

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

Appeal No. 278 of 2013
AND
Appeal no. 36 of 2014 &
IA Nos . 59, 36 & 165 of 2014

Dated 29th November, 2014

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member

Appeal No. 278 of 2013

In the matter of:

Reliance Infrastructure Limited,
"H" Block, 1st Floor,
Dhirubhai Ambani Knowledge City,
Navi Mumbai- 400 710

... Appellant

Versus

1. The Maharashtra Electricity Regulatory Commission,
World Trade Centre No. 1,
13th Floor, Cuffe Parade, Colaba,
Mumbai-400 001
2. Tata Power Company Limited,
Bombay House, 24, Homi Mody Street,
Mumbai-400 001.
3. Mumbai Grahak Panchayat,
Grahak Bhavan, Sant Dynaneshwar Marg,
Vile Parle (W),
Mumbai-400 056.
4. Prayas,
C/o Amrita Clinic,
Athawale Corner,
Deccan Gymkhana, Karve Road, Pune-411 004

5. Thane Belapur Industries Association,
Plot No. P-14, MIDC,
Rabale Village,
Post: Ghansoli, Navi Mumbai-400 071.
6. Vidarbha Industries Association,
1st Floor, Udyog Bhavan,
Civil Lines, Nagpur-400 041
7. Shri N Ponrathnam,
25, Majithia Industrial Estate,
Waman Tukaram Patil Marg,
Deonar, Mumbai-400 088
8. Shri Rakshpal Abrol,
Bhartiya Udhami Avam Upbhokta Sangh,
Madhu Compound, 2nd Floor,
2nd Sonawala Cross Road,
Goregaon (East), Mumbai-400 063
9. Shri Sandeep N. Ohri,
A-74, Tirupati Tower, Thakur Complex,
Kandivali (East), Mumbai-400 101. ...Respondent(s)

Counsel for Appellant : Mr. J.J. Bhatt, Sr. Adv.,
Ms. Anjali Chandurkar
Mr. Hasan Murtaza
Mr. Aditya Panda

Counsel for the Respondents: Mr. Buddy A. Ranganadhan for R-1
Mr. Ramji Srinivasan, Sr. Adv.
Ms. Sakya Singha Chaudhuri,
Ms. Prerna Priyadarshini
Ms. Kanika Chug,
Ms. Anusha Nagarajan for R-2

**Appeal no. 36 of 2014 &
IA Nos . 59, 36 & 165 of 2014**

In the matter of:

The Tata Power Company Limited,
Bombay House,
24, Homi Mody Street,
Mumbai-400 001

... Appellant

Versus

1. Maharashtra Electricity Regulatory Commission,
World Trade Centre No. 1,
13th Floor, Cuffe Parade, Colaba,
Mumbai-400 005.
(Through Secretary)

2. Reliance Infrastructure Limited,
Reliance Energy Centre,
Santacruz (East),
Mumbai- 400 055
(Through Company Secretary)

... Respondents

Counsel for Appellant : Mr. Ramji Srinivasan, Sr. Adv.
Ms. Sakya Singha Chaudhuri,
Ms. Perna Priyadarshini
Ms. Kanika Chug

Counsel for the Respondents: Mr. Buddy A. Ranganadhan for R-1
Mr. Hasan Murtaza,
Mr. Aditya Panda for R-2

J U D G M E N T

MR. RAKESH NATH, TECHNICAL MEMBER

Appeal Nos. 278 of 2013 and 36 of 2014 have
been filed by Reliance Infrastructure Ltd. and Tata

Power Company Limited against the impugned order dated 30.10.2013 passed by Maharashtra Electricity Regulatory Commission (“State Commission”) in a *suo motu* proceeding in case No. 85 of 2013.

2. The Appellants are the distribution licensees having common area of supply. The State Commission is the Respondent no. 1.

3. The brief facts of the case is as under:

(A) Both the Reliance Infrastructure Limited (“RInfra”), the Appellant in Appeal No. 278 of 2013 and M/s Tata Power Company (“Tata Power”), the Appellant in Appeal No. 36 of 2014 are the distribution licensees having suburban Mumbai as a common area of supply.

- (B) The genesis of the present dispute dates back to the year 2002. The RInfra filed a Petition in case No.14 of 2002 before the Maharashtra Electricity Regulatory Commission under Section 22 of the Electricity Regulatory Commission's Act 1998 for restraining the Tata Power from supplying electricity to the consumers having contracted demand less than 1000 kVA in the area of supply of 1st Respondent R-Infra.
- (C) On 03.07.2003, the State Commission passed an Order in Case No. 14/2002 observing that in terms of clause 5 of its license, the Tata Power is entitled to supply energy "for all purposes including supply to other licensees for their own purposes and in bulk". However, in its order the State Commission restrained Tata Power from

offering new connection to any consumers with energy requirement below 1000 kVA.

