

18. The Respondent Commission invited our attention to the difference in the provisions made under the first, second and fifth provisos with the third and fourth provisos. It was submitted that the Deemed Licensees under the third and fourth provisos need not have to obtain a licence whereas, the first, second and fifth provisos are silent and therefore, the Deemed Licensees (under first, second and fifth provisos) have to obtain the Licence under the present Act i.e. the Act 2003. We are inclined to accept the contention of the Respondent Commission.

19. Considering that the Appellant is covered by the first proviso, it has to obtain a Licence under the provisions of the Act 2003, by virtue of it, the term of the Licence shall be governed by the Act 2003.

20. On 31st December 2004, the State Commission notified the UPERC (General Conditions of Distribution License) Regulations, 2004 ("Distribution License Regulations") in exercise of the powers conferred by section 16 read with section 181 of the Act 2003, which is applicable to all the distribution licensees in the State of Uttar Pradesh and on 12th May 2014, in exercise of the powers conferred under Section 61 read with Section 181 of the 2003 Act, the State Commission notified the Uttar Pradesh Electricity Regulatory Commission (Multi Year Distribution Tariff) Regulations, 2014 (the "MYT Regulations 2014") governing the approval of the Revenue Requirements and determination of tariff.

21. It is noted from the above that the said Distribution License Regulations have been notified after a lapse of more than one year, therefore, as per section 14 of the Act 2003, the Appellant shall be the deemed licensee under the Act 2003 and the provisions of the repealed laws i.e. the Act 1910 shall continue for a period of one year i.e. up to 09.06.2004 and thereafter the

provisions of the Act 2003 shall be applicable including the term of the Licence.

22. The State Commission vide its letter dated 24th September 2019 directed the Appellant to file its Business Plan for FY 2020-21 to FY 2024-25 on or before 15th October 2019 as against 30th November 2019 proposed in the Draft MYT Regulations 2020 (under finalization). Accordingly, on 6th November 2019, the Appellant filed its Business Plan Petition No. 1526 of 2019 (the “Business Plan Petition”) before the State Commission for approval of its Business Plan for MYT Control Period FY 2020-21 to FY 2024-25 against which the Impugned Order has been passed.

23. Separately, the Appellant has challenged the MYT Regulations 2019 by way of a Writ Petition being W.P. (MISB) No. 24992 of 2020 before the Hon’ble High Court of Judicature at Allahabad, Lucknow Bench for being ultra vires to the provisions of the 2003 Act, which is pending decision.

24. On 26th November 2020, the State Commission passed the Impugned Order in the Business Plan Petition filed by the Appellant, the Appellant, by way of the present Appeal, challenged the Impugned Order on 16.01.2021 on account of declaring the term of the Licence up to 30.08.2029 and consequentially deciding on the Business Plan submitted by the Appellant for the control period FY 2020-21 to FY 2024-25, directing that:

“NPCL has submitted Business Plan for the second control period i.e. from FY 2020-21 to FY 2024-25 for review and approval of the Commission. The submission of NPCL includes Category / Sub-category wise number of consumers, connected load, Load factor, sales projections, Power Procurement Plan (Renewable Energy and

*Non- Renewable Energy) and Forecasting, Renewable Purchase Obligation (RPO) Planning and Forecasting, Distribution Loss trajectory, Capital Investment Plan, Financing Plan and Physical targets, Equity, Grants, etc. **It is noted that the NPCL was granted a 30-year supply License on August 31, 1993 i.e. upto August 30, 2023 and the License of NPCL will expire within the control period unless renewed as per law.***

Considering the importance of all these elements in the business of distribution licensee and to ensure business continuity the business plan is approved subject to the following:

A.Business Plan up to the period of License of NPCL i.e. August 30, 2023 is approved in respect to billing determinants, loss trajectory and above-mentioned directions of the Commission regarding various other matters.

B.Business plan for period beyond the license term i.e. August 30, 2023 is taken on record for business continuity purposes only and will be subject to renewal/ grant of license as per law.

