Pilot Power Plant in IMT Manesar, Haryana, directly to the installation of each industrial consumers i.e. load centre, through its dedicated transmission lines in terms of the provisions of sub-section 2 of section 10 of the Act of 2003 without obtaining a license;

- (b) *Declare that the petitioner can supply such power through its dedicated transmission lines up to the load centre i.e. installation of the industrial consumer without seeking open access of respondent No. 1 and / or respondent No.2's system for such supply;*
- (c) *Declare that petitioner will not be liable to pay cross subsidy surcharge and/or additional surcharge to the respondent nos. 1&2 for such supply through its dedicated transmission line upto the installation of each industrial consumer i.e. up to each load centre;*
- (d) *Such other order or orders as this Hon'ble Commission may deem fit and appropriate to do substantial justice in the matter."*

9) The appellant was respondent No.1 and respondent No.3 was respondent No.2 before the State Commission. The respondent No.1 (petitioner) made the following submissions before the State Commission during the hearing of the petition:

- a) that Section 10(2) of the Electricity Act 2003 entitles a generator to supply power directly to the consumer through its dedicated transmission lines on point to point transmission by taking the power up to load center of each industrial consumer. Any other interpretation of Section 10(2) of the Act would render the intent of the legislature otiose

- b) that the regulations framed under Section 42(2) of the Electricity Act 2003 are principally for providing charges for use of the transmission or distribution system of licensee for carrying his power to the industrial consumer(s). Section 10(2) of the Act subject to open access regulation may not be interpreted to mean “*only under open access regulation*”, section 10(2) of the Act enables the respondent No.1(Toshiba Co.) to supply power to consumers through dedicated lines without resorting to open access because Section 10(2) of the Act encourages the power generating company to establish generating plant in India and to assure the generator to supply power to any consumer.
- c) that the captive generator as well as generating company can supply electricity through a dedicated transmission line to a cluster of customers without any need for obtaining any license.
- d) that Section 10(2) of the Electricity Act attracts levy of cross subsidy surcharge and additional surcharge, however, in the present case the respondent No.1 (Toshiba Co.) desires to supply power through dedicated transmission lines without availing open access from the licensee and therefore it ought not to have attracted charges including cross subsidy surcharge and additional surcharge.

- d) for supplying power to an industrial consumer i.e. load center of each consumer through dedicated transmission line under the provisions of 10(2) of Electricity Act 2003 is well within the contemplation of the Electricity Act 2003 and therefore it need not seek open access of the distribution or transmission system of distribution and transmission licensee (the appellant and respondent No.2 herein respectively) so as to effect this supply.
- 10) The learned State Commission after hearing found that in case a generating company supplying power to consumers) through a dedicated transmission line, such transaction may take effect through the following two alternates:
- a) a generating company can supply to any number of consumers (each consumer considered as a load center) provided each consumer is connected to the generator from point to point by the dedicated transmission line and/or
- b) a generator through a shared dedicated HT transmission line can supply to consumers / class of consumers.
- 11) That the State Commission after making consideration of both the alternates, clearly found in the impugned order that the first alternate is obviously ineffective and practically difficult to implement, as per minimum area requirement criteria for grant of distribution license, if that was the case, the

respondent No.1 will not qualify for the same. Hence, the present case falls under the ambit of intra-state open access which is a matter of right rather than discretion. The Commission clearly observed, in the impugned order, that the respondent No.1/petitioner desires to supply directly to a few consumers through dedicated transmission lines subject to Section 42(2) of the Electricity Act 2003 by adopting alternate (b), in which case it does not require any distribution license subject to certain conditions.

- 12) After a lot of deliberations and discussions, the State Commission held that the respondent No.1/petitioner can supply power from its proposed generating plant to industrial consumers through its dedicated transmission line considering the load centre as a consumer under section 10(2), read with 42(2) of the Electricity Act 2003 and shall be liable to pay cross subsidy surcharge to the distribution licenses and additional surcharge as applicable under the Regulations framed by the State Commission. The said petition of the respondent No.1 has been allowed, as detailed above, by the impugned order dated 29.07.2013 of the State Commission which is under challenge before us in the instant appeal.
- 13) Before we proceed further, we deem it necessary to describe the grievances raised by the appellant, a distribution licensee of the concerned area against the impugned order, which are as under:

