

Introduction to Law on Electricity
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Lecture 17
Distribution (Contd.)

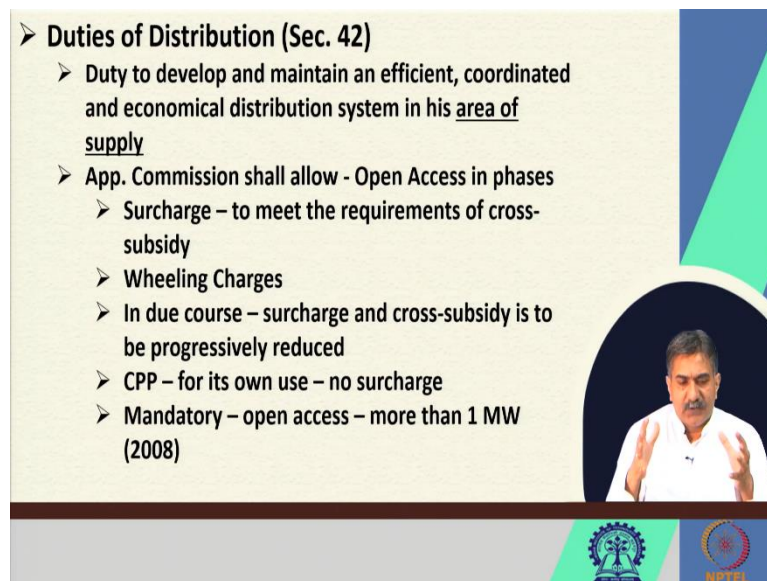
In the last session, we have read about that distribution is a licensed activity and then we also discussed in detail that whether second license can be given in the same area of supply or not and then, we have also discussed what are the benefits and the challenges of this.

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In this session, we will be discussing about the duties of distribution licensee. We will also discuss what are the powers? We will also discuss universal service obligations, and then we will discuss certain case laws to understand that how the law has been developed in this sector or this area.

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➤ **Duties of Distribution (Sec. 42)**

- Duty to develop and maintain an efficient, coordinated and economical distribution system in his area of supply
- App. Commission shall allow - Open Access in phases
 - Surcharge – to meet the requirements of cross-subsidy
 - Wheeling Charges
 - In due course – surcharge and cross-subsidy is to be progressively reduced
 - CPP – for its own use – no surcharge
 - Mandatory – open access – more than 1 MW (2008)

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Now, section 42 of the Act talks about the responsibility of the distribution licensee. If you look at the language, it says duty. So, this is something which is a statutory obligation. Legally imposed obligation on the licensee and what is the obligation? To develop and maintain an efficient, coordinated and economical distribution system in his area of supply.

So, the law has conferred this obligation on the distribution licensee that it is the responsibility of the licensee to install sub-station, to lay down the wires, and to ensure that the connection reaches to the consumer at the place where the consumers are residing. So, all these are responsibilities of the distribution licensee.

It also says that distribution licensee can very well be allowed to open up its own infrastructure for others. But then, for that, it says that the appropriate commission, appropriate commission what I mean is obviously, if it is intra-state, it is the state regulatory commission, and if it is inter-state, it has to be central regulatory commission.

So, the appropriate commission shall decide on open access. So, open access here what does it mean is the availability of the infrastructure of the licensee for others. Open access is one of the remarkable additions in the power market through the 2003 Act. It is for bringing in competition, it is for bringing in transparency, but then, the law says that let this open access be done in a phased manner, not in one go, let it be decided in phases. The reason being that power market has been very guarded one right after independence.

Since independence, it has been heavily regulated sector where the state alone was the player. Therefore, the opening up of the market, the complete liberalization must happen in a gradual

manner so that there would be confidence of the player, there would be very careful examination of the rules, and that is why it says so.

Now, if open access has been allowed, the law says that surcharge is to be paid by the one who is availing the open access; the reason is that once a license has been given to the distribution licensee, he has the obligation to supply electricity to all in his area of supply. Now, if the consumers in his area decide to get supplied from other licensee, then he will be losing revenue and to compensate that loss of revenue, the idea of surcharge has been introduced so that, that would be a mechanism to compensate.

