

2. During pendency of the aforesaid application, the applicant was allowed to undertake transactions involving inter-State trading in electricity, in terms of certain interim orders passed by the Commission.

3. The Commission, on being satisfied that the applicant fulfilled the net worth criteria specified under the trading licence regulations, by its order dated 6.9.2004, had proposed to grant the licence, as prayed for. As statutorily required under clause (a) of sub-section (5) of Section 15 of the Act, the Commission had to publish notices in newspapers of its proposal to grant licence to the applicant. In response to the notice published by the Commission, an anonymous complaint dated 13.9.2004 leveling grave allegations against one of the Directors of the applicant was received. Subsequently, certain allegations and objections were also received from Department of Power, Government of Tripura. In view of these developments, the Commission had to take a view in the matter to protect the general public from the alleged undesirable activities of the applicant, as entry of undesirable persons could cause problems to the entire value chain of the electricity sector. Consequently, details of pending cases involving the applicant, its sister company, Belgundi Cements Ltd. (BCL), and Directors were sought by the Commission. After being initially aggrieved, the applicant filed detailed information with the Commission of civil and criminal cases, in terms of the undertaking given by it before the Appellate Tribunal for Electricity (hereinafter referred to as "the Appellate Tribunal") in Appeal No.22 of 2006. During pendency of the application, trading licence regulations were amended in terms of the Central Electricity Regulatory Commission (Procedure, Terms and Conditions for Grant of Trading Licence and other related matters) (Amendment) Regulations, 2006,

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which came into force with effect from 13.4.2006, with the insertion of Regulation 6A which prescribed disqualifications for grant of trading licence. After the amendment of the trading licence regulations, the application was to be considered based on the specified criteria. The applicant's contention was that since its application predated the amended trading licence regulations, its application could not be viewed in terms of these regulations.

4. Thereafter, on examination of all details provided by the applicant in regard to the civil and criminal cases and after considering the settled principles of law, the Commission, in the interest of public in general and the electricity sector in particular, did not consider the applicant to be a fit and proper person for grant of licence in terms of the said Regulation 6A. Consequently, by its order dated 28.8.2006, the Commission rejected the application. The interim orders also ceased to have effect in terms of the said order.

5. The applicant, feeling aggrieved by rejection of its application, preferred an appeal before the Appellate Tribunal (Appeal No. 06 of 2007) against the said order dated 28.8.2006. The said appeal has culminated into the Appellate Tribunal's judgment dated 7.6.2007. In the said judgment, although the Appellate Tribunal has upheld the application of Regulation 6A to the case of the applicant and has not found any error or irregularity in invoking the said regulation on the alleged ground of retrospective operation or otherwise, the Appellate Tribunal has specifically pointed out that for the operation and application of clause (b) of Regulation 6A, it was necessary for the Commission to form an opinion that due to the involvement of the applicant in legal proceedings the interests of the electricity sector or consumers might be adversely affected by grant of licence. The Appellate

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Tribunal came to the finding that the aforesaid opinion had not been arrived at by the Commission while rejecting the application on the ground that the applicant could not be considered to be a fit and proper person for grant of licence. On the other hand, the Appellate Tribunal has also come to the finding that the ground under clause (f) of Regulation 6A that the applicant could not be considered to be a fit and proper person could not be invoked by relying on the basis provided in clause (b) of Regulation 6A, that is, that the applicant is involved in any legal proceedings. The Appellate Tribunal has held that clauses (b) and (f) operate in different manners. Accordingly, the Appellate Tribunal remitted the matter to the Commission for fresh consideration in the light of observations made in its judgment. The operative part of the said judgment reads as under:

“52. In the circumstances, therefore, we remit the matter to the CERC to consider afresh the question whether the grant of licence to the appellant is likely to adversely affect the interests of the electricity sector or the consumers in view of the involvement of the appellant in the legal proceedings.

- 53. It will also be open to the CERC to consider the application of the appellant in the light of the other relevant provisions of the Regulations including clause (f) of Regulation 6A. The appellant shall be heard by the Commission on the aforesaid questions before passing the order”.

6. Consequent to the aforesaid judgment dated 7.6.2007 of the Appellate Tribunal, the applicant filed an affidavit before the Commission for early hearing of its application. From the affidavit and the details provided there-under, it was noticed that there was change in the constitution of the Board of the applicant after the filing of the application on 22.3.2004 as Shri N.S. Pathania was shown as the Managing Director of the applicant though earlier Shri Harry Dhaul and Smt Lakshmi Dhaul, against whom criminal proceedings are

pending, were on the Board of Directors. As under Form I of the trading licence regulations, as amended, the "Organisational and Managerial Capability of the applicant was required to be furnished, the applicant was directed vide order dated 15.6.2007, to furnish afresh the details as per the said Form I .