(D) As against this order dated 3.7.2003, both the Tata Power and RInfra filed separate Appeals before this Tribunal. RInfra filed Appeal in Appeal No.31 of 2005 and Tata Power filed Appeal in Appeal No.43 of 2005.

(E) The Tribunal after hearing the parties by the judgment dated 22.5.2006, disposed of both these Appeals setting aside the order of the State Commission dated 3.7.2003 holding that the Tata Power under its license was entitled to supply energy only in bulk to other licensees and it was not entitled to supply in retail to the consumers irrespective of their demand.

(F) Against this judgment of the Tribunal, the Appeals were filed by Tata Power and others before the Hon'ble Supreme Court.

(G) On 08.07.2008, the Hon'ble Supreme Court passed its judgment in the case of the Tata Power Company Limited v. Reliance Energy Limited & Ors reported as (2008) 10 SCC 321. The Hon'ble Supreme Court held that there is nothing in the Erstwhile Tata Power Licenses which restricts the supply of electricity to consumers whose maximum demand is less than 1000 KVA and Tata Power is entitled to supply electricity directly to consumers whose maximum demand is less than 1000 KVA apart from its entitlement of supplying electricity to other licensees for their own purpose and in bulk.

- (H) Subsequently, as per the Hon'ble Supreme Court's judgment as well as the Capital Investment approval guidelines, 2005 laid down by the State Commission, Tata Power submitted a Network Rollout Plan to the State Commission, in which it proposed a network roll out for the period FY 2009-10 to FY 2011-12.
- (I) The State Commission in its Order dated 15.06.2009 in Case No. 113 of 2008 did not approve the Network Rollout Plan proposals of Tata Power and directed the Tata Power for exploring the use of the wires of other distribution licensees.
- (J) In pursuance of this order, Tata Power made a request to Rinfra for permission for use of its network under open access to supply power to

- consumers who sought power from Tata Power. RInfra through its letter dated 30.7.2009 offered no objection to the Tata Power for use of its distribution system to supply electricity to the consumers in the common licence area.
- (K) On the strength of the judgment of the Hon'ble Supreme Court and the letter of no objection sent by Rinfra referred to above, the Tata Power on 31.8.2009 filed a Petition in Case no.50 of 2009 before the State Commission requesting it to lay down the operating procedure for the consumers who wanted to receive supply from the Tata Power while being connected to the distribution network of the RInfra.
- (L) The State Commission, after considering the pleas of both the parties, while disposing of the Petition

in Case no.50 of 2009 passed an order dated 15.10.2009 providing for an interim arrangement finalising the procedure, including payment of wheeling charges, for consumers opting for changeover of supply from one licensee to other licensee through the network of the existing licensee.

(M) On 21.10.2011, the RInfra filed petition before the Commission being case No.151 of 2011 seeking relief on account of certain issues affecting R Infra and its financial viability. In this petition, RInfra alleged that Tata Power is indulging in cherry picking in case of changeover consumers i.e. permitting changeover only to subsidizing consumers and also laying network selectively to connect large subsidizing consumers. RInfra

alleged that they had permitted the Tata Power to use their network in the overall interest of consumers. However, the Tata Power's game plan is to push RInfra out of business and attain monopoly in distribution in Mumbai.

- (N) This Petition in Case 151 of 2011 was disposed of by the State Commission by the order dated 22.8.2012, directing Tata Power to focus all its energy in developing network in 11 clusters identified by the Commission and within 1 year Tata Power shall develop a network such that it would be in a position to connect to any consumer within a period of 1 month. Further, the State Commission granted relief to RInfra by imposing few additional restrictions relating to consumer category for changeover on Tata Power.

- (O) Against this Order of the State Commission, Tata Power filed an Appeal being Appeal No. 246 of 2012 before this Tribunal. RInfra had also filed Appeal No. 229 of 2012 before this Tribunal.
- (P) While these Appeals were pending before the Tribunal. The State Commission initiated *suo motu* proceedings in case No. 85 of 2013 to ensure that the Commission's directions in Case No. 151 of 2011 are complied with both in letter and in spirit and passed the impugned order on 30.10.2013 directing, interalia, that in the identified 11 Clusters, all residential category consumers in the 0-300 units consumption slab (whose average monthly consumption over the previous 12 months is upto 300 units per month)

shall be treated as direct consumers of Tata Power for the purposes of tariff.

(Q) Aggrieved by this order of the Commission the RInfra has filed an Appeal No. 278 of 2013 with the prayer to set aside the directions contained in paragraphs (a) to (i) of paragraph 35 of the Commission's Order dated 30.10.2013.