Compensate in terms of earning revenue to supply electricity to the customer who has been consumer, who has been made entitled to get the electricity on a subsidized cost. So, surcharge is a mechanism to compensate. It is a mechanism to compensate for the loss of business to the distribution licensee. So, you can very well visualize that if a new player enters the market of distribution, and if he is not a licensee in that area, then, he shall be allowed to operate, provided he pays the surcharge.

Why this surcharge? So, the distribution licensee should be in a position to supply electricity to its consumer, and then the new entrant is also required to pay wheeling charges, the charges for transporting electricity that is what is also needed. But then, the law also says that in longer term if you want the sector to be self-sustainable, you have to gradually take care of the cross-subsidy surcharge.

The reason being, that it is all about, as I discussed in the last session, you are taking money from one pocket, or you are taking money from one person and handing it over to another person, and this cannot be a way to operate business in the market. What shall be the mechanism? Whatever electricity, one is consuming, the consumer must pay the cost of that electricity.

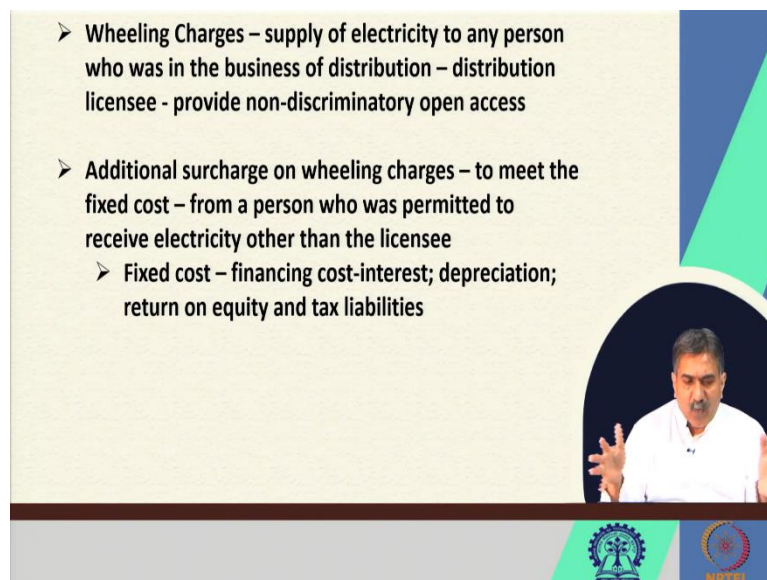
Then the question comes in that, is he in a position to pay? Does he have that financial ability to pay? So, until the financial ability is attained, this cross-subsidy mechanism has to be there. But no surcharges to be levied if distribution segment has been used by captive power plant to transport electricity from its generating units for its own use, then no surcharge. This is obviously to encourage generation capacity. So, if captive power plant generates electricity and wanted it to transport for its own use, which is not nearer to the generating unit, it is far away, and then therefore, this network has to be used, then the law says no surcharge.

In order to promote competition, it has been suggested that open access must become a reality for the large consumers, the one who are having the requirement of more than one megawatt. For them, the application to open access, must not be denied since there has to be some beginning for bringing competition in the market.

So, if it is not to be taken up from the perspective of all the consumers, at least let it be a kind of beginning for the large consumers. Let them have this benefit. Let them not dependent upon the distribution licensee of his area. Let him get the electricity from anyone else.

If he is willing to pay a surcharge, then let him get the electricity, and that is what is being realized after 5 years of the enactment of the Electricity Act in the year 2008. Now, any consumer who has the requirement of more than 1 megawatt can very well apply for open access, and it cannot be denied.

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- **Wheeling Charges – supply of electricity to any person who was in the business of distribution – distribution licensee - provide non-discriminatory open access**
- **Additional surcharge on wheeling charges – to meet the fixed cost – from a person who was permitted to receive electricity other than the licensee**
 - **Fixed cost – financing cost-interest; depreciation; return on equity and tax liabilities**