- a) that the Toshiba Corporation (in short Toshiba) has erroneously been allowed to undertake the activity of distribution without a distribution license under the erroneous notion of supply to consumers through its dedicated transmission lines.
- b) that the supply of electricity by generating company under section 10(2) of the Electricity Act 2003 cannot be put at par with the activity of distribution licensee and section 10(2) of the Act cannot be used as a bypass mechanism to overcome the mandatory license provisions prescribed under the Act.
- c) that the **State Commission wrongly introduced a notion of a shared dedicated transmission line, this concept is completely alien to the electricity Act and is nothing but a distribution of electricity.** The State Commission has violated the principle of *quando aliquid prohibetur, prohibetur at omne per quod devenitur ad illud*” (doing indirectly something which cannot be done directly).
- d) that the learned State Commission, despite observing that Toshiba was not eligible for a distribution license, had erroneously allowed it to supply power to industrial consumers in derogation of purpose of principles of Electricity Act 2003 and allowed Toshiba to indulge in

cherry picking of consumers. Under the Electricity Act 2003, a generation, as an activity, has been delicensed. However, the activities of transmission, distribution and trading are under the regulatory jurisdiction of Electricity Regulatory Commission. Under the Act, captive generation and consumption has been delicensed and Section 9 of the Act provides specifically that no licensee shall be required to supply power to any licensee or consumer. However, the language of Section 10(2) of the Act does not specify that no license shall be required for it. The legislature in its wisdom has not treated supply under section 9 and 10(2) at the same level. Therefore, supply under section 10(2) cannot be *de hors* the provisions of the Act and as such supply to many consumers on a commercial basis without a license results in-completely defeating the provisions of the Electricity Act.

e) Lastly, that if the model suggested by the State Commission is accepted, it shall create havoc with the electricity sector and no one would ever require a distribution license for supplying power to consumers.

14. We have heard Mr.G.Saikumar for the appellant and Mr. Vishal Gupta for the respondents. We have gone through the written submissions filed by the rival parties and peruse the material available on record including the impugned order.

15. The following two issues arise for our consideration:
- a) **Whether the respondent No.1/petitioner is legally entitled to supply power to the industrial consumers from its generating plant through its dedicated transmission lines and further whether the nature of transaction amounts to distribution of electricity requiring a distribution license in accordance with provisions of the Electricity Act, 2003?**
 - b) **Whether the generating company like respondent No.1 can supply to any number of consumers (each consumer considered as a load centre) provided each consumer is connected to the generator from point to point by a dedicated transmission line.**

Since both these issues are interwoven we are taking and deciding them together.

16. On these issues the following submissions have been made on behalf of the appellant :
- (a) that the said petition filed under Section 66, 86(2) and Section 10 of the Electricity Act, 2003 was not maintainable before the State Commission because the respondent No.1 (Toshiba) was seeking 'in principle approval' in the nature of advance supply of power which is not provided for in the Electricity Act nor in the Regulations framed there under. A private company setting up a generating plant is nowhere contemplated under the said provisions of the Electricity Act for seeking a declaratory relief and approval of the said nature. For such relief, a competent court is Civil Court

and the State Commission cannot usurp the power without there being any provision in the Electricity Act.

- b) that the Commission sought a faulty route on the face of it by passing the impugned order exercising powers under Electricity (removal of difficulty) 5th order 2005 which came into force on 08.02.2005.
- c) that the dedicated transmission lines cannot be legally used to supply power to several consumers without obtaining a distribution license for the following reasons:
 - i) that the State Commission innovated novel method of making a dedicated transmission line split up through a switching station (which is nothing but a sub-station without a transformer, but with circuit breaker, switch gear system etc.) and supply electricity to different consumers through several split up lines at the same voltage of 11 KV, calling it as the “*shared dedicated transmission line*”, a concept which is alien to the Electricity Act, 2003.
 - ii) that Toshiba in their petition had given diagram of network where a number of users are to be supplied directly through dedicated transmission lines and other customers fed from the distribution hut which takes the supply from the dedicated transmission line from a generating station and distributes it to various consumers through a dedicated line from a distribution hut. The same amounts to distribution system for which activity a license is required.