7. On perusal of the information furnished by the applicant under affidavit dated 22.6.2007, the applicant was directed, vide order dated 16.7.2007, to issue a public notice afresh in accordance with Regulation 4 of the trading licence regulations, as amended during April 2006. In response to this direction, the applicant, vide its affidavit dated 10.8.2007, contended against the requirement of fresh publication of public notice for the following reasons, namely:

(a) The applicant being a corporate entity, has an identity different from its members or its Board of Directors; Neither the Act nor the trading licence regulations contemplate publication of application twice, once on submission of application before the Commission and then again consequent to change in management.

(b) In terms of the Appellate Tribunal's judgment dated 7.6.2007, the proceedings are not to be taken *de novo* but are to be limited to a finding whether or not the applicant is a fit and proper person for grant of licence.

8. The applicant also requested for a hearing for elaboration on reasons in support of its stand against issue of public notice once again. In the interests of justice, the applicant was heard on 27.9.2007. During the hearing, learned counsel, Shri Sanjay Sen, made

submissions on behalf of the applicant. Learned counsel for the applicant, during the hearing also relied on the following case laws: (a) *The Heirs of Narayan Chandra Das, Shrimati Nabin Bala Das and Others Vs. Beni Madhab Das and Others*. [AIR 1975 Gauhati 70]; (b) *Sarug Rai and Others Vs. Sri Bhagwan Rai* [AIR 1975 Patna 162]; (c) *K. Veerabasappa Vs. The Court of Dist Judge at Chitradurga and Others*. [AIR 1979 Karnataka 40]; (d) *Chandanmal Vs. Rawatmal* [AIR 1980 Rajasthan 139].

9. Subsequently, written submissions were filed on behalf of the applicant on 4.10.2007. However, the order for the above hearing could not be issued by the Members of the Commission who heard the matter. The Commission, therefore, decided to hear the matter afresh. Accordingly, the case was again listed and heard on 23.9.2008. After the hearing, the applicant was directed to submit the following information on affidavit :

(a) Up-to-date status of all legal proceedings pending as on date against the applicant, any of its partners, promoters, directors or associates;

(b) Financial statements of the applicant for immediately preceding two financial years; and

(c) Amended copy of the Memorandum of Association of the applicant, showing its authorized capital.

10. The applicant has vide its affidavit dated 13.10.2008 submitted the above information.

11. Having heard the applicant and after considering the material placed on record, the Commission is of the view as under:-(i) The application as filed on 22.3.2004 under clause (c) of Section 14 read with sub-section (1) of Section 15 of the Act, with the details provided thereunder from time to time has been considered. Also, the details provided by the applicant company in regard to the civil and criminal cases to which it or its associates, promoters, directors etc. are party, have been examined. The Commission has also examined the information submitted vide affidavit dated 13.10.2008 that relating to (a) up-to-date status of all legal proceedings pending as on date against the applicant, any of its partners, promoters, directors or associates; (b) financial statements of the applicant for the immediately preceding two financial years; and (c) amended copy of the Memorandum of Association of the applicant showing its authorized capital. The Commission has also considered that in the proceedings before the Appellate Tribunal in Appeal No. 06 of 2007, the requirement to publish application once again under subsection (2) of Section 15 was not in issue. The purpose of issuing a public notice is to apprise the public about the pending application and to facilitate the public participation. That being the case, the Commission is satisfied that this purpose and objective was achieved through the notices already published by the applicant under sub-section (2) of Section 15 of the Act read with Regulation 4 of the trading licence regulations, and those by the Commission under clause (a) of sub-section (5) of Section 15 of the Act. It will not be justifiable to seek re-publication under sub-section (2) of Section 15 and nullifying the applicant's previous compliance of the said statutory provision. Accordingly, the Commission holds that the public notice already published by the applicant under sub-section (2) of Section 15 of the Act meets the requirements of law and the applicant need not re-publish the said public notice at this

stage. This decides the issue as to whether the applicant is required to republish the notice of his application. The application is required to be considered on the touchstone of Regulation 6A of the trading licence regulations.

(ii) The next issue that needs to be decided is as to whether the grant of licence to the applicant is likely to adversely affect the interests of the electricity sector or the consumers in view of the involvement of the applicant, BCL or its promoters, in legal proceedings. Before delving into the said issue, there is one aspect which needs to be clarified in light of the requirement laid down in subsection (6) of Section 15 which prescribes the time within which the Commission is required to issue a licence or reject the application. The fact is that the application made by the applicant for grant of licence could not be disposed of by the Commission in time because of the unwillingness on its part to furnish the information called for by order dated 28.9.2004, and because of the proceedings initiated by it before the Hon'ble High Court at Delhi and the Appellate Tribunal first by Appeal No.22 of 2006 and thereafter by Appeal No. 6 of 2007 decided under judgment dated 7.6.2007. The inordinate delay that has occurred in the case prompts the Commission to facilitate its speedy disposal while ensuring substantial compliance of the provisions of law. In the circumstances, the Commission proposes to take a practical and pragmatic view of the matter.