C.The Order shall not be construed as approval of the Capital Investment Plan as the same shall be done in accordance with the directions given under the sub-head “Capital Expenditure Plan”.

With above observations, the Commission has approved the Billing Determinants for the Licensee as per Table No. 4 to 6 for the Control Period FY 2020 - 21 to 2024 - 25. Further, the

Distribution Loss Trajectory for the Control Period is approved as per Table No. 8.

Besides re-iterating the observations made on this Business Plan, the Commission also directs the licensee to fulfil its following obligations:

Metering

100% metering is a necessary condition for an efficient distribution network and financial viability of the distribution companies. As per the submission made by the Petitioner, the metering of all the consumers (except LMV-5) shall be completed by end of FY 2020-21. The Petitioner must ensure metering of consumers in LMV-5 category as well because 100% metering of consumers is essential.

The Petitioner is directed to ensure 100% feeder metering and DT metering within next one year.

The Commission directs that only either pre-paid meter or smart meters be installed for all new connections or replacement of faulty meters.

Power Purchase

In view of the expiration of license period in August 2023, the licensee is directed not to contract any long term or medium term PPA extending beyond the license period. However, no approval will be required for purchasing power through exchange to fulfil contingent / short term power requirements. For all other power purchases, prior approval of the Commission is necessary. The Licensee is also directed to strictly follow the Central Government

Guidelines for Procurement of power for short term (i.e. for a period more than one day to one year) through tariff-based bidding process using National e-bidding portal.”

Our Analysis & Observations: -

25. As already observed that the main issue under the dispute is the term of the Licence granted to the Appellant inter alia perpetuity of the Licence as claimed by the Appellant versus the date of expiry i.e. 30.08.2023 as decided by the State Commission.

26. The Respondent Commission vehemently opposed the contention and claim of the Appellant that the Licence granted is perpetual or otherwise purchased or revoked by submitting that the Licence was granted under Section 3(1) of the Act 1910, and as per section 6(b) of the Act 1910, the Licence can be granted for the maximum period of 30 years at one go and after the expiry of the said period, if not extended, the State Electricity Board /State Government/Local authority shall have the option of purchasing the undertaking in accordance with Sections 6, 7, and 7A of the Act 1910.

27. We decline to accept the contention of the Respondent Commission as section 3 or section 6 of the Act 1910 or any other provision therein do not have any provision of expiry or extension, the only provision which exists is purchase or revocation of the Licence. However, at this stage, the submission is irrelevant as the Act 1910 has already been repealed by the Act 2003, and any provision which is inconsistent with the provisions of the Act 2003 stands repealed.

28. Further, the option of purchase can be exercised under section 6 of the Act 1910, which has since been repealed, by the State Government/ State Electricity Board as per the repealed laws is one year prior to completion of 30 years from the date of issue i.e. 30.08.1993, therefore, the same is valid only if such a provision stands under the present law.

29. Undisputedly, the Appellant is deemed distribution licensee under the first proviso to section 14 of the Act 2003, for the sake of brevity it is quoted as under:

*“PROVIDED that any person engaged in the business of transmission or supply of electricity under the provisions of the repealed laws or any Act specified in the Schedule on or before the appointed date shall be deemed to be a licensee under this Act for such period as may be stipulated in the licence, clearance or approval granted to him under the repealed laws or such Act specified in the Schedule, **and the provisions of the repealed laws or such Act specified in the Schedule in respect of such licence shall apply for a period of one year from the date of commencement of this Act or such earlier period as may be specified, at the request of the licensee, by the Appropriate Commission and thereafter the provisions of this Act shall apply to such business.**”*

30. From the simple reading of the proviso, the Appellant, engaged in the business of supply of electricity under the Act 1910, is a deemed licensee under the Act 2003 and the provisions of its Licence as prescribed under the repealed law shall remain in place for a period of one year or for such period as decided by the State Commission, however, after such period, the

Appellant has to obtain the Licence under the provisions of the Act 2003 and the provisions contained therein shall come into force. The Appellant, therefore, is a Licensee under the Act 2003 and the term period as prescribed under the Act 2003 shall be applicable to the Licence.