- iii) that Section 2(16) and Section 2(72) of the Electricity Act 2003 defines “*dedicated transmission line*” and “*transmission line*” respectively. Section 9 of the Act, dealing with captive generation states that a person may construct, maintain or operate a captive generating plant and dedicated transmission line provided that the supply of electricity from the captive generating plant through a grid shall be regulated in the same manner as the generating station of a generating company, for which no license shall be required. It further provides that no license shall be required under this Act for supply of electricity generated from a CGP to any licensee or to any consumer subject to the regulations made under Section 42(2) of the Act. Further, such a person who has constructed a captive generating plant and maintains and operates such plant, shall have the right to open access for carrying electricity from his captive generating plant to the destination of his use. The proviso of such open access shall be subject to availability, if adequate transmission facility, which shall be determined by the CTU or STU as the case may be and further any other dispute regarding availability of transmission facility shall be adjudicated upon by appropriate Commission.
- iv) that the intention of the Parliament is that consumer would be supplied electricity through distribution network of the licensee under open access with appropriate cross subsidy surcharge and other surcharge being levied under the tariff. Section 10(2) of the Act makes it clear that any

generating company may supply electricity to any licensee in accordance with Act, Rules and Regulations and may subject to the Regulations made under section 42(2) of the Act supply electricity to any consumer. Further, there is no difference in the intention of the Parliament with respect to consumer to be supplied by CGP under Section 9 of the Act which is meant to be through a distribution network of a licensee under open access.

- v) that in terms of Electricity Rules 2005 which also came into effect from 08.06.2005 as in the case of Electricity (removal of difficulty) 5th order 2005, the captive user of such a captive generating plant should ensure consumption is above the minimum percentage (51% of generation on an annual basis) and if it is not complied, then the entire electricity generated shall be treated as if it is a supply of electricity by a generating company.
- vi) that the State Commission has erred in not treating the switching station or distribution hut as a load centre in the impugned order and any connection beyond that needs a license.**
- vii) that the State Commission has completely erred in the impugned order in bringing the new concept of “*shared dedicated HT transmission line*” to consumers which is alien to the Electricity Act, Rules and Regulations made there under and further erred in not treating the switching station/ distribution hut as a load centre and further not

holding that any connection beyond that needs a license.

- viii) that the State Commission after framing the issue of maintainability of the petition and recording contentions of the appellant therein, gave its mandate in the impugned order on the basis that clarity is required on some issues of supply of power by a generating company through dedicated lines and therefore completely erred in giving decision without recording any reason.
- ix) that the State Commission further erred in holding that the supply of power by a generating company to some industrial consumers, through switching station, does not require a distribution license. It also erred in holding that an arrangement where one or more dedicated transmission lines from a generating station feed a bus bar (switching station) and then from switching station to individual industrial consumers are supplied power through individual lines at the same voltage of 11 kV without any voltage transformation in between through '*shared dedicated HT transmission line*'. Such supply does not need distribution license provided the consumer shall not supply power thereon to other consumers.
- x) that as per the Constitution Bench judgment of the Hon'ble Supreme Court in PTC India Ltd. Vs. Central Electricity Regulatory Commission reported in (2010) 4 SCC 603, the Central Commission is a decision making as well as regulation making

authority having advisory, adjudicatory and legislative regulatory functions. Section 86(2) of the Act provides for advisory functions of the State Commission to the State Government. The relief sought by respondent No.1, under Section 86(2) of the Act, was not for advice to be rendered by the State Commission to State Government but the same was worded as apparent from the relief sought in the petition, which is nothing but 'in principle approval', which is not permissible under the Electricity Act or any Regulations framed there under.

- xi) that Section 10 of the Act states the duties of a generating company and gives the generating company the freedom to supply to any consumer subject to the applicable rules and regulations under Section 42(2) of the Act. Section 10 of the Act does not enable the respondent No.1 to have approached the Commission for any adjudication which had been made in the impugned order. Under the Act only generation as an activity has been de-licensed. In other words, generation of electricity has been brought outside the purview of licensing regime, the transmission, distribution and trading are subject to grant of license and are kept within the regulatory regime. The Electricity Act 2003 encourages free generation and more and more competition amongst the generating companies and other licensees so as to achieve customer satisfaction and equitable distribution of electricity.

- xii) that the Commission, which is a creature of statute, is bound by this provision. Its duties and functions are defined and circumscribed by the Act. Of course, as any other statutory function, it undoubtedly had incidental or ancillary power to effectively exercise its jurisdiction in respect of the power confided to it but the Commission should necessarily act within the parameters prescribed by the Act creating it and confines of jurisdiction vested in it by law. As held by the Hon'ble Supreme Court in *N.C.Dhoundial Vs. Union of India (2004) 2 SCC 579*, the State Commission has committed illegality in the impugned order by erroneously allowing a thing indirectly which could not be allowed to be done directly under the Electricity Act.
- xiii) that the State Commission found out by-pass method and provided to respondent No.2 option (b), whereas under the Electricity Act 2003 it is nowhere provided by way of any definition or reference to '*share dedicated HT transmission lines*'. Further there is no reference of system dedicated transmission HT lines in any of the regulations framed by the State Commission. Hence, the concept of allowing '*shared dedicated transmission line*' and term it as '*un-licensed activity*' is incorrect and against the Act.
- xiv) that if Toshiba seeks to establish the proposed pilot project and it is indeed a collaborative project between the Government of India and Government of Japan, the correct mechanism would be to get exemption under Section 13 of the Electricity Act,

