

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No.192 of 2011

Dated: 17th April, 2013

**Present : HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM,
CHAIRPERSON
HON'BLE MR. RAKESH NATH, TECHNICAL
MEMBER**

In the Matter of:

**RELIANCE Infrastructure Limited,
a Public Limited company incorporated
under the provisions of the Indian
Companies Act, 1913 having its
registered office at H Block, 1st Floor,
Dhirubhai Ambani Knowledge City
Navi Mumbai-400710.**

...Appellant

Versus

- 1. The Maharashtra Electricity Regulatory Commission
World Trade Centre No.1
13th Floor, Cuffe Parade,
Colaba, Mumbai-400001.**
- 2. Mumbai Grahak Panchayat,
Grahak Bhavan, Sant Dnyaneshwar Marg,
Behind Cooper Hospital, Vile Parle(W)
Mumbai-400 056.**

3. **Prayas (Energy Group)**
Amrita Clinic, Athawale Corner,
Karve Road, Lakdipool-Karve Road,
Pune-411 004.

4. **Thane Belapur Industries,**
Plot No.P-14, MIDC,
Rabale Village, Post: Ghansoli,
Navi Mumbai-400 071.

5. **Vidarbha Industries Association,**
1st Floor, Udyog Bhavan,
Civil Lines, Nagpur-400041.

.....Respondent(s)

Counsel for the Appellant(s) : Mr.Akhil Sibbal
Mr. Saswat Pattnaik
Mr. Hasan Murtaza

Counsel for the Respondent(s): Mr. Buddy A. Ranganadhan(R-1)
Mr. Krishanan Venugopal, Sr.Adv.
Mr. Sakya Singha Chaudhury
Mr. Kaushik Mishra
Mr. Sitesh Mukherjee
Mr. Anand Shrivastava
Ms. Anusha Nagarajan for R-6
Mr. Bomi Shroff
Mr. Avijeet Kr. Lala
Mr. Ishan Arora
Ms. Richa Bharadwaja for MERC.
Ms. Mandakini Ghosh

J U D G M E N T

PER HON'BLE MR. JUSTICE M. KARPAGAVINAYAGAM,
CHAIRPERSON

1. Reliance Infrastructure Limited (RInfra) is the Appellant herein.
2. Maharashtra State Electricity Regulatory Commission (State Commission) is the 1st Respondent.
3. Respondents 2 to 5 are authorized consumer representatives appointed by the State Commission.
4. Tata Power Company Limited is the 6th Respondent.
5. The present Appeal has been filed by the Appellant challenging certain adverse remarks made against the Appellant in Paragraph-56 of impugned order dated 19.5.2011 passed by the State Commission.
6. The short facts of the Appeal are as follows:-
 - i) The Appellant is a Generating Company as well as a Distribution Licensee.
 - ii) By the order dated 29.01.2004, the State Commission recognised the condition pursuant to the license conditions to the effect that the Appellant was obligated

to procure power only from Tata Power Company Limited (R-6) which is a bulk supply company.

- iii) Accordingly, the Appellant had been procuring the power from Tata Power Company Limited.
- iv) The Appellant requested the Tata Power Company Limited to offer 762 MW whereas Tata Power Limited offered to supply quantities between 400 to 600 MW from time to time.
- v) At last, the Tata Power Company Limited (R-6) through its letter dated 28.4.2009 agreed to sell 500 MW and accordingly requested the Appellant for a confirmation by sending draft PPA on the lines approved by the State Commission. However, in the meantime, several disputes arose between them resulting in various litigations. Ultimately, the matter was taken up to Hon'ble Supreme Court.
- vi) The Hon'ble Supreme Court by judgment dated 6.5.2009 held that Tata Power Company Limited being the Generating Company, can not be compelled to sell the power only to a particular Distribution Licensee. By virtue of this judgment, Tata Power Company Limited became entitled to supply power to any person of its choice and to enter into PPA for that purpose.

- vii) Thereafter, PPA has been entered into between Tata Power Company Limited and the Appellant for the limited quantity.
- viii) The Appellant, thereafter, filed the Petition before the State Commission for determination of tariff for the Financial Year 2009-10.
- ix) Accordingly, the State Commission by the order dated 15.6.2009 determined the same by increasing the tariff in favour of the Appellant in Case No.121/2001. At that point of time, on the basis of the representation made by several consumers opposing the increase in tariff of the Appellant, the Govt of Maharashtra sent a Government Memorandum dated 25.6.2009 to the State Commission giving the direction under Section 108 of the Act, 2003 to investigate into the affairs of the Appellant and to take emergent steps for protecting the consumer's interest in the State of Maharashtra. Pursuant to the said Government Memorandum, the State Commission, having felt the necessity for taking immediate action for investigating the affairs of the Appellant, ex-parte passed an order dated 15.7.2009 staying the operation of its tariff order dated 15.6.2009.