(iii) It is essential to first consider whether the applicant is eligible at all for grant of licence as sought for. The Commission has carried out a detailed analysis of the eligibility of the applicant as against the technical requirement, capital adequacy and creditworthiness pursuant to the provisions under Section 52 of the Act and the trading licence regulations.

Regulation 6 of the trading licence regulations lays down two criteria for being eligible to be considered for grant of trading licence, viz., technical requirements; and capital adequacy requirement and Creditworthiness. Situations which would render an applicant disqualified are contained in Regulation 6A. In terms of the eligibility criteria, the applicant, in its application, has submitted details of key persons of the organization. Further, the technical requirement of staff can be complied with before undertaking trading activities. Therefore, the Commission has examined the capital adequacy requirement and creditworthiness wherein the regulations prescribe net worth criteria of Rs. 1.5 crore for being eligible for grant of category 'A' licence. From the documents submitted by the applicant vide its affidavit dated 13.10.2008, it follows that its net worth is represented by the following:

Year	2003-04	2004-05	2005-06	2006-07	2007-08
1 Fixed Assets					
Gross Block	3,208.11	3,233.36	3,257.41	3,908.05	5,117.72
Less: Depreciation	188.33	312.49	435.60	565.10	753.88
Net Block	3,019.78	2,920.87	2,821.81	3,342.95	4,363.84
Capital Work-in-Progress					
Sub-Total 1	3,019.78	2,920.87	2,821.81	3,342.95	4,363.84
2 Investments	-	-	-	-	318.58
3 Current Assets, Loans & Advances					
Inventories	3.61	2.01	0.46	29.51	30.84
Cash and Bank Balance	167.88	47.11	92.01	93.56	189.10
Sundry Debtors	254.14	181.75	276.13	392.93	380.26
Loans & Advances	172.71	210.10	178.13	223.24	385.07
Other Current Assets					-
Sub-Total 3	598.34	440.97	546.73	739.24	985.27
4 Current Liabilities & Provisions					
Sundry Creditors	419.27	436.67	579.15	917.81	531.60
Other Liabilities	326.29	290.88	290.88	5.29	32.57
Provisions	4.50	4.50	7.00	60.15	306.38
Sub-Total 4	750.06	732.05	877.03	972.67	870.55
5 Loans					
Secured Loans	113.24	116.22	100.65	117.19	502.11
Unsecured Loans	-	19.17	23.02	18.27	11.72
Deferred Credits		-	-	296.17	296.17

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Also, Ref. Judgment of Hon'ble Supreme Court in Civil Appeal No. 3457-3458 of 2009 dt. 11/5/2009

	Sub-Total 5	113.24	135.39	123.67	431.63	810.00
6	Items not considered for Net worth					
	Share application money	1,081.11	1,026.13	227.33	12.97	180.90
	Deferred Tax Liabilities	24.79				8.49
	Sub-Total 6	1,105.90	1,026.13	227.33	12.97	189.39
	Net Worth(1+2+3-4-5-6)	1,648.92	1,468.27	2,140.51	2,664.92	3,797.75

From the above, it is noted that the applicant is having net worth of Rs. 37.97 crore against the prescribed net worth of Rs. 1.5 crore. The Commission is of the view that the applicant satisfies the technical, commercial and financial requirements to qualify for the grant of licence to undertake inter- State trading in accordance with the trading licence regulations, as amended. Further, the Commission can reasonably conclude that there is no likelihood of any substantial depletion in the net worth in future, even if pending commercial litigation goes against the applicant. Besides, the applicant is also under a statutory obligation to submit to the Commission its annual reports and audited financial statements. The applicant will be under obligation to furnish the performance details for each year to the Commission in the format prescribed in Form IV, appended to the trading licence regulations by 30th April immediately following the year ending on 31st March. Based on such information it could be found out as to whether the net worth has decreased in which case it would render the licence of the applicant liable to revocation. The Commission would not be powerless to take steps that would be required under such circumstances.

(iv) In regard to the applicability of Regulation 6A, the Commission has taken into consideration the updated details submitted by the applicant pertaining to the following court cases:

(a) CBI Proceedings against Shri Harry Dhaul and Smt. Laxmi Dhaul: These proceedings emerge from the alleged cheating of the Central Bank of India by taking of loans for Belgundi Cements Ltd. (a sister concern of the applicant). As per the affidavit dated 13.10.2008, the power plant for which loan was taken has been completed and synchronized to the grid with the approval of KPTCL. The applicant has stated that the CBI proceedings were initiated in 2002 and more than 6 year have elapsed without any charges having been framed against any accused person. According to the applicant these cases are being contested by Shri Harry Dhaul and Smt. Laxmi Dhaul in their personal capacity and have no bearing on the applicant's proposed business of electricity trading.