2003 which can be granted by the State Commission on the basis of recommendation of appropriate Government. Without grant of the exemption by State Commission, the present project cannot be executed in the present form because the model suggested by Toshiba amounts to distribution activity which is prohibited under the Act without a distribution license.

xv) that a dedicated transmission line can only be used for supply to consumers directly when there is only one consumer and the same is considered to be a load centre. If there are more than one consumer, then the same amounts to distribution requiring a distribution license.

xvi) that this Appellate Tribunal in its judgment dated 07.05.2008 in Appeal No. 27 of 2006 and batch, *Jindal Steel and Power Ltd. Vs. Chhatisghar State Electricity Regulatory Commission & Or.*, while interpreting Section 10(2) of the Act, the gist of which is reproduced below, held as under;

xvii) The sale can be done at bus bar of a generating company. If it is so done, the purchaser of power, whether it is a licensee or a consumer, has to organize its wheeling up to the load centre. However, if this function is not undertaken by a consumer then wheeling or carrying of electricity from a generating station up to the load centre has to be done either by a licensee or by a generator. In order to reach the load centre, the generating company can take the help of a distribution licensee

by using its distribution system. The word '*distribution*' is not defined in the Electricity Act 2003 although it defines distribution licensee, distribution main and distribution system. Distribution system means the wires and associated facilities between the delivery points on the transmission lines or generating station connection and the point of connection to the installation of the consumer. The distribution licensee operates and maintains the distribution system for supplying electricity to the consumer. Further, the generating company can reach the consumer for supplying electricity through a dedicated transmission line as defined in Section 2(16). The dedicated transmission lines which the generating station can establish can go up to the load centre. Therefore, a generating station can sell electricity to consumer through dedicated transmission lines up to the load centre. However, if the generating company, instead of establishing a dedicated transmission line from its generating station up to a particular load centre wants to supply electricity to large group of consumers in a large area then what he requires is not a '*dedicated transmission line*' but a distribution system for he is certainly not contemplated to have a dedicated transmission line for each consumer. If a generating station intends to supply to a group of consumers but not through '*dedicated transmission line*', the intended activity becomes a distribution.

xviii) that the word consumer cannot include a group of consumers and a consumer cannot be treated as

load centre which has wrongly been held by the Commission in the impugned order.

17. **Per contra** following submissions have been made on behalf of the respondent Toshiba Corporation.

- i) that the petition filed by respondent No.1 and reliefs claimed by it and the relief granted by way of impugned order were all within the scope of provisions of the Electricity Act 2003. It is wrong to plead that the said petition was not maintainable before the State Commission.
- ii) that the provisions of Electricity Act, in particular Section 66, 86(1), read with Section 10 of the Act, clearly articulate the permissibility of having a proposed structure of supply where supply of power generation be made from 15-20 Mega Watt (MW) for the pilot power plant at IMT Manesar directly to the installation of each industrial consumer i.e. load centre through dedicated transmission line and to a few others, through a switching station i.e. an arrangement where one or more dedicated line from the generating station fed the bus bar (switching station) and then from the switching station to individual consumers, who will be supplied power through individual line at the same voltage (11 kV) without any voltage transformation in between. The appellant's submission with the proposed arrangement approved by the State Commission by the impugned order dated 29.07.2013 amounts to its distribution and requires a distribution license is misconceived and erroneous as it clearly loses sight of the provisions of 10(2) of the Act which reads as under:

“10. Duties of generating companies – (1) Subject to the provisions of this Act, the duties of a generating company shall be to establish, operate and maintain generating stations, tie- lines, sub-stations and dedicated transmission lines connected therewith in accordance with the provisions of this Act or the rules or regulations made there under.

(2) A generating company may supply electricity to any licensee in accordance with this Act and the rules and regulations made there under and may, subject to the regulations made under sub-section (2) of section 42, supply electricity to any consumer.

(3) Every generating company shall-

(a) submit technical details regarding its generating stations to the Appropriate Commission and the Authority;

(b) Coordinate with the Central transmission utility or the State Transmission Utility, as the case may be, for transmission of electricity generated by it.”