- x) The State Commission, thereupon, on 8.9.2009 appointed Administrative Staff College of India, Hyderabad (ASCI) as Investigating Authority to carry out investigation into books of accounts maintained by the Appellant to ensure optimal impact on the cost of supply and the tariff charged by them under section 128 of the Act, 2003.

- xi) At that stage, the State Government issued another Government Memorandum on 7.5.2010 directing the State Commission to take suitable steps in Mumbai having regard to M/s Reliance Infrastructure Limited's obligation to ensure that its consumers do not have to suffer any increase in tariff and also the Tata Power Company's obligation to use its generation capacity to supply power at reasonable rates in Mumbai, in the interest of the consumers.

- xii) In pursuance of the Government Memorandum of the State Government dated 07.5.2010, the State Commission initiated a separate suo-moto proceedings in case no. 13 of 2010 and issued public notice on 18.5.2010 narrating "the broad principles" as mentioned in the Government Memorandum dated 07.5.2010 and seeking for the comments and

suggestions from various stake-holders and the public. Those “broad principles” are as follows:-

- a) The role of the State Commission to take measures in regard to the broad principles indicated in the Government Memorandum dated 7.5.2010 along with the views of reporting committee.
 - b) Statutory provisions under which the State Commission can take measures, if any.
- xiii) On the basis of this Public Notice dated 18.5.2010, the Appellant (RInfra), appeared before the State Commission and filed the written submission putting the blame on the Tata Power Company stating that it was in a dominant position and therefore it refused to enter into the PPA with Appellant at the cost of the interest of the consumers.
- xiv) In response to the Public Notice, Tata Power Company also appeared in the State Commission and filed its written submission bringing to the notice of the State Commission, the judgment of Hon’ble Supreme Court dated 6.5.2009 in which it was held that the Tata Power Company being the Generating Company cannot be compelled to enter into a contract with a

particular Distribution licensee and it has got the freedom to supply to any person of its choice. Simultaneously, during the pendency of the said suo-moto proceedings in case No.13 of 2010 in which public notice was issued, the Tata Power Company filed a Writ Petition before the Bombay High Court challenging the Government Memorandum dated 7.5.2010 and prayed for quashing the same.

- xv) In the meantime, public hearing was held in the suo-moto proceedings in case No.13 of 2010 on 28.6.2010 and 3.7.2010 before the State Commission. All the parties concerned including the Appellant and the 6th Respondent were heard and permitted to file their respective written submissions. Accordingly, they filed the same. The hearing was over on 3.7.2010.
- xvi) At that stage, the State Commission, in the earlier tariff proceedings in case No.121 of 2008, received the report from the ASCI on 9.7.2010 in pursuance of the order directing for investigation by the order dated 8.9.2009 in pursuance of earlier Government Memorandum dated 25.6.2009.
- xvii) After the receipt of the report of ASCI dated 9.7.2010, the State Commission by the order dated 9.9.2010,

vacated the stay of the tariff order imposed through order dated 15.7.2009 and closed those proceedings in Case No.121 of 2008 by making some negative observations about the performance of the Appellant (RInfra).

xviii) Aggrieved over these observations, the Appellant filed an Appeal before this Tribunal in Appeal No.201 of 2010 on 25.10.2010. The said Appeal was entertained and the same was pending. At that stage, the writ petition filed by Tata Power Company as against the Memorandum of the State Government dated 7.5.2010, came-up for final hearing on 18.1.2011. After hearing the parties including the Appellant and Tata Power Company (R-6), Bombay High Court by the order dated 18.1.2011, quashed the Government Memorandum dated 7.5.2010. However, the High Court of Bombay permitted the State Commission to proceed with the matter without interdicting the suo-moto proceedings in case No.13 of 2010 initiated in pursuance of the public notice dated 18.5.2010 issued on the basis of the Government Memorandum dated 7.5.2010 and to arrive at its own conclusion, independent of the said Memorandum dated 7.5.2010.

- xix) In pursuance of this order of the High Court, the State Commission proceeded to continue the said suo-moto proceedings and decided to refer the matter for the opinion from the Competition Commission over the proposed action to be taken by the State Commission in the light of the materials available on record. Accordingly, the State Commission sent all the records along with a covering letter dated 01.2.2011 seeking for the opinion of the Competition Commission. On receipt of the