

**.THE UTTAR PRADESH ELECTRICITY REGULATORY COMMISSION
LUCKNOW**

Petition No. 595/2009

Petitioner/Applicant:

Paschimanchal Vidyut Vitran Nigam Limited, Urja Bhawan, Victoria Park,
Meerut (U.P.)

Objector and Other Appropriate Authorities / Bodies:

1. M/s Noida Power Company Ltd. Commercial Complex, H-Block, Sector Alpha –II, Greater Noida – 20103089
2. Secretary (Energy), Government of Uttar Pradesh, Bapu Bhawan, Lucknow
3. Chief Executive Officer, Greater Noida Industrial Development Authority - 169, Chitwan Estate, Sector Gama II, Greater Noida City, District Gautam Budh Nagar.

IN THE MATTER OF:

Application for Grant of Distribution License for Greater Noida Area by PVVNL

ORDER

1. Paschimanchal Vidyut Vitran Nigam Limited (hereinafter referred to as PVVNL) had filed an application before the Commission on 21st January, 2009 for grant of distribution license for supplying electricity in Greater

Noida area. As M/s Noida Power Company Limited (hereinafter referred to as NPCL), the existing licensee in the Greater Noida area, has a supply license since 1993 for supplying electricity in Greater Noida for thirty (30) years, the present application is in the nature of an application for grant of second distribution license in Greater Noida area. Although the application was duly submitted along with the specified fee on the form specified in the UPERC (General Conditions for Distribution License) Regulations 2004, it had certain deficiencies in terms of Distribution of Electricity License (Additional Requirement of Capital Adequacy, Creditworthiness and Code of Conduct) Rules 2005 as notified by the Central Government under sixth proviso of Section 14 of the Electricity Act 2003 (hereinafter referred to as Act,03) and the same were communicated to the applicant.

2. The Distribution of Electricity License (Additional Requirement of Capital Adequacy, Creditworthiness and Code of Conduct) Rules 2005 (hereinafter referred to as Rules 2005) provide that the requirement of capital adequacy and creditworthiness would be decided keeping in view the size of the area of supply and service obligation in terms of Section 43 of Act, 03. It further provides that the applicant for grant of license shall be required to satisfy the Commission on a norm of 30% equity on the cost of investment that the applicant, including the promoters, in case the applicant is a company, would be in a position to make available resources for such equity of the project on the basis of the net worth and generation of resources of its business including that of its promoters in the preceding three years after excluding his other committed investments.
3. Further, the applicant was requested to submit its business plan and roll out plan indicating load forecast and its plans for development of network

so as to satisfy the Commission that the applicant is in a position to shoulder the responsibility of universal service obligation.

4. In response to the above the applicant submitted that the total capital expenditure estimated for the purpose is Rs. 55.75 Crs. and also that it envisages no difficulty in extending services to Greater Noida area from its existing resource base in Noida. As regard its negative net worth and equity commitment, the applicant has submitted that it is a government supported company and hence can obtain funds from State Government for capital works. PVVNL, the applicant, has also submitted that it expects a revenue of 68 paise per unit by supplying power to Greater Noida area, and that the additional revenue so collected would be sufficient to recover the proposed capital expenditure of Rs. 55.75 crore in a period of two years.

5. As PVVNL on its own was not in a position to fulfill the requirements of creditworthiness and capital adequacy as stipulated in the Rules 2005, it was asked to submit supporting documents demonstrating commitment from the State Government (promoter of the applicant company) for providing the necessary support in terms of equity infusion. PVVNL was also required to submit a detailed roll out plan. PVVNL in its response reiterated that on the basis of average revenue realization, the estimated capital expenditure of Rs. 55.75 Cr. would be recovered in a period of two years. PVVNL also submitted that the required infrastructure of 132 kV & 33 kV voltage level already exists in the vicinity of Greater Noida and therefore, if any consumer desires to take electricity supply on 11 kV or LT voltage level the same may be provided by constructing electrical network with the help of Greater Noida Development Authority. It has also been submitted by the applicant that the proposed capital works would be completed within one year. As regards negative net worth the

applicant has reiterated that since it is a 100% subsidiary of UP Power Corporation Limited (UPPCL), it faces no problems in raising institutional finance from various financial institutions despite its negative net worth. As such, finances for the company are not a problem. Meanwhile, the Commission was verbally assured by the applicant that the Government is in the process of issuing a letter to the effect of its commitment regarding equity infusion for the purposes of development of the network.

6. Subsequent to its submissions, the petitioner was directed to publish a notice of his application in accordance with section 15(2) of Act, 03 and the requirements as laid in Regulation 93 of Conduct of Business Regulation 2004. The notice to above effect was published by the petitioner in 'The Times of India' and 'Dainik Jagran' dated 21.4.2009. The petitioner also sent a copy of the above application for grant of license along with other information to the Central Government, Government of UP, UP Power Transmission Corporation Limited (in its capacity of State Transmission Utility), UP Power Corporation Limited, Greater Noida Industrial Development Authority and Noida Power Company Limited (NPCL).

7. In response to the aforesaid notice, NPCL was the sole objector to the application of PVVNL for the grant of license. It is noteworthy that barring NPCL, no other stakeholder including the general public objected to the petition of PVVNL. In response to objections filed by NPCL, PVVNL submitted its reply dated 17th June, 2009. Subsequent to it, a rejoinder was filed by NPCL on 7th August, 2009 and thereafter, a sur rejoinder was submitted by PVVNL on 22nd August, 2009. A hearing in the matter was held on 10th August, 2009 and thereafter, written submissions were also filed by the rival parties. During the course of hearing, the petitioner

(PVVNL) was represented by their counsel Mr Sitesh Mukerjee and the objector (NPCL) was represented by their counsel Sri.M. Ramchandran.