- iii) that the appellant is obfuscating by pleading that the State Commission is not empowered to pass declaratory reliefs as a comparison between State Commission and Civil Court is totally baseless. Further, the State Commission has been given a duty and responsibility to develop the market and advice the State Government on matters relating to promotion of competition, efficiency and economy, promotion and investment in electricity industry, matters concerning generation, transmission, distribution and trading of electricity or any other manner refer to by that Commission as is evident from

the scrutiny of Section 66 and 86(2) of The Electricity Act, 2003.

- iv) that in case a generating company does not meet the various standards of grid connectivity and/or technical standards for consideration of technical lines as laid down in order No.2 of Electricity (removal of difficulty) 5th order, 2005, the State Commission would deem it fit to take action against such a generating company. Thus while generating company or person setting up a captive generating plant does not require a license to establish, operate or maintain a dedicated transmission line, that by itself, cannot be taken to mean that generating company or a person setting up the power plant does not have to comply with technical standards and/or directions as may have been provided for under the provision of the Electricity Act and/or rules and regulations framed there under.

- v) that if a State Commission can proceed and take defaulting generating company or CPP to task, it does not stand to reason as to why the State Commission cannot review, consider and approve the proposed arrangement of supply. Therefore, the appellant's submission that State Commission does have adequate power as it has not been empowered and/or is not a Civil Court is not germane and must not be given any credence. Section 94 of the Act empowers the State Commission or appropriate Commission to exercise the powers of a Civil Court in the circumstances prescribed therein, where an appropriate Commission has been empowered to pass such interim order in any proceeding, hearing before it as it may consider appropriate.

18. Additionally, following submissions have been made by respondent No.1/Toshiba regarding the supply of power by generating company to group of companies through dedicated transmission lines under section 10(2) of the Electricity Act 2003 if amounts to distribution requiring distribution license.

- i) This Appellate Tribunal in its judgment dated 31.01.2008 in review petition No. 31 of 2007 in the case of *Madhya Pradesh State Electricity Regulatory Commission Vs. Universal Cables Ltd., inter alia*, observed that one of the objects of the Electricity Act is to encourage generation of electricity including captive generation. The National Electricity Policy also endeavors to tap electricity generated by CGPs. An interpretation which defeats these objects of the Act would be improper.

- ii) This Appellate Tribunal in its judgment dated 25.05.2009 in Appeal No. 139 of 2009 in case of *Nalwa Steel and Power Ltd. Vs. Chhatisgarh State Power Distribution Co. Ltd.* also held that a dedicated transmission line can go, admittedly from the captive generating plant to the destination of its use. Such destination namely the point of consumption has to be covered by the term '*load centre*'. The consumption point is neither electricity transmission line nor sub-station or generating station. Hence, the only way such a line can be termed is '*dedicated transmission line*' when the point of consumption is treated as a load centre. Thus load centre as appears in the definition of '*dedicated transmission line*' has been described by this Appellate Tribunal as conglomeration of load which implies that a '*load centre*' can comprise of a cluster or a group of consumers. Therefore, both CGP or a generating

company may supply electricity over dedicated transmission lines to a cluster of consumers.

- iii) That a line from the power plant of respondent No.1 to the industrial consumer shall be an electric supply line, which shall be for point to point transmission namely from a generating plant to its load centre of each industrial consumer and therefore, it is sale within the scheme and scope of the term “*dedicated transmission line*” as defined in Section 2(16) of the Electricity Act, 2003. Contrary to the assertion made by the appellant, the proposed nature supply through dedicated transmission line does assume the character of distribution and does become a distribution hut. The nature of supply does change its character to distribution as held by this Appellate Tribunal’s judgment dated 07.05.2008 in Appeal No. 27 of 2006 in *Jindal Steel and Power Ltd. Vs. Chhatisgarh Electricity Regulatory Commission* (supra) observed in paragraph 50 thereof that a transmission line cannot be an essential part of a distribution system of a licensee and would not reach the load or installation of a consumer. The generation company can reach the consumer for “*supplying*” electricity through a dedicated transmission line as defined in Section 2(16) of the Act.
- iv) That this Appellate Tribunal in its judgment dated 09.02.2010 in Appeal Nos. 119 and 125 of 2009 in the case of *Aryan Coal Benefication Pvt. Ltd. Vs. Chhatisgarh State Electricity Regulatory Commission & Anr.* held that for supply of electricity to a licensee or to consumer or both, generating company as well as captive generating company are similarly placed and second proviso to

Section 9 of the Act does not place the captive generating company at a higher position than the generating company. Further observed that if load centre is the installation of the consumer, then both the captive generating station and generating company can install the dedicated transmission line up to the place of consumer without the need to obtain any license. Load centre cannot be incorporated as not including the installation of the consumer, if such an interpretation is given, both captive generating plant and the generating company cannot lay down the dedicated transmission line up to the place of the consumer. Hence, under the regulations no licensee is required to undertake supply of electricity through the dedicated transmission line without using the distribution system or transmission system of the licensee.

