

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal No.41/07 & IA Nos. 70/07 & 28/08,
Appeal No. 143/07 & IA No. 70/08,
Appeal No. 159/07 and Appeal No. 14 of 2008

Dated: May 6 , 2008.

Present: - Hon'ble Mr. Justice Anil Dev Singh, Chairperson
Hon'ble Mr. H.L. Bajaj, Technical Member

Appeal No.41/07 & IA Nos. 70/07 & 28/08,

Municipal Corporation of Greater
Mumbai
BEST Undertaking, BEST Bhawan
BEST Marg, Colaba,
Mumbai-400001

.....Appellant(s)

versus

1. Maharashtra Electricity Regulatory
Commission
World Trade Centre No. 1
13th floor, Cuffe Parade, Colaba
Mumbai-400001
2. The Tata Power Company Limited
Bombay House, Homi Mody Street
Mumbai-400001
3. Reliance Energy Ltd.
Reliance Energy Centre
Santacruz (E)
Mumbai-400005

.....Respondents

Counsel for Appellant(s): Mr. Ramji Srinivasan, Sr.Advocate
With Mr. Krishan Kumar,Advocate
Mr. Harsh Kaushik,Advocate
Mr. S.P. Bhatia, Advocate
Ms Mandakini Singh,Advocate

Counsel for Respondent(s) Mr. Jayant Bhushan, Sr.
Advocate with
Mr. Buddy A. Ranganadhan and Mr.
Arijit Maitra for MERC
Mr. J.J. Bhat, Sr. Advocate with
Ms Anjali Chandurkar &
Ms. Smieetaa Inna for REL
Mr. Sitiesh Mukherjee
Mr. Vishal Anand and Mr. Sakya
Singha Choudhary for IPC.
Mr Sapan Mishra for TPC
Mr. H.S. Jaggi,Advocate
Mr. Syed Naqvi, Advocate for REL
Mr.Saroya Gupta,Advocate
Mr. Arvind Gupta for Tata Power
Ms Mandakini Singh for R-3
Mr. Rajiv Yadav,Advocate
Mr. Suresh Gehani,Consultant
For MERC

Appeal No. 143 of 2007 & IA No. 70 of 2008

Reliance Energy Ltd.
Reliance Energy Centre
Santacruz(East)
Mumbai

.....Appellant

Versus

1. The Maharashtra Electricity Regulatory Commission
World Trade Centre No. 1,13th floor

- Cuffe Parade, Colaba,
Mumbai-400001
2. The Tata Power Company Ltd.
Bombay House, Homi Mody Street
Mumbai-400001
 3. BEST Undertaking, BEST Bhawan
BEST Marg, Colaba
Mumbai-400001
 4. Mumbai Grahak Panchayat
Sant Dnyaneshwar Marg, Vila Parle(W)
Mumbai-400056
 5. Prayas C/o Amrita Clinic,
Athawale Corner, Karve Road
Pune-411004
 6. Thane Belapur Industries, Post Ghansoli
Navi Mumbai-400071
 7. Vidarbha Industries Association
Civil Lines, Nagpur-4400041Respondents

Counsel for the appellant : Mr. J.J. Bhatt, Sr. Advocate
Ms Anjali Chandurkar and
Ms Smieetaa Inna
Mr. Harish V. Shankar,Adv.
Mr. Syed Naqvi, Advocate

Counsel for respondents: Mr. Jayant Bhushan, Sr.
Advocate with
Mr. Buddy A. Ranganadhan and Mr.
Arijit Maitra for MERC
Mr. Sitiesh Mukherjee

Mr. Ramji Srinivasan, Sr.
Advocate
Mr. Krishan Kumar for BEST

Mr. Sakya Singha Choudhary for
TPC
Mr. Sapan Kumar Mishra for TPC
Mr. Harish Kaushik for BEST
Mr. Vishal Anand for TPC
Mr. S.P.Bhatia for TPC

Appeal No. 159 of 2007

The Tata Power Company Ltd. TPC(D)
Bombay House, Homi Mody Street
Mumbai-400001

.....Appellant(s)

Versus

1. Mararashtra Electricity Regulatory Commission
World Trade Centre No. 1
13th floor, Cuffe Parade, Colaba
Mumbai-400001

2. Reliance Energy Ltd.
Reliance Energy Centre
Santacruz (E)
Mumbai-400001

3. BEST
BEST Undertaking,BEST Bhawan
BEST Marg, Colaba
Mumbai-400001

.....Respondents

Counsel for the appellant:

Mr. Sitesh Mukherjee,Advocate
Mr. Vishal Anand and

Mr. Sakya Singa Choudhary,
Advocates.

Mr. Sapan Kumar Mishra,

Counsel for the respondent: Mr. Ramji Srinivasan, Sr.Adv.
Mr. J.J. Bhat, Sr. Advocate
Mr. Jayant Bhushan, Sr.Adv.
Mr. Krishan Kumar for BEST
Ms Anjali Chandurkar and
Ms Smieetaa Inna for REL
Mr. Buddy A. Ranganadhan and
Mr. Arijit Maitra for MERC
Mr. Harish V. Shankar for REL
Mr. S.P.Bhatia, Advocate

Appeal No.14 of 2008.

The Municipal Corporation of
Greater Mumbai
BEST Undertaking
BEST Bhawan, BEST Marg
Colaba
Mumbai-400001

...appellant

Versus

1. Maharashtra Electricity Regulatory Commission
World Trade Centre No. 1
13th floor, Cuffe Parade Colaba
Mumbai-400001
2. Reliance Energy Ltd.
Reliance Energy Centre
Santacruz (E)
Mumbai-400001

3. The Tata Power Company Ltd.
Bombay House, Homi Mody Street
Mumbai-400001

....Resondents

Counsel for the appellant : Mr. Ramji Srinivasan, Sr. Adv.
Mr. Krishan Kumar,Adv.
Mr. Harsh Kaushik,Advocate
Mr. S.P. Bhatia,Advocate
Mr. Girish Rawat

Counsel for the respondent: Mr. J.J. Bhat, Sr. Advocate
Ms Anjali Chandurkar
Ms Smieetaa Inna for REI
Mr. Buddy A. Ranganadhan
Mr. Arijit Maitra for MERC
Mr. Sitesh Mukherjee,Advocate
Mr. Vishal Anand,Advocate
Mr. Sakya Singha Choudhary
Adv. For TPC
Mr. Sapan Kumar Mishra
Mr. Syed Naqvi, Advocate

Judgment

Per Hon'ble Mr. H.L. Bajaj, Technical Member

As the issues involved were similar, we have heard the following six appeals together:

Appeal No. 41 of 2007.

2. Appeal No. 41 of 2007 has been filed by BEST Undertaking (BEST in short), being an undertaking of the Municipal GB No.of corrections

Corporation of Greater Mumbai initially against Maharashtra Electricity Regulatory Commission (MERC or the Commission in short) order dated April 02, 2007. Subsequently, by an amendment Tata Power Company Ltd. (TPC in short) Reliance Energy Ltd. (REL in short) were also added as respondents No. 2 and 3 to this appeal. This appeal challenges MERC order dated April 02, 2007 in TPC (Generation) Multi Year Tariff Petition for the control period FY 2007-08 to FY 2009-10. The challenges in this appeal relate to the allocation of the electricity generated by TPC through its generation business {TPC(G) in short}. In the impugned order, MERC had, inter-alia, held that net energy for FY 2007-08 was to be allocated to the three Distribution Companies namely BEST, REL(Distribution) {REL (D) in short} and TPC (Distribution) {TPC (D) in short} in the proportion mentioned in the order as an interim arrangement for allocation of net energy available and for levy of fixed charges for TPC(G) amongst the three licensees namely BEST, REL(D) and TPC(D). MERC had further held that it would approve the net energy available and fixed charges for TPC(G) based on approved Power

Purchase Agreements between the TPC(G) and the three distribution licensees named above for the subsequent Financial Years for the control period. Aggrieved by the aforesaid allocation, BEST has challenged the impugned order to this limited extent.

Appeal No. 51 of 2007.

3. Appeal No. 51 of 2007 has been filed by Tata Power Company Ltd. in the capacity of a generating company as well as a distribution licensee, against the MERC order dated April 02, 2007 passed in case No. 72 of 2006 in the matter of Multi Year Tariff (MYT) petition of TPC for its generating business for the control period FY 2007-08 to FY 2009-10. The appellant has also sought reliefs similar to that of BEST in appeal No. 41 of 2007 on the similar grounds.

4. The following order dated May 17, 2007 was passed by this Tribunal in respect of appeal No. 41 and 51 both of 2007:

“ On hearing arguments from the learned counsel for the parties at some length we are of the opinion that pending disposal of appeals it will not serve the ends of justice to vacate the impugned order passed by the MERC. The

appeals need to be heard fully on merits. They are directed to be listed for further hearing on July 31, 2007.

In the meantime the MERC shall decide petition nos. 87 and 88 of 2006 within a period of four months. We have no manner of doubt that in case the MERC seeks any information from the appellants it shall be furnished forthwith.

The parties are agreeable that no party will claim equities on account of the impugned order passed by MERC.

The plea whether or not cost incurred for marginal purchase of electricity based on tariff fixed by the MERC is to be reimbursed to the affected parties, shall be considered at the time of final hearing.

Call the matter on July 31, 2007”

5. During the course of further hearing of the appeal, the following order was passed in appeal No. 51 on April 07, 2008 due to the stand taken by parties.

“ The learned counsel for the appellant is not pressing for adjustment of the amount which may be reimbursed to the appellant, as claimed in the appeal. He does not press the appeal and accordingly, the same is dismissed as not pressed”.

Appeal No. 143 of 2007.

6. Appeal No. 143 of 2007 has been filed by Reliance Energy Ltd. and challenges the impugned MERC order dated

November 6, 2007 passed, inter-alia, under the provisions of Section 86(1) (f) of The Electricity Act, 2003 (The Act in short). The appellant has challenged the validity and legality of that part of the impugned order whereby MERC has approved a draft PPA between TPC(G) and BEST. In this PPA, TPC(G) has agreed to sell/allocate 800 MW of power generated by it to BEST and had also approved the arrangement between the TPC(G) and TPC(D) allocating 477 MW of power to TPC(D) out of the entire 1777 MW generated by it. The appellant has sought to set aside the allocation and the approval of the PPA on the plea that same is inequitable and inter-alia, contrary to the provisions of the Act.

Appeal No. 145 of 2007.

7. Appeal No. 145 of 2007 has been filed by Tata Power Company Ltd. (D) against the MERC order dated April 30, 2007 passed in case No. 70 of 2006 in the matter of MYT petition of TPC for its distribution business for the control period FY 2007-08 to 2009-10. This appeal also challenges the order of the Commission dated April 23, 2007 passed in case No. 2 of 2007 which was in the nature of interim order and stood merged in the

order of April 30, 2007. In this order MERC had made an allocation of energy generated by TPC for the year 2007-08.

8. During the course of hearing of the appeals, the following order was passed by this Tribunal on April 09, 2008:

“ The learned counsel for the appellant does not press the relief claimed in paras (a) & (b) of the prayer clause. Insofar relief claimed in para (c) of the prayer clause is concerned, the controversy is covered by decision rendered by this Tribunal in Appeal No. 70 of 2007 dated September 19, 2007.

Accordingly, impugned orders dated April 23, 2007 and April 30, 2007 to the extent they have not permitted truing up of the shortfall in revenue due to the applicability of MYT tariff from May 01, 2007 instead of April 01, 2007 are set aside and the matter is remitted to the MERC for appropriate orders, in the light of the decision rendered by this Tribunal in Appeal No. 70 of 2007”.

Appeal No. 159 of 2007.

9. Appeal No. 159 of 2007 filed by TPC(D) challenges the impugned order dated November 06, 2007 passed by MERC whereby it had approved the PPA signed between TPC and BEST and between TPC(G) and TPC(D). This appeal has been filed to a limited extent of challenging the observations made by MERC in

the penultimate paragraph of the impugned order where the Commission had held that it is empowered under Section 23 of the Act to issue directions to the appellant as a generation company to supply power to the distribution licensees irrespective of any approved PPAs executed by the appellant.

Appeal No. 14 of 2008.

10. Appeal No. 14 of 2008 has been filed by BEST against the impugned order of November 06, 2007 passed under Section 23 of the Act. BEST has inter-alia, sought relief to hold and declare that MERC has no power to regulate the allocation of power generated by the TPC (G) as a generating company and also hold that power under Section 23 can be misused by MERC in the name of shortfall on the contracted capacity and licensee who has not taken any efforts to enter into any contract and may stand benefited.

11. The brief facts of the case are as under:

12. Tata Power Company has been a pioneer for the supply of electricity in the city of Bombay, now known as Mumbai. Since early 20th century TPC has been generating and supplying a

substantial, if not entire quantity of the generation, to the city of Mumbai. TPC has also been described as a bulk licensee. The limits of supply have been delineated in its various distribution licenses granted to it from time to time in 1903, 1919, 1921 and 1953.

13. BEST had got its license from 1905 and started buying power from TPC through agreement dated back in 1915 which was renewed from time to time for meeting all power requirements from generation of TPC. The previous agreement was signed in the year 1987 up to August, 2004 with a provision of extending it on monthly basis till the renewal of agreement. This agreement was mutually renewed by BEST and TPC and submitted to MERC on July 13, 2005. Thereafter, MERC directed that BEST should obtain a fair commitment of the allocation of capacity. BEST area of supply is Island City of Mumbai. It has approximately 10 lakhs consumers.

14. Since 1929 REL has been a distribution licensee in the suburbs of Mumbai and till 1995 for approximately 80 years has

been purchasing the requirement for its entire quantity of energy from TPC which is a bulk licensee having generating stations. In 1995 REL commissioned its 500 MW plant at Dahanu, Maharashtra which generates power to be distributed in REL area of supply in suburbs of Mumbai which constitutes more than 25 lakhs consumers.

15. On April 02, 2007 MERC passed an order in the matter of Multi Year Tariff petition for its generation business in a petition filed by TPC for the control period FY 2007-08 to 2009-10 in which MERC stated that since approval for the PPAs between TPC(G) and BEST and between TPC(G) and TPC(D) was pending and since the PPA between TPC(G) and REL (D) was yet to be submitted, in the absence of the approved PPAs for the year FY 2007-08 the Commission would allocate total power available from TPC(G) in proportion to Co-incident Peak Demand the figures of which were by then available and that for the year 2007-08 it will be allocated in the proportion of 42.85% to REL(D), 36.88% to BEST and 20.27% to TPC(D) based on the Coincident Peak Demand.

16. Two of the present bunches of appeals were filed: Appeal No. 41 of 2007 was filed by BEST and appeal No. 51 of 2007 was filed by TPC against the MERC on April 02, 2007 as briefly stated (Supra).

17. On July 11, 2007, when the process of consideration of approval of PPAs between BEST and TPC(G) and TPC(G) and TPC(D) was continuing before the MERC, REL filed a petition No. 30 of 2007 before the MERC under Section 86 of the Act that TPC should be directed to allocate 762 MW to it and enter into PPA with REL for this quantity of 762 MW and that PPA between TPC and REL should contain fixed quantity of 762 MW.