31. In the present case, as already observed, the provisions of the Act 1910 shall continue for one year from the date of enactment of the Act 2003 and thereafter the provisions of the Act 2003 shall prevail. Therefore, from the date, the terms and conditions of the distribution licence as notified by the State Commission, such conditions consistent with the Act 2003 shall prevail.

32. The Respondent Commission informed that it has granted distribution licence for 25 years under the provisions of the Act 2003 to various other distribution licensees operating in the State, engaged in the business of supply of electricity, prior to the enactment of the Act 2003. Sub-section (8) of Section 15 of the Act 2003 provides that ***“A licence shall continue to be in force for a period of twenty-five years unless such licence is revoked.”***

33. We are inclined to accept the contention of the State Commission that any licence including the deemed licence shall continue to be in force for 25 years as per section 15 of the Act 2003 or otherwise it is revoked under the law, however, it shall come into force after the lapse of one year from the date of enactment of the Act 2003 or from the date the deemed status is recognized by the State Commission under the terms and condition for the distribution licensees, whichever is earlier.

34. Further, we find the contention of the Respondent Commission unjust and unreasonable that it has time and again made observations that the period of Licence is 30 years from the date of grant of it i.e. 30.08.1993, and

is denied. Once the Act 2003 has been promulgated, the provisions contained therein shall be in force, any contrary observation by the State Commission is totally unacceptable in the eyes of law.

35. During the pendency of the captioned Appeal, the Respondent Commission issued advertisement dated 08.06.2022 inviting 'expression of interest' from reputed consulting firms with experience in license application for assisting the Commission in the process of grant of distribution license for the area served by NPCL. Being aggrieved, the Appellant filed IA no 1025 of 2022, which was taken up for urgent hearing (on 08.07.2022 and 14.07.2022) and passed the interim order as quoted under:

“The matter has come up before us for early hearing in the context of IA No.1025 of 2022. It appears in the wake of the decision impugned in the main appeal, the respondent commission has published a public notice on 08.06.2022 inviting expression of interest, the purpose being essentially to select another entity, to replace the appellant as the licensee. We find the assumption in the impugned order that the license of the appellant would expire on 30.08.2023 to be open to debate. In these circumstances, we stay any steps to be taken pursuant to the impugned decision including action in the nature of invitation for expression of interest held out by public notice issued on 08.06.2022. The Commission shall issue a fresh public notice informing the public at large about this ad interim injunction.”

36. Considering the urgency of the subject matter, the Appeal was heard on 28.07.2022 and 29.07.2022 on the issue of term period of the Licence granted to the Appellant.

37. The submission of the Appellant that the State Commission has not specified any term of the Licence, it may continue as per the provision of the Act 1910, is not correct as the term of Licence including for deemed licensees shall be as per section 15(8) of the Act 2003. Even for the sake of argument, it is agreed that the provision contained under section 6 of the Act 1910 shall remain in force, the option of purchase of the Licensee's business shall occur only after the term of expiry of 30 years i.e. on 30.08.2023, however, considering that the provision is inconsistent with the Act 2003, the same cannot be exercised now and also the provision of continuity shall become void.

38. The Respondent Commission, as already pointed out, has opposed the submission of the Appellant on perpetuity citing various provisions of the Act 2003 (reference section 14, section 15, section 16 and section 185) and various judgments rendered by Hon'ble Supreme Court of India. As already indicated in the preceding paragraphs, the Licence granted to the Appellant shall be deemed to be granted under the provisions of the Act 2003 after its enactment. As per section 15(8) read with first proviso to section 14 of the Act 2003, the term of Licence shall be 25 years after expiry of one year from the date of enactment of the Act 2003 i.e. 10th June, 2003 as the State Commission has not specified any date earlier to completion of one year for which the existing provision as specified in the Licence granted under the Act 1910 shall continue. Therefore, the argument of perpetuity is rejected.