(R) Aggrieved by the Commission's adverse observation in the Impugned Order regarding slow progress in laying down the network in the 11 clusters and continuation of restrictions on Tata Power imposed in case No. 151 of 2011, Tata Power has filed Appeal No. 36 of 2014 with a prayer to expunge the adverse remarks about its performance from the Impugned order and to remove the restrictions imposed on it by

Commission's order dated 22.8.2012 in Case No. 151 of 2012.

4. RInfra's in Appeal No. 278 of 2013 has made the following submissions:
- i. The entire thrust of the *suo motu* proceedings was to find out whether Tata Power had complied with the directions for setting up of its distribution network and if not, what should be the action taken against Tata Power and also to ascertain whether the low end consumers in the identified area had benefited.
 - ii. The impugned Order affects the RInfra-D's rights. The State Commission has gone beyond the notice given to Tata Power. The contention of Tata Power also was that the RInfra-D has "no locus" as the proceedings were relating to the Tata Power's

network development The Impugned Order, therefore, is in breach of principles of natural justice.

- iii. The State Commission had categorically found that Tata Power had flagrantly violated and/or failed to comply with the directions of the Commission. Having so found not only has the Commission not chosen to take any action against Tata Power but has in fact conferred a huge benefit on Tata Power to the detriment of RInfra-D and its consumers and has achieved a situation which far from maintaining efficient supply would result in inefficient uncoordinated and haphazard supply, would not secure equitable distribution of electricity nor would promote competition.

- iv. There is no provision in law to direct consumers of one distribution licensee to “be treated as direct consumers of” another distribution licensee for the purposes of tariff or otherwise. If the network of one distribution licensee is used for the purpose of supply and wheeling of electricity the other distribution licensee is not entitled in law to any wheeling charges.
- v. The Wheeling Charges for Tata Power were higher than the wheeling charges of RInfra. Thus, by the Impugned Order directing these consumers to be direct consumers of Tata Power and pay Tata Power Tariff, the Commission has benefitted the Tata Power to the extent of Rs 25 Crores during FY 2013-14 alone.

- vi. If any direction is to be given by the State Commission it has to be in consonance with the provisions of 2003 Act and the powers conferred upon the State Commission within the four corners of the said Act. Such directions cannot transgress the powers so conferred.

- vii. Under Section 45 of Act a distribution licensee can charge tariff fixed for such distribution licensee alone and not of any other distribution licensee. The impugned order compels and directs RInfra to charge tariffs of Tata Power and converts the role of RInfra from that of a distribution licensee qua the said 11 clusters to that of a provider of wires and a collecting agent which is not permissible under any of the provisions of Act.

- viii. While the impugned order starts with the consideration of the question of failure of Tata Power to lay its network and the consequent proposed penalty, it goes on far beyond the issue for consideration as is set out in para 35. In para 35 under the guise of offering an option to the consumers to buy cheaper electricity the order foists only one source which in the erroneous perception of the Commission is the cheaper option.
- ix. The genesis of the order is the admitted repeated failure of Tata Power to lay its network and the repeated failure to comply with the Commission's orders and the consequent contemplated action against Tata Power. The order goes on to foist only one source compulsorily on the consumers and

completely sets at naught the basis of orders in Case No. 50 of 2009 and Case No. 151 of 2011.

- x. The direction given to Tata Power to lay its network was to comply with Tata Power's USO obligations and the object of the exercise initiated in Case No. 50 of 2009, was only to evolve an interregnum arrangement to offer an option to the consumers. It had nothing to do with compulsory supply of cheaper power to consumers. On the contrary, if Tata Power was compelled to comply with its USO obligations it would have had to lay its network in the entire area including the 11 Cluster and the incurring of such capital costs would have had to be factored in the tariff of Tata Power which would then have resulted in the tariff of Tata Power being higher than that of the

current tariff of the RInfra-D. By the impugned order Tata Power is being rewarded for its admitted and repeated failure to comply with license conditions, provisions of the Act, Regulations and the directions of Maharashtra Commission. The impugned order on the one hand allows Tata Power to go scot-free without any action for flouting the various aforesaid and on the other confers undue benefit by illegal and ultra vires orders. The entire object of the exercise initiated by Case No. 50 of 2009 has now been converted into conferring the permanent benefit on Tata Power.

- xi. The calculation of Supply Services Charges is ad hoc and arbitrary. There is nothing like Supply Services in any of the provisions of Act and/or the

Regulations and it is a concept evolved only in the impugned order which is contrary to the provisions of the said Act.

- xii. The network of RInfra-D has been handed over with all its benefits to Tata Power leaving the onerous responsibilities in respect thereof with the RInfra-D which is clearly beyond the purview of the Act particularly when the said party in whose favour the order is passed is in flagrant violation as found in the order itself and that too without specifying a timeline upto which it would be in operation.
- xiii. In addition to above on law points, RInfra has also raised few issues relating Implementation of the directions given in the Impugned order and issues related to Consumer's interests.