18. On November 06, 2007 MERC issued an order approving PPA between the TPC(G) and BEST with allocation of 800 MW to BEST and 477 MW arrangement between TPC(G) and TPC(D). Aggrieved by this order REL has filed appeal No. 143 of 2007.

19. MERC order of November 06, 2007, in the penultimate para of its order, states that it is empowered under Section 23 of the Act to issue directions to TPC(G) to supply power to

distribution licensees despite the existence of any or all approved PPA executed by TPC(G). This has been challenged by TPC(G) in its appeal No. 159 of 2007. Similarly BEST vide appeal No. 14 of 2008 has challenged the MERC order saying that MERC has no power to regulate the allocation of power generated by TPC(G) as a generating company and that power under Section 23 can be misused by the MERC in the name of shortfall on the contracted capacity.

20. Learned counsel for the parties have advanced their contentions as below:

21. Mr. J.J. Bhatt, learned counsel appearing for REL submitted that the fundamental premise on which REL intervened in the process of the approval of the agreement/arrangement by and between TPC and BEST and TPC inter se was that the generation of TPC should be equitably distributed amongst the three claimants and that it was the case of REL that the claim of REL based on its historically recognized and acknowledged demand was reasonable and that such a

claim stood foreclosed against REL by presenting REL with a fait accompli of having entered into agreements/arrangements between TPC and BEST of 800 MW TPC inter se of 477 MW. This fact has not been considered by MERC at all and MERC has merely proceeded on the footing that since there was no PPA between REL and TPC and since the demand of TPC(D) and BEST were allegedly justified, the said agreements/arrangements should be approved and REL should be directed to enter into PPA. This finding effectively means that REL is a residual recipient of the electricity that TPC may choose to give to REL after it enters into a PPA with BEST and with itself. This arrangement does not take into account the historical accepted, recognized and acknowledged demand position which is required to be equitably met.

22. He submitted that MERC failed to consider the detailed correspondence between the parties for entering into a PPA and did not appreciate that while the correspondence and negotiations between TPC and REL were going on, TPC went ahead and entered into purported agreements/arrangements

with BEST and with itself contrary to law and that having acknowledged and accepted its power, authority and jurisdiction to intervene in the process of approval of agreement/arrangement, MERC ought to have directed the parties to enter into agreements/arrangements based on principle of equitable allocation.

23. He further submitted that the reference to Writ Petition No. 916 of 2001 filed by TPC was inter alia, for two important points viz., that it was the claim of TPC that REL was bound to purchase the electricity from TPC and should not be allowed to put up additional generation capacity and that such a claim of TPC was based upon a consistent and repeated stand that TPC was supplying electricity to the Mumbai city and suburbs as one system. This approach of TPC as affirmed in the writ petition clearly and unequivocally entailed the requirement of equitable distribution in a shortage situation and should have been taken into account by the MERC in considering the approval of the agreement or arrangement.

24. Mr. Bhatt contended that TPC is clearly in a dominant position so far as supply of electricity of Mumbai is concerned. Section 60 of the said Act clearly empowers the Commission to intervene when inter alia a generating company takes steps that cause adverse effect in the competition in the electricity industry. Misusing its dominant position TPC has proceeded to enter into an agreement with BEST and arrangement with itself which deprives REL of substantial quantity of power at the same rate at which TPC would meet the entire demand of BEST and itself. As held by MERC 800 MW and 477 MW is the quantity required to meet the demand of BEST and TPC(D) respectively. However, this reduces the quantity to be supplied to REL(D) and its consumers which would result in REL(D) buying costly power from outside which may result in raising the tariff to its consumers within the Mumbai system. On the other hand, as shown by the contents of the writ petition TPC insists on REL buying its power from TPC and contends that REL should be prevented from setting up further capacity. This is clearly abuse

of its dominant position attracting the provisions of Section 60 of the said Act.

25. Mr. Bhatt pleaded that MERC failed to appreciate that REL has an existing arrangement/agreement with TPC to purchase its requirements from TPC for approximately the last 80 years. Prior to 1995, REL was purchasing its entire requirement from TPC, even after setting up of REL's Dahanu Project, REL has been purchasing over 40% of TPC's generation from TPC for supply to its consumers. The quantities purchased were already a matter of record before MERC and the extracts of the relevant orders of the MERC in TPC's tariff petitions showing the quantities purchased are annexed at Annexure 24 to the appeal. REL(D)'s monthly peak demand data for the last two years and its projected demand for the next two years is annexed at Annexure 25 to the appeal. Thus there is an existing arrangement/agreement that REL would purchase approximately 40% of TPC's generation. Till about 2006, there was no shortage of power in Mumbai and the arrangement/agreement worked without any hindrance. BEST was purchasing its entire

requirement from TPC and REL was also purchasing its requirement from TPC. It is on account of the shortage of power that the question of allocation and long Term Power Purchase Procurement Agreement being entered into has arisen.

26. He averred that TPC has unequivocally recognized the fact that TPC and REL have a long term arrangement for purchase of power by REL from TPC. On the basis of the said submissions, TPC had contended that REL should not be allowed to put up additional capacity. Moreover, TPC has contended in writ petition No. 916 of 2001 that TPC is a bulk licensee who has been supplying energy to Mumbai over the past about 80 years and has a legitimate expectation that REL would not be permitted to bring energy within Mumbai on its own.

27. Mr. Bhatt contended that in the light of above, MERC ought not to have approved the PPA between TPC(G) and BEST and TPC(G)'s internal allocation to TPC(D).

28. Mr. Bhatt submitted that TPC and REL are ad idem that just as TPC has the legitimate expectation that REL would buy from TPC, REL also has a legitimate expectation that TPC would supply to REL its requirements from TPC's generation and that in view of the shortage of power MERC ought to have looked into the capacity requirement of various distributing licensees and allocated the quantity of power in the long term PPA accordingly and that MERC ought not to have accepted the quantity mentioned in the proposed PPA between TPC(G) and BEST and the arrangement between TPC(G) and TPC(D) without considering the various aspects of the actual requirement of all parties.

29. Mr. Bhatt averred that the Division Bench of the Hon'ble Bombay High Court in writ petition No. 1205 of 2001 (Dabhol Power Vo. Vs MSEB & Others) where MERC is also a party by its judgment dated March 5, 2002 while interpreting provisions para materia contained in Electricity Regulatory Commissions Act, 1998 has, inter alia, specifically found as under:

“45. Mr. Chidambaram then submitted that Section 22 and 29 confer regulatory power on the state Commission. The word “regulate” though wide in its scope and amplitude, does not include the power to adjudicate. The power to adjudicate under Section 22(2)(n) is only incidental to and in aid of the function to determine the tariff under Section 22(1) (a) to (c). This is not an independent power but only step in aid in exercise of regulatory function relating to tariff. According to Mr. Chidambaram the MERC has jurisdiction to revise the tariff or regulate purchase and procurement process. However, the MERC would have no power to make the contract for the parties in respect of other terms and conditions on which parties would have to reach mutual agreement.

“48. It is thus clear that the word “regulate” is a word of broad import having wide meaning comprehending all facets not only specifically enumerated in the Act but also embracing within its fold the powers incidental to the regulation envisaged in good faith with an eye single to the public welfare. It would also be seen that the assumption that the power to regulate does not include power to vary the terms and conditions of the contract is not correct.

“ 54. The ERC Act brings about a completely new and comprehensive scheme relating to the electricity industry, all within the purview of the regulatory commission. A plain reading of section 22 read with Section 29 shows that the entire system of transmission, sale distribution and supply of electricity in the state and the price thereof is now made the subject matter of control and regulation by the Commission. Section 22(2)(n) confers power on the state Commission to adjudicate upon disputes and differences between the licensees and utilities as such disputes and differences can directly or indirectly have

ramification on third parties including the consumer. The conferring of the regulatory powers and adjudicatory jurisdiction on the central and state Electricity Regulatory Commissions are matters of public policy. Such disputes are no longer regarded as a private Lis, but disputes affecting the consumer interest and therefore, in the public interest, required to be settled by a special forum constituted under the Act. The ERCs are intended to have extremely wide powers in the electricity field. In exercise of its powers under Section 22(1) (d), the Commission can decide upon investment proposals. It may bar generating companies from taking stakes in each other or in licensee companies or vice versa, to prevent monopolies or cartelization. It can prevent entry into the field or exit therefrom, since power is an infrastructure issue. The ERCs have necessarily to adjust rights or intrude into private proprietary rights as well as rights under contract. In this connection, it would be worthwhile to notice the tariff regulations. Regulation 72(1) provides that no generating company shall charge their customers any tariff for supply of electricity without the general or special approval of such tariff by the Commission. Sub-regulation 2 of the Regulation 72 expressly provides that not only the tariff but the terms and conditions for the supply of electricity are subject to obtaining the approval of the Commission. The proviso to Regulation 72 says that the existing tariff being charged by generating companies shall continue to be charged after the date of commencement of the Regulations as may be specified by a notification, without prejudice to the powers of the Commission to take any matter relating to tariff falling within the scope of Section 22 of the Act. Regulation 73 provides that any generating company proposing to enter into any agreement for supply of electricity between the generating company and any buying party shall get the approval of the Commission for the tariff before entering

into such contracts. It is thus apparent that the power conferred on the ERC is of the widest possible magnitude and would cover the disputes between the petitioner DPC and the Respondent Board. The disputes between the parties essentially pertain to tariff. The non-payment is based on the claim for rebate. The claim for rebate has a direct bearing on the tariff arrangement between DPC and the Board. The rebate is based on rates in the PPA. This is also a tariff issue. The PPA is basically a tariff determination mechanism. The Board's claim arising from the alleged incorrect billing by DPC for capacity statements and the alleged misstatements of Available Capacity for dispatch in the Availability Declarations made by DPC have a direct bearing on tariff issues as between the Board and the DPC. The terms of the contract such as escrow, LC, etc. are also matters directly arising out of tariff issues. These are all matters directly pertaining to tariff and can be regulated by the Commission. Therefore, we are unable to agree with the narrow and restrictive interpretation of Section 22(2)(n) as suggested by Mr. Chidambaram”.

30. Mr. Bhatt to the similar effect cited the observations of the Hon'ble Supreme Court in the following judgments.

(i) **K.Ramanathan vs State of Tamil Nadu (1985) 2 SCC 116 page 130 para 18.**

“The word ‘regulation’ cannot have any rigid or inflexible meaning as to exclude prohibition. The word regulate is difficult to define as having any precise meaning. It is a word of broad import, having a broad meaning, and is very comprehensive in scope. There is a diversity of opinion as to its application to a particular state of facts, some courts

giving to the term a somewhat restricted and others giving to it a liberal construction. The different shades of meaning are brought out in Cofrpus Juris Secundum Vol 76 at p.611:

“Regulate” is variously defined as meaning to adjust order or govern by rule method, or established mode, to adjust or control by rule, method, or established mode or governing principles or laws, to govern by rule, to govern by, or subject to certain rules or restrictions, to govern or direct according to rule, to control govern or direct by rule or regulations. “Regulate “ is also defined as meaning, direct, to direct by rule or restriction, to direct or manage according to certain standard laws, or rules, to rule, to conduct, to fixed establish, to restrain to restrict see also Webster’s Third New International dictionary Vol.II p. 1913 and Shorter Oxford Dictionary Vol. II 3rd Edn. P. 1784.

*19. It has been said that the power to regulate does not necessarily include the power to prohibit and ordinarily the word regulate is not synonymous with the word prohibit. This is true in a general sense and in the sense that mere regulation is not the same as absolute precipitation. At the same time, the power to regulate carries with it full power over the things, subject to regulation and in absence of restrictive words, the power must be regarded s plenary over the entire subject. It implies the power to rule, direct and control and involves the adoption of a rule or guiding principle to be followed, or the making of a rule with respect to the subject to be regulated. **The power to regulate implies the power to check and may imply the power to prohibit under certain circumstances, as where the best or only efficacious regulation consists of suppression. It would therefore appear that the word regulation cannot have any inflexible meaning as a exclude prohibition.** It has different shades of meaning and must take its colour from the contest in which it is used having regard to the purpose and object of the legislation and the court must necessarily keep in view the mischief which the legislature seeks to remedy”.*

(ii) Indu Bhushan vs Rama Sundar AIR 1970 SC 228, page 231 para 5.

“The dictionary meaning of the word regulation in Short Oxford Dictionary is “the act of regulation” and the word “regulate” is given the meaning “to control, govern, or direct by rule or regulations”. This entry thus, gives the power to Parliament to pass legislation for the purpose of directing or controlling all house accommodation in cantonment areas. Clearly, this power to direct or control will include within it all aspects as to who is to make the constructions under that conditions the construction can be altered, who is to occupy the recommendation and for how long, on what terms it is to be occupied, when and under what circumstances the occupant is to ceased to occupy it, and the manner in which the accommodation is to be utilized. All these are ingredients or regulation of house accommodation and we see no reason to hold that this word “regulation” has been used in a wide sense in this entirety.”

(iii) V.S. Rice and Oil Miss vs State of Andhra Pradesh AIR 1964 SC 1781

Page 1787 Para 20 “... .. The word “regulate” is wide enough to confer power on the respondent to regulate either by increasing the rate or decreasing the rate, the test being what is it that is necessary or expedient to be done to maintain, increase, or secure supply of the essential articles in question and to arrange for its equitable distribution and its availability at fair prices. The concept of fair prices which S.3(1) expressly refers does not mean that the price once fixed must either remain stationary, or must be reduced in order to attract the power to regulate. The power to regulate can be exercised for ensuring the payment of a

fair price, and the fixation of a fair price would inevitably depend upon a consideration of all relevant and economic factors, which contribute to the determination of such a fair price. If the fair price indicated on a dispassionate consideration of all relevant factors turns out to be higher than the price fixed and prevailing, then the power to regulate the price must necessarily include the power to increase so as to make it fair.”

**(iv) Deepak Theatre, Dhuri vs State of Punjab 1992
Supp (1) SCC 684 @ 687 – AIR 1992 SC 1519**

Page 687 Para 3 – “It is settled law that the rules validly made under the Act, for all intents and purpose, be deemed to be part of the statute. The conditions of the license issued under the rules form an integral part of the statute. The question emerges whether the word regulation would encompass the power to fix rates of admission and classification of the seats. The power to regulate may include the power to license or to refuse or to requiring taking out a license and may also include the power to tax or exempt from taxation, but not the power to impose a tax for the revenue in rule making power unless there is valid legislation in that behalf. Therefore, the power to regulate a particular business or calling implies the power to prescribe and enforce all such proper and reasonable rules and regulations as may be deemed necessary to conduct the business in a proper and orderly manner. It also includes the authority to prescribe the reasonable rules, regulations or conditions subject to which the business may be conducted “[emphasis supplied]

(iv) Cellular Operators Association of India & Ors. Vs Union of India & Ors. AIR 2003 SC 899

*“33. The regulatory bodies exercise wide jurisdiction. They lay down the law. They may prosecute. They may punish. Intrinsically, they act like an internal audit. They may fix the price, they may fix the area of operation and so on and so forth. **While doing so, they may, as in the present case, interfere with the existing rights of the licensees.**”*

31. Mr. Bhatt quoted the Affidavit in Reply filed by MERC in Appeal No. 159 of 2007 read with the Affidavit in Reply filed by MERC in Appeal No. 41 of 2007 and adverted that these clearly support the contentions of the REL as stated above. He contended that though the MERC in its impugned Order has purported not to interfere with the agreed quantity it has in the affidavit in reply filed before this Tribunal, clearly asserted its authority and jurisdiction to interfere with such PPA even at the threshold before approving the same.