39. We are of the view that after elapse of one year post enforcement of Act 2003, the appellant was required to apply for a licence under Section 15. This requirement seems to have escaped the notice of all concerned perhaps because of the first proviso to Section 14 not being properly construed. It is, however, too late in the day – at this distance in time – for us to insist on strict compliance in such regard by the appellant. We have rejected the claim of perpetual licence because the same would be inconsistent with the provisions of Act 2003, in particular Section 15(8) which envisages the term of the licence granted under this law to be for a period of 25 years which can be curtailed by revocation, there being no provision for it being exceeded. Since the appellant has been allowed to continue as the licensee for the area under its control, even after the elapse of one year from the date of commencement of Act 2003, without the arrangement being formalized, more by sufferance on account of default than by a conscious decision, we would treat the remaining term of the licence thus exercised by the appellant as one subject to the provisions of Act 2003.

40. Considering issues other than term of the Licence as prayed under the petition no. 1526 of 2019, before the State Commission, are restricted to or rejected on the ground that the Licence granted to the Appellant shall expire on 31.08.2023 i.e. before the term of the control period, need revisit by the State Commission appropriately for the control period FY 2020-21 to FY 2024-25, especially, the issue of signing up of power supply contracts/PPAs for Long Term and Medium Term for purchase of power beyond August 2022, as it has a direct bearing on the consumers of the licensed area of Appellant inter alia the economics of cost of power purchase.

41. Keeping the above in view, we opine that the Clause 10 of the Licence regarding term of the Licence or perpetuity of the Licence is rendered otiose

as the 1910 Act has been repealed, differently, Clause 10 of the Licence cannot be read as term of the Licence but merely an “option to purchase”, the option which cannot be exercised at this stage as observed in the preceding paragraphs.

42. Therefore, the term of the Licence shall be governed by the provisions contained under the Act 2003 from the date of coming in to effect of the Act 2003, also, with the repeal of the 1910 Act, the option to purchase the assets of the Appellant by State Board/Utility/State Government or by any designated agency appointed under section 6 of the Act 1910 stand repealed.

43. Accordingly, the term/tenure of the Appellant has to be read in context of the provisions of the first Proviso to Section 14 read with subsection (8) of section 15 i.e. 25 years in terms of Section 15(8) of the Act from the lapse of one year from the date of coming into effect the Act 2003 i.e. 10th June 2004. Thus, the Appellant licensee’s term/tenure is held to be valid till 9th June 2029.

ORDER

For the foregoing reasons as stated above, the captioned Appeal i.e. Appeal No.72 of 2021 has merit and is allowed. The Impugned Order dated 26.11.2020 passed by the Uttar Pradesh Electricity Regulatory Commission (the State Commission) in Petition no. 1526 of 2019 is set aside. We hold that the Licence of the Appellant shall continue to be valid and subsisting up to 09.06.2029 and direct for all consequential action to be taken by the concerned.

We remit the matter to the State Commission for a fresh decision on the issues other than the term of Licence as raised before the State Commission through Petition no. 1526 of 2019, considering the term of the Licence up to 09.06.2029.

Needless to say, the State Commission shall ensure that the order it passes pursuant to our directions is scrupulously complied with expeditiously and in a time-bound manner, the issue having persisted for long, we would expect the State Commission to pass the fresh order in terms of above directions expeditiously, not later than three months from the date of this judgment.

The captioned Appeal is disposed of accordingly, including all pending IAs, if any.

Pronounced in the Open Court on this 23rd day of August, 2022.

(Sandesh Kumar Sharma)
Technical Member

(Justice R.K. Gauba)
Officiating Chairperson

REPORTABLE/NON-REPORTABLE

pr/mkj