5. In reply Tata Power has made the following submissions in Appeal No. 278 of 2013:

- i) The directions passed by the Commission for treating approximately 7.92 residential category consumers of the RInfra within the slab of 0-300 units consumption, as direct consumers of the Tata Power for the purpose of tariff is an extension of the Commission's order dated 15.10.2009 in Case No. 50 of 2009(Changeover Protocol) allowing consumers to take supply from one licensee through the wires of another licensee (Changeover) so as to facilitate a choice between parallel licensees to consumers in the common area of supply and allow such consumers the benefit of cheaper tariffs offered by either of the licensees.

ii) The direction to transfer approximately 7.92 lac residential consumers in the 11 identified clusters to Tata Power from the RInfra for the purposes of tariff is furtherance to the Commission's objective to facilitate the choice of supply available to consumers in suburban Mumbai. In accordance with the Changeover Protocol, the consumers in suburban Mumbai already have the choice of availing supply from one licensee on the wires of another. The procedure specified in the Impugned Order for allowing the 7.92 lac residential consumers to take supply from the Tata Power merely cuts across such procedure for changeover as was formulated in the Changeover Protocol, while retaining the basis and the core of such procedure. In this regard, it may be pointed out that the provision under paragraph 35 (d) of the

Impugned Order requiring the Tata Power to pay to the RInfra, wheeling charges, cross subsidy surcharge and regulatory asset charge as determined for the RInfra under its MYT Order particularly continues the arrangement for sharing of network as under the Changeover Protocol to compensate the RInfra since such consumers are still connected to its network.

- iii) The directions contained in paragraph 35 (a) to (h) have been passed in the interest of the low end consumers so as to make available to them cheaper tariffs approved for the Tata Power. This is in furtherance of the objective of the Changeover Protocol order as well as the Order passed by the Commission on 22.07.2009, in Case No. 113 of 2008, wherein the Commission

had clearly opined that for the benefit of consumers in the parallel licensee situation prevailing in Mumbai, the shift of consumers from one licensee to another needs to be facilitated.

- iv) However, it is relevant to note that as clarified by the Commission in its affidavit dated 26.11.2013 filed before this Tribunal in the present proceedings make it amply clear that the intention of the above direction is not to restrict consumer choice as regards the supplier of electricity and a consumer who desires to continue to take supply from the RInfra despite the benefits available to him on account of lower tariffs, the consumer was free to do so. Therefore, the directions contained in paragraphs 35 (a) to (h) do not in any manner affect or curtail consumer's choice but rather

enables consumers to exercise such choice guaranteed to them under the Act by simplifying the process of migration for such consumers. The directions contained in paragraphs 35(a) to (h) of the Impugned Order are therefore procedural in nature to facilitate the migration of consumers in pursuance of a choice already available to them, and do not prejudice the rights of the consumers in any manner.

- v) It is pertinent that Case No.151 of 2011 was initiated by the RInfra itself before the Commission complaining of the prejudice caused to the RInfra on account of the alleged cherry picking of high end consumers by the Tata Power for supply of electricity both on its own wires as well as through Changeover, which allegedly

caused a lop-sided consumer profile for the RInfra. It is really shocking, that having started Case No.151 of 2011 on its refrain of carrying the burden of low end consumers and prompting the Commission to pass an order directing the changeover of 7.92 lakh low end residential consumers, the RInfra has a grievance against such direction as well.

vi) It is in fact the RInfra who has been complaining about a large base of low end subsidized consumers as the cause of higher tariff charged by it from the different categories of consumers. Further, it is the RInfra who has sought for such directions from the Commission in Case No. 151 of 2011. The RInfra has continued to raise the

grievance about a skewed consumer mix even before this Tribunal in various Appeals

- vii) While the Tata Power has challenged the findings of the Commission in the Case 151 order, including the finding that the Tata Power is guilty of cherry picking and the restrictions imposed on the development of network, the Tata Power has no reservations to service consumers in the low end category slab of 0-300 units.
- viii) The Commission has in fact proceeded to issue the directions under paragraph 35 (a) to (h) to safeguard and promote the interest of low end consumers of the RInfra.
- ix) The RInfra's challenge in fact brings out the intent with which the RInfra has been pursuing Case 151, i.e. to use its current consumer profile

heavily tilted towards the low end consumers, to put pressure to eliminate Tata Power as a competitor in the electricity distribution business in sub-urban Mumbai. It has been the attempt of the RInfra in Case 151 to limit Tata Power's ability to expand its network to certain specified areas for certain categories of consumers, so that the network of the Tata Power become inefficient and uneconomical. The bogey of low end consumers, being a burden on the RInfra, is being used by it to achieve this end through the regulatory process which is now clear from the present appeal.