32. Learned counsel contended that in the circumstances the order of the MERC that it must approve the quantity

agreed to be supplied by TPC to BEST as a part of the PPA is incorrect and contrary to its own submissions in the affidavits before this Tribunal.

33. Mr. Bhatt submitted that the historical background clearly shows that the energy generated by TPC was distributed equitably between BEST and REL, while TPC(D) retained only a very small quantum to supply to its own customers and whether they have such a right is a question being considered in separate proceedings by the Hon'ble the Supreme Court. MERC taking into account various factors allocated by the supply of energy by TPC to BEST and REL equitably for the year 2007-08. However, thereafter while approving the PPA between TPC and BEST the MERC has ignored all factors and has merely approved the PPA on the basis that there is a signed PPA between the parties which contemplates a particular quantity and that the PPA would show that BEST requires the agreed quantity. MERC has adversely commented upon the failure of REL to enter into a PPA with TPC but has clearly overlooked the efforts that

REL made to get a higher quantity from TPC and in view of the fact that TPC had already foreclosed the issue against REL by entering into PPAs with BEST and TPC itself. He averred that this left REL with no option either to accept what was offered to REL contrary to all its historical requirements and other actual ground realities or to agitate its claim in present proceedings.

34. During the hearing, learned senior counsel Mr. Bhatt in order to prove that there was an arrangement with TPC(G) for procurement of power by REL profusely depended upon the Writ Petition No. 916 of 2001 filed by TPC in the High Court of Judicature at Mumbai against the state of Maharashtra and Others. In this appeal TPC(G) had inter alia, prayed that erstwhile BSES (now REL) should not be allowed to add further generating capacity at Saphale as Tata Power has enough surplus power so as to meet with the demand and future growth in demand for electricity. Mr. Bhatt stated that though this Writ Petition was subsequently withdrawn and was dismissed as withdrawn, as the facts stated therein under Affidavit in Writ

Petition do not change and has cited many paras from the judgment in order to fully press his point of view. It is necessary to extract the relevant paras read out by the learned counsel as below:

3.(d) The impugned Orders are contrary to the Cabinet decision of the GOM taken on July 24, 1999 (communicated to Tata Power in letters dated October 13, 1999 and November 01, 1999 of the GOM) and the Agreement between the GOM, MSEB, BSES and Tata power in the form of the agreed Report duly signed and subscribing to the recommendations of a Committee set up by the GOM, viz. the Kukde Committee which recognized that the existing commercial arrangement between Tata Power, BSES and MSEB should not be disturbed, that power generated by BSES's Saphale project would be permitted only to meet the future growth in demand and that BSES could under no circumstances utilize the power generated from Saphale Plant to reduce the off-take of power being purchased from Tata Power. The Impugned Orders deleted the requirement that the present commercial arrangement between MSEB, Tata Power and BSES not be disturbed and would be continued even after commissioning the Saphale Project (a condition previously imposed by MSEB in its letter dated July 18, 2000)

The GOM Order dated January 19, 1998 and Principles of Agreement between BSES and Tata Power dated January, 31, 1998

22. The GOM by its Order dated January 19, 1998 directed BSES to complete inter-connection at Borivali by January 26, 1998 and BSES was to take 275 MVA

standby power supply from Tata Power for BSES's Dahanu Generating Station. Certain other directions were also given by the said Order. By a document dated January 31, 1998 signed by Tata Power and BSES and titled "Principles of Agreement" it was stated that both the parties had agreed to cooperate in order to ensure that the GOM Order dated January 19, 1998 would be implemented in spirit and that a detailed Power Supply Agreement would be executed by April 2, 1998. It was further provided in the said 'Principles of Agreement' as under:-

- "(4) BSES agrees to take or pay to TEC in each financial year.*
- (a) overall minimum guaranteed aggregate energy of – take and*
 - (b) minimum aggregate maximum demand at 22 kv/33 KV points"*

For the year 1997-98 "(a)" and "(b)" off-takes are set at 2875 M.U.s. and 6900 MVA respectively. BSES will submit their realistic projection for the year 1998-99 and 1999-2000 for minimum guaranteed aggregate energy off-take and aggregate maximum demand by first week of March 1998. TEC agreed to supply minimum guaranteed energy as well as power demand.

The monthly billing will be on the basis of the existing practice between TEC and BSES and adjustment, if any, for the aggregate maximum demand and energy will be done at the end of the year." (emphasis supplied).

23.The aforesaid clause 4 was agreed to between Tata Power and BSES so that a commercial equilibrium would be maintained by BSES continuing to purchase a minimum guaranteed energy off-take from Tata Power each year, to the extent of BSES's annual shortfall

*being the difference between the total electricity generated by BSES Dahnu Generating Station and the requirement of electricity of BSES for supply to its consumers within its licensed area in Mumbai. Since the requirement of electricity of BSES for supply to its consumers within its licensed area could vary from year to year depending upon several factor and projections and since Tata Power would be required to arrange its affairs accordingly, BSES's requirement of the minimum guaranteed off-take from Tata Power had to be ascertained/determined by BSES on the basis of realistic projections in the near future and committed to Tata Power. As a result, in the Principles of Agreement dated January 31, 1998 the demand off-take for the year 1997-98 was determined and fixes at 2875 MUs as being the minimum guaranteed off-take from Tata Power on a **"take or pay"** basis. The said Agreement also accordingly provided that for the years 1998-99 and 1999-2000 BSES would submit its realistic projections for a minimum guaranteed aggregate energy off-take by first week of March, 1998. Such projections were necessary not only to enable BSES to determine its off-take and liability to Tata Power on a "take or pay" basis but also for Tata Power to arrange its affairs accordingly, in order to provide for the supply for the minimum guaranteed energy as well as power demand and its connected commercial impact. Clause 4 of the said Agreement also provided that BSES would indicate its realistic projection in each financial year the minimum aggregate maximum demand at 22KV/33KV points. By this, it was meant that BSES had to indicate to Tata Power the committed maximum demand annually and the committed annual draw of energy from the points of supply which for year 1997-98 was indicated at 2875 MUs and 6900 MVA. Under the Agreement, BSES was to compensate Tata Power on "take or pay" basis namely it would either consume the minimum of the said demand off-take or in any event*

would make payment to Tata Power for the same. In fact, under the Schedule to the 1910 Act it is provided that the distributing licensee is required to execute an Agreement with the bulk licensee to receive and pay for a supply of energy. However, due to BSES' non-cooperation, a detailed finalized power supply agreement was not executed between BSES and Tata Power.

(ii) **TATA POWER:** Tata Power indicated that it wished to generate additional capacity by re-powering of the existing generating stations at Trombay, which would efficiently utilize the existing assets of Tata Power to the optimum capacity. Tata Power contended that the present technical and commercial arrangement between Tata Power and BSES should remain unchanged and would continue in the future even after commissioning of the two new projects.

(iii) **BSES:** BSES wished to consume the power generated from the Palghar Project within its licensed area and only wish to sell outside its licensed area so much excess power as was available at the off-peak hours. BSES indicated that on commissioning Palghar Project it intended to reduce its demand off-take from Tata Power and would discontinue the existing commercial arrangements with Tata Power.

30. Tata Power and BSES also sought to raise their respective contentions regarding sharing between them of the standby charges payable to MSEB. However, the Committee decided and it was agreed that this issue be mutually discussed and finally decided by the GOM while deciding the tariff structure.

31. Ultimately Shri Kukde and each of the parties represented thereon including BSES decided and agree "that the present commercial arrangement between

*MSEB & TEC and TEC & BSES should not be disturbed in future and additional power generated through Bhivpuri and Palghar Projects should be consumed to meet the growth in demand” and that this “will continue in future even after commissioning of Bhivpuri and Palghar Projects”. The Committee decided and it was agreed by the parties that the said Bhivpuri and Palghar Projects could be directed for commissioning in a phased manner, MSEB should be compensated by cross subsidy component by both Tata Power and BSES and that Tata Power and BSES should be allowed to sell the excess energy “available during the lean period of the year particularly between 2001-2006” outside the State at negotiated prices with the consent of MSEB and GOM. The Kukde Committee made a report dated May 26, 1998 recoring inter alia the above agreement which report was signed (in acceptance and agreement thereof) by representative of all the parties including BSES and MSEB. By so unconditionally signing the Kukde Committee Report BSES gave up and/or deemed to have given up its intention to reduce its demand off-take from Tata Power and to discontinuing commercial arrangements with Tata Power since such intentions were contrary to the final agreement reached before the Kukde Committee as recorded in the recommendations of the Kukde Committee Report. The Kukde Committee recommended that the actual load growth in Mumbai licenced area should be reviewed every 2 years to compare with the projections and be taken into reckoning while implementing the Committee’s recommendations. Hereto annexed and marked **Exhibit “W”** is a copy of the signed Kukde Committee Report dated May 26, 1998.*

32. Tata Power addressed letters dated July 28, 1998, August 28, 1998, November 3, 1998 and June 23, 1999 to the GOM (with copies to MSEB) pointing out

*the aforesaid. It was reiterated that it had been agreed before both the Kukde Committee (and formed part of its recommendations) as well as GOM that the commercial equilibrium between Tata Power, BSES and MSEB should not be disturbed. Tata Power pointed out that as bulk licensee it had surplus capacity to economically meet Mumbai's needs and stressed that having regard to the scheme underlying the 1910 and 1948 Acts sanction under Section 44 of the 1948 Act for the establishment by BSES of further generating capacity for Mumbai, that too at high cost, could not and ought not be permitted. The said letters are annexed as **Exhibits "X", "Y", "Z" and "AA"**, hereto.*

The proposed sanction to Saphale

*33. In July, 1999, Tata Power learnt that the GOM was considering imminent approval of additional generating capacity by BSES at Palghar/Saphale for use in Mumbai. By a letter dated July 23, 1999, Tata Power wrote to the Secretary (Energy) of the GOM, registering their protest against any move to approve the BSES Palghar/Saphale Project. Since the matter had far reaching consequences, Tata Power requested the GOM not to take any decision in the matter until the issues were discussed and resolved to the mutual satisfaction of the GOM as well as Tata Power. A copy of the said letter dated July 23, 1999 is hereto annexed and marked **Exhibit "BB"**.*

*36. By a letter July 26, 1999, Tata Power addressed its concerns to the CEA regarding the new project of BSES. By its reply dated August 24, 1999, CEA assured Tata Power that these concerns would be gone into when MSEB approached the CEA for consultation under Section 44(2)(A) before giving consent to BSES. Hereto annexed and marked **Exhibits "EE" and "FF"** are*

copies of the aforesaid letters dated July 26, 1999 and August 24, 1999, respectively.

37. *By a letter dated July 28, 1999, Tata Power had also registered its objections with the Governor, Maharashtra State. Hereto annexed and marked **Exhibit “GG”** is a copy of the said letter dated July 28, 1999.*

38. *Tata Power addressed a letter dated September 27, 1999 to the GOM with a copy marked inter alia to MSEB pointing out, inter alia, that:*

- (i) Tata Power presently had ample power available for Mumbai’s needs and had in fact a surplus capacity of 200-400 MW;*
- (ii) the cost of Tata Power’s power was far less than the estimated unit cost of new generation by BSES or the other IPPs;*
- (iii) even if additional power was required for the future Tata Power had at all times been willing to install such additional capacity;*
- (iv) if BSES was permitted to generate 450 MW at Palghar and bring such power to Bombay, the same would be used not for meeting additional demand but for displacing Tata Power’s bulk sales to BSES:*
- (v) allowing such defacto delimitation/reduction of Tata Power’s area of supply would be contrary to the Kukde Committee Report and also contrary to the obligations assumed by GOM and the Union of India under the Sovereign Guarantees issued by the Union of India to the World Bank.*

*Tata Power sought confirmation from the GOM as to whether any such approval had in fact been issued to BSES and also called on MSEB not to grant sanction under Section 44, Hereto annexed and marked as **Exhibit “HH”** is a copy of the aforesaid letter dated September 27, 1999.*

Cabinet decision of July 24, 1999 communicated to Tata Power and promises made to Tata Power.

39. Though the Petitioners were aware that the Cabinet of Ministers of GOM had at its meeting dated July 24, 1999 taken various decisions concerning BSES’ Saphale Project, the exact terms and conditions of the decision were not known to the Petitioners. However, under cover of a letter dated November 1, 1999 addressed by the Governor of Maharashtra, a copy of the letter dated October 13, 1999 was furnished to Tata Power whereby the cabinet decisions/Order of July 24, 1999 concerning BSES’ Saphale Project was communicated. By means of a copy of the letter dated October 13, 1999, certain material parts of the cabinet decisions/order were communicated to Tata Power. It was thus, represented and promised to Tata Power that GOM had decided to approve of BSES’ Saphale Project on conditions which had been imposed but which were not communicated to Tata Power. It was further represented that:-

- (i) the GOM had accepted the recommendations of the Kukde Committee;*
- (ii) the GOM had accordingly decided that the present commercial arrangements between MSEB, Tata Power and BSES should not be disturbed and would continue in future even after commissioning of the Bhiwpuiri and Plghar (Saphale) Project,*

- (iii) *Tata Power's sales of power to BSES would not be allowed by GOM to decrease;*
- (iv) *this would thus ensure that the condition in the sovereign guarantees executed by the Union of India in favour of the World Bank would not be violated.*

Hereto annexed and marked Exhibit "II" is a copy of the Governor's letter dated November1, 1999 addressed to Tata Power together with its enclosure viz. a copy of the letter dated October 13, 1999 from GOM.

*40. In reply thereto, Tata Power addressed letters dated December7, 1999, December 16, 1999, December 29, 1999 and December 31, 1999 to GOM highlighting various issues that remained outstanding including some recommendation of the Kukde Committee and seeking a copy of the full text of the cabinet decisions/Order dated July 24, 1999. By its letter of December7,1999 Tata Power expressed its apprehension that BSES would jeopardize the recommendations of the Kukde Committee Report by avoiding signing of the Commercial Agreement with Tata Power and sought the intervention of the GOM to ensure BSES signed such a formal Agreement. By its letter December 16, 1999 Tata Power expressed its apprehension that BSES would substantially reduce its purchase from Tata Power in contravention of the Kukde Committee Report upsetting the Commercial equilibrium between MSEB and Tata Power and Tata Power and BSES. Hereto annexed as **Exhibits "JJ", "KK", "LL" and "MM"**, respectively are copies of Tata Power's said letters dated December 7, 1999, December 16,199, December 29, 1999 and December 31, 1999.*

41 A task Force was constituted by GOM under the Chairmanship of the Chief Secretary to review the proposal of Tata Power and BSES for additional power generation. At a meeting held on March 27, 2000 before the Task Force, Tata Power made the said proposal that included re-powering of its existing Tombay unit by conversion thereof to a more efficient combined cycle operation. Such re-powering would, apart from releasing less effluent, also reduce the fuel cost by about 20% and create an additional capacity of 450 MW. The same was reduced to writing by Tata Power by letter dated March 29, 2000. By their letters dated March, 31, 2000, April 4, 2000 and May 10, 2000 addressed to GOM, Tata Power recorded the aforesaid as also the promise and representation made to Tata Power by GOM by its letter of November 1, 1999, inter alia, that while clearing future power projects, Tata Power's sales to BSES would not be reduced and that the additional generating projects would not adversely affect the present equilibrium between Tata Power, MSEB and BSES. Hereto annexed and marked as Exhibits **"NN"**, **"OO"**, **"PP"** and **"QQ"** are copies of the letters dated March 29, 2000, March 31, 2000, April 4 and May 10, 2000 all addressed to GOM.