Main Arguments of NPCL:

8. It is the case of NPCL that PVVNL does not fulfill the conditions specified under the Act, 03, the rules and regulations made there under and specially the Rules, 2005 for grant of license. It has been submitted that PVVNL does not fulfill any of the conditions provided for in Rules, 2005, which is a mandatory provision for grant of second licence, as it does not have the requisite capital adequacy, creditworthiness and positive track record to apply for the grant of distribution licence and it also does not satisfy the requirement of minimum area as specified in Rules, 2005.

9. It is the contention of NPCL that since PVVNL has not submitted the complete information regarding its financial status and creditworthiness to the Commission, the petition deserves to be dismissed in limine. It has further been commented by NPCL that PVVNL has not filed audited balance sheet before the Registrar of Companies since FY-2006-07 and that the un-audited balance sheet submitted by PVVNL before the Commission, for FY 2007-08 indicates a total loss of Rs.2838.30 Cr. as against the shareholders fund of Rs.1815.97 Cr. NPCL has accordingly concluded that PVVNL has a negative net worth of Rs.1022.33 Cr. In addition to this, NPCL has also submitted performance related data of PVVNL which speaks negatively about the performance of PVVNL. On the basis of above, it has been concluded by NPCL that PVVNL is incurring huge losses and is virtually a sick company funded by public money. Further, while commenting that there is no firm commitment by the Government of UP to support PVVNL, NPCL has challenged the logic of PVVNL that it being a Government supported company capital

adequacy should not be an issue. In support NPCL has further quoted the relevant contents of the order of Hon'ble Appellate Tribunal of Electricity, in appeal no.114 of 2007 :

- *If DMRC is seeking a second license in the area of supply of a distribution licensee, it has to fulfill the conditions of the Rules. Admittedly, it is unable to fulfill the condition of minimum area of supply and hence not entitled to a license.*
- *It is contented on behalf of the appellant that the DMRC is a company of the Central Government and that of the National Territory of Delhi and financially supported by them and that this is sufficient to fulfill the requirement of capital adequacy, creditworthiness provided by the notification. We are unable to agree to this contention of the learned counsel for the appellant. DMRC is a Company just as any other powerful or rich company in the country. No exception can be carved out for DMRC because the company is entirely owned by the Central Government and the Government of National Capital Territory of Delhi. Neither the DMRC Act 2002 nor the EA, 03 makes any exception for companies held by the Government.”*

10. With respect to minimum area of operation it has been submitted that Greater Noida area does not fall within the definition of Municipal Council or a Municipal Corporation or a revenue district, which is the basic requirement for grant of second distribution license as per Rules 2005, notified by the Central Government. While rejecting the contention of PVVNL that if its application for grant of second distribution licence does not fulfil the requirement of minimum area of supply, the licence of NPCL should also be revoked on the same ground, it has been submitted by

NPCL that it is a complete misinterpretation of rules and the National Electricity Policy. The rules of 2005 framed under the Act, 03 stipulates the condition of minimum area of supply for grant of second distribution licence and is not applicable to licensees existing on the appointed date of the Act, 03. It has been further submitted that complying with the requirement of minimum area of supply is a mandatory requirement under the Rules of 2005 and not meeting the said requirement will necessarily have to result in rejection of the application for grant of second distribution licence. In this context, NPCL has also quoted judgment dated 7th May, 2008 passed by Hon'ble Appellate Tribunal of Electricity in Appeal no.27/06,179/05,188/05 & 16/06 in which it has been held that the requirement of minimum area of supply has to be adhered to.

11. NPCL has argued at length to justify why the Rules 2005 are applicable to a person seeking license after the framing of these Rules and not to NPCL. It is the contention of NPCL, that as far as it is concerned, it was granted license in 1993 for a period of 30 years thereby rendering it to be treated as a deemed licensee under the Act, 03 till 30 years from the date of grant of license. Hence it is not required to comply with the conditions of minimum area of supply as mentioned in Rules, 2005. However, after coming into force of Act, 03 and above mentioned Rules 2005, it is mandatory for an applicant to comply with all the conditions given therein for grant of second licence.

12. On the basis of performance parameters, NPCL has commented that PVVNL's track record and performance in distributing electricity in Western UP has been dismal and much below the tolerable level. While asserting this claim, NPCL has rejected the contention of PVVNL that the supply situation in NPCL area is worse as has been shown by PVVNL

through a plethora of newspaper cuttings. It has been submitted by NPCL that the fact is that there has been no complaint before the Commission in regard to performance of NPCL. It is the submission of NPCL that in the matter of grant of second distribution licence to PVVNL, what is material is the performance of PVVNL and not that of NPCL. NPCL has contented that PVVNL, in order to digress from the main issue, is trying to raise irrelevant factors which are not germane to the present proceedings. It is the contention of NPCL that if newspaper reports are to be given any credence then reports suggesting the poor condition of supply in the PVVNL area are more relevant in context to the present petition. Accordingly, NPCL has appended several paper cuttings speaking poorly about PVVNL's performance.

13. It is an argument of NPCL that the application filed by PVVNL (an instrumentality of the Government of Uttar Pradesh) asking for licence in the NPCL Licensed area is contrary to the legitimate expectation of NPCL (which is a joint venture company of the Greater Noida Authority and CESC Limited) as it was granted license after due consultations with UP State Electricity Board (UPSEB) by carving out the said area from UPSEB's area of supply. Accordingly PVVNL is estopped from applying for license for the same area.

14. NPCL has further questioned the licensee status of PVVNL. It has been submitted by NPCL that 5th proviso of section 14 of Act, 03, under which PVVNL is claiming its deemed licensee status, refers to the Govt. Company or the company referred to in section 131(2) of Act, 03 i.e. U.P Power Corporation Ltd, formed on reorganisation of erstwhile U.P State Electricity Board and not Paschimanchal Vidyut Vitran Nigam Ltd. It is submitted that PVVNL is only supplying electricity to western UP area by virtue of 7th proviso of section 14 of Act, 03, which permits a distribution

licensee to undertake distribution of electricity for a specified area in its area of supply through another person.