- v) That in terms of provisions of Section 10(2) of the Act, the mandate cast by the legislature is unequivocal and clearly points towards the entitlement of a generating company to supply power directly to consumers where such supply shall not take the color of distribution requiring license under Section 12 and 14 of the Electricity Act, 2003.
- vi) that the impugned order passed by the State Commission is quite legal, just and correct one as based on the provisions of the Electricity Act and also in conformity of various decisions of this Appellate Tribunal.
- vii) that the State Commission has legally approved arrangement of supply and sharing of dedicated transmission line as in actuality a sharing is an

arrangement where one or more dedicated lines from a generating station feed a bus bar (switching station) and then from switching station to individual industrial consumer should be supplied power through individual lines at the same voltage (11 kV) without any voltage transformation in between.

- viii) that the appellant has sought to suggest that supply of power can be considered as being carried out through the dedicated transmission line only if it is from '*point to point*' and not otherwise. The definition of '*dedicated transmission line*' does characterize these lines as electric supply lines for point to point transmission, that by itself, cannot be taken to mean that Section 2(16) of the Act does not take within its ambit or scope, tap off (switching station). Merely because a line has been tapped at a particular point to transmit electricity to another point or has a switching station, it does not cease to a dedicated transmission line. It would still be a point to point transmission of energy and would still continue to link one generating station with a load centre. Similarly, merely because there are certain tapplings, the supply does not become distribution nor does the supply line become a distribution system or grid. Further, any interpretation to the contrary would mean that in order to qualify as dedicated transmission line, one would have to put separate lines for each use which would mean a national waste, besides being inefficient and impractical. Quite clearly the Act may not be interpreted in a manner which forces a party to have duplication of lines thereby encouraging wastage of scarce national resources.

- ix) That appellant's submission that the respondent No.1 envisages to indulge in distribution under the garb of transmission line is misconceived. The proposed arrangement does not attract provisions of Section 12 to 14 of the Electricity Act and the issue of minimum requirement for a distribution licensee too is irrelevant as an arrangement of supply is within the scheme and Section 10(2) of the Electricity Act, 2003. Further the arrangement for supply of power through '*dedicated transmission lines*' does not, in any manner, encroach upon the regulated business of distribution. The structure of supply in all its forms is covered within the ambit of transmission line and does not require license.
- x) That appellant's submission that power of respondent No.1 to industrial consumers in the area of the appellant i.e. the subsidizing category of consumers of the appellant would result in a higher tariff for the remaining subsidizing consumers and also tariff shock to subsidized ones is also misconceived because the same view is beyond the scope, scheme and object of Electricity Act.
- xi) That the instant project was envisaged under a joint collaboration between Government of India, Government of Haryana and Government of Japan so as to solve crisis prevalent in the State of Haryana. It is in this back ground that respondent No.1 Toshiba should be considered, as even at IMT Manesar where the joint project is being set up, power intensive industry have been constrained to install back up generating equipments, mostly diesel in their own premises to

overcome the problem of constant power disruptions due to insufficient supply from the grid.

19. Our discussion and conclusion:

M/s Toshiba Corporation, as we have stated above, filed the said petition being Petition No.HERC-PRO/23 of 2012 before the learned State Commission for declaring that the petitioner M/s Toshiba Corp. can supply power from its proposed 15-20 MW pilot power plant in Haryana directly to the installation of each consumer, namely load centre through its dedicated transmission line in terms of Section 10(2) of the Electricity Act 2003 without obtaining distribution license. Without seeking open access from the distribution licensee, the appellant herein, or without seeking use of transmission system of respondent No.3, namely Haryana Vidyut Prasaran Nigam Limited. Toshiba also sought declaration that it will not be liable to pay cross subsidy surcharge or additional surcharge to the distribution licensee or transmission licensee of the concerned area for such supply through Toshiba's dedicated transmission line up to the installation of each industrial consumer, namely its load centre. As we have mentioned above that the afore said petition was allowed by the learned State Commission holding that the Toshiba can supply power from its proposed generating plant to the industrial consumer through its dedicated transmission line. Under Section 10(2) of the Electricity Act, 2003, read with