(E) Without prejudice to the aforesaid and even assuming while denying that the impugned Order dated November 1, 2000 has been issued by MSEB itself and not at the dictate of the GOM, it is submitted that the impugned Order dated November 1, 2000 is clearly illegal, arbitrary, ignores relevant considerations, is contrary to the Kukde Committee report and to the agreement of MSEB recorded therein and is unfair, irrational and violative of Article 14 of the Constitution of India:-

(i) As stated above, it was agreed by all the parties (represented on the Kukde Committee and as denoted

by their signatures on the Kukde Committee Report) that:-

a) the existing commercial and technical arrangements between MSEB and Tata Power and Tata power and BSES would not be disturbed and would continue in future even after commissioning of inter alia the Saphale Project;

b) that the additional power generated by the Saphale Project (and re-powering Project of Tata Power) would be consumed only to meet the expected future growth of demand and that in the event of surplus power the same would be sold by Tata Power and BSES outside their respective licensed area and/or outside the State of Maharashtra with the consent of MSEB and GOM.

c) that therefore the consumption of power by BSES from Tata Power would not decrease and that the minimum guaranteed demand off-take of BSES of its entire shortfall for its licensed area (that could not be made up by its Dahanu Generating Station) on a “take or pay” basis as arranged inter alia in the Principles of Agreement dated January 31, 1998, would continue on the same basis and would not decrease even after commissioning of the Saphale Project.

(K)As stated above the Kukde Committee Report and the agreement of the GOM and MSEB, proceeded on the basis of a projected growth in demand that required both the project of BSES as well as that of Tata Power for additional power generation to be sanctioned. If, however, only one of these was to be sanctioned then such sanction ought to have been and could in law only have been granted to Tata Power – the bulk licensee for the Mumbai area – whose application was prior in time and who was ready and willing to meet all the

requirements of power in Mumbai in the future, that too at a cheaper cost than BSES. Moreover, in law BSES could never have been allowed to generate power to supply to consumers in Mumbai without the consent of Tata Power. The 1910 and 1948 Acts posit that neither the Electricity Board, nor another licensee, nor any other person, will be permitted to supply electricity to consumers within the area of supply of an existing licensee, unless such existing licensee is unwilling or unable to meet the requirement of consumers in the area on reasonable terms and within reasonable time. Section 22 of the 1910 Act casts a mandatory statutory duty on a licensee to supply electricity to all applicants in an area of supply on the same terms. Similarly Clause IX of Schedule I requires Bulk Licensees to give supply to distributing licensees within the area of supply. Setting up a power generating and transmission system capable of meeting the demand requirements of all consumers and distributing licensees in the area of supply necessarily involves a huge capital outlay and unless a licensee was entitled to undisturbed distribution rights no party would be willing to undertake the financial burden involved. That this is the scheme of the Acts is evident inter alia from:

(i) Section 28 of the 1910 Act which posits that the State Government shall not permit any party to supply electricity within the area of supply of a licensee without the consent of such licensee – unless the State Government is of the view that such consent has been unreasonably withheld.

(ii) Section 19 of the 1948 Act which stipulates that even the State Electricity Board shall not supply electricity within the area of supply of a bulk licensee/licensee without the consent of such bulk licensee/licensee unless such bulk licensee/licensee is either unwilling or unable to effect supply on

reasonable terms and within reasonable time. Moreover under Section 44 no person or licensee can set up a new generating station without the consent of the State Electricity Board.

The Petitioners submit that it would be contrary to the statutory scheme and purpose of the 1910 and 1948 Acts to construe the Acts as enabling Respondent Nos. 1 and 2 to grant a license to a party to supply electricity within the area of supply of an existing licensee, in circumstances where MSEB is itself precluded from supplying electricity within the area of supply of an existing licensee i.e. where the existing licensee is both willing and able to supply all applicants on reasonable terms and in reasonable time. The impugned Order November 1, 2000 violates and is ultra vires Section 44 of the 1948 Act and/or in any event is passed in disregard of considerations that are vital to the exercise of power under Section 44. If the existing bulk licensee is able and willing to effect supply on reasonable terms/cost, it is submitted that Section 44 does not authorities MSEB to grant sanction to any other person. In the present case. Tata Power have been duly catering to Mumbai 's needs both directly and through the two distributing licensees for the last eight decades. As a consequence of the efforts and investment of Tata Power, Mumbai has enjoyed and continues even today to get the best quality power in the country. Tata Power's licenses are valid and have in fact been extended recently till 2014. Tata Power has invested over Rs. 2800 crores in strengthening and improving its generation and distribution systems. At present Tata Power have 200 MW surplus power at peak hours and 400 MW surplus power at other hours – i.e. approx. 1700 MUs surplus each year. The Petitioners accordingly can generate adequate power available to meet the needs of consumers in Mumbai in the foreseeable future (including the growth in demand).

Moreover, Tata Power is ready, willing and able to install/establish additional generating capacity and to meet Mumbai's demand for power on reasonable terms and at reasonable cost MSEB is aware of this. Tata Power's power is far cheaper than power generating by BSES or other new IPPs: Tata Power's average basic energy rate (excluding FAC & MD Charges) is Rs. 1.97 Per Unit for HT Industries as against BSES' Rs. 3.14 for HT Industries, and Tata Power's average basic energy rate (excluding FAC & MD charges) is Rs.2.72 for LT single part as against BSES' Rs. 4.12 for LT single part Furthermore, Tata Power's proposal for re-powring Trombay would have converted Trombay Generation Station into a combined cycle plant, thus further reducing the cost of generation. MSEB was bound in law to have taken the aforesaid into consideration, and, therefore, not to have passed the impugned Order under Section 44. In these circumstances the Petitioners submit that to permit/license BSES to generate 495 MW of power at Saphale and bring the same to Mumbai within the area of supply of the Petitioners, is arbitrary, contrary to the provisions of Section 44, without the authority of law ultra viues the scheme and object of the said Acts and is bad in law.

(L) The impugned decision is arbitrary, irrational, vitiated by non-application of mind and bad in law. On the basis of the licenses granted to them, Tata Power have invested several thousand crores of rupees in creating, expanding and maintaining their power generation, transmission and distribution infrastructure, so that the Mumbai Metropolitan Region enjoys reliable, high quality power supply at all times. The increase over the years in the cross fixed assets of Tata Power are depicted on the chart, hereto annexed and marked as **Exhibit "ZZZ"**. In fact, in the last few years Tata Power have invested over Rs.800 crores on their generating & transmission systems. The investment

made by Tata Power was on the premise that during the licensing period their position as the sole bulk licensee of electrical energy in the Mumbai Metropolitan Region would not be compromised or in any way adversely affected. The GOM has recently extended Tata Power's licenses up to August 15, 2014. The investments made by Tata Power were based on an expected or projected rate of return calculated on the basis that Tata Power's area of supply would not be reduced or de-limited and no other party would be allowed to bring in additional electrical energy into the Mumbai Metropolitan Region. Moreover Tata Power's average basic energy charge (excluding FAC & MD) is substantially lower than the average basic energy charges of BSES and others IPPs. Tata Power today has more than adequate power available to meet the needs of the consumers of Mumbai in the foreseeable future. In fact, Tata Power presently has 200 MW surplus power at peak hours & 400 MW surplus power at other hours – i.e. 1700 Million Units surplus per year. The impugned decision by the GOM and MSEB to permit BSES to generate and bring in an additional 495 MW of power into the Tata Power's area of supply will:

(i) have the effect of replacing the Petitioners present low cost supply of energy with high cost energy which will adversely impact the consumer;

(ii) result in the BSES virtually ceasing purchases of bulk electricity from Tata Power and sharply increase the quantum of Tata Power's power rendered surplus; and

(iii) put in jeopardy the massive investments made by Tata Power and result in a colossal waste of the national resources invested by Tata Power;

The Petitioners submit that the 1st and 2nd Respondent have failed to have regard to these most

relevant considerations. Moreover, Tata Power's application for clearance of the Bhiwpuri/ Trombay project was pending before MSEB and no regard has been had to this application while preparing to clear the Palghar/Saphale project. Tata Power's application was prior in point of time and was also approved of by the Kukde Committee. In the circumstances, the Petitioners submit that the impugned decision suffers from patent non-application of mind, ignoring of relevant factors and is arbitrary.

- (M) The impugned actions are contrary to the rules of fairness and/or natural justice. It was incumbent upon MSEB in the circumstances of the case, to grant an effective opportunity to Tata Power before taking the impugned actions. The impugned actions have a direct and proximate impact on the area of supply, financial position, operations and ability of Tata Power. Tata Power had made written representations pointing out the tremendous adverse impact that the impugned decision is likely to have on it and had asked specifically for an opportunity to put forward their case. Despite these representations, the MSEB's decision was taken without granting any opportunity of a hearing to Tata Power (despite request by Tata Power's letters dated June 2, 2000 and July 21, 2000) or holding any discussions with Tata Power. In refusing either to hear Tata Power and/or to grant an effective opportunity, MSEB has acted contrary to rules of fairness and/or natural justice and the impugned Order therefore, is liable to be set aside.
- (N) The Petitioners say and submit that as the bulk licensee who has been supplying energy to the Mumbai Metropolitan Region over the past eight decades and who holds a licence that is valid up to the year 2014. Tata Power was under a legitimate expectation that no person, much less a distributing licensee who is

subordinate to the bulk-licensee under the statutory scheme, would be permitted to bring in energy in the area of supply of Tata Power during the license period. The Petitioners were also under a legitimate expectation that their view and representations would be considered before any decision was taken that would delimit their area of supply or have an adverse impact on their financial position and operations. Tata Power altered its position based on such legitimate expectation. The impugned decision has been taken in breach of such legitimate expectation and is therefore liable to be set aside:

- (O) The Petitioners submit that the impugned action is violative of Article 14 of the Constitution of India for the aforesaid reasons and further since it is even otherwise arbitrary, unreasonable and irrational. The impugned decision also violates Article 19(1)(g) of the Constitution and amounts to an unreasonable restriction on the right to freedom of the Petitioners to carry on their trade or business. The Petitioners submit that the impugned action is without the authority of law and transgresses their constitutional right to property under Article 300A of the Constitution of India.*

60. In the aforementioned circumstances, it is also submitted that the CEA has no jurisdiction or authority in law to proceed with consideration of whether it should grant its approval to MSEB's sanction dated November 1, 2000. The CEA cannot and/or in any event ought not to proceed with the hearing or determination of BSES's application and this Hon'ble Court ought to issue a Writ of Prohibition or any other appropriate writ Order or direction as prayed for prohibiting the CEA from considering BSES' proposal.

61. In the premises, the Petitioners submit that they are entitled to the writs, orders and reliefs prayed for hereinafter.

62. *The Petitioners submit that the GOM and MSEB have a duty in law to implement the decision of the GOM dated July 24, 1999, the recommendations of the Kukde Committee Report and the agreement recorded thereon and to act in accordance therewith. The Petitioners submit that it was incumbent upon MSEB not to have issued the impugned Order November 1, 2000. MSEB is “the State” and owe a public duty not to have issued the said permission and not to have taken the impugned actions. Tata Power has by its letters (and those of their Solicitors) demanded justice, but justice has been denied to them. It is submitted that it is incumbent upon GOM and MSEB and part of their public duty to withdraw and cancel the said permission/condition in the impugned Order.*

63. *Petitioners further say and submit that it is absolutely necessary and in the interest of justice that appropriate ad-interim and interim relief is granted in the present case. As set out in the grounds hereinabove, the impugned actions are: (i) contrary to the Order of the GOM dated July 24, 1999 and the agreement of the GOM and MSEB (ii) ultra virus the express provisions of the Act (iii) contrary to and defeat the basic scheme and object of the said Acts (iv) contrary to the solemn promises given and obligations undertaken by the GOM and communicated by the letters October 13, 1999 and November 1, 1999 (v) contrary to public interest (vi) arbitrary unreasonable and unfair. The impugned action sanctioning Saphale is also contrary to public interest as it will have the effect of replacing Tata Power’s low cost power with BSES’s high cost power and will render infructuous the vast investment and assets developed by Tata Power for ensuring supply of quality power to Mumbai. Permitting such supply by BSES will cripple the commercial viability of Tata Power and have the effect of destabilizing and adversely affecting the established power distribution and supply arrangements in the City of Mumbai and its environs. The impugned decision is not only against the interest of Tata Power but also against the public interest at large, inasmuch as there is*

a very strong likelihood that the thousands of crores of rupees in the existing infrastructure will be put in jeopardy or will be wasted with the Palghar/Saphale Power Project coming up. Eventually this means that the consumers of electricity will have to pay a higher price. The Order of November 1, 2000 being wholly illegal and without jurisdiction or the authority of law and no permission of the CEA having been granted, no equity can be claimed by BSES. Unless appropriate ad-interim and interim relief is granted, BSES is likely to invest substantial amounts of money in relation to the Palghar /Saphale Power Project, resulting in a waste of public monies. The impugned actions are not only against the interest of Tata Power but also against the public interest at large including BEST the Railways, textile mills, etc., inasmuch as there is a very strong likelihood that the thousands of crores of rupees in the existing infrastructure will be put in jeopardy or will be wasted. Moreover, Tata Power will be forced to increase its electricity tariff which will have serious adverse consequences for the consumers in Mumbai and, inter alia, the BEST. Unless appropriate ad-interim and interim relief is granted, irreparable harm, injury, loss and prejudice would be caused, inter alia, to the Petitioners. Since this in matter relating to basic infrastructure, the Petitioners say and submit that it would affect millions of citizens in Mumbai as well as very large investment of public monies. It is, therefore, submitted that the interests of justice and the public interest requires that interim and ad-interim reliefs as sought for be granted. The balance of convenience is clearly in favour of the Petitioners and the grant of interim and ad-interim reliefs and no prejudice or harm will be caused to the Respondents, if ad-interim and interim reliefs are granted. No prejudice will be cause even to the public at large as Tata Power has enough surplus power so as to meet with the demand and future growth in demand for electricity and that there is no need of undue hurry or haste in the matter.