15. It is also the case of NPCL that PVVNL is motivated to file the present petition not for any bonafide purpose but with the colourable and malafide intention of causing prejudice to NPCL in other pending litigations and proceedings arising out of illegal and wrongful acts of PVVNL and/or its holding company UPPCL. Further, NPCL has also emphasized that PVVNL has not abided by the requirement of filing a roll out plan for the grant of second distribution license and has also not indicated how it is going to meet the universal service obligation.

Replies of PVVNL:

16. PVVNL has vehemently opposed various objections raised by NPCL, the sole objector to the petition. While rebutting the objection of capital adequacy and creditworthiness, as raised by NPCL, the petitioner has relied heavily on the support of GoUP, as is obvious from following submissions:

“.....the above rule will show that the petitioner is required to satisfy the Hon’ble Commission that it has along with the promoters, the ability to provide equity participation to the extent of 30% of the capital investments as determined by the Hon’ble Commission to be necessary for the distribution network. It is necessary to point out that PVVNL is a 100% subsidiary of UPPCL a Government of UP company which in turn is held 100% by the Government of UP. It is submitted that the Government of UP vide letter dt.22.4.09 has already consented that the funds required for capital investment in the Greater Noida will be released by Government of UP in case of

such development work undertaken by the petitioner. In view of the above letter of commitment from the State Government the requirement of capital adequacy and credit worthiness for investment in the distribution network stands fulfilled. The objector can not question the capital adequacy and credit worthiness of the Government of UP which has accorded its approval to finance the petitioner.”

With reference to the order of Hon'ble Appellate Tribunal of Electricity in appeal no. 114 of 2007 in the matter of DMRC Vs Delhi Transco, it has been submitted by PVVNL that capital adequacy and creditworthiness of DMRC for grant of second licence was not an issue before the Hon'ble Appellate Tribunal. The submissions made by DMRC regarding capital adequacy and observations by the Tribunal were not relevant to the issues raised in the present appeal and therefore do not constitute ratio of the judgement. Justifying further its creditworthiness, PVVNL has asserted that it is getting regular financial assistance from the financial institutions for other projects and that there has been no default in repayment of loans by it in any case.

17. Regarding requirement of minimum area for grant of distribution license it has been submitted by PVVNL that the Act does not restrict grant of second license below minimum area as indicated under the National Electricity Policy. The requirement of minimum area of operation has been specified under the National Electricity Policy to ensure competitiveness and viability of a second licensee, while carrying on distribution business in any specified areas. Thus, the petitioner who is supplying electricity in eleven districts in the State including parts of Gautam Budh Nagar district fulfils the requirement of minimum area of operation. It is also the case of PVVNL that if NPCL's objection regarding

the fulfilment of minimum area requirement for grant of second licence is accepted, no second licence can ever be issued for the area of Greater Noida. It has been stressed that the National Electricity Policy is in the nature of guidelines and can not override the express provisions of the Act. In this regard, reference is placed on the observation made by the Hon'ble Appellate Tribunal in case of Power Trading Corporation Vs Central Electricity Regulatory Commission & others in Appeal No. 228 & 230 of 2006, while explaining the nature and scope of National Tariff Policy and National Electricity Policy :

“The policy etc. are guidelines indicated as an object to be achieved in the power sector and being a policy or guideline, it cannot run counter to the legislative mandate nor such a course is permissible to a delegate to over turn the legislative enactment much less a whole.”

It is also the contention of PVVNL that if Greater Noida area does not qualify to being the minimum area as prescribed under clause 5.4.7 of the National Electricity Policy, license of the objector itself is liable to be revoked in view of the express provision of section 185(2)(a) of Act,03.

18. With respect to its performance, it is submitted by PVVNL that Meerut and other places coming under its existing distribution area have different consumer profiles as compared to Greater Noida area. The petitioner has to bear high system losses at places where consumer densities are low. As the petitioner is a government company it is duty bound to ensure network development in backward rural areas, having sparse population, larger number of agricultural connections etc, these are financially unviable areas, where tariffs are less than the cost of supply of electricity. On the other hand Greater Noida area has a large

number of industrial consumers and not many rural areas. The objector because of these reasons is getting benefitted by the extra revenue. The petitioner, therefore, denies that their losses are due to inefficient management and functioning of the company. The petitioner, in fact, goes on to add that if a comparison is to be made then the same should be done between the performance of the petitioner in Noida area vis-à-vis the performance of NPCL in the Greater Noida area where the two have similar consumer and load profiles. It has been further submitted that the loss level in Noida area is less than 8% which is better in terms of performance as compared to that of the objector in the Greater Noida area. The petitioner has further stressed that as it is already in the business of distribution of electricity in the entire western region of Uttar Pradesh and is successfully distributing electricity in eleven districts of western UP since 2003, there is no occasion for the objector to question the capability and performance of the petitioner in operating the distribution license in Greater Noida area. The petitioner also submits that in a competitive business atmosphere, the viability and the existence of a licensee will be ultimately determined on the basis of their efficiency in operation.

19. While justifying its performance, the petitioner has decried the performance of NPCL stating that the news reports, as appended by it, clearly point out that there is regular law and order problem in Greater Noida because of poor supply of electricity in the NPCL licensed area. To corroborate its claim, the petitioner has submitted a report of District Magistrate, Gautam Budh Nagar dated 1st August 2008, which indicates that the objector had failed to supply electricity to nearly 128 villages in its licensed area. Stressing further it has been submitted that the objector had failed so miserably to cater to the rural areas that the Government of Uttar Pradesh vide minutes of meeting dated 11th June, 2008 had to take

a decision to hand over to the petitioner the responsibility to supply electricity certain rural areas of NPCL. With regards to the objection of NPCL that the petitioner's inability to carry out distribution business is proved by the fact that it has invited tenders for appointment of distribution franchises for its distribution business, it has been submitted by PVVNL that Act, 03 provides for appointment of distribution franchise under 7th proviso of section 14. Therefore, appointment of franchises by the petitioner can not be made a ground for denying licence to the petitioner.