Section 42(2) of the Electricity Act, and further Toshiba shall be liable to pay cross subsidy surcharge or additional surcharge, if any, to the distribution licensee (appellant herein) under the Regulations of the State Commission. The impugned order has been passed by the State Commission, subject to the already mentioned six conditions, which are as under:

- i) That the voltage of supply i.e. 11 kV or above from Toshiba's bus bar upto the consumer's premises shall remain the same. There ought not to be any transformation of voltage level in between.
- ii) No line beyond switching station (to be owned by the generator) shall serve more than one consumer namely each line going to a consumer / load centre shall be a dedicated line.
- iii) Automatic Meter Reading (AMR) compatible with Available Base tariff (ABT) meter shall be installed at its switching station to enable the State Load Despatch Centre to certify the quantum of energy injected by a generator for onward supply to consumer/group of consumers through dedicated transmission lines.
- iv) Open access may be sought by consumers collectively or a generator for a limited purpose of energy accounting to facilitate levy of cross subsidy surcharge and additional surcharge.
- v) The consumer getting supply through a dedicated transmission line shall not indulge in further distribution of power received from the generator to other consumer(s) from its load centre.

- vi) Cross subsidy surcharge and additional surcharge, as decided by the State Commission, for relevant years shall be payable by the consumers/generator to the distribution licensee(s) of the area.
20. The State Commission, by impugned order has taken care of the relevant interests of the distribution licensee, namely the appellant, by allowing cross subsidy surcharge or additional surcharge, if any, to the appellant. In the impugned order full endeavor has been made by the State Commission to dispel apprehension appearing in the mind of the appellant and after considering the relevant aspects, the learned State Commission clearly has held that the Toshiba is entitled to supply the electricity produced by its pilot power project directly to the industrial consumer(s) through its dedicated transmission line by putting certain stipulations in the impugned order, namely that the consumer getting supply through dedicated transmission line shall not indulge in further distribution of power from its load centre to anyone and there ought not to be any transformation of voltage level in between and the voltage of supply namely 11 kV or above from a generator bus bar/switching station up to the consumers premises shall remain the same and further no line beyond the switching station shall serve more than one consumer. After considering all the relevant aspects and also considering the said project to be a pilot power project and also the fact that the instant project was envisaged under the joint collaboration between Government of India, Government of Haryana and Government of Japan to solve crisis prevalent in the State of Haryana, the learned State Commission has allowed the said system for supply of power by 'Toshiba' to its consumers directly from its dedicated transmission lines.

21. Before the passing the impugned order, the learned State Commission considering the nature and viability of the said system proposed by the Toshiba and further considering two routes clearly has held that the system permitted by the State Commission in the impugned order was fit and legal requiring no distribution license for such supply of power from its 15-20 MW power generating plant.

22. Though in paragraph 13 of our judgment, we have detailed and narrated the grievances raised by the appellant and we do not want to repeat the same here. After considering all the contentions raised by the appellant, distribution licensee, we find that the State Commission was well within its jurisdiction and competence in passing the impugned order and rightly and legally allowed the respondent No.1 Toshiba Corp. to construct the said 15-20 MW pilot power project and correctly introduced '*shared dedicated transmission line*' system and we are also of the same view that the same system allowing supply of electricity through shared dedicated transmission line to Toshiba is completely within the provisions of Electricity Act, 2003. The said system does not, by any stretch of imagination, amount to distribution of electricity as strongly pleaded by the appellant, distribution licensee. Though 'Toshiba' has clearly stated that it shall not use the distribution or transmission network of distribution or transmission licensee of the area of supply, but the State

Commission even then had made it liable to pay cross subsidy surcharge and other additional surcharge as decided by the State Commission under the concerned Regulations to the distribution licensee, the appellant herein. In the impugned order proper arrangement has been made to ensure that the distribution licensee, the appellant herein, would be properly compensated through the payment of cross subsidy surcharge and additional surcharge, if any, found fit by the State Commission.