The Petitioners, therefore, pray:

- a) *that this Hon'ble Court be pleased to issue a Writ of Certiorari or a Writ in the nature of Certiorari or any other appropriate writ, order or direction to quash and set aside the consent given by Respondent No.2 (MSEB) under Section 44 of The Electricity (Supply) Act, 1948 by its letter dated November 1, 2000 (Exhibit "KKIK" hereto);*

- b) *that this Hon'ble Court be pleased to issue a Writ of Mandamus or a Writ in the nature of Mandamus or any other appropriate writ, order or direction directing;*
 - (i) *Respondent No. 2 (its servants, agents and officers) to withdraw and /or cancel the impugned consent given by MSEB (Respondent No.2) dated November 1, 2000 (Exhibit "KKK" hereto);*

 - (ii) *Respondent Nos. 1 and 2 to implement and act strictly in accordance with the GOM's Order dated October 13, 1999 (as communicated to Tata Power on November 1, 1999 – Exhibit "11" hereto) and the Kukde Committee Report March 26, 1998 (Exhibit "W" hereto);*

 - (iii) *Respondent No. 1 (its servants, agents and officers) to withdraw and/or cancel its Order October 27, 2000 (Exhibit "JJ" hereto) issued to MSEB;*

 - (iv). *Respondent No.2 (its servants, agents and officers) to forbear and desist from granting sanction under Section 44 of the 1948 Act to respondent No. 3 (BSES) or any other person for further generating capacity (including at Saphale) without first consulting the CEA as required by Section 44 (2A) of the 1948 Act imposing conditions 1(d) and 10 of the letter dated July 18, 2000 (Exhibit "HHH"*

hereto) and that no part of the additional power generated by BSES from such generating unit, directly or indirectly, be supplied to any part of Mumbai and/or to Tata Power's licensed area of supply;

c) this Hon'ble Court be pleased to issue a Writ of Prohibition or a Writ in the nature of Prohibition or any other appropriate writ, order or direction prohibiting the Central Electricity Authority (Respondent No.4) from considering the proposal of BSES (Respondent No.3) to set up a generating plant at Saphale as proposed;

d) this Hon'ble Court be pleased to issue a Writ of Prohibition or a Writ in the nature of Prohibition or any other appropriate writ, order or direction prohibiting Respondent No.3 (BSES) from setting up any new power generating unit/plant for supplying the power in the licensed area of Petitioner No.1 (Tata Power).

35. Learned senior counsel Mr. Bhatt also drew our attention to the following paras from the Committee Report on Review of Power demand in Mumbai area (referred to as Kukde Committee Report) in these appeals.

“GOM has to appoint committee to set up commercial and operational norms between two companies so as to ensure techno-commercial operations with minimum sufferings.”

TEC indicated that they would like to generate additional capacity through re-powering of the existing generators in Trombay by using gas turbines and existing steam turbines. The overall power efficiency is expected to

increase and will therefore reduce the cost of the power generation and hence their consumers will be marginally affected. However, the under utilization of the assets will be ultimately at cost to their consumers. TEC expect that the only alternative to utilize assets to its optimum capacity is to sell the power outside. The power could be sold at fuel cost plus suitable incentive if the PLF is more than 68.5%. Committee recommended that the suitable incentive should be decided by mutual agreement and finally approved by GOM while deciding the tariff structure.

“From the above discussions, it will be observed that TEC’s understanding is that the present technical and commercial arrangement between TEC and BSES will remain unchanged and continue in future, while BSES considers that the present commercial arrangement will be discontinued in future. On detailed discussions, the committee has agreed that the present commercial arrangement between MSEB and TEC and TEC and BSES should not be disturbed in future and additional power generated through Bhiwpuri and Palghar projects should be consumed to meet the growth in demand.”

36. Per contra Mr. Sitesh Mukherjee, learned counsel for TPC averred that REL till date, has miserably failed and willfully avoided performance of its obligations as a distribution licensee specified under the prevailing laws and regulations. He set out before us the relevant extract of various regulations and orders as below:-

**“Maharashtra Electricity Regulatory Commission
(Terms and Conditions of Tariff) Regulation, 2005.**

.....

21. Applicability

21.1 The regulations contained in this part shall apply to electricity purchase and procurement by a Distribution Licensee from a generating company or licensee or from any other source through agreement or arrangement for purchase of power for distribution and supply within the state.

23.1 The distribution licensee shall prepare a five-year plan for procurement of power to serve the demand for electricity in his area of supply and submit such plan to the Commission for approval. Provided that such long-term power procurement plan shall be an annual rolling plan and the first plan period shall commence on April 01, 2006;

Provided further that the long-term power procurement plan shall be submitted along with the application for determination of tariff, in accordance with Part B of these Regulations.

23.2 The long-term power procurement plan of the distribution licensee shall comprise the following:

- (a) A quantitative forecast of the unrestricted demand for electricity, within his area of supply, from each tariff category over the plan period;*
- (b) An estimate of the quantities of electricity supply from the approved sources of generation and power purchase;*

- (c) *Standards to be maintained with regard to quality and reliability of supply, in accordance with the standards of Performance Regulations:*
- (d) *Measures proposed to be implemented as regards energy conservation and energy efficiency:*
- (e) *The requirement for new sources of power generation and/or procurement, including augmentation of generation capacity and identified new sources of supply, based on (a) to (d) above*
- (f) *The plan for procurement of power including quantities and cost estimates for such procurement*

Provided that the forecast/estimate contained in the long-term procurement plan shall be separately stated for peak and off-peak periods, in terms of quantities of power procured (in millions of units of electricity) and maximum demand (in MW/MVA);

Provided further that the forecasts/estimates shall be prepared for each three-months period over the plan period;

Provided also that the long-term procurement plan shall be a cost-effective plan based on available information regarding costs of various sources of supply.

Explanation- for the purpose of this Regulation, the term “peak period” shall mean such block of three (3) continuous

hours during a twenty-four (24) hour period representing maximum demand for power by the distribution licensee.

23.3. The forecasts/estimates shall be prepared using forecasting techniques based on past data and reasonable assumptions regarding the future. Provided that the forecasts/estimates shall take into account factors such as overall economic growth, consumption growth of electricity-intensive sectors, advent of competition in the electricity industry, trends in captive power, impact of loss reduction initiatives, improvement in generating station Plant Load Factors and other relevant factors.

23.4 The forecasts/estimates submitted to the Commission as part of the long-term power procurement plan shall be consistent with the forecasts of power generation, ;power purchase and demand for electricity prepared and submitted under Regulation 15.

**Maharashtra Electricity Regulatory Commission
(General Conditions of Distribution Licensee)
Regulation, 2006**

**8.3 FUNCATIONS/ACGTIVITIES OF THE
DISTRIBUTION LICENSEE**

8.3.1 The Distribution Licensee shall develop and maintain an efficient, safe, coordinated and economical distribution system in the area of supply and effect safe supply of electricity to consumers in such area in accordance with the provisions of the Act, Rules, Regulations, Orders and directions of the Commission.

8.3.2 *The Distribution Licensee shall take all reasonable steps to ensure that all consumers connected to the Distribution Licensee's distribution system receive supply of electricity as provided in the Standards of Performance Regulations, and other guidelines issued by the Commission in accordance with the provisions of the owner or occupier of any premises within the area of supply, give connection to the Distribution Licensee's System for the purposes of providing supply of electricity to such premises.*

Provided that the Distribution Licensee shall duly comply with the standards as the Commission may specify from time to time, for the performance of duties of the Distribution Licensees under the Act.

8.3.3 *After seeking prior approval of the Commission, the Distribution Licensee shall purchase electricity from generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the area of supply and for meeting the obligations under the licence and under the provisions of the Act, provided that such procurement shall be made in an economical manner and under a transparent power purchase and procurement process which shall be required to be in accordance with the regulations, guidelines directions made by the Commission from time to time.*

Electricity Act, 2003

42. Duties of distribution licensees and open access.

- (1) *It shall be the duty of a distribution licensee to develop and maintain an efficient coordinated and economical distribution system in his area of supply electricity in accordance with the provisions contained in this Act.*

MERC ORDER dated June 11, 2004

3. *Power Purchase Agreement (PPA)*

3.1 *Objections*

Prayas has highlighted that there should be a Power Purchase Agreement (PPA) between TPC and BSES with standby support from MSEB to ensure reliability of power supply to Mumbai BSES has contended that TPC has neither provided any legal justification nor any tenable reason to substantiate for a PPA between TPC and BSES, BSES has also objected to TPC's allegation of breach of obligation by BSES.

3.2 *TPC's Response*

TPC has welcomed the suggestions made by Prayas and has pointed out that it has been making efforts to sign a PPA between TPC and BSES with stand by support from MSEB since the past six years. TPC has further clarified that currently, TPC and BSES are already in discussions over the PPA.

3.3 Commission's Ruling

As for the requirement of a PPA between TPC and BSES the Commission is of the view that this is a bilateral agreement between TPC and BSES, which is best left to the discretion of the Utilities concerned.

MERC order dated December 9,2005

51. *The Commission notes that prior to implementation of The Electricity Act, 2003, open access to transmission network was neither available to distribution licensees nor to consumers. Therefore, it was incumbent on the distribution licensee, in this case REL to procure power from the bulk licensee, i.e. TPC. However, now licensees are permitted to procure power from any source subject to availability of transmission capacity. The EA 2003 provides flexibility to REL to procure from any other source, as well as to TPC to sell power to any consumer or licensee other than REL.*

52. *Commission while addressing this issue in its order on general conditions and special conditions applicable to Distribution Licensee, has mentioned the following special conditions for REL with respect to power purchase:*
 - a) *Licensee shall purchase the electricity in accordance with the provisions of EA 2003 and on the terms and conditions as approved by the Commission.*

 - b) *Licensee is authorized to purchase supply from generating companies, other licensees and/or from any other source as may be approved by the Commission.*

c) Licensee shall continue to purchase electricity from such suppliers as the licensee has been purchasing as on the date of issue of these conditions.

Though the Commission has addressed this issue in its order on licences, this situation is bound to create uncertainty about availability of power to Mumbai consumers. Therefore, the Commission hereby directs both the parties to enter into an agreement within three months of this order to ensure long-term availability of power to Mumbai consumers”

37. Mr. Mukherjee submitted that REL as a distribution licensee is required to take necessary steps in time to secure adequate supply of power to its consumers by making projections for demand in growth and making necessary arrangements for procuring additional power to meet the demand growth. He stated that REL has been completely unmindful of the growth of demand for power within its supply area and has taken no steps to procure additional power and that REL never approached TPC(G) for executing power purchase agreement. In fact, TPC on various occasions had requested REL to enter into a firm commitment for its available capacity and that even for power procured from other sources, REL has not proceeded with any

long term procurement plans and REL has not called for any bid for long term supply of power.

38. He contended that REL has, therefore, failed to manage its procurement according to the growth of its consumer demand. REL is now seeking redistribution of TPC (G)'s capacity to meet the present load requirement of its consumers. The contractual entitlement of BEST and TPC (D), who are competing distribution licensees of REL, and who have planned and managed their operations efficiently and planned for projected demand growth cannot be curtailed to make up for REL's mismanagement.

39. Mr. Mukherjee advanced a legal proposition that TPC understood that it had a right and REL had an obligation to procure all its requirements from TPC at that point in time, while relying on the writ petition filed by TPC against REL in connection with the approval granted to REL for setting up its 495 MW power station in Saphale, Mr. Mukherjee admitted that indeed was the situation borne out by the existing law as well as the license available to TPC.

40. Mr. Mukherjee stated that REL had initially proposed to set up a 495 MW power station at Palghar. TPC was facing a situation where it had created generation capacity for its consumers within its area of supply including REL. However, no part of the capacity had been tied up by REL on a long term basis as it continued to draw power from TPC according to its requirement.

41. He averred that it would appear from the Kukde Committee Report that REL proposed to substitute the power supplied by TPC by its own alternative generation source (Palghar 495MW). However, the Kukde Committee was of the view that the existing infrastructure already created by TPC at that time should be first utilized by REL for the purpose of supplying to its consumers, and the additional power available from the Bhivpuri and Palghar projects should be consumed to meet the future growth in demand. The Committee while clearing the Bhivpuri and Palghar projects recommended that TPC (then TEC) and REL (then BSES) should ensure full utilization of their existing

infrastructure developed by TEC or BSES. Kukde Committee also recommended the manner in which the incidental excess power during off-peak hours from the Bhivpuri and the Palghar projects was to be utilized. TPC in its writ petition had prayed for the implementation of the Kukde Committee Report to ensure utilization of its existing capacity which had been developed at substantial cost for meeting the requirement of consumers within its area of supply. The extract of Kukde Committee report was extracted before us:

“From the above discussion, it will be observed that TEC’s understanding is that the present technical and commercial arrangement between TEC & BSES will remain unchanged and continued in future, while BSES considers that the present commercial arrangement will be discontinued in future. On detailed discussions, the Committee has agreed that the present commercial arrangement between MSEB & TEC and TEC & BSES should not be disturbed in future and additional power generated through Bhivpuri and Palghar project should be consumed to meet the growth in demand”.

42. Mr. Mukherjee pointed out in this regard that on an earlier occasion when the Dahanu station of REL was initially approved, the power generated from such station was required to be supplied to the MSEB grid. However, when the project was

ultimately commissioned, the power generated from such station was supplied to REL's consumers thereby substantially decreasing REL's off-take of power from TPC stations. Immediately, on commissioning of Dahanu in 1995, REL's demand went down from 4409 MUs to 2038 MUs.

43. Mr. Mukherjee submitted that in this background the challenge against approval to Saphale proposal of REL was primarily because TPC had a prior application pending with the Government/Board for implementing Bhivpuri project. The Saphale project was approved without clearing the Bhivpuri project even though the Kukde Committee had recommended clearance of both projects. Without considering the Kukde Committee Report (which required existing infrastructure of TPC to be fully utilized by REL and TPC) as also the prior application of TPC for Bhivpuri, the board had granted approval to REL to set up Saphale. The fact that TPC in the writ petition essentially asked for implementation of the Kukde Committee Report clearly shows that TPC was not opposed to setting up additional

capacity by REL to meet its future demand. In relation to the existing demand (in 2001) it was TPC's case in the writ petition that as recommended by Kukde Committee Report, REL had to make a permanent commitment to off-take TPC's available capacity at the level then drawn by it (in 2001) and not seek to substitute this available capacity of TPC.

Extract of Prayers in W.P. No. 916 of 2001

(a) that this Hon'ble court be pleased to issue a writ of certiorari or a writ in the nature of Certiorari or any other appropriate writ, order or direction to quash and set aside the consent given by respondent No. 2 (MSEB) under Section 44 of The Electricity (Supply) Act, 1948 by its letter dated November 01, 2000 (Exhibit "KKK" hereto).

(b) That this Court be pleased to issue a writ of Mandamus or a writ in the nature of Mandamus or any other appropriate writ, order or direction directing:

(i)

(ii) Respondent No. 1 and 2 to implement and act strictly in accordance with the GOM's order dated October 13, 1999 (as communicated to Tata Power on November 01, 1999- Exhibit "11" hereto) and the Kukde Committee Report dated March 26, 1998 (Exhibit 'W" hereto);

.....

c) That this court be pleased to issue a writ of Mandamus or a writ in the nature of Mandamus or any other appropriate writ, order or direction directing;

(i) Respondent Nos. 1 and 2 to forthwith withdraw the application made to CEA

(Respondent No. 4) under Section 44 (2A) of The Electricity (Supply) Act, 1948 to permit BSES (Respondent No. 3) to set up a generating plant at Saphale;

(ii) CEA (Respondent No. 4) to return to BSES (Respondent No. 3) the application filed by BSES with CEA for approval to set up a generating plant at Saphale as being contrary to law;

(iii) In the alternative to prayer e(ii) above, CEA not to consider respondent No. 3's application purportedly made under Section 44(2A) of The Electricity (Supply) Act, 1948 unless and until condition nos 1(d) and 10 appearing in the letter of respondent No. 2 dated July 18, 2000 are added/restored;

(iv) Respondent nos. 1 and 2 forthwith restore condition nos 1(d) and 10 appearing in the letter dated July 18 (Exhibit 'HH" hereto) issued by respondent no.2 to respondent no. 3.