- x) The RInfra cannot be allowed to approbate and reprobate with respect to distortion of the level playing field in the common license area by at one time attributing the same to its 22 lakh low end

- subsidized consumer base and the skewed consumer mix as the cause of its higher tariff and the consequent adverse impact on its distribution business and at another refusing to part with its low end subsidized consumers by claiming that such consumers are a boon to the Tata Power.
- xi) In addition to above submissions, Tata Power has also submissions on (i) no prejudice caused to the RInfra on account of the Impugned Directions. (ii) no Violation of the principles of nature justice vis-à-vis the RInfra and (iii) No undue benefits caused to the Tata Power on account of the directions impugned in the present appeal.
6. The submissions made by Tata Power in Appeal No. 36 of 2014 relate to certain adverse remarks made by the State Commission against them and

continuation of restrictions imposed on them by order dated 22.8.2012 in Appeal No. 151 of 2012. Tata Power has submitted as under:

- i) The Commission has acted in contravention of the principles of natural justice by not considering the justification provided by the Tata Power for its inability to comply with the Case 151 order insofar as there is a delay in completing network development in the 11 clusters.
- ii) The Tata Power had placed before the Commission, voluminous documents and data to demonstrate that the network development work in various areas had been impeded due to reasons beyond the control of the Tata Power such as non-issuance of necessary consents and permission by the Municipal Corporation for excavation, lack of

space for transformers, meters and for laying down distribution lines and similar region.

- iii) The Impugned Order has completely ignored the provisions of the Act and the extant regulations while finding fault with the Tata Power for not achieving the targets of rollout of distribution network within the period of one year. The Commission has failed to appreciate that in terms of Regulation 4 of the MERC (Standards of Performance of Distribution Licensees, Period for Giving Supply and Determination of Compensation) Regulations, 2005 (SOP Regulations) read with Regulation 5.7 of the MERC (Electricity Supply Code and Other Conditions of Supply) Regulations, 2005 (Supply Code), the timelines for commencement of supply

to a person are triggered from the time that the distribution licensee receives a complete application from such person. A complete application is said to be received, inter alia, upon the applicant making necessary arrangements for space and upon receipt of necessary approvals. The Tata Power cannot be said to have defaulted in complying with its obligations unless such conditions are satisfied. Therefore, to the extent that the Impugned Order penalizes the Tata Power for being unable to roll out its network in the 11 clusters irrespective of space constraints or lack of necessary statutory approvals and permissions is clearly inconsistent with the SOP Regulations and the Supply Code formulated by the Commission.

- iv) Despite this position, the Commission in contravention of its own Regulations and disregard of the data and details submitted by the Tata Power, proceeded to ignore the impeding factors on the ground that the Tata Power did not approach the Commission with such difficulties at an earlier point of time, and that such difficulties have been already categorically dealt with by the Commission in the Case 151 order.
- v) Therefore, in the first instance, the Commission in disregard to the Supply Code has refused to take cognizance of genuine impeding factors that are otherwise recognized under the Supply Code, and has left it on the Tata Power to get the necessary space, consents etc. with the “the help of the state government and other appropriate authorities.

7. In reply to the submissions made by Tata Power in Appeal No. 36 of 2014 RInfra has made submissions in support of the observation of the State Commission made against Tata Power.

8. Since the issues raised in both the Appeals are interconnected and the same impugned order is challenged, we are rendering a common judgment.

9. On the above issues we have heard Shri J.J. Bhatt, learned Senior Counsel for RInfra, Shri Ramji Srinivasan, learned Senior Counsel for Tata Power and Shri Buddy Ranganadhan, learned counsel for the State Commission.

10. In view of rival contentions of the parties, the following issues arise for our consideration:

(i) Whether the State Commission was justified in passing an order directing transfer of residential consumers upto 300 Units average consumption from RInfra to Tata Power to be treated as direct consumers of Tata Power affecting RInfra in a *suo motu* proceeding initiated to examine the progress of setting up of the distribution network by Tata Power as per its directions given in order dated 22.8.2012?

(ii) Whether the impugned directions have been passed in violation of the principles of natural justice?

(iii) Whether the impugned directions regarding treating consumers of RInfra having consumption of upto 300 units as direct consumers of Tata Power are as per law?

(iv) Whether the State Commission had powers to pass such direction?

(v) Whether the State Commission was correct in making adverse observations about Tata Power's non-compliance of the directions for laying down the distribution network in the 11 clusters given in case No. 151 of 2011 without considering the justification provided by Tata Power along with supporting documents for delay in laying down the network?

(vi) Whether the State Commission was justified in directing continuation of restrictions imposed on Tata Power in case No. 151 of 2011?