20. As far as objection of NPCL regarding estoppel against its legitimate expectations is concerned, it has been submitted by PVVNL that there can not be any legitimate expectation against the provisions of the statute. Under the Act, 03 multiple licences can be issued in the same area of supply for distribution of electricity through independent distribution systems. Whereas, the objector is trying to make out a case where no second licence can be granted in the Greater Noida area because the Government has consented to give a license to the objector. PVVNL has further contended that the objector itself has failed to fulfil the basic obligations of a distribution licensee as well as the terms under which the license was granted to the objector in the year 1993. As per the terms the objector was required to set up a generating station for the consumers of the Greater Noida area, which it has failed to do so even though sixteen years have elapsed since the grant of license to them.

PVVNL has further rejected the contention of NPCL that it does not have a licensee status. It has been submitted by PVVNL that:

“pursuant to the unbundling of the UPSEB, the UPPCL was granted Distribution Retail & Bulk Supply Licence for a period of 30 years in

2000 under the UP Reforms Act,1999. It is submitted that in pursuance of section 131 (4) the Act, 03 and sub-section 4(23) of the Reforms Act the UP Power Sector Reforms (Transfer of Distribution Undertakings) scheme, 2003 (“Scheme”) was effected on 12.8.03 wherein UPPCL i.e. one of the aforesaid distribution licensees was broken in to four distribution companies viz. PVVNL, MVVNL, PuVVNL & DVVNL, which have a deemed licensee status in accordance with 5th proviso of section 14 of the Act, 03. However, in compliance of the scheme, the petitioner has applied before the Hon;ble Commission for grant of licence to undertake the business of distribution and retail supply of electricity in the area of operation.

21. On the issue of roll out plan PVVNL has submitted that the estimated capital expenditure of Rs.55.75 Cr. has been indicated as initial expenditure required towards distribution network roll out in Greater Noida area. The distribution network shall be expanded gradually by the petitioner as required to cover the entire area of Greater Noida. It has been submitted that once petitioner’s network becomes operational in a particular ward as per the roll out plan, all categories of consumers in that ward will be able to take benefit of the petitioner’s network without any discrimination. It has also been mentioned that the entire distribution network can not be created in first instance. The same has been set up by the objector over a period of sixteen years. The petitioner has also mentioned that the initial investment proposed by it is only indicative and may differ while setting up the distribution network. It is also the submission of PVVNL that necessary infrastructure for supply of power to the consumers will be developed by the Development Authority in the Greater Noida and handed over to the petitioner.

22. As regard universal service obligation it has been contented by the petitioner that it is properly fulfilling its obligations to supply power to all the consumers and also incurring expenditure towards setting up a distribution network in all areas. It has also been pointed out by PVVNL that on the contrary, the objector is not fulfilling the universal service obligation as it is not providing enough supply to rural areas.
23. While stressing further its case of grant of licence, PVVNL has averred that multiple license in the Act, 03 was put in to promote competition in distribution sector and that the operations of the petitioner as the second licensee in Greater Noida area would not only allow the consumers to choose between the services of objector and the petitioner, but would also bring about a competitive edge amongst both the licensees in providing the best services at economic rates. The Central Government in National Electricity Policy has specifically identified the benefits the consumers are likely to get because of competition in the distribution sector. It is submitted that the Act, 03 provides for multiple licensees in an area to promote public interest at large.
24. Pressing further its case for grant of licence, PVVNL has submitted that GNIDA, which holds 27% stake in the objector, after analyzing the present power situation in Greater Noida area (which is witnessing rapid increase in demand of electricity), has itself recommended the participation of the petitioner for distribution of electricity in the area. It is with this in view that GNIDA has accorded its concurrence in favor of the petitioner and has forwarded its concurrence in writing to the Hon'ble Commission to allow the petitioner's application for distribution license in Greater Noida area.

25. Further, it is the contention of PVVNL that the objections filed by NPCL have to be seen in light of the fact that the objections are being filed by a business rival and hence the same can not be considered by the Hon'ble Commission and are liable to be rejected outright. It has also been stressed by PVVNL that as no other stakeholder, barring NPCL, has preferred to file an objection; it shows the support of general public in favor of grant of distribution license to the petitioner.

Public hearing:

26. Subsequent to above exchange of affidavits, the Commission conducted a public hearing in the matter on 1st Oct 2009 in the District Magistrate Office Auditorium, Greater Noida. The notice for the public hearing was published by the Commission in two newspapers. In fact, going beyond the statutory requirement the Commission once again considered all the suggestions and comments received from the public at large, apart from those received under section 15(2) of Act, 03.

27. There was overwhelming response to the public hearing and people from all walks of life came to express their views during the public hearing. Some also submitted their comments in writing before the Commission.

28. Most of the written submissions were however related to problem being faced by the rural consumers who complained about the non-availability /poor supply in the rural areas served by NPCL.

29. Representation, submitted by General Secretary, UP Udyog Vyapar Pratinidhi Mandal highlighted the poor supply position in the Greater Noida area. It was requested in the representation that licence for power

supply in Greater Noida area may be given to UPPCL or some other company as it would promote competition. In another representation submitted by K.R Engineers & Consultant, it was requested that NPCL may be compelled to start generation as was promised by them.

30. Based on verbal submissions made during the public hearing, the impression that emerged was that the people in general were satisfied with the services provided by NPCL but they had no objection to grant of second distribution licence so as to promote competition in the area. General view was that NPCL did not have adequate power to distribute to the consumers. People were generally aggrieved by NPCL for not setting up a generating station of its own as was promised by them at the time of grant of licence.