Extract from Kukde Committee Report:

"TEC indicated that they would like to generate additional capacity through re-powering of the existing generators in Trombay by using gas turbines and existing steam turbines. The overall power efficiency is expected to increase and will therefore reduce the cost of the power generation and hence their consumers will be marginally affected. However, the under utilization of the assets will be ultimately at cost to their consumers. TEC expect that the only alternative to utilize assets to its optimum capacity is to sell the power outside. The power could be sold at fuel cost plus suitable incentive if the PLF is more than 68.5% Committee recommended that the suitable incentive should be decided by mutual agreement and finally approved by GOM while deciding the tariff structure.

BSES views this scenario in a different perspective. BSES consider, if they do not purchase from TEC, they can consumer their Palghar power in their area. The excess power available at the off-peak hours can be arranged to sale outside provided it is accepted. As far as impact of Palghar on BSES tariff to their consumer, BSES stated that they have been purchasing a costly power from TEC and due to commissioning of Palghar Project TEC off-take will reduce. The cost of generation at Palghar will be lesser than the power purchase from TEC and hence the impact on pool tariff of newly commissioned project will be minimum.

From the above discussion, it will be observed that TEC's understanding is that the present technical and commercial arrangement between TEC and BSES remain unchanged and continued in future, while BSES considers that the present commercial arrangement will be disc continued in future. On detailed discussions, the committee has agreed that the present commercial arrangement between MSEC and TEC and TEC and BSES should not be disturbed in future and additional power generated through Bhivpuri and Palghar project should be consumed to meet the growth in demand.

(c) In order to reduce the impact of unutilized energy available in Mumbai area as compare to their demand, BSES and TEC have recommended that splitting of unit capacity will reduce the impact to some extent. Project can be commissioned and brought up in Mumbai area phased manner.

(d) Safety and security in the power supply of Mumbai area is essential. Islanding of Mumbai area under grid disturbance can provide the security to power supply. TEC and BSES therefore opined that the excess energy produced in Mumbai area will ultimately

affect their consumers and suggested to develop separate and energy will be surplus in Mumbai area”.

44. Mr. Mukherjee stated that not only was a firm commitment to take or pay for energy not forthcoming from REL, TPC was faced with a further adverse situation where REL was seeking to add more generation capacity to substitute TPC's existing capacity even for the purpose of meeting REL's prevailing demand (in 2001). TPC was only exercising its right under the law and license to carry out supply within its supply area to the extent of its existing capacity as opposed to meeting the future demand. The reading of the writ petition would show that it was TPC's case that the prevailing demand had to be met from TPC's existing capacity and the future growth in demand had to be met from the new power plant proposed to be commissioned either by TPC or by REL.

45. He pointed out in this regard that it was in fact REL which did not want to continue drawal of power generated by TPC even at that time and that it was the Kukde Committee which rejected

REL's proposal to substitute TPC power, and recommended full utilization of TPC capacity to meet the existing demand in 2001.

46. He averred that in view of the scarcity in availability of power faced in Mumbai over the last few years and REL's failure to either develop adequate generation capacity or tie up supply for its increased demand, REL is now seeking to assert a right over TPC's generation capacity and that it is an example of approbation and reprobation according to REL's convenience and business interest.

47. Mr. Mukherjee drew our attention to the matter in which a generating company was regulated in the previous legal regime so as to appreciate the changes ushered in under The Electricity Act, 2003.

Prior to The Electricity Act, 2003 (Act/Act of 2003)

- a. *Required concurrence by the CEA under Section 29 of The Electricity (Supply) Act, 1948 (Supply Act).*
- ii. *The estimates of proposed supply and revenue had to be considered as reasonable- Section 30 (b) of Supply Act.*
- iii. *Approval from Board under Section 44 of Supply Act.*

- b. *The areas of operation of generating company was specified by the competent government – Section 15(3) of Supply Act.*
- C. *There were restrictions imposed on the sale of power from the generating company*
 - i. *Sale to the Board u/s (a) or (b)*
 - ii. *Sale to any person only with the approval of the competent government u/s 42(c) of Supply Act.*
- d. *Under Section 36 of Supply Act the Board could even direct the closure of generating station owned by a licensee (who had a license under the Indian Electricity Act, 1910 (1910 Act)).*
- e. *Under the Electricity Regulatory Commission Act of 1998d (ERC Act) the same position continued in respect of the establishment and continuation of the generating station. In addition:*
 - i. *ERCs could be empowered to regulate the investment approval for generation also u/s 22(2)(a) of the ERC Act.*
 - ii. *Under Regulation 73 of the MERC Conduct or Business 1999 “any generating company proposing to enter into any agreement for supply of electricity between the generating company and any buying party shall get the approval of the Commission for tariff before entering into such contracts.*
 - iii. *Under Regulation 72 (a),”no generating company except that which has entered into or otherwise has a composite scheme for generation and sale of electricity in more than one state, shall charge their customers any tariff for supply of electricity*

without the general or specified approval of such tariff by the Commission”.

48. Mr. Mukherjee asserted that one of the main aims of the Act of 2003 is to de-license and to a large extent deregulate generation. As seen from the main features of the Act the following objects would emerge.

“ Generation is being delicensed and captive generation is being freely permitted”.

49. He stated that the above object can be seen explicitly in the Act of 2003, which are as follows:

- a. *Section 7 of the Act provides that any generating company may establish, operate and maintain a generating station without obtaining a license under the Act at any location (subject to course to the environment and other regulations)*
- b. *Section 10(2) provides that a generating company is free to supply electricity to any licensee in accordance with the provisions of the Act rules or Regulations made thereunder, anywhere in the country- not only distribution licensees but also licensees.*
- c. *Section 42(2) provides that a generating company can sell directly to any consumers where even the tariff is unregulated Section.*
- d. *Tariff is also unregulated in case of sale to a trader.*

Refer: Judgment of APTEL in petition No. 1 of 2006 titled Gajendra Haldea vs CERC

- e. *The generator comes within the regulatory purview only when he enters in to a PPA with a Distribution Licensee. Then all the terms, not only tariff but also the quantum of power sold under such PPAs, are within the regulatory purview.*
- i. *While the Commission can lay down the terms, it is for the generating company to accept such terms or to walk away. Refer:Judgment to APTEL in Small Hydro Power Developers Association vs APERC in appeal No. 1 etc. of 2005- paras 40(a), and 114.*
- ii. *The exercise of power and/or jurisdiction by the commission over a generating company is conditional on the generating company entering into an agreement with a Discom (not with a trader or a consumer) to buy and sell power i.e. a Power Purchase Agreement (whether subsisting or breaches) but not otherwise.*

50. Mr. Mukherjee cited that in case of Small Hydro Power Developers Association vs APERC in appeal No. 1 etc. of 2005 where this Tribunal has held as follows:

“ 114.....We answer the points framed above as under:

(i) On the point A, we hold that the Regulatory Commission has neither the power nor the authority nor jurisdiction to compel the developers to sell the power generated by them to APTRANSCO or DISCOMS”.

51. Mr. Mukherjee also cited case of “PTC vs CERC and ors. Appeal no. 228 and 230 of 2006 where the Commission had directed an IPP to sell electricity to distribution utilities and not to licensed traders, and this Tribunal has categorically held s follows:

“ 32. A conjoint reading of various Sections of Part III,- Generation of Electricity Part IV Licensing in the 2003 Act and in particular Section 7, 10(2). 4 read with Section 1224 and definition clauses, the generating company may supply electricity to any licensee including a Trader in accordance with the provisions of the Act and the rules and Regulations made there under. It is also open to the generating company to supply electricity to any consumer subject to the regulations made under Section 42(2) of the Act. It is well open to a generating company to supply electricity generated by it to any licensee, be it a transmission licensee or distribution licensee or a licensed electricity trader and there could be no restriction nor impediment contemplated in the 2003 Act.

.....

It is not as if by virtue of the provisions in The Electricity Act, 2003, an independent generator could be compelled to sell entire power generated much less 85% or any portion of the power generated by it only to distribution licensees/utilities nor there is any provision in the Act by which a generator could be compelled or directed not to sell the power generated by it to a licensed trader. This legal position is clear and follow on a consideration of the entire Act and not controverted before us.

On a conspectus consideration of the entire 2003 Act, Directing generators to sell power only to state utility/distribution licensees much less 85% of power

generated is not contemplated, except under extraordinary circumstances falling under Section 11 of the Act”.

52. Mr. Mukherjee submitted that the above decisions clearly show the Commission exercises regulatory control over a generating company only in relation to such part of its generation capacity as it committed to a distribution licensee under a power purchase agreement which is approved by the Regulatory Commission and accepted as such by the generating company. The Commission cannot direct a generating company to enter into a PPA or create a contract to bind a generating company.

53. Mr. Mukherjee contended that REL's requirement is not a relevant factor for approval of BEST and TPC(D) PPA under Regulation 24 of the Tariff Regulations. It is settled law that when the law provides for a certain thing to be done in a certain way, a statutory authority has to carry out such act in such way only and in no other. Therefore, it was beyond MERC's jurisdiction to take into consideration factors other than those specified in the Regulations.

54. Mr. Mukherjee contended that there is no contract between TPC and REL for purchase of power and that it was a casual buyer varying its drawl and even before the Kukde Committee REL had signified its intention to stop drawal of power and therefore now it cannot assert its right for equitable share of power from TPC generation. He stated that equitable distribution of power has been done only twice in the past 80 years and that the interim arrangement was done by MERC in the absence of approved PPAs. He further stated that no planning or arrangement has been made by REL for procurement of power from other sources.

55. Mr. Mukherjee averred that contract status cannot be assumed by REL due to mere negotiations and that it was offered 600 MW but was not accepted by it and that clearly REL does not intend to enter into any commitment for buying power from TPC on consistent basis.

56. Mr. Mukherjee stated that the objective of entering into long term PPA is to remove any uncertainty that may be faced by the consumers of a distribution licensee in the absence of tied up capacity. REL should have executed long term contracts with generators suppliers in the interest of its consumers. However, it has not done so at any point of time.

57. Mr. Mukherjee addressing the contention of REL that the approval of BEST and TPC-D PPA is against interest of its consumers as such approval would ultimately increase the power purchase cost of REL and thereby increase the tariff for REL's consumers most of whom are residential units and that MERC has failed to regulate the PPA in the interest of REL's consumers who would be required to pay more due to purchase of costlier power by REL. The regulation in question has to be done at the stage of tariff determination when MERC can determine the manner in which cost of power is to be distributed among consumer categories.

The argument of consumer interest is presumptive because that it presumes that MERC would not apply its mind to appropriately work out the tariff structure so

that there is minimum impact on the residential consumers.

The present process is not a tariff determination process. The approval of PPAs can only be assailed if the procedure has not been followed or the aggrieved party has a legal right. However, no irregularity of procedure has been shown by REL in its appeal. Further, REL has not been able to establish any legal right against TPC's generation capacity before MERC.

REL is in fact seeking to preclude/dislodge MERCs jurisdiction for appropriately fixing consumer tariff of REL under its tariff determination jurisdiction.

Admittedly, the overall average impact on REL consumers is 40 paise per unit. This can be suitably distributed among different consumer categories. The tariff impact on TPC-D consumers on the other hand if allocation is made according to REL formula, is 74 paise per unit. He extracted the relevant paragraph given hereunder:

“(i) We in our reply of 7th March 2007 had indicated that if the capacity as given in the Tariff Order of FY 2007-08 was applied, it would entail a rise in tariff of 74 paise per Kwh (one an average) to TPC-D consumers. Such rise was supported with detailed computation in our reply.

(ii) As against the same, REL in their reply to a similar question had stated (Question 4 of the Additional questions of REL-D APR) that the impact of implementation of MERC order dated 6th November 2007 would have an impact of about 40 paise per unit on their consumers. In effect, the impact is much more adverse for TPC-D consumers as compared to the impact on REL-D consumers.

Further, the computations of REL are relevant if the Discom has arranged power for its consumers.”

58. Mr. Mukherjee averred that REL has carried out trading operations for FE 07-08 and been able to achieve a sale of 17MU from Dahanu Plant and the revenues flowing to REL from trading of off-peak power can be used to subsidize its consumers.

59. Mr. Mukherjee asserted that even otherwise, the tariff policy envisages differential tariff for different distribution licensees on account of efficiency gains. The relevant extract of Tariff Policy has been extracted for the perusal of this Tribunal:

“2. The National Electricity Policy states that existing PPAs with the generating companies would need to be suitably assigned to the successor distribution companies. The State Governments may make such assignments taking care of different load profiles of the distribution companies so that retail tariffs are uniform in the State for different categories of consumers. Thereafter the retail tariffs would reflect the relative efficiency of distribution companies in procuring power at competitive costs, controlling theft and reducing other distribution losses”

60. Mr. Mukherjee submitted that while REL is seeking setting aside of approval of the PPAs, TPC-D would be gravely prejudiced if the same is allowed as under:

- (a) *Despite having a generation capacity of 1777 MW, TPC-D would be deprived of power from its own generating stations to meet the requirement of its consumers, especially when it constitutes approximately 27% of the total capacity.*
- (b) *While there is an admitted average impact of 40 p per unit for REL consumers if allocation is made according to PPA, TPC consumers would have an impact of 74 paise per unit if REL's formula is allowed.*
- (c) *A major portion of TPC-D supply is made to essential services e.g. railways, port trust, Bhaba Atomic Research Centre, etc. An increase in tariff for the essential services would not only affect the consumers in TPC's area but the people of Mumbai.*

61. Mr. Ramji Srinivasan, learned Senior Counsel for BEST submitted that The Electricity Act, 2003 came into effect from 10.06.2003. The Tariff Regulations were framed by the MERC on 26th August, which made it abundantly clear that the distribution licensee has to enter into a Long Term Power Purchase Agreement/arrangement and submit the application for

approval of the Commission within 3 months of the above date. The BEST accordingly has taken all necessary steps to submit the PPA to the Commission even in anticipation of the draft Regulations that was yet to come into effect. The Regulatory procedures were also fully complied with and the MERC have also finally given their approval of the PPA in to to by its order dated November 6, 2007.

62. He contended that REL, on the other hand, have not taken any steps either to submit any PPA or arrangement either with TPC or any other generating company arrangement for approval of the MERC, till date. They have also not brought on record any efforts taken by them to enter into PPA with any other generating company. The various directions passed by MERC from time to time have been completely ignored by REL and they have committed total breach of the directions/order of the MERC to comply with the Regulations by not submitting the required PPA/arrangement.