11. All the above issues are interconnected and therefore, being dealt with together.

12. Let us first examine the purpose of *suo motu* proceedings in case no. 85 of 2013 initiated by the State Commission.

13. We find that the *suo motu* proceeding of the State Commission was initiated to ensure that its directions given by order dated 22.8.2012 in case No. 151 of 2011 to Tata Power are complied with in letter and spirit.

14. The key issues identified by the State Commission in the *suo motu* proceedings were:

“a) Has Tata Power complied with the Commission’s directions for setting up its distribution network in the identified 11 Clusters in the common area of supply between Tata Power and RInfra, such that it is able to give supply on request to any consumer within these 11 Clusters,

and have consumers benefited, and if not, what action should be taken against Tata Power?

b) Has there been a violation of the Commission's directions restricting changeover of consumers to 0-300 units per month residential category consumers and switchover of consumers to 0-300 units per month residential category consumers and existing changeover consumers in the 11 Clusters, during the period from August 22, 2012 to August 21, 2013, and if so, what action should be taken against Tata Power?"

15. The State Commission found that Tata Power is yet to achieve the target of roll out of distribution network and is actually way behind the deadline of 21.8.2013 for setting up the desired distribution network in the identified 11 clusters. In fact Tata Power sought additional time due to difficulties faced by them to achieve the desired network roll out. The

State Commission also found that cherry picking has been avoided as a consequence of the State Commission's directions in order no. 151 of 2011. However, only around 99,000 changeover consumers and 87 switchover consumers have been benefited from Tata Power's lower tariff in the period of one year after issue of order dated 22.8.2012 in case no. 151 of 2011, as compared to consumer base of around 9 lakhs in 11 clusters.

16. The State Commission came to conclusion that though Tata Power had taken some action towards compliance of the directions of the Commission regarding laying of distribution network in the identified 11 clusters, this is considered as token and there has been default by Tata Power in achieving the target.

17. Accordingly, the State Commission issued the following directions:

“35. The issue is far more serious for the low-end residential category consumers in the identified 11 clusters, who cannot be penalised for the slippage of the distribution licensee in its obligation to set up the requisite distribution network, and they should not be denied the option to source cheaper electricity, which option was provided to them by the Commission vide the Order in Case No. 151 of 2011. Towards this end, the Commission issues the following directions:

a) In the identified 11 Clusters, all residential category consumers in the 0-300 units consumption slab (whose 'average' monthly consumption over the previous 12 months is upto and including 300 units per month) shall be treated as direct consumers of Tata Power for the purposes of tariff.

b) From November 1, 2013, Tata Power shall charge such consumers the tariff approved by the

Commission in Tata Power's MYT Order (Case No. 179 of 2011) for Tata Power's direct consumers, comprising of Fixed/Demand Charges, Energy Charges, and Wheeling Charges. The indicative amount of additional cash inflow to Tata Power pertaining to Wheeling Charges has been estimated based on the data submitted by Tata Power regarding number of LT-I Residential (0-300 units) consumers in identified 11 Clusters, and RInfra-D data on total consumer and consumption in its licence area, ...:

However, the above amounts are only indicative and the actual amounts shall be billed based on the actual number of consumers and consumption in the respective areas, and shall be reconciled between the Licensees.

- c) *Since, these consumers will be treated as direct consumers of TPC-D, TPC-D shall have to procure the necessary power for meeting the requirement of these consumers in the 11 Clusters, and inject such procured energy into the system, after grossing up*

for RInfra-D's wheeling losses at the appropriate voltage, as approved by the Commission in RInfra-D's MYT Order (Case No. 9 of 2013).

- d) *Since, these consumers are actually connected to RInfra, TPC-D shall pay Wheeling Charges and Regulatory Asset Charges on a per unit basis, as approved by the Commission in RInfra-D's MYT Order for the energy wheeled using RInfra-D's wires. The indicative amount payable by TPC-D to RInfra-D has been estimated based on the data submitted by TPC-D regarding number of LT-I Residential (0-300 units) consumers in identified 11 Clusters, and RInfra-D data on total consumer and consumption in its licence area, as under.....*

However, the above amounts are only indicative and the actual amounts shall be billed based on the actual number of consumers and consumption in the respective areas, and shall be reconciled between the Licensees.

e) Further, since RInfra-D distribution network is being used, RInfra-D will be responsible for providing the Supply Services, for which appropriate Supply Services Charge as assessed below shall be payable to RInfra-D on a per unit basis.