(b) Arbitration of disputes with KPTCL: This case relates to the dispute between the applicant and KPTCL over termination of the PPA between them allegedly on the ground of delay in completion of the power plant by GEL. The matter is at the stage of cross-examination of claimant's witness.

(c) Arbitration with Goa Electricity Department: This case emanates from the alleged breach of the agreement dated 26.4.2002 between the Goa Electricity Department for sale of surplus power from State.

(d) Arbitration with Tripura Electricity Department: According to the applicant, this is a commercial dispute and it arises out of a PPA between the parties.

(e) Belgundi Cement Ltd – reference before BIFR: Belgundi Cements Ltd (BCL) which is a sister concern of the applicant was declared a sick company vide BIFR

order dated 30.8.2007 and the Central Bank of India was appointed as the Operating Agency. Central Bank of India proceeded to take possession of the assets of BCL under Section 13(4) of SARFAESI Act, 2002 whereupon BIFR directed abatement of the proceedings. BCL has filed an appeal before the AIFR against the order of abatement dated 14.2.2008 by BIFR. BCL has obtained stay order from the DRAT, Mumbai against the SARFAESI notice of the bank.

(f) In addition to the above, the applicant has also submitted details of some other pending cases to which it is a party and in respect of BCL, which are of minor nature and as per the applicant, are accordingly not required to be taken into consideration.

However, the issue that needs to be decided is as to whether the grant of licence to the applicant in view of the above noted cases is likely to adversely affect the interests of the electricity sector or the consumers. The powers to disqualify an applicant on the basis of pending cases / litigation is to be exercised *ex debito justitiae* to do real and substantial justice. From the details of cases/litigation pending against the applicant and its promoters, and those relating to Belgundi Cements Limited ("BCL"), it can be reasonably inferred that all cases disclosed are pending. Final orders have not been passed in these cases. The commercial disputes related to the power plant of BCL do not have a bearing on electricity trading activities of the applicant. The criminal cases initiated by CBI relating to a loan taken by BCL against the promoters are pending for further investigation as regards Smt. Laxmi Dhaul. The Commission is of the view that these cases do not

appear to be material to have an impact on the applicant towards the performance of its duties and obligations as an electricity trader under the Act. However, the issue that needs to be decided is as to whether the grant of licence to the applicant is likely to adversely affect the interests of the electricity sector or the consumers in view of the involvement of the applicant in legal proceedings. The Commission is of the view that the applicant is required to undertake trading of electricity and to fully and efficiently discharge the duties and obligations in accordance with the conditions of licence, the provisions of the Act and the rules and regulations made there-under. The applicant is also required to act in a manner that does not prejudice public interest. Therefore, the pendency of (i) cases initiated/filed by the applicant; (ii) cases initiated / filed against the applicant or its sister concern, BCL; and (iii) BIFR / AAIFR proceedings concerning BCL, cannot be said to be an inculcation or a finding of any nature as to the commission of any offence and consequently one cannot possibly lead to the conclusion that these pending cases are likely to adversely affect the interests of the electricity sector or the consumers of electricity. The exercise of power by the Commission to disqualify an applicant on the basis of pending cases / litigation would be the exception and not the rule to secure the ends of justice. Moreover, from the facts disclosed, no order as passed by any court of law has been found convicting the applicant or its promoters / directors or sister concerns. None of the cases seem to suggest the commission of any grave offence by the applicant or its promoters / directors or sister concerns of such a nature that it outrages the moral sense of the community or conviction due to an offence involving moral turpitude.

(v) There is no reason for the Commission to conclude that the applicant is not a fit and proper person for the grant of licence.

12. In view of the above, we direct that the applicant be issued licence for inter-State trading in electricity as a category `A` electricity trader for trading in electricity up to 100 MU of electricity in a year in the whole of India. The licence is being granted is subject to the condition that the onus of intimating the Commission about the orders passed in the aforesaid pending cases shall lie with the applicant and the applicant shall submit a copy of the court orders immediately after the issuance of such orders. The grant of licence shall further be subject to the applicant complying with the provisions of the Act, the rules framed by the Central Government and the regulations specified by the Commission from time to time. The applicant shall abide by the trading margin specified under Section 79(1)(j) of the Act for inter-State trading transactions. The applicant shall not engage in any trading transaction which would be detrimental to the interests of the electricity consumers.

13. Accordingly, the application seeking inter-State trading licence stands disposed of.

Sd/-
(S.JAYARAMAN)
MEMBER

Sd/-
(R.KRISHNAMOORTHY)
MEMBER

Sd/-
(DR. PRAMOD DEO)
CHAIRPERSON

New Delhi dated the 28th November, 2008