63. Mr. Srinivasan contended that the BEST has a written agreement with TPC ever since 1915 and the said Agreement have been renewed from time to time without break. There are provisions in the Agreement which state that TPC shall meet the entire requirement of BEST and accordingly and BEST is obliged to take it's entire requirement from TPC and from no other source. This continued contractual Agreement between BEST and TPC which has been in existence for decades and which culminated by; entering into a PPA has to be given due weightage, especially in view of the fact that BEST does not have a generating unit of its own. This situation is in striking contrast to REL who have never had any contractual Agreement with TPC and have been in a position of a casual buyer inasmuch as they have been sourcing their requirement from TPC only as and when required. REL have not even submitted the so-called arrangement which they claim to have had with TPC for approval of the Commission as per Regulations. The Agreement of BEST with TPC, therefore, stand on a higher footing as compared to the so called arrangement which REL claims to have with TPC.

64. Mr. Srinivasan argued that it is pertinent to note that there is no challenge by REL regarding the requirement of 800 MW of electricity be BEST and which have been approved by MERC. The only ground canvassed by REL is that since they have been sourcing their requirement from TPC over and above the power generated by them for a number of years they have a legitimate expectation that the said supply would be continued to be made by TPC. This argument of REL must fail in view of the fact that the doctrine of legitimate expectation would apply only against the government or a public authority and cannot be invoked against a private party and that too without any Written Argument. The REL has, therefore, not established any legal right for getting their requirement of electricity from TPC. In fact, REL has been directed by the MERC to enter into a PPA from any source which need not necessarily be from TPC. REL having miserably failed to comply with the directions of MERC and also the Regulations cannot now shed crocodile tears by saying that their consumers would be adversely affected if there is no

allocation of 762 MW of electricity from TPG(G) He stated that the fact is that REL will not suffer any major loss and their consumers can afford to bear the burden. BEST is already out of pocket to the extent of Rs. 128 crores and their consumers cannot be made to suffer any further a higher cost due to negligence and disobedience by REL.

65. Learned Senior Counsel submitted that the contention of REL that they did not put up any further generating station apart from the Dahanu Generating Station in view of the fact that it was their understanding that TPC would continue to supply electricity to meet their requirement of power to their consumer is past history and has no relevance in view of the fact that under the present electricity regime they are required to enter into a PPA/arrangement which is mandatory requirement and submit the same to the MERC for approval under the Regulations and that in any event the legitimate requirement of 800 MW of electricity by BEST which has also been approved by the MERC cannot be set at nought by REL thereby exposing the consumers

of BEST to suffer burden of expensive power. This would be nothing but providing a premium to a party who has been consistently defying the law and all the directions/orders issued by the MERC to enter into the PPA with whichever source that REL thinks fit. The BEST consumers, therefore, cannot be made to pay a price for the negligence and default of REL.

66. Mr. Srinivasan contended that there is no power under Section 23 of The Electricity Act, 2003 for the regulator to resort to equitable distribution of a generators capacity. The scheme of the Section is very clear that the same would apply only to a distribution licensee and not to a generator. Therefore, the question of equitable distribution as contended by REL and MERC of a generator capacity does not arise. This power if any is available only to the appropriate Government and that too can be exercised only in circumstances mentioned under Section 11 of The Electricity Act, 2003. Best is not required to consider the requirement of any other licensee while entering into a PPA and only consider the interest of their own consumer. What is

therefore not permitted under Section 23 of the Act cannot be brought in through a legal device by resorting to some other section. This in fact would defeat the very spirit of the Act inasmuch as the Act does not provide to regulate the generator under Section 23. Section 23 of the Act cannot therefore be equated to Section 11 of the Act. The jurisdiction of the appropriate commission and that the appropriate Government are distinct and different and one is exclusive to the other.

67. Mr. Srinivasan submitted that it is also pertinent to point out that even historically BEST has demonstrated a higher off take of power from TPC except in 2005-2006. REL has a larger area of supply and has also been growing rapidly. BEST therefore can lay a legitimate claim for its share of 800 MW of electricity from TPC.

68. Mr. Srinivasan stated that MERC had resorted to twice, once on October 3, 12006 and April 2, 2007, allocation of TPC generation in view of the fact that the distribution licensees did

not have approved PPAs and therefore had resorted to interim allocation. This interim allocation has also been challenged by BEST in Appeal No. 41 of 2007. BEST had to suffer a burden of Rs. 128 crore by way of expensive power purchase in view of the fact that its allocation from TPC generation was reduced by way of interim orders. However, subsequently the PPA of BEST has been approved. BEST is, therefore, justified in laying its claim of reimbursement as made out in I.A. No. 28 in Appeal No. 41 of 2007.

69. Learned senior counsel Shri Jayant Bhushan appearing for MERC submitted that BEST and TPC have contended, inter alia, that the Commission does not have the power to allocate the capacity of a generating company while REL has argued, inter alia, that the Commission does have the power to allocate the capacity of a generating company and that the present circumstances render a fit case where the Commission ought to have exercised such power, i.e. to disapprove the PPA between BEST and TPC and allocate the generation of TPC(G) between the

three distribution licensees of Mumbai in an equitable manner by regulating the supply in terms of Section 23 of the Act.

70. Learned senior counsel further contended that normally the Commission would go by the PPA's contracted between the generating companies and distribution licensees if the contracting parties could justify the terms of the PPA. However, if the circumstances or situation so warrant, the Commission does have the power to allocate the capacity of a generating company notwithstanding the PPA. It is also the contention of the MERC that the present is not a fit case for exercise of such power since none of the circumstances brought before it in the present case could at the present moment justify exercise of such power.

71. On the power to allocate the generation of a generating company, it is the contention of the MERC with respect to Section 23, inter alia, as follows:

- (i) *The power to allocate the generating capacity of a generating company and the circumstances under which such power is to be exercised arises from a*

conjoint reading of Section 23, 60 and 86(1)(b) of the EA 2003.

(ii) *The word “regulate” appearing in Section 23 and in Section 86(1)(b) of the EA 2003 has been interpreted by the Hon’ble Supreme Court of India in the widest possible terms. It would embrace within its ambit all the powers necessary for the implementation of the Act. In this regard learned counsel referred to the following judgments:*

1. *V.S. Rice and Oil Mills vs State of AP
AIR 1964 SC 1781 at 1787 para 20*
2. *Indu Bhushan Bose vs Rama Sundari Devi
-AIR 1970 SC 228 at 231 para 20*
3. *The Adoni Cotton Mills vs Andhra Pradesh
State Electricity Board –(1976) 4 SCC 68 at 76
para 24 and at 78 para 28*
4. *K. Ramanathan vs State of Tamil Nadu-)1985)
2SCC 116 at 130 para 18*
5. *Jeyajeerao Cotton Mills vs Andhra Pradesh
Electricity Board
- (1989) SUPP 2 SCC 52 at 82 para 35*
6. *Deepak Theatre Dhuri vs State of Punjab
- (1992) SUPP 1 SCC 684 at 687- 688*
7. *UP Cooperative Cane Unions Federation
vs West UP Sugar Mills Association-
(2004) 5 scc 430 AT 454 PARA 20*

72. Learned counsel further contended that the phrase
“....regulating supply...” appearing in Section 23 of the EA 2003

is very clear since the term “supply” has been defined in Section 2(70) of the EA 2003 to mean the “...sale of electricity to a licensee or consumer...”. Hence the sale of electricity to a distribution licensee by a generating company can be regulated by the Commission.

73. Learned counsel submitted that BEST and TPC have sought to argue, inter alia, that the marginal note to Section 23 i.e. ”directions to licensees” must be read to mean that the Commission could give directions only to licensees and not to generating companies. The said argument according to learned senior counsel is fundamentally fallacious, inter alia, for the following reasons:

- (a) It is settled law that a marginal note is no part of the Section. Reference may be had to:
Board of Muslim Wakf’s Rajasthan vs Radha Krishna – (1979) 2 SCC 468 at para 24; and Maharashtra Tubes vs SIDC- 2SCC 144 at 158.

- (b) It is also a fundamental principle of law that a marginal note cannot cut down the plenitude of the plain words of the section.
- (c) Even if some judgments have held that the marginal note can be used to clear up any ambiguity in the plain text of the Section, firstly there is no ambiguity in the plain words of Section 23 and secondly in this case it is the marginal note which, if at all, is causing the ambiguity.
- (d) The marginal note far from being usable to clear up any ambiguity, the marginal note is being used to create the ambiguity which cannot be permitted by principle of statutory interpretation.

74. Learned counsel stated that BEST and TPC have sought to argue, inter alia, that since Section 23 appears in “Part-IV-Licensing”, Section 23 must be curtailed to apply only to licensees and not to generating companies. He contended that the said argument is again fundamentally fallacious, inter alia, for the following reasons.

- (a) It is settled law that chapter headings cannot be used to interpret the plain and unambiguous words of a Section. Reference may be had to: Balraj Kumar vs Jagatpal Singh 31 IA 132 (PC) for the proposition that the title of a chapter cannot be legitimately used to restrict the plain terms of the enactment.
- (b) Even assuming without admitting the correctness of the argument that the chapter heading i.e. 'Licensing' can at all be the guiding light for every section in the chapter, the argument is completely destroyed since even Section 60 of the Act which applies directly and indefeasibly to generating companies appears in Part -IV which deals with "Distribution: Provisions with respect to Distribution Licensees". This shows that although Section 60 does apply to generating companies (and also to transmission, distribution licensees and traders) the said Section 60 has been placed under a chapter that is titled Part -IV- Distribution of Electricity. Although the activity of distribution is a distinct licensed activity there is a provision under Section 52 titled "Provisions with respect to Electricity Traders" that has been placed under the same chapter Part-VI dealing with distribution. Even "control of transmission and use of

electricity” has been placed under the same chapter that purportedly deals only with distribution as per the chapter heading.

75. Mr. Bhushan stated that BEST and TPC have also argued, inter alia, that by virtue of Section 11, it is only the appropriate Government which can give directions etc. to generating companies and not the appropriate Commission. He asserted that this argument also is fundamentally flawed, inter alia, for the following reasons:

- (a) The argument ignores the clear wording of Section 23 and Section 86(1)(b) of the Act;
- (b) There can always be a duality of authorities to regulate a particular activity and the interaction between the two provisions conferring power on two different authorities would be relevant only in the case of conflicting directions from the two authorities. In this case there are undisputably no such conflicting directions:
- (c) Section 11 and Section 23 provide for completely different sets of circumstances in which the

appropriate authority, viz Government or Commission, as the case may be, can exercise their powers. While Section 11 predicates exercise of power by the Government on the existence of extraordinary circumstances arising out of threat to security of the State, Public order or natural calamity or such other circumstances arising in the public interest, Section 23 requires the Commission to regulate by passing an order in case if the Commission is of the opinion that the exercise of power is necessary or expedient so to do for maintaining: (i) efficient supply or (ii) to secure equitable distribution or (iii) promoting competition. He inferred that the two provisions, i.e. Section 11 and Section 23 apply in vastly different areas or zones and even though in a given situation there may be some overlap, as mentioned earlier, the issue of such overlap would be relevant only in case of conflicting directions given by the two authorities.

76. Mr. Bhushan averred that the conditions mentioned in Section 23, namely for maintaining efficient supply, securing equitable distribution and promoting competition are some of the situations or triggers for the exercise of power by the Commission to regulate and/or allocate the capacity of a generating company

and that such conditions also have to be read harmoniously with Section 60 and Section 86(1)(b) of the Act.

77. Mr. Bhushan, learned senior counsel, contended that if Section 86(1)(b) gives the power to regulate “power purchase” and “procurement process” of a distribution licensee, the same could not be effectively achieved or implemented without the power to regulate the corresponding party in such “power purchase” or “power procurement”, namely the generating company and that in line with the various judicial pronouncements on the meaning of the word “regulate” as mentioned hereinabove, it is submitted that the Commission has all the powers associated with “power purchase” and “power procurement” and the Commission could exercise all the powers necessary to ensure that the “power purchase” and “power procurement” by a distribution licensee are carried out.

78. Mr. Bhushan contended that normally the Commission would go by approved PPA’s between contracting parties since it is the intention, inter alia, of Section 86(1)(b) to give primacy to

such PPAs. However, either in the absence of approved PPA's or if the situation so warrants, notwithstanding the PPA, if the power purchase or power procurement of a distribution licensee were to be regulated with reference to the power to regulate "supply" (i.e. sale of electricity to a licensee), appropriate directions could be given to a generating company for maintaining efficient supply, securing equitable distribution and promoting competition. This interpretation of Section 86(1((b) is further reinforced by the use of the word "including" before the phrase "...price at which power is procured from generating companies...." It is submitted that the legislature intended to give the maximum possible latitude to the Commissions to exercise power in this area of interaction between the generating companies and distribution licensees.

79. Mr. Bhushan further contended that Section 60 determines one of the many conditions on the happening of which the Commission would exercise power to regulate the capacity of a generation company and that the factors mentioned in Section 60 have to be conclusively brought out and proved before the

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Commission could exercise power in that situation. However, no material has been placed before the Commission to arrive at a conclusion that any of the ingredients of Section 60 have been fulfilled by BEST and TPC entering into the PPA.

80. Mr. Bhushan contended that simply because generation is an unlicensed activity does not mean that it is an unregulated activity. He cited several provisions in the Act which provide for regulation etc. of generation and/or generating companies.

- (i) Section 10(3)
- (ii) Section 11(2)
- (iii) Section 23
- (iv) Section 33(2)
- (v) Section 55(2) and (3)
- (vi) Section 60
- (vii) Section 62(1),(2) and (95)
- (viii) Section 86(1)(a), (b),(e),(f) and sub-section (2)
- (ix) Section 128(1), (6),(7) and (8)
- (x) Section 129
- (xi) Section 181

81. On the question of whether the present is a fit case for the Commission to have exercised power to disapprove the PPA and allocate the generation capacity of TPC(G), Mr. Bhushan contended that at the present moment no circumstances have been shown to be made out before the Commission for exercise of such power and that none of the ingredients of Section 60 of the Act have been shown to be made out by BEST and TPC entering into a PPA. He submitted that BEST has justified its requirement of 800 MW of power which is contracted for in the PPA. There is no reason or justification shown as to why this should be ignored and/or done away with.

82. Mr. Bhushan averred that the argument of REL on the Writ Petition filed by TPC in the year 2001 before High Court of Bombay are fallacious, inter alia, for the following reasons:

- (a) The Writ Petition was ultimately withdrawn by TPC.
- (b) The Commission cannot be called on to give a finding on the merits of the Writ Petition which was filed

before the High Court and in any event ultimately withdrawn.

- (c) There is no finding of the High Court on any of the issues raised in the writ petition.
- (d) The factual background and the applicable law as prevalent at the time of the Writ Petition and as at present are completely different and cannot be compared.

83. Mr. Bhushan asserted that the purported historical demand of REL cannot override a written contract entered into between BEST and TPC(G) particularly after the coming into force of the Act and especially the Tariff Regulations w.e.f. April 01, 2006. In this connection reference may be had to Regulation 7.1, 7.2 and 24.1 of the MERC (Terms and Condition of Tariff) Regulations, 2005.