f) The approved O&M expenses for RInfra-D's Supply Business for FY 2013-14 is Rs. 306 crore, which is utilised to service approximately 25 lakh consumers, which works out to approximately Rs. 1200 per consumer per year or Rs. 100 per consumer per month. According to the Tata Power figures, which RInfra-D has not questioned, the eligible consumer base (i.e., 0-300 units per month residential category) is 7.92 lakh, which is approximately 30% of RInfra-D's total consumer base. Broadly, therefore, it would be appropriate to assume that 30% of the charges are also to be collected from the same area. However, since, the database available with the Commission is not scientific, nor have the details been gone into, the Commission opines that 25% of these costs, which

works out to around Rs. 25 per consumer per month would be due to RInfra-D for supply services, which will amount to approximately Rs. 1.98 crore per month and Rs. 1.92 crore per month for FY 2013-14 and FY 2014-15, respectively. However, the above amounts are only indicative and the actual amounts shall be billed based on the actual number of consumers and consumption in the respective areas, and shall be reconciled between the Licensees. As the documents available with the Commission from both Parties do not enable the Commission to make a more scientific assessment of the cost of such services, either Party may approach the Commission for a more scientific determination of such charges to be paid to RInfra-D, along with the requisite data.

g) The paperwork for transferring these consumers from RInfra-D to Tata Power shall be completed for 5 Clusters by December 2013 and for the remaining 6 Clusters by March 2014, and till such time as the paperwork is completed, RInfra-D shall raise the bills on the consumers based on the tariff

approved by the Commission in Tata Power's MYT Order (Case No. 179 of 2011) for Tata Power's direct consumers, under intimation to Tata Power.

h) The above dispensation shall continue till such time as Tata Power rolls out its network in the identified Clusters or the directions in this Order are reviewed, which prima-facie is likely to be at the time of issue of distribution licence in 2014.

i) It may be noted that apart from the above directions, all other directions given by the Commission in the Order dated August 22, 2012 in Case No. 151 of 2011 shall continue to be in force till reviewed by the Commission”.

18. Thus, the State Commission directed that all residential category consumers in 0-300 units consumption slab in the identified 11 clusters (estimated to be 7.92 lakhs consumers) shall be treated as direct consumers of Tata Power for the

purpose of tariff (even though they are connected on the wires of RInfra). These consumers will be charged the tariff of Tata Power. Tata Power will pay to RInfra their wheeling charges. Besides RInfra will also be paid supply service charges which was worked to be approximately Rs. 25/- per consumer per month, to be reconciled later. However, till the paper work for transferring these consumers is completed RInfra shall raise the bills on these consumers at Tata Power tariff. Besides, all directions given by the State Commission in order dated 22.8.2012 in case No. 151 of 2011 shall continue to be in force.

19. We find that in this case even though RInfra was made a party by the State Commission, no public notice was given. However, RInfra was not given a notice about the direction to transfer all its residential

consumers under 300 Units consumption totaling to about 7.92 lakhs enblock to be made the direct consumer of Tata Power even though they remain connected to the network of RInfra.

20. On the issue of principles of natural justice, the argument of learned counsel for the State Commission was that the consumers will be benefited by this order and therefore, there was no need to hear the consumers on this issue. In any case, the consumers can exercise their choice to again become the direct consumer of RInfra, if they so desire. According to him, RInfra should also not be aggrieved by the order as all along they have been complaining about Tata Power taking their subsidizing consumers either by changeover or switchover, disturbing the balance of subsidizing and subsidized consumers in RInfra area.

RInfra have been alleging that Tata Power was creating obstacles in changingover of subsidized consumers from RInfra to Tata Power and also deliberately not extending their network to the low end consumer to enable them to switchover to Tata Power's system.

21. We do not find any force in the arguments rendered by the learned counsel for the State Commission for the following reasons:

(i) The *suo motu* proceeding in the present case had been initiated by the State Commission in view of the slow progress of Tata Power in laying distribution network in the identified 11 clusters as per the directions given to Tata Power by order dated 20.2.2012 in case No. 151 of 2011. There was no notice given either to the consumers or RInfra regarding transfer of low end consumers

from RInfra to Tata Power in the 11 clusters enblock to be made as direct consumers of Tata Power.

(ii) The residential consumers in 0-300 units category already had a choice to changeover to Tata Power as per the changeover protocol devised by the State Commission. There was no cross subsidy surcharge applicable to these consumers. Despite this, the consumers had not chosen to changeover to Tata Power. The impugned order also does not indicate that the consumers will have choice to changeover back to RInfra as is being contended now by the learned counsel for the State Commission. In any case, the choice for supplier has to be exercised by the consumers. The State Commission has to only facilitate that

such choice can be exercised by the consumers without any hindrance.

(iii) RInfra have given elaborate arguments about the detrimental impact on them due to the impugned directions of the State Commission. Whether transfer of the low end consumers from RInfra to Tata Power would have any detrimental impact on RInfra can be found only after an enquiry is made by the State Commission. The State Commission did not give that opportunity to RInfra as the order has been passed without notice to them on the proposal to transfer the low end consumer enblock.