31. After considering the arguments and pleas of the parties the Commission feels that the following issues need to be deliberated upon in the matter related to grant of distribution licence to PVVNL for Greater Noida Area:

- a. Whether PVVNL fulfils the criteria of capital adequacy and credit worthiness as stipulated in Rules 2005.
- b. Whether the criterion of minimum area of operation is attracted to in the present case and if yes, whether PVVNL satisfies the said criteria.
- c. What is the bearing of principle of legitimate expectation with specific reference to NPCL licence in the Greater Noida Area.
- d. Whether PVVNL would be able to meet the universal service obligation.
- e. Relative performances vis-à-vis competition in case of second distribution licence.

32. Issue No. 1 - Whether PVVNL fulfils the criteria of capital adequacy and credit worthiness as stipulated in electricity rules.

Based on various submissions made by NPCL and UPPCL on the above issue it seems that on the mere strength of its own balance sheet, PVVNL probably can not meet the requirement of capital adequacy and credit worthiness as laid down under the Rules, 2005. However, it is also an acknowledged fact that PVVNL is a 100% subsidiary of UPPCL which in turn is a Government of UP Company. By virtue of this very special status PVVNL has been able to obtain funds for various capital works from the Govt. of UP and also raise funds as required from time to time from the financial institutions. It is because of such Government support that the petitioner has been able to sustain its operation in entire western region of Uttar Pradesh and successfully supply electricity in eleven districts of western UP since 2003 by erecting & maintaining a large stretch of distribution networks. Therefore, erecting a distribution network, with the support of the Government, in the Greater Noida area, which is much smaller in size, should not be a problem for PVVNL.

In this context, the relevant portion of Rule-2005 needs to be reproduced

'Requirement of capital adequacy and creditworthiness

- (1) *The Appropriate Commission shall, upon receipt of application for grant of license for electricity under sub- section (1) of section 15 of the Electricity Act, 03, decide the requirement of capital investment for distribution network after hearing the applicant and keeping in view the size of the area of supply and the service obligation within that area in terms of section 43.*

- (2) *The applicant for grant of license shall be required to satisfy the Appropriate Commission that on a norm of 30% equity on cost of investment as determined under sub-rule (1), **he including the promoters**, in case a applicant is a company, would be in a position to make available resources for such equity of the project on the basis of the net worth and generation of internal resources of his business including of promoters in the preceding three years after excluding his other committed investments.'*

As is obvious from the language of the rules above the financial strength of the petitioner, i.e. its capital adequacy and credit worthiness has to be assessed keeping in view the financial strength of its promoters also. As long as Govt. support is available to PVVNL, its capital adequacy and credit worthiness can obviously not be questioned.

Also, the commitment given by the State Government in the matter of grant of distribution license to PVVNL for Greater Noida Area needs to be quoted, from the letter dated 22.4.09 from Secretary (Energy) Govt. of UP, to Secretary, UPERC:

' कृपया उपरोक्त विषय का संदर्भ ग्रहण करने का कष्ट करें। इस संबंध में अवगत कराना है कि उ० प्र० शासन द्वारा वितरण नेटवर्क के सुदृढीकरण हेतु स्वीकृत धनराशि में से, पश्चिमांचल विद्युत वितरण निगम लि० को ग्रेटर नोएडा क्षेत्र में समानांतर लाइसेंस दिए जाने की स्थिति में , ग्रेटर नोएडा क्षेत्र में भी वितरण नेटवर्क के सुदृढीकरण का कार्य किया जायेगा।

इस संबंध में यह भी अवगत कराना है कि आवश्यकतानुसार उ० प्र० शासन द्वारा पश्चिमांचल विद्युत वितरण निगम लि० को, ग्रेटर नोएडा क्षेत्र में समानांतर लाइसेंस दिए जाने की दशा में, वितरण नेटवर्क के स्थापना/ सुदृढीकरण हेतु वित्तीय सहायता दिए जाने पर विचार किया जायेगा। '

NPCL has raised its apprehension that the language of the letter does not tantamount to a firm commitment from the State Government. However, it must be understood that the above letter is more than an assurance from the Govt. as it has been written in a specific context with the specific knowledge that PVVNL's application for grant of distribution license is pending with the Commission. As the Government is well aware that at the moment there is no distribution network of PVVNL existing in Greater Noida area, therefore, a harmonious reading of both the paras together would show that the Government is committed to carry out not only the strengthening of the network but also the development of new distribution network in Greater Noida area. Otherwise also, it is a known maxim that *Ex antecedentibus et consequentibus fit optima interpretatio* i.e. a passage is best interpreted by reference to what precedes and what follows it. It is an important rule of construction that the meaning of the instrument should be taken collectively *Ex antecedentibus et consequentibus* i.e. to say that every part of it should be brought into action, in order to derive from the whole one uniform and consistent meaning. Accordingly, the letter of the Government should be construed as a commitment to develop as well as strengthen the system because otherwise a narrower construction would mean a commitment for only system strengthening, which is meaningless because presently no system of PVVNL exists in Greater Noida area. Therefore, in presence of the sovereign guarantee for system development & strengthening and keeping in view the fact that the petitioner on its own is managing system development and extension, in an area which is several times larger than the Greater Noida area, there is no reason to raise any doubt on capital adequacy and creditworthiness of PVVNL to develop and maintain the distribution system in Greater Noida area.

In relation to the requirement of capital adequacy and creditworthiness for grant of distribution license to the petitioner, NPCL has, quoted para 24 of the order of Hon'ble Appellate Tribunal of Electricity in the matter of DMRC Vs. Delhi Transco & Ors. The above order of DMRC is however not attracted to in this case since the Government of UP, as promoter of the petitioner has itself confirmed to the Commission its intentions of providing necessary financial support to the petitioner for the development and strengthening of the network and systems in the Greater Noida area. Accordingly, the condition of capital adequacy and creditworthiness as stipulated in the Rules , 2005 is effectively met in the present case.