23. The Regulations framed under Section 42(2) of the Electricity Act, 2003 are principally for providing charges for use of transmission or distribution system of licensee for carrying power by a generating company to the industrial consumer. The Toshiba Corp. prayed before the State Commission for supply of power to consumers through dedicated lines without resorting to open access as Section 10(2) of the Act encourages the power generating company to establish generating company in India and to assure generators to supply power to any consumer directly. The main prayer of Toshiba, respondent No.1, before the State Commission was that Section 10(2) of Electricity Act attracts levy of cross subsidy surcharge and additional surcharge, however, in the present case the respondent No.1 Toshiba desires to supply power through its 'dedicated transmission lines' without availing

open access from the distribution licensee and therefore, Toshiba ought not to have attracted cross subsidy surcharge and additional surcharge and the said prayer of respondent No.1 has not been accepted by the State Commission in the impugned order which has directed Toshiba Corp, to pay cross subsidy surcharge and additional surcharge, if any, to the distribution licensee, the appellant.

24. The main contention of the learned counsel for the appellant is that the 'dedicated transmission line' can only be used for supply to consumers directly when there is only one consumer and the same is considered to be a load centre. If there are more than one consumers, then the supply of power amounts to distribution requiring distribution license. We are unable to accept this contention of the appellant and on this point we agree to the views expressed by this Appellate Tribunal in its judgment dated 07.05.2008 in Appeal No. 27 of 2006 and Batch in the case of Jindal Steel and Power Ltd. Vs. Chhattisgarh State Electricity Regulatory Commission and Ors. (supra) when this Tribunal had occasion to interpret the Section 10(2) of the Electricity Act, where this Appellate Tribunal held that the generating company can reach a consumer for supplying electricity through a dedicated transmission line as defined in Section 2(16) of the Electricity Act. The dedicated transmission line, which a generating station can establish, can go to the load centre. Therefore, a

generating station can sell electricity to a consumer through dedicated transmission lines up to the load centre. Thus this Tribunal had earlier also taken a view that a generating station who intends to supply power to a group of consumers through its 'dedicated transmission lines' and the intended activity, does not become distribution.

25. We are further unable to accept the contention of the appellant that such kind of declaration, as has been granted in the impugned order by the State Commission, always can be granted by the civil court, which power is vested with the civil court and State Commission or any other appropriate Commission under Electricity Act has not been vested with the power to grant a declaratory decree. The Electricity Act 2003 is a complete code for generation, supply, transmission, distribution and trading of electricity and appropriate Commission is fully empowered to grant the relief prayed for after considering the nature of the relief sought in the petition in the light of the provisions of the Electricity Act, 2003, National Electricity Policy and National Electricity Rules and other Regulations framed there under. This could not be the intention of the legislature while framing the Electricity Act 2003, not to vest the power with the appropriate Commission to grant relief of the nature granted in the instant case. We hold that such kind of relief prayed for in the petition by respondent No.1 could not be granted by a civil court. Further

an electric line from the power plant of the respondent No.1 to the industrial consumer, shall be an electricity supply line, which shall be for point to point transmission, namely from a generating plant to the load centre / premises of each industrial consumer and therefore, we are clearly of the view that it is 'sale' or 'supply' within the scheme and scope of the term '*dedicated transmission line*' and the proposed nature of supply through '*dedicated transmission line*' does not assume the character of distribution. The case law cited in the aforesaid appeal No. 72 of 2006 decided by this Appellate Tribunal on 07.05.2008 cannot be read towards the benefit of the appellant because in that case this Tribunal came to the conclusion that the JSPL really wanted to distribute electricity through the distribution system and not lay dedicated transmission line to a particular load centre, which is consumer in the case before us.

26. In view of the above discussion, we do not find any merit in the contentions of the appellant, a distribution licensee of the area where supply of energy generated by the respondent No.1 Toshiba Corp. is to be made to the individual industrial consumers directly through dedicated transmission lines of respondent No.1. we agree to the findings recorded in the impugned order by the State Commission and we approve the same view as there is no perversity or illegality in the impugned order of the State Commission. Consequently, both

the issues are decided against the appellant. The instant appeal merits dismissal.

Order

27. The instant appeal No. 254 of 2013 is hereby dismissed and the impugned order dated 29.07.2013 passed by the Haryana Electricity Regulatory Commission in the aforesaid Petition No. 23 of 2012 M/s Toshiba Corporation Vs. Managing Director, Dakshin Haryana Bijli Vitran Nigam Ltd. & Otrs. is hereby upheld. There shall be no order as to costs.

Pronounced in the open court on this **29th day of May, 2015.**

(T. Munikrishnaiah)
Technical Member

(Justice Surendra Kumar)
Judicial Member



REPORTABLE / ~~NON-REPORTABLE~~