(iv) Certain *ad hoc* decisions have been taken by the State Commission regarding the billing

arrangements, service charges, etc., which could not have been decided without following the procedure and giving opportunity to the affected parties to be heard, as per the provisions of the Act and the Regulations.

(v) During the period till the paper work for transfer is completed RInfra has been directed to bill the said consumes at Tata Power tariff. This may involve difficulties as the billing is computerized with the tariff applicable to RInfra as an input requiring change in programme/software and may result in erratic bills causing inconvenience to the consumers.

22. We feel that the impugned directions have been passed without following the principles of natural justice.

23. RInfra has made submissions about the adverse impact of the impugned directions and also pointed out that it would result in enrichment of Tata Power by Rs. 25 crores due to difference in wheeling charges of RInfra and Tata Power. We feel that it is not proper for us to go into these aspects at the appellate stage as the same have not been considered by the State Commission.

24. We find that the State Commission has tried to calibrate the balance of subsidized and subsidizing consumers between RInfra and Tata Power by a direct intervention by making about 7.92 lakhs consumer in 0-300 units slab in 11 clusters as direct consumers of Tata Power overnight even though they remain connected to RInfra's network. In order to implement the same, the State Commission has decided some ad-

hoc arrangements including some ad-hoc charges without giving notice to the affected parties.

25. Section 14 of the Electricity Act, 2003 provides for the Appropriate Commission to grant a licence to two or more persons for distribution of electricity through their own distribution system within the same area. The Appropriate Commission has also been empowered under Section 62 of the Electricity Act, 2003 that in case of distribution of electricity in the same area by two or more distribution licensees, the State Commission may, for promoting competition among the distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity. Section 42 of the Electricity Act, 2003 provides that the State Commission shall introduce open access in phases and subject to certain conditions. Section 43(1)

provides that every distribution licensee, shall, on an application by the owner or occupier of any premises, give supply of electricity to such premises, within one month after receipt of the application requiring such supply.

26. The basic objectives of this provision of the Electricity Act, 2003 is to promote competition and to provide choice to consumer. If there are two distribution licensees in an area then the consumer has to decide from which licensee it has to take power. As Tata Power had not laid its network in the entire distribution area common to RInfra, the State Commission in a proceeding in case No. 50 of 2009 order dated 15.10.2009 devised an arrangement by which the consumer could opt for changeover of supply from one distribution licensee to the other

distribution licensee using the existing network of the former. Accordingly, the consumers of RInfra have a choice to changeover to Tata Power at their choice while remaining connected network of RInfra by paying wheeling charges and other compensatory charges including cross subsidy surcharge to RInfra and vice versa. The arrangement was devised using the provisions of open access under Section 42 of the 2003 Act.

27. The Electricity Act, 2003 does not empower the State Commission to give such directions of transfer of consumers connected to the distribution system of one licensee to the other parallel licensee to be made latter's deemed consumer. The consumers connected to RInfra can become direct consumers of Tata Power only by switching over to Tata Power's distribution

network. Further, the choice of supplier has to be exercised by the consumer by giving an application in the appropriate form along with fees as specified by the State Commission in its Regulations. We feel that the State Commission has exceeded its jurisdiction in passing the impugned directions for transfer of RInfra consumers to Tata Power to be made the direct consumers of Tata Power while remaining connected to the RInfra network.

28. In Appeal No. 36 of 2014, Tata Power is mainly aggrieved by continuing of directions given by the State Commission by order dated 20.8.2012 in case No. 151 of 2011 imposing several restrictions on Tata Power and some adverse remarks against them regarding slow progress of lay down of the network despite the detailed explanation given by them in

laying down the network. In our judgment dated 28.11.2014 in Appeal No. 246 of 2012, we have discussed the constraints in laying down distribution network in the common licensed area of RInfra and Tata Power and have already set aside the directions given by the State Commission in Case No. 151 of 2011 and have given fresh directions to the licensees. In view of our judgment dated 28.11.2014, nothing survives in Appeal No. 36 of 2014.

29. **Summary of our findings:**

(i) The State Commission has exceeded its jurisdiction in giving the directions for transfer of about 7.92 lakhs consumers in 0-300 Units slab enmass to Tata Power while being connected to RInfra's distribution system. These directions

have been passed in violation of the principles of natural justice.

(ii) Appeal No. 36 of 2014 does not survive in view of our judgment dated 28.11.2014 in Appeal No. 246 of 2012.

30. In view of above Appeal No. 278 of 2013 is allowed. Nothing survives in Appeal No. 36 of 2014 in view of our judgment dated 28.11.2014 in Appeal No. 246 of 2012. The impugned order is set aside. No order as to costs.

31. Pronounced in the open court on this **29th day of November, 2014.**

**(Rakesh Nath)
Technical Member**

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**(Justice M. Karpaga Vinayagam)
Chairperson**

REPORTABLE/NON-REPORTABLE

Vs