84. During the course of hearing a tabular statement was handed over showing a calculation on the hypothetical impact of the approval of the PPA on the tariff of the three distribution licensees for 2007-08 if, hypothetically, the PPA between BEST

and TPC(G) were approved with effect from April 01, 2007. The comparison shows only a marginal difference in tariff between the current allocation on the basis of the coincident peak demand on the one hand, and on the other, as if the PPA had been approved. Mr. Bhushan submitted that even in the light of this calculation, no ground would be made out for the Commission to exercise power, disapprove the PPA and allocate the generation capacity of TPC(G).

85. Mr. Bhushan contended that BEST and/or TPC have relied on a judgment of this Tribunal in the case of Power Trading Corporation vs CERC & Ors. in appeal No. 228 of 2006 dated November 23,2006. He argued that the said judgment is not applicable to the facts of the present case, inter alia, for the following reasons:

- (i) In that case the factual background pertaining to the issue raised in that case was whether the CERC could impose a condition that the generator would sell its power only to distribution licensees and not to distribution licensees through traders, while according

an in-principle acceptance of project capital cost and financial plan of the generation project. The question in the present case is completely different.

- (ii) In that case this Tribunal was concerned with the powers of the CERC under Section 79 of the Act which are materially different and not comparable to the powers of the state Commissions under Section 86 particularly Section 86(1)(b) of the Act. The powers to the SERC under Section 86(1)(b) is not available to the CERC. The CERC cannot regulate the power procurement and purchase of electricity of distribution licensees simply because there cannot be inter state distribution as distribution is always within the state and this activity, therefore, is necessarily only to be regulated by the SERC's and not CERC.
- (iii) In that case even the CERC Regulations, namely Regulation 17 does not have any remote linkage to the MERC Tariff Regulations concerning approval of PPA's etc.

86. Mr. Bhushan submitted that no hard and fast rule or straight-jacket formula can be laid down for exercise of power of allocation of generating capacity of a generating company and

each case must be seen and dealt with on its own merits and each such exercise of power must be viewed in the light of the requirements contained in the Act itself.

Analysis and Decision.

87. After due consideration of the entire matter and taking into account contentions advanced by rival parties and totality of circumstances, we now proceed to decide the appeals.

Appeal No. 41 of 2007

88. The main question in appeal No. 41 of 2007 before us revolves around the allocation of power from TPC(G) between the BEST, TPC(D) and REL (D) on the basis of Coincident Peak Demand of power in the absence of approved PPA between the generation company and the distribution licensees. Though during the final hearing of the group of appeals, BEST and TPC had not addressed any argument on the merits of MERC order dated April 02, 2007 and April 30, 2007, during initial hearing stage the issue was keenly addressed.

89. So as to decide this issue, it is necessary to understand the term Coincident Peak Demand (CPD). As per Energy Dictionary (Source www.energyvortex.com) Coincident Peak Demand is understood as below:

“Coincident demand is the energy demand required by a given customer or class of customers during a particular time period. Coincident peak demand is the energy demand by that group during periods of peak system demand. Loosely speaking, it refers to demand among a group of customers that coincides with total demand on the system at that time. Residential demand at a time of peak industrial demand can be referred to as coincident peak demand, as can a particular plant’s demand at a time of peak demand across the whole system.

A customer’s coincident peak demand is usually calculated from meter readings taken at the time when the customer’s demand is likely to be highest. Their non-coincident peak demand would be calculated using several readings taken at different times to determine what their actual peak demand periods may be. A more sophisticated type of meter is required to calculate non-coincident demand, but it doesn’t necessarily produce a better result for the utility or the customer. An energy provider may care more about demand at a given time when total customer demand is highest than they care about the peak demand of a given customer during other times.”

90. On the other hand generally Non-Coincident Peak Demand (NCPD) is understood as:

“ Non Coincident Peak Demand is the individual or actual peak demands of each load in an electrical system. Oftentimes occurring at different hours of the day. It does not necessarily fall during system peak.”

91. In view of the above understanding of the Coincident Peak Demand and Non-coincident Peak Demand, we appreciate that in the absence of PPAs and the data regarding Coincident Peak Demand, the Commission had used the Non-Coincident Peak Demand for determining allocation of charges amongst the distribution licensees. Once data regarding Coincident Peak Demand was available, the Commission has used the same during the year 2007-08 for allocation of net energy available and fixed charges for TPC(G) amongst the Distribution Licensees.

92. We are not inclined to interfere with the order passed by the Commission since the period during which allocation of energy was made is already over and the allocation has obviously been utilized. In the circumstances, therefore, appeal No. 41 of 2007 is dismissed but without any order as to costs.

Appeal Nos. 143 of 2007, 159 of 2007 and 14 of 2008

93. The main question in the set of these appeals revolves around the approval of PPA between TPC(G) and BEST and arrangement between TPC(G) and TPC(D). These appeals raise the question whether the Commission has the power to disapprove the PPA and allocate the power of a generating company amongst the distribution licensees by regulating the supply in terms of Section 23 of the Act?

94. BEST and TPC have contended that the Commission does not have the power to allocate the capacity of generating company while REL has argued that the Commission has the power to allocate the capacity of a generating company and that the present circumstances were fit case where the Commission ought to have exercised such power, i.e. to disapprove the PPA between BEST and TPC and allocate generation of TPC(G) amongst the three distribution licensees of Mumbai in an

equitable manner by regulating the supply in terms of Section 23 of the Act.

95. As MERC has argued that the power to allocate the generating capacity of a generating company and the circumstances under which such power is to be exercised arises from a conjoint reading of Section 23, Section 60 and Section 86(1)(b) of the Act, at this stage it is necessary to set out these sections of the Act before us.

Section:23:

Directions to licensees:- If the appropriate Commission is of the opinion that it is necessary or expedient so to do for maintaining the efficient supply, securing the equitable distribution of electricity and promoting competition, it may, by order provide for regulating supply, distribution, consumption or use thereof.

Section: 60- Market domination:

The Appropriate Commission may issue such directions as it considers appropriate to a licensee or a generating company if such licensee or generating company enters into any agreement or abuses its dominant position or enters into a combination which is likely to cause or causes an adverse effect on competition in electricity industry.

Section 86(1) (a)

The State Commission shall discharge the function namely: determine the tariff for generation supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the state:

Provided that where open excess has been permitted to a category of consumers under Section 42, the state Commission shall determine only the wheeling charges and surcharges thereon, if any, for the said category of consumers;

Section 86(1)(b)

Regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the state.

96. We agree with the contention of the Commission that the word “regulation” appearing in Section 23 and in Section 86(1)(b) of the Act has been interpreted by the Supreme Court of India liberally and that powers of the Commission are wide and take into its sweep the power to reject, modify alter and/or vary the terms of the Agreement for the purchase of power vide following judgments in exceedingly wide terms and it would embrace

within its ambit all powers necessary for the implementation of the Act.

1. *V.S. Rice and Oil Mills vs State of AP*
AIR 1964 SC 1781 at 1787 para 20
3. *Indu Bhushan Bose vs Rama Sundari Devi*
-AIR 1970 SC 228 at 231 para 20
3. *The Adoni Cotton Mills vs Andhra Pradesh*
State Electricity Board -(1976) 4 SCC 68 at 76
para 24 and at 78 para 28
6. *K. Ramanathan vs State of Tamil Nadu-(1985)*
2SCC 116 at 130 para 18
7. *Jeyajeerao Cotton Mills vs Andhra Pradesh*
Electricity Board
- (1989) SUPP 2 SCC 52 at 82 para 35
6. *Deepak Theatre Dhuri vs State of Punjab*
- (1992) SUPP 1 SCC 684 at 687- 688
7. *UP Cooperative Cane Unions Federation*
vs West UP Sugar Mills Association-
(2004) 5 SCC 430 AT 454 PARA 20

97. As per Section 23, the Commission has the power to regulate supply. The term “supply” has been defined in Section 2(70) of the Act to mean the “...sale of electricity to a licensee or consumer”. Therefore, sale of electricity to a distribution licensee by a generating company can be regulated by the Commission.

On the other hand, BEST and TPC have contended that the marginal note to Section 23 “directions to licensees” must be read to mean that the Commission can give directions only to licensees and not to generating companies. We do not agree with this view as it is a settled law that marginal note is not part of the Section. In this regard the Commission has relied upon the following observations of the Hon’ble Supreme Court in Board of Muslim Wakfs Rajasthan vs Radha Krishna- (1979) 2 SCC 468 at para 24.

24. In dealing with the scope of enquiry by the Commissioner of Wakfs under sub-section (3) of Section 4, the High Court adverts to the heading of Chapter II and the marginal note of sub-section (1) of Section 4. It observes:

The heading of Section 4 with which this chapter started was ‘Preliminary survey of wakfs’. The use of the word ‘Preliminary’ in the heading is one of significance.

*The weight of authority is in favour of the view that the marginal note appended to a section cannot be used for construing the section. Lord Macnaghten in **Balraj***

Kumar v. Jagatpal Singh considered it well settled that marginal notes cannot be referred to for the purposes of construction. This Court after referring to the above case with approval, said in ***C.I.T v. Ahmedbhai Umarbhai & Co.***:

Marginal notes in an Indian statute, as in an Act of Parliament cannot be referred to for the purpose of construing the statute .

As explained by Lord Macnaghten in the Privy Council, marginal notes are not part of an Act of Parliament.

98. Moreover, it is also a fundamental principle of law that a marginal note cannot cut down the plenitude of the plain words of the Section. At best the marginal note may be used to clear up any ambiguity in the plain text of the Section and not to confuse it if the wording of the Section is plain and simple.

99. BEST and TPC have also argued that Section 23 appears in 'Part -IV-Licensing' and, therefore, Section 23 must be held to apply only to licensee and not to generating companies. It is a settled law that chapter headings cannot be used to interpret the

plain and unambiguous words of a section. Reference may be had to: Balraj Kumar vs Jagatpal Singh 31 IA 132 (PC) for the proposition that the title of a chapter cannot be legitimately used to restrict the plain terms of the Section.

100. We are unable to agree with the view of BEST and TPC that by virtue of Section 11, it is only the appropriate Government that can give directions to generating companies and not the appropriate Commission. One has to keep in mind that there can always be a duality of authorities to regulate a particular activity and the interaction between the two provisions conferring power to two different authorities would be relevant only in the case of conflicting directions from the two authorities. Section 11 and Section 23 provide for completely different sets of circumstances in which the appropriate authority, viz Government or the Commission, as the case may be, can exercise its powers. While Section 11 predicates exercise of power by the Government on the existence of extraordinary circumstances arising out of threat to security of the state, public order or natural calamity or such other circumstances arising in the

public interest, Section 23 requires the Commission to regulate, by passing an order, in case the Commission is of the opinion that the exercise of power is necessary or expedient so to do for maintaining (i) efficient supply or (ii) to secure equitable distribution or (iii) promoting competition and these conditions have to be read harmoniously with Section 60 and Section 86(1)(b) of the Act. Section 86(1)(b) gives the power to regulate “power purchase” and “procurement process” of a distribution licensee and the same could not be effectively achieved without the power to regulate the corresponding parties in such power purchase or power procurement. In the procurement process there are two parties, distribution licensee being the purchaser and the generating company being the seller. One needs to note in Section 86(1)(b) (Supra) the word “including” before the phrase “...price at which the power is procured from generating companies...” which implies that the Legislature intended to give enough latitude to the Commission to exercise power in the area of interaction between the generating companies and the distribution licensees.

101. It is relevant for us to refer to the MERC Regulation 24 which is reproduced below:-

24. Approval of power purchase agreement/arrangement

24.1 Every agreement or arrangement for long-term power procurement by a Distribution Licensee from a Generating Company or Licensee or from other source of supply entered into after the date of notification of these Regulations shall come into effect only with the prior approval of the Commission.

Provided that the prior approval of the Commission shall be required in accordance with this Regulation 24 in respect of any agreement or arrangement for procurement of electricity by the Distribution Licensee from a Generating Company or Licensee or from any other source of supply on a standby basis:

Provided further that the prior approval of the Commission shall also be required in accordance with this Regulation 24 for any change to an existing arrangement or agreement for long-term power procurement, whether or not such existing arrangement or agreement was approved by the Commission.

24.2 The Commission shall review an application for approval of power purchase agreement/ arrangement having regard to the approved long-term power procurement plan of the Distribution Licensee and the following factors:

- (a) Requirement for power procurement under the approved long-term power procurement plan;*
- (b) Adherence to a transparent process of bidding in accordance with guidelines issued by the Central Government;*
- (c) Adherence to the terms and conditions for determination of tariff specified under Part E of these Regulations where the process specified in (b) above has not been adopted.*
- (d) Availability (or expected availability) of capacity in the intra –state transmission system for evacuation and supply of power procured under the agreement/arrangement;*
- (e) Need to promote cogeneration and generation of electricity from renewable sources of energy.*

24.3 Where the terms and conditions specified under Part E of these Regulations are proposed to be adopted, the approval of the power purchase agreement between a Generating Company and a Distribution Licensee for supply of electricity from a new generating station may comprise of two steps, at the discretion of the applicant:

(a) Approval of a provisional tariff, on the basis of an application made to the Commission at any time prior to the application made under clause; (b) below; and

(c) Approval of the final tariff, on the basis of an application made not later than three (3) months from the cut-off date.

102. We note from the above regulations that the Commission itself recognizes an agreement or an arrangement for long-term power procurement by a Distribution Licensee. Regulations require prior approval of the Commission for any change to an existing arrangement or agreement for long term procurement. When an arrangement for power procurement between TPC and BEST as also between TPC and REL does exist, how the Commission failed to consider the claim of REL.

103. We conclude from the aforementioned that the Commission has wide powers to regulate the quantity of energy that may be supplied by a generating company to a distribution licensee when both are under the jurisdiction of the same Commission.

104. It is not in dispute that the claims of REL have not been considered by the Commission while approving the PPA between the TPC(G) and BEST and arrangement between TPC(G) and TPC(D). It is also not in dispute that the approval of PPA and the arrangement has affected the allocation of power to REL. The interests of REL have been adversely affected by the Commission in violation of the principle of natural justice. The Commission ought to have considered the claim of REL for allocation of power while considering the approval of PPAs between TPC(G) and BEST and arrangement between TPC(G) and TPC(D).

105. In the circumstances, appeal No. 143 of 2007 is allowed and order dated November 06, 2007 of the MERC approving the PPA of TPC and BEST and arrangement between TPC and TPC(D) with reference to allocation of power to BEST and TPC(D) is set aside. The Commission is directed to consider the question of approval of PPA and the arrangement afresh after taking into consideration the claims of BEST, REL and TPC(D). While considering the case of the parties the Commission shall have regard to the fact that the consumers of respective areas have been bearing the Depreciation and Interest on Loan elements of the Fixed Cost of tariff and also consider all other submissions of the parties which are permissible in the law.

106. Since we have held that the Commission has wide powers to regulate the quantity of energy that may be supplied by a generating company to Distribution Licensees when both are under its jurisdiction, appeal No. 159 of 2007 and appeal No. 14

of 2008 are liable to be dismissed. Accordingly, appeal No. 159
of 2007 and appeal No. 14 of 2008 are hereby dismissed.

107. Appeals and IAs are disposed of.

No costs.

(H.L. Bajaj)
Technical Member

(Justice Anil Dev Singh)
Chairperson