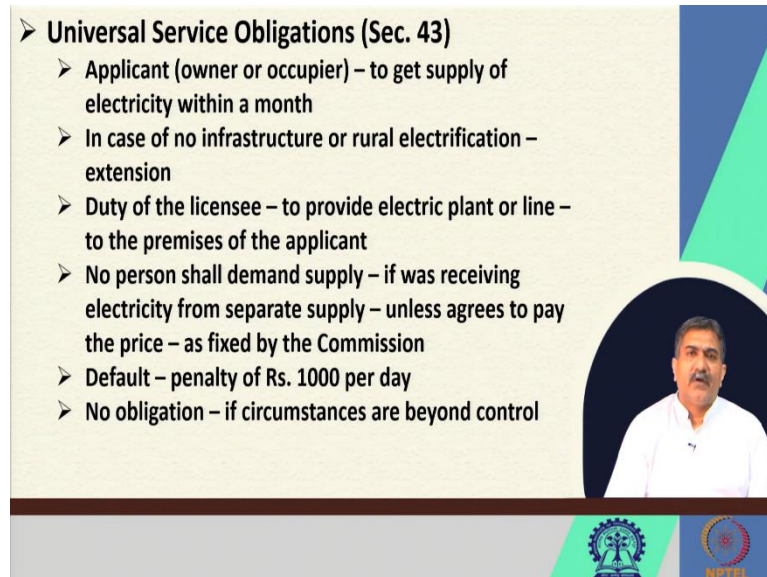
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Now what is wheeling charges? It says the supply of electricity to any person who was in the business of distribution. So, it is something where distribution licensee is ensuring that the infrastructure of the licensee is available to the other person in non-discriminatory manner. So, if the wires are already laid down by distribution licensee and the consumer wants that wire to be used to get the electricity from the other person, then, consumer can very well pay wheeling charges and get the electricity through the wire of the distribution licensee.

Then it says that additional surcharge is also to be levied on wheeling charges, that is for getting the fixed cost. We know that there are two costs which are generally available in tariff formula, one is the fixed cost, and the other is the variable one. One, it says fixed cost; it is to

be taken from a person who was permitted to receive electricity rather than the licensee, so additional surcharge is possible, and fixed costs comprises of financing costs interest, depreciation, profit, and tax liabilities of the utilities. So that is what is the scheme which has been suggested.

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➤ **Universal Service Obligations (Sec. 43)**

- Applicant (owner or occupier) – to get supply of electricity within a month
- In case of no infrastructure or rural electrification – extension
- Duty of the licensee – to provide electric plant or line – to the premises of the applicant
- No person shall demand supply – if was receiving electricity from separate supply – unless agrees to pay the price – as fixed by the Commission
- Default – penalty of Rs. 1000 per day
- No obligation – if circumstances are beyond control

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Now, Section 43 makes a very important provision; it imposes an obligation, what we call as Universal Service Obligation, and that obligation is of the distribution licensee. Section 43 says that if an applicant applies for getting the supply of electricity, regardless of whether he is owner of the premise, or is an occupier of the premises. So, you can very well make out that the law, as far as ensuring supply of electricity is concerned treats individual equally. It does not make any distinction that whether he is an owner of that premise or he is an occupier.

So, even if he is a tenant, he can get the electricity. So, if the application has been submitted by the owner or the occupier and if he is meeting with all the requirements then the distribution licensee has an obligation to supply electricity within 1 month. A timeline has been given. This 1 month can be diluted only when there is no infrastructure in that locality.

If distribution licensee has been asked to supply electricity in a remote location where for the first time, there is a need to install transformers, substation, laying down the wires, or it is for rural electrification, then this 1-month timeline can be extended otherwise, 1-month is a statutory timeline which has been given. It is the duty of the licensee to provide electric plant or electric line to the premises of the applicant.

So, the distribution licensee cannot take the argument that see, the applicant did not facilitate the whole process. It is the responsibility of the distribution licensee once the charges are being paid, once the security amount is being paid and once his application is approved. Distribution licensee has this responsibility. Further, it also says that if the applicant is already receiving electricity from some other licensee, from some other sources, then he cannot get the electricity as per the requirement laid down of 1 month unless the consumer agrees to pay the price, which is fixed by the Commission, and not very difficult to visualize that why this kind of conditionalities are attached.

Otherwise, the consumer will keep on oscillating from one to another, and it will completely disturb the market. So, if he is already getting a supply from one licensee, if he wants to switch over, he has to agree to pay the price as fixed by the appropriate commission that is what it says. Further, if the licensee fails to meet the requirement of that 1-month, then licensee has to pay a penalty to the tune of Rs.1000 per day.

So, you can very well visualize that how this universality is being attempted to achieve. You would not find the term Universal Service Obligation used in the Act, but then the essence, the way section 43 is being designed, it is clearly reflected that if there are no genuine reasons to not to supply, the penalty will be there. The punitive measures are to be taken.

What could be a situation of not providing, not supplying electricity? It says when certain things are happening which are beyond the control of the distribution licensee. Cyclone comes in, some natural disaster is there, and then distribution licensee cannot really ensure supply of electricity in a month. Obviously, it is something which is to be taken hold of.

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➤ **Universal Service Obligation**

- Origin from postal services – telecom services – with an idea of providing base line level services to everyone
- Reference - The Preamble of the United States' Communications Act of 1934 - "to make available, so far as possible, to all the people of the United States, a rapid, efficient, nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges"
- The European Directive on Telecommunications, 2018 as "minimum set of services of specified quality to which all end-users have access, at an affordable price in the light of specific national conditions, without distorting competition"

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Now, when you look at what is Universal Service Obligation, why I am emphasizing upon this because it gives a different dimension to the rights of the consumer. Universal Service Obligation as an idea have a very old connection between infrastructural law because infrastructure need not be or should not be or ought to not be created only for a few.

It is essential for human centric development, and that is why for your reference, I have drawn these 2 references, 2 laws where you would find the reference of Universal Service Obligation. It has to do with the telecom services. In fact, the idea of Universal Service Obligation has its origin, has its genesis in telecommunication services. For the first time, you will find that it has been incorporated in The United States Communication Act 1934.

What does it say; I read to make available, so far as possible, to all the people of the United States a rapid, efficient nationwide and worldwide wire, and radio communication service with adequate facilities at reasonable charges. So, what is important is to all the people, and at reasonable charges and this is what is the essence of the Universal Service Obligation. If either of them is not being taken care, it is not Universal Service Obligation.

Then you have the 2018 European Directive on Telecommunications, a minimum set of services of specified quality to which all end-users have access at an affordable price in the light of a specific national conditions without distorting competitions. Again, minimum set of services that is bare minimum must be available to everyone and at an affordable price. So, that is what is the essence of Universal Service Obligation, and that is how you need to read it in the context of section 43.

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➤ **Obligation on the licensee to supply electricity on requisition - has been interpreted to cast Universal Service Obligation on the licensee**

- In the legal parlance the concept of “universality” which broadly means “equality of applicability” may be understood as an essence of universal service obligation

➤ **Significance of ‘application’ – quality supply??**

Section 43 talks about supply of electricity by the distribution licensee within a month. When the application is submitted, when conditions are being fulfilled, there is an obligation on the licensee. So how do you understand in terms of law? That there has to be a decision making in a very fair and transparent manner.

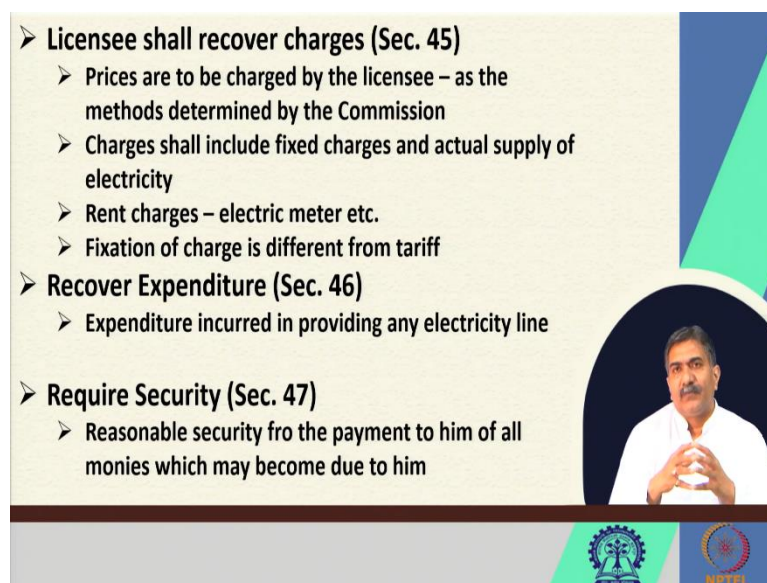
Distribution licensee is in a position to supply electricity within a month, but distribution licensee is taking one or the other alibi for not doing so. Universality is something which is to be taken care, which has to be followed very religiously and same is the case with equality. Please do take note of this fact; that is why section 43 becomes very important in today's context, because, in the last century electricity was considered to be a very prized commodity. It was not available, even if you apply for connection. It was taking years to get the connection and therefore, section 43 becomes very important that it is no more whims and fancies of the licensee; that as and when you decide on my application, you come and give the connection. Section 43 makes it very clear. Within a month, you have to do it, and that is why I am emphasizing on Universal Service Obligations, where universality is important, where equality of applicability is important. Everyone who applies regardless of his social status, regardless of his economic ability, financial position, he must get the electric connection.

Distribution licensee is obligated to fulfill. But the point is that which we need to understand as a law student is that how do you read the word “universal” along with the very condition of applying. It is not that the licensee has to go on its own and provide electricity. It is like one has to come forward and apply. What if the citizens are not ready to become consumer?

In such a situation whether you would expect the awareness to come in, when they would like to apply or there has to be some campaign drive to make people believe that the benefit of electricity is multiple fold.

So, I just raised this question that how do you read Universality on the one hand, and the very condition of applying it as given in section 43 on the other hand. And then, follow up question is, is it only about getting the supply, or it is also about getting quality supply. It is also about 24 into 7 supply. It is also about reliable supply. What does it mean? How do we read this Universal Service Obligation? So, these are the important questions to look at.

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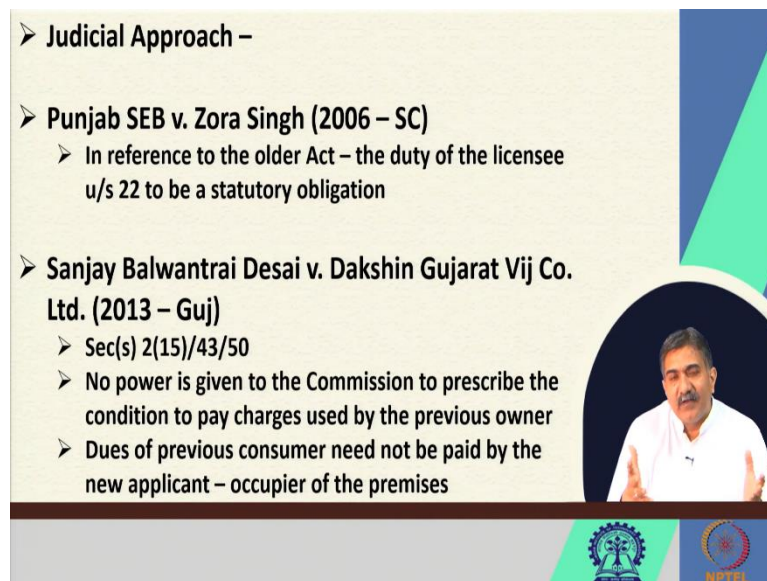


- **Licensee shall recover charges (Sec. 45)**
 - Prices are to be charged by the licensee – as the methods determined by the Commission
 - Charges shall include fixed charges and actual supply of electricity
 - Rent charges – electric meter etc.
 - Fixation of charge is different from tariff
- **Recover Expenditure (Sec. 46)**
 - Expenditure incurred in providing any electricity line
- **Require Security (Sec. 47)**
 - Reasonable security fro the payment to him of all monies which may become due to him

Look at what are the powers of the distribution licensees. Section 45 says that licensee shall recover charges. That prices are to be charged by the licensee, and how that is to be done, what shall be methods of that, it is for the appropriate commission to determine, but then what it says is that charges shall include fixed charges and actual supply of electricity, what is the cost for establishing the network? And what is the actual supply? And that is how charges can be fixed. Now, this fixation of charge under Section 45 is different from the tariff fixation done under Sections' 61 & 62.

Distribution licensee also has the power to recover expenditure. If distribution licensee is incurring expenditure for laying down the electric line, for installing transformer, then it can very well recover the same from the consumer, and then it further says that it also has a power to ask for security. Why security? In order to ensure that the consumer pays the due on time. If consumer fails to pay due on time, then distribution licensee can very well forfeit the sum.

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➤ **Judicial Approach –**

➤ **Punjab SEB v. Zora Singh (2006 – SC)**

- In reference to the older Act – the duty of the licensee u/s 22 to be a statutory obligation

➤ **Sanjay Balwantrai Desai v. Dakshin Gujarat Vij Co. Ltd. (2013 – Guj)**

- Sec(s) 2(15)/43/50
- No power is given to the Commission to prescribe the condition to pay charges used by the previous owner
- Dues of previous consumer need not be paid by the new applicant – occupier of the premises

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Now in this regard, look at how the court has read the duties and powers of licensee. This 2006 judgment of the Supreme Court, wherein the court was asked to examine the statutory obligation of the licensee to supply electricity to the applicant. Obviously, this case relates with section 22 of the Supply Act, and there was an application made that application was not considered for 7-8 years. There was no reason given by the licensee as to why he is not getting the connection.

Ultimately matter came before the Supreme Court. Supreme Court said that as far as the statutory scheme is concerned, distribution licensee has a statutory obligation. Once the application is submitted, once all the requirements have been met, distribution licensee cannot sit over the application. This is another interesting case; *Sunjay Balwantrai Desai versus Dakshin Gujarat Vij Comapany*. This is a Gujarat High Court judgment of 2013. It is interesting judgement because, in this case, what happened was that; the premise was bought by a buyer, a new buyer, and that new buyer has applied for the electric connection.

Now the seller of the premise was having some due with the distribution licensee. The one who sold the property, he was having some due. The distribution licensee said that we will not give you the connection unless and until you clear the due. Now, the buyer said that there is no obligation on my part to pay that amount because you should have recovered it. There is a provision to take the security amount and, in this regard, the Gujarat High Court read the schemes of the law, that what is the definition of consumer under section 2, what is the obligation of the duty of the distribution licensee, and what is the law in relation to supply code? Now, on the closer reading Gujarat High Court said that as far as the obligation of the

purchaser of the property is concerned, it is nowhere written that he has to also clear the due of the seller of the property.

It is not the responsibility of the purchaser, because under Section 50 when you have a code clearly defined about recovering the charges from the consumer, it nowhere says that the consumer must also clear the due of the previous consumer. Section 43 also nowhere says which talks about the obligation of the distribution licensee to supply the electricity within a month time. It nowhere says that the applicant has to clear all the dues of the earlier occupant.

So, in this case, the court has said that if the regulatory commission has made the regulation; those with regard to clearance of the due by the applicant and due from the earlier occupant. The court said that regulation is without any jurisdiction. The regulatory commission does not have the jurisdiction to make law and regulation in this matter because Sections' 43 & 50 do not authorize the commission to make a regulation to recover the due from the due applicant. And therefore, it says that denial of the application, denial of the request, and denial of the supply of electricity, on the basis of non-payment of the due from the earlier occupant, is not valid, and is not sustainable in the eyes of law.

The distribution licensee has a responsibility to supply the electricity, and it can very well take up the recovery of due from the earlier occupant in a separate legal proceeding. So, wonderful case to understand that how the court has examined the lawmaking power of the regulatory commission in the light of the statutory provisions.

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➤ **BEST v. MERC (2015 – SC)**

- A consumer applied for supply of electricity from Tata Power Company (TPC) – local authority (BEST) was a distribution licensee
- Should TPC lay down its own infrastructure for supply?

➤ **Held:**

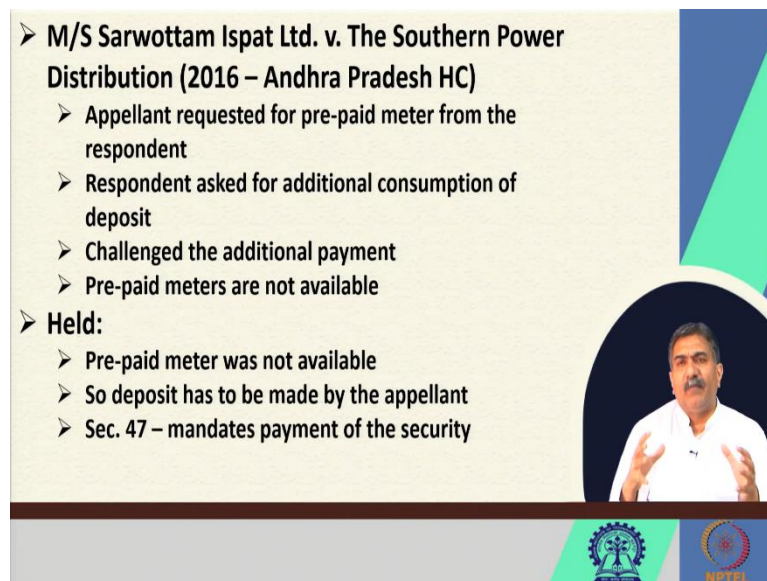
- No exemption from Universal Service Obligation to any licensee – there is a presence of a local authority as a distribution licensee
- If local authority refuses to wheel the electricity – responsibility on the licensee to lay down wires

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You have another case of 2015, decided the Supreme Court. This is *BEST* versus *MERC* wherein, what happened that it was been argued by Tata Power Company that because there is already local authority which is a deemed licensee, therefore, it cannot supply electricity to the consumer.

Now, the court looked into the scheme of the law. The court has said that once you become second licensee, even if there is a local authority, you do have a responsibility to supply electricity. If local authority refuses to allow you to wheel electricity, then it is the responsibility of the licensee to lay down the infrastructure, to lay down the wires. The court has said that there is no exemption from the obligation given to any licensee if there is a presence of local authority as a deemed the licensee because BEST here was deemed licensee in this case.

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➤ **M/S Sarwottam Ispat Ltd. v. The Southern Power Distribution (2016 – Andhra Pradesh HC)**

- Appellant requested for pre-paid meter from the respondent
- Respondent asked for additional consumption of deposit
- Challenged the additional payment
- Pre-paid meters are not available

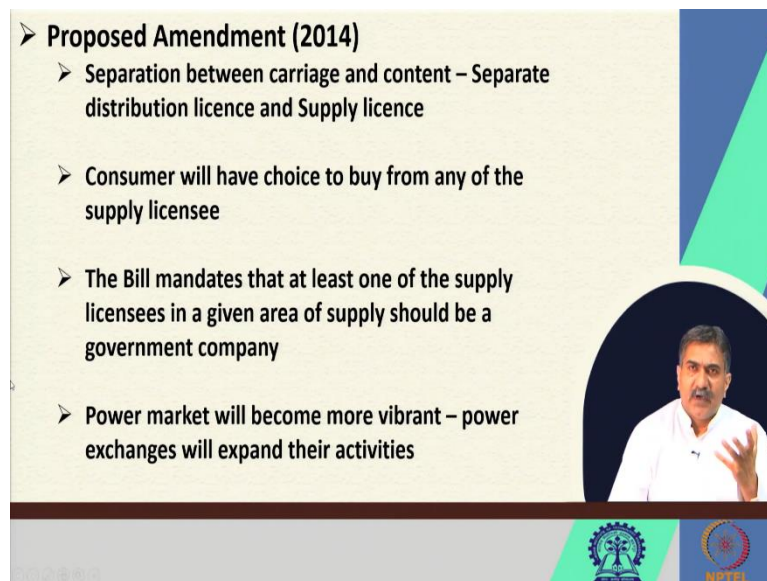
➤ **Held:**

- Pre-paid meter was not available
- So deposit has to be made by the appellant
- Sec. 47 – mandates payment of the security

This is another important case where you will find that M/S Sarwottam Ispat Limited was being asked to pay a security amount for a high consumption. Now, Sarwottam Ispat Limited has applied for prepaid meter, and section 47 says that for prepaid meter there need not be any security amount. Now, the distribution licensee said that the prepaid meter is not available. That is still not available in the market, and therefore, they cannot really install that but they have said that the deposit is to be paid because of the higher consumption.

This was challenged by Ispat Limited, because we have asked for prepaid meters; there is no question of paying any additional deposit amount. Matter went to the court, court said that because prepaid meter is not available, the distribution licensee was well within his power to ask for higher deposit under section 47, and then there is no reason that why it should not be paid. So, when you look at it, you find that the judiciary is somewhere, in a way drawing a balance between the interest of the consumer on the one hand, and the interest of the distribution licensee on the other hand.

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➤ **Proposed Amendment (2014)**

- Separation between carriage and content – Separate distribution licence and Supply licence
- Consumer will have choice to buy from any of the supply licensee
- The Bill mandates that at least one of the supply licensees in a given area of supply should be a government company
- Power market will become more vibrant – power exchanges will expand their activities

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These are some proposed amendments in the case of distribution segment. So, now when you look at this, you find that the court has done a good balance. With this, we complete our discussion on distribution, the duties of distribution licensee, and then what are the powers of distribution licensee and how the court has addressed the issue. Thank you very much.