33. Issue No. 2 - Whether the criterion of minimum area of operation is attracted to in the present case and if yes, whether PVVNL satisfies the said criteria.

In context to above issue, it is to underline that multiple licenses in the same area of operation is an enabling provision of the Act, 03, for promoting competition in distribution and therefore, where ever possible, it should be introduced in accordance with the spirit of the Act. It needs to be further impressed upon that the requirement of minimum area for grant of distribution license is not specifically provided under the 6th proviso of section 14 of the Act, 03, which is the only clause dealing with the concept of multiple license. The 6th proviso of section-14 provides that:

“ Provided also that the Appropriate Commission may grant a license to two or more persons for distribution of electricity through their own distribution system within the same area, subject to the conditions that

the applicant for grant of license within the same area, subject to the conditions that the applicant for grant of license within the same area shall, without prejudice to the other conditions or requirements under this Act, comply with the additional requirements (including the capital adequacy, credit-worthiness, or code of conduct) as may be prescribed by the Central Government, and no such applicant who complies with all the requirements for grant of license, shall be refused grant of license on the ground that there already exists a licensee in the same area for the same purpose”

The above proviso of the Act was further amended by the Electricity (Amendment) Act, 2003 dated 31st December, 2003 **whereby the words (including the capital adequacy, credit-worthiness, or code of conduct) were replaced by (related to capital adequacy, credit-worthiness, or code of conduct)** thereby restricting the additional requirement for grant of license only to capital adequacy, credit-worthiness, or code of conduct. Thus, the nature of clause has been changed from inclusive to an exhaustive one. The most important aspect emerging from this change is that neither the requirement of minimum area finds a place in it nor it can be included in any manner.

The requirement of minimum area for grant of distribution license finds mention only under the explanation given in the Rules, 2005. Since under the provisions of the Electricity (Amendment) Act, 2003 the scope of application of proviso has been restricted only to defining the additional requirement of capital adequacy, creditworthiness and code of conduct, the requirement of minimum area as specified under the Rules, 2005, apparently runs contrary to the spirit of the Act, 03. However, one of the intent for specifying the minimum area may be to prevent cherry

picking of consumers by the second distribution licensee, as becomes apparent from National Electricity Policy, which is discussed below.

In accordance with the provisions of the Act, the Government of India vide notification dated 12th, February, 2005 notified the National Electricity Policy, under which the only safe guard that has been advised to be taken in regard to grant of second distribution license is that the licensee does not indulge in cherry picking of consumers. For ensuring the same respective State Electricity Regulatory Commissions have been made responsible. The relevant provision of National Electricity Policy is reproduced below:

*“With a view to provide benefits of competition to all section of consumers, the second and subsequent licensee for distribution in the same area shall have obligation to supply to all consumers in accordance with provisions of section 43 of the Electricity Act 2003. The SERCs are required to regulate the tariff including connection charges to be recovered by a distribution licensee under the provisions of the Act. **This will ensure that second distribution licensee does not resort to cherry picking by demanding unreasonable connection charges from consumers.**”*

The idea, therefore, is to promote competition while dissuading the second licensee from cherry picking in the incumbent distribution licensee’s area.

Since, PVVNL, which has been managing the entire western region of the State of U.P, is seeking distribution license for the entire NPCL area the question of cherry picking by the PVVNL does not arise. Otherwise also, area of PVVNL as existing in Noida area and the proposed area of

Greater Noida taken together shall not only suffice the requirement of a revenue district, as laid down under Rules-2005.

In its submissions it has been indicated by NPCL that in terms of section 14, 1st proviso a person who has been granted licence under Indian Electricity Act, 1910 prior to coming into force of Act, 03, such as the NPCL, will be a deemed licensee under Act, 03 for the period for which the licence was granted earlier, without the need to apply for and obtain a fresh licence from the Hon'ble Commission. Such a licence will be governed by Indian Electricity Act, 1910 for a period of one year and thereafter the Act, 03 would apply. The period of deemed licence shall however be for the period for which the licence was granted and not restricted to one year. In the case of NPCL, the licence was granted in 1993 for a period of 30 years for an area less than a revenue district the minimum area prescribed under the Rules-2005. If the criterion regarding "Minimum Area" is to be fulfilled it will be seen that while NPCL would be eligible to apply for grant of second distribution license in other licensees' areas, other licensees would never be in a position to apply for grant of second distribution licence in NPCL area because its area of operation is smaller than the prescribed area. The same can not be the intent of the Act.

In context to requirement of minimum area for grant of distribution licence NPCL has also cited the order of Appellate Tribunal for Electricity in the matter of DMRC Vs. Delhi Transco & Ors. The relevant portion of the judgement is reproduced below:

'(23) If DMRC is seeking second licence in the area of supply of a distribution licensee, it has to fulfil the conditions of the Rules.

Admittedly, it is unable to fulfil the condition of minimum area and hence is not entitled to a licence.'

The decision of the Tribunal in DMRC case is not applicable in the present case for the simple reason that DMRC had applied for licence to supply electricity in only a part of the total area of four existing licensees of Delhi forming an area less than the minimum area prescribed in the Rules-05, whereas PVVNL has applied for the total area of operation of NPCL. The Rules-05 probably is attracted where licence is applied for a portion of the area of supply of existing licensee and not on cases where second licence is sought for the entire area of operation of an existing licensee, as any other interpretation would render the rule contrary to the 6th proviso of section 14 of the Act, 03.

NPCL has also quoted order of Hon'ble ATE in appeal no.27/06, 179/05, 188/05 & 16/06 wherein the application for grant of distribution licence to JSPL had been rejected on the grounds of not meeting the minimum area requirement as laid down under the Rules,2005. The above order of Hon'ble ATE is not applicable in the present case for the same reasons as discussed above.

34. Issue No. 3 - What is the bearing of principle of legitimate expectation with specific reference to NPCL licence in the Greater Noida Area.

It has been contended by NPCL that the application filed by PVVNL (an instrumentality of the Government of Uttar Pradesh) asking for licence in the NPCL licensed area is contrary to the legitimate expectation of NPCL (which is a joint venture company of the Greater Noida Authority and CESC Limited) as NPCL was granted the licence after due consultations

with UPSEB by carving out the said licensed area from the area of UPSEB. Accordingly PVVNL is estopped from applying for such licence.

In context to above issue raised by NPCL it is to underline that the grant of multiple licences in the same area of operation is an enabling provision of the Act and is basically to promote competition in the distribution.

Just because NPCL, a joint venture company of the Greater Noida Authority and CESC Limited, was granted a licence by the Govt. of UP in consultation with erstwhile UPSEB, when the Act, 03 was not in force, it can not have legitimate expectations that a particular provision of Act, 03, would not apply on it. **It is an established principle of law that where a statute imposes a positive duty to do a particular act, the doctrine of estoppel can not be set up to prevent the person under that duty from performing it.** Hence, express provision of a particular Act does not get supplanted by legitimate expectation. Same has been observed by Hon'ble Supreme Court in the matter of Union of India & Another Vs. International Trading Company & Another (2003) 5 Supreme Court Cases (Civil Appeals nos.4020-23 of 2003). The relevant para of the judgement is reproduced below:

*'As was observed in Punjab Communications Ltd. V. Union of India the change in policy can defeat a substantive legitimate expectation if it can be justified on "Wednesbury reasonableness". The decision-maker has the choice in the balancing of the pros and cons relevant to the change in policy. It is, therefore, clear that the choice of policy is for the decision-maker and not for the court. **The legitimate substantive expectation merely permits the court to find out if the change of policy which is the cause for defeating the legitimate expectation is irrational or***

perverse or one which no reasonable person could have made. A claim based on merely legitimate expectation without anything more cannot ipso facto give a right. Its uniqueness lies in the fact that it covers the entire span of time: present, past and future. How significant is the statement that today is tomorrow's yesterday. The present is as we experience it, the past is a present memory and future is present expectation. For legal purposes, expectation is not same anticipation. Legitimacy of an expectation can be inferred only if it is founded on the sanction of law. '

As the mandate of multiple licensees, as enshrined in Act, 03 is to promote competition among various players and therefore can not be held to be perverse or irrational, the doctrine of legitimate expectation is not attracted to in the present facts of the case.

Hon'ble Supreme Court has observed in catena of cases that doctrine of estoppel does not supplant the provisions of the statute. Similar view has been echoed by the Hon'ble Court in the matter of Noida Vs. Arvind Sonekar (2008) 11 Supreme Court Cases (Civil appeal no.5514 of 2001). The relevant para is reproduced below:

'Before parting with this judgement, we may deal with the doctrine of legitimate expectation as was the ground taken by the MRTP Commission to allow the petition of the respondent. According to the respondent, this doctrine comes into play because the respondent had legitimately expected the NOIDA Authorities to implement the public policy laid down for the allotment of sites for starting nursing homes and clinics. The only question is that to implement such policy, what should be the rate at which the allotment of the plot should be made. In view of the discussions made hereinabove, we do not feel that the NOIDA

Authorities acted either unjustly or in an unfair manner by charging the rate of Rs.3600 per square meters. Therefore, we do not find any ground on which we can hold that this doctrine is at all applicable to the facts of this case.'

Further, the legitimate expectation of NPCL is also not tenable as GNIDA, the promoter company, itself has given its concurrence for grant of distribution license to PVVNL.

35. Issue no. - 4 Roll out plan and whether PVVNL would be able to meet the universal service obligation.

PVVNL, being a Government company, is within the meaning of 'State' as per article 12 of the constitution of India. Therefore by its very nature it is obliged to carry out the social responsibility towards public welfare. following the principle of "Salus Populi est suprema lex". Hence, no doubt whatsoever can be raised against PVVNL's ability to carry out the universal service obligation without discrimination.

PVVNL is managing the universal service obligation of entire western U.P. region. Hence it should not have much problem in meeting the universal service obligation for the Greater Noida area, which is much smaller in size.

As regard the roll out plan, PVVNL in its submission has indicated that initially it would be investing an amount of aprox. 55.75 Cr rupees towards distribution network roll out in Greater Noida area and thereafter the distribution network shall be expanded gradually to cover the entire area of Greater Noida. All categories of consumers in a ward will be able

to take benefit of the petitioner's network without any discrimination. The petitioner has further mentioned that the initial investment proposed by it is only indicative and could differ while setting up of the distribution network.

While accepting PVVNL's contention that laying of second distribution network for the entire Greater Noida Area may take some time, the Commission is of the view that there has to be clear cut time lines for achieving the same. The Commission, accordingly, expects that the licensee shall immediately start laying its distribution network after the issue of licence and shall cover the entire area within a time span of 5 years. The Commission shall review the progress made by PVVNL in this regard every six months and accordingly directs PVVNL to submit a six monthly progress report to the Commission in this regard preferably in April and October each year.

Further, in accordance with the spirit of the Act, 03 and the National Electricity Policy wherein lot of emphasis has been provided to discourage cherry picking by the second distribution licensee, the Commission is of the view that PVVNL shall start laying the distribution network in area(s) which have a reasonable mix of the category of consumers.

36. Issue no. - 5 Relative performances vis-à-vis competition in case of second distribution licence.

The enactment of Act, 03 along with other initiatives like National Electricity Policy and the Tariff Policy has outlined the contours of a suitable enabling framework for the over all development of the power sector in the country. As a result, power sector in India is on the verge of

witnessing a gradual transformation from a monopolistic market structure to a vibrant competitive market milieu. The Act, 03 is reflective of this paradigm shift in the legislative intent wherein competition has been made as one of the basic building blocks for the development and growth of the power sector. The Act, 03 thereby aims at promoting competition.

Grant of multiple distribution licenses in the same area of operation is basically to promote competition in distribution function, and therefore needs to be promoted wherever feasible. Application filed by PVVNL, is in accordance with the above spirit of the Act and would definitely promote competition in the Greater Noida Area and shall benefit the consumers at large. Further, it is an established economic principle that competition improves efficiencies and that it is the consumers, who ultimately reap the benefits of competition in terms of better services and efficient prices.

As far as the relative performance of the two companies is concerned, the Commission is in receipt of news paper cutting submitted by both the parties which indicate pitfalls in the performance of either of the parties. The commission, from its own sources, is also aware about the relative performance of both the parties. PVVNL is providing its services in a much bigger geographical areas as compared to NPCL and its consumer mix is also much different from that of NPCL, which has a predominantly commercial and industrial consumer base. The performance of the two companies therefore can not be compared directly. However, if we compare the performance in Noida area of PVVNL, which has a similar consumer mix as that of Greater Noida area, the performance of PVVNL almost matches that of NPCL. Otherwise also, differentiation in performance can not be made a criterion for rejecting an application for grant of licence.

In view of the above discussions, the Commission grants the distribution licence to Paschimanchal Vidyut Vitran Nigam Limited (PVVNL) for the Greater Noida area, as per the Terms and Conditions of Licence and Schedule-1 enclosed with this order. The licence shall continue to be in force for a period of twenty five (25) years unless it is revoked by the Commission prior to expiry of the said period. A copy of the licence is being forwarded to the Government of Uttar Pradesh, Central Electricity Authority, NPCL, Greater Noida Industrial Development Authority (GNIDA), U. P. Power Transmission Corporation Ltd.

(Rajesh Awasthi)
Chairman

Dated: 11th December, 2009
Lucknow

DISTRIBUTION LICENSE, 2009 UNDER ELECTRICITY ACT- 2003

TO

PASCHIMANCHAL VIDYUT VITRAN NIGAM LTD. (PVVNL)

FOR GREATER NOIDA AREA

(License no.1 of 2009)

1. The UTTAR PRADESH Electricity Regulatory Commission (hereinafter referred to as “the Commission”), in exercise of the powers conferred under Section 14 of the Electricity Act, 2003 (hereinafter referred to as “the Act”), hereby grants this licence to Paschimanchal Vidyut Vitran Nigam Ltd. (hereinafter referred to as ‘PVVNL’ or ‘the licensee’) a company incorporated under the Companies Act, 1956 and having its registered office at Urja Bhawan, Victoria Park, Meerut, for carrying out the business of Distribution of electricity within the Area of Supply (as defined in the Schedule-1 enclosed with this licence).
2. This License may be called “The Paschimanchal Vidyut Vitran Nigam Ltd. (PVVNL) Distribution License, 2009 (License No.1 of 2009)” and shall come in to force from the date of issue of license by the Commission.
3. The licence shall be subject to the terms & conditions contained in the Act, (in particular, Sections 17 to 24 thereof, both inclusive), The Distribution of Electricity License (Additional Requirements of Capital Adequacy, Creditworthiness and Code of Conduct) Rules, 2005 made by the Central Government (hereinafter referred to as “Rules,2005”) and the Regulations specified by the Commission (herein after referred to as “the Regulations”), specifically the UPERC(Terms & Conditions of Distribution License), Regulations,2004 including statutory amendments, modifications, reenactments thereof, which shall be read as part and parcel of this license.

4. The grant of this license to the licensee shall not in any way hinder or restrict the right of the Commission to grant a license to any other person within the same area for distribution of electricity as a Distribution Licensee. The licensee shall not claim any exclusivity.
5. This license shall come into effect from the date of its issue and unless revoked earlier, shall continue to be in force for a period of 25 (Twenty Five) years.
6. The licensee may, with prior intimation to the Commission, engage in any business for optimum utilization of its assets.
7. Unless otherwise specified by the Commission, the licensee shall pay an annual license fee in accordance with UPERC(Fee & Fine) Regulations, 2000 and amendments/reenactments made thereof. The license fee for a part of the year shall be paid on pro-rata basis. The year for the purpose of this clause shall mean a period of twelve months from 1st April of a year to 31st March of the following year.
8. The licensee may lay down or place electric supply lines subject to provisions of section 67 to 69 and 159 to 161 of the Electricity Act, 2003.
9. The licensee shall ensure compliance with the provisions of UP Electricity Grid Code and the Supply Code as specified by the Commission.
10. This license shall further be subject to conditions as laid down in the accompanying order of the Commission dated. 11th December, 2009.

Secretary

Place: Lucknow

Dated: 11th December, 2009

Schedule 1

Paschimanchal Vidyut Vitran Nigam Ltd.(PVVNL) Area of Distribution License

Area of supply -The entire **Greater Noida area** i.e. the area bounded as follows:

North: Chipiyana Khurd, Dundahera, Mawai, Akbarpur Bahrapur and Chipiyana Buzurg

East: Charaula, Achheja, Sadopur, Dhoom Manikpur, Amka Roopwas, Tilpata Karanwas, Pali, Palia, Boraki, Chamrawali, Hazaratpur, Ghori Bachhera, Ajayabpur, Rithodi, Maycha, Chitsi, Raghunathpur, Pachaytan, Inayatpur, Girdharpur, Kheri Hafizpur and Devta.

South: Astauli, Azampur, Gahi, Bilaspur, Talda, Roshanpur and Chachula

West: Yusufpur, Haibatpur, Bisrakh Jalalpur, Jalpura, Haldauni, Kulesra, Suthiana, Shahdara, Chaprauli, Banger, Nalgada, Muhaiyapur, Mubatakpur, Gujarpur, Rohillapur, Tugalpur, Haldauna, Chuharpur, Khadat, Murshadpur, Atta, Muradpur, Amarpur, Nanwara, Rajpur and Kanarsi

The boundaries whereof are delineated in the deposited map.