


● PRAYAS

Initiatives in Health, Energy,
Learning and Parenthood



Amrita Clinic, Athawale Corner, Karve Road, Deccan Gymkhana, Pune - 411 004, INDIA.

 (020) 542 0720 / 562 05726 Fax: (020) 542 0337. E-mail: prayas@vsnl.com Web-site: www.prayas-pune.org

18th November 2003

BEFORE MAHARASHTRA ELECTRICITY REGULATORY COMMISSION

In the matter of application of M/S. BSES Ltd. for distribution license

Comments / Objections by Prayas, Pune

1. BSES Ltd. has applied to MERC for distribution license using own distribution system in Pune (Urban) Zone (of MSEB). BSES, wide public notice published in various newspapers in Pune on or around 20th October 200, has invited objection from public regarding the said application by BSES Ltd. We are filing these objections pursuant to this public notice.
2. The Electricity Act 2003 casts significant responsibilities on the state electricity regulatory commissions (MERC) and MERC is required to develop several regulations in this regard. The regulations would cover important aspects such as methodology for tariff fixation, tariff principles, surcharge and wheeling charges, license conditions, and licensee's standards of performance. MERC, with the help of four power utilities in the state, has already initiated process for developing these regulations. It is expected that these regulation would be in place within the next few months. These regulations have important bearing on the license application by BSES Ltd. Unless public has clear idea about these regulations, it would not be possible for public to provide meaningful comments on the BSES's application and proposed license conditions.
3. For example, let us consider how one such issue of tariff principles would affect peoples ability to make effective comments / objections on the BSES application. Unless the issue of how tariff for second (or third or fourth) licensee (using own distribution network) would be fixed is cleared, it would not be possible to evaluate the implications of such license on consumers or overall efficiency and economy of the sector. If at a later date MERC decides to treat second licensee also under the cost-plus regime (similar to either Schedule VI or section 59 of the 1948 Act), then there is eminent danger of duplication of the distribution network at the cost consumers. This is because both licensees would want to expand the network (as recovery of revenue requirement is assured) in the hope of connecting to same set of current / prospective consumers. This would make a certain portion of their investments redundant (from the point of view of consumers connected to that licensee) but consumers of that licensee would be required to repay that investment through tariff as licensee is operating under cost plus regime. On the other hand, if MERC decides to have a ceiling tariff and to allow both utilities to compete for consumers, then again several issues emerge. In this case in order to ensure that both licensees have a level playing field, it would be essential to ensure that both licensees have same area of supply, same consumer mix and same opportunities for sourcing power from different suppliers and separate accounts / financial reports for the same area of

supply. This implies that unless MSEB is unbundled and a separate company is created for the same area there would not be a 'level playing field'. Also if these conditions, amongst others, are not met, then there is a danger that, indirectly, the utility with larger area of supply may offer lower tariff in the competitive area, at the cost of consumers in non-competitive area (effectively consumers from non-competitive area would cross-subsidize consumers in the competitive area, a concept that E. Act 03 wants to abolish!). In this context it is essential to note that MERC has already withheld the principle of 'level playing field' in its earlier orders. Thus, even based on this one example of the importance of MERC regulations and its relevance to peoples' ability to make effective comments on the BSES application and license conditions, it is clear that any consideration of BSES's license application at this stage (i.e. before finalization of various key regulations by MERC), is premature, unwarranted and would deny public right to make meaningful comments / objections.

4. Consideration of BSES's application at this stage would also lead to piecemeal considerations of various issues emerging out of the new Act. MERC, being a regulatory authority has to look at the entire power sector in the state in a comprehensive manner and has to strive for effectively discharging the mandate cast by the E Act 03, which includes promotion of competition, protection of consumer interests and supply of electricity to all areas, as mentioned in the preamble of the Act. The tariff guidelines (specified in S 61 of the E. Act 03) also confirm that ERC's have to adopt a comprehensive approach so as to ensure overall economy, efficiency and protection of consumer's interest. Thus, in this case also unless, various key regulations are finalized first (through proper public process), MERC would not be able to justify how the proposed application would further the objectives of the Act or responsibilities of the commissions, mainly in terms of improving overall efficiency and economy and protection of consumer interest. Hence, from this perspective also consideration of the BSES application at this stage is premature and unwarranted.
5. Section 86.4 of the E. Act stipulates that in discharge of its functions the state commission would be guided by the National Electricity Policy, National Electricity Plan and Tariff Policy published under sub section 2 of section 3 of the E. Act 03. The concerned agencies are currently in the process of developing these policies / plans. These policies also have important bearing on the BSES Application and license conditions. For example, the tariff guidelines / principles. Further, sixth proviso to S. 14 of the Act also stipulates that the licensee has to comply with additional requirements as may be prescribed by the Central Government. Hence, unless the MERC ascertains that the applicant has complied with all such additional requirements, MERC cannot consider any application for second license. In this light MERC needs to ascertain if the central government has prescribed any such additional requirements, or the likely time-frame in which such requirements are likely to be prescribed, and should consider the present application only after such additional requirements are prescribed. If MERC considers this application before the central government prescribes these requirements and if at a later date it becomes evident that the applicant does not comply with such requirements then the license will have to be revoked, leading to enormous waste of resources (of all stakeholders). Hence, on this ground also it would be premature and unwarranted to consider the present application at this stage.
6. Section 14 of the Act stipulates that "The appropriate commission may, .. grant license to any person ... to distribute electricity as distribution licensee .. in any area as many be specified in the license." As per Section 2.62, 'specified' means specified by regulations. Thus, S. 14 read with S 2.62, clearly demonstrates that unless MERC specifies 'area of supply' through its license

regulations, MERC cannot consider any application for distribution license. Considering this petition without framing these regulations would restrict MERC's ability to objectively decide on the issues of 'area of supply' through a meaningful public process for finalization of regulations.

7. In para 3 above, we have already demonstrated that to ensure level playing field, and for fixing rational, fair tariff, it is imperative to have license areas of both (first and subsequent) licensees to be same. Sixth proviso to S. 14 of the Act also stipulates "the appropriate commission may grant a license to two or more persons for distribution of electricity through their own distribution system within **same area** ...". This proviso always refers to 'same area' and never mentions 'part of the area' or any similar word. Also the last sentence of this proviso, read "...shall be refused grant of license on the ground that there already exists a licensee in the **same area** for the same purpose". Here again the words 'same area' are used. Thus, as per this proviso, any application for the second license has to cover same area as of the first licensee, i.e in this case entire MSEB, and not any sub-part or area which is not same as of existing licensee i.e. MSEB. Since, the present license application is not for the same area as of MSEB, we urge the MERC not to consider this application.
8. The application as well as the public notice refers to the proposed area of supply as Pune (Urban) Zone and in the maps proposed area is shown as that of Pune and Pimpri-Chinchawad Municipal Corporation. But, currently, in case of MSEB, there is no such Pune Urban Zone. In April 03, the erstwhile Pune Urban Zone was converted to Pune Zone and now consists of entire Pune District. A press clipping on this is attached as annexure 1. Thus, there is a significant discrepancy in the application and hence the application cannot be considered in this form.
9. Without prejudice to our contentions and rights, we have following specific objections on the license conditions proposed by BSES Ltd.
 - a. Before proceeding further with the application, MERC should seek detailed investment and financing plan as well as business plan (estimated consumer mix, sources of power, power transmission facility etc.) from the applicant. Such information is utmost essential to evaluate the capability of any applicant for distribution license.
 - b. The draft license conditions proposed by the applicant are substantially loaded in favor of the licensee. For example, the licensee has proposed that no open access be provided on its distribution network for 25 years! (clause 4.3) This is clearly against the basic tenants of the E. Act 03.
 - c. Further the draft license proposes the roll out period to be three years and no obligation to supply in the initial roll out period. In the current high cross-subsidy regime and considering the load mix of the proposed licensed area, three years is a long period and offers substantial opportunity for cherry picking. To avoid this, the roll out should be in a phased manner; with division most closely resembling the total supply area being covered first and obligation to supply to all applicants should start within six months for each such division. Also the license should not provide for any extension of roll out period. If such an extension is required then the process for license amendment as stipulated in the E. Act 03 should be adopted.
 - d. Section 5 of the proposed license proposes a provision of for 'Deemed Approval' by the commission. This provision, which unnecessarily binds the commission, should be deleted. When consumers are required to have faith in the commission's decisions and procedures, there is no reason why the licensee should attempt to bind the commission. Depending on the

exigencies of the situation / matter the commission would take decisions at appropriate time and manner.

- e. Similarly, section 6.1 of the proposed license makes it binding on the commission to vest with the licensee all possible functions and rights that could be vested as per the Act. This again removes any discretionary authority of the commission. If the law allows any discretion, then such discretion should not be removed through license conditions.
- f. One proposed license condition (S. 6.2.1) attempts to authorize licensee to set off money due from the entities owned or controlled by the state government. This should not be a license condition, but if at all essential, should be part of a separate agreement between the concerned parties or should be a matter of separate petition before the MERC once the license is granted. Also, the licensee is free to adopt any standard legal remedy available in the Electricity Act 03 to recover dues.
- g. Further, we also urge the MERC to include stringent provisions in the distribution licensee to protect public / consumer interest. Some of the principles which should be reflected in the license are listed below:
 - i. There should be strict and effective mechanism to prevent licensee from benefiting unfairly from the 'licensed' operations. (i.e. through relationships with 'affiliate', 'associate' or 'subsidiary' companies or through engaging in non-licensed businesses).
 - ii. In very clear terms the licensee should be required to obey and effectively implement all directions, regulations and orders of the commission as well as all applicable laws.
 - iii. Prohibited activities / actions should be clearly defined and the licensee should be required not to undertake any such activities / actions without specific approval of the commission.
 - iv. Licensee should be specifically prohibited from showing undue preference or discrimination
 - v. Licensee should be expressly required to adhere to consumer service standards, to provide supply to all applicants, to strive for universal access, to minimize environmental impacts and to protect environment etc.
 - vi. Licensee should be required to ensure efficiency and economy in its operations and the onus of demonstrating such efficiency and economy and 'prudence' of investments / decision should be on the licensee.
 - vii. The licensee should be required to ensure that adequate, good quality, continuous power is available for all consumers and there should be provisions to ensure that the licensee's power procurement procedure ensures economy and efficiency and is fully transparent
 - viii. The licensee shall be required to extend all co-operation to Commission (and other authorities) for all matters including, any investigation, studies, measures to promote competition, efficiency and economy, protect and promote consumer and public interests etc.
 - ix. Licensee should have express binding to immediately communicate to the commission any force Majeure event, major accident, any event or cause affecting licensee's ability to comply with any directive, order, regulation, standard of performance of the commission etc.

10. The issue of second licenses for the areas chosen by the applicant would have significant impact on the overall power sector in the state. Apart from number of technical, methodological and regulatory approach issues, there will be severe social and economic implications. Essentially, these are 'policy' issues, vitally affecting the 'public interest' and going to the root of the electricity industry reorganization. Any decision on such issues should be taken with utmost care, adequate homework / analysis, preparatory actions and most importantly, through a meaningful participatory process. Unfortunately, in the present scenario, neither there is enough homework / preparatory work nor any opportunity for meaningful participatory process. Also, no significant harm would be done if the consideration of present or any similar application for second license is postponed till all relevant policies, plans and regulations are made and adequate preparatory actions are taken. On the other hand, if the present application is rushed without meeting such pre-conditions, then there is an eminent danger of making costly mistakes. These would be largely irreversible with long-term implications, and will be legally binding for the full term of the license i.e. next 25 years. In this scenario, it is absolutely essential to focus on other crucial challenges facing the state power sector and any decision on issues such as second license should be taken with adequate precaution and detailed considerations. Hence, we urge the commission not to consider the present application at this stage.

11. Prayers – In light of the above submission –

- a. We urge the commission to take due notice of our above-mentioned submission and to reject the present application by BSES Ltd.
- b. Without prejudice to our above contentions and rights, if the commission decides to process the application further, then we urge the commission
 - i. To seek (from the applicant) and make available to us the additional information as mentioned in the above submission
 - ii. Declare it's decision to process the application further and conduct technical validation session to seek the required information from the applicant, make this information along with MERC's draft license public and to conduct a proper public hearing on the same.
- c. BSES has made similar applications for distribution license in other areas of Maharashtra also. Considering the similar nature of issues in those applications also, we request the MERC to consider this submission / objections in those proceedings also.
- d. We urge the MERC to give us an opportunity for personal hearing in this matter before MERC takes any further decision in this regard. We wish to make additional submission at the time of personal hearing.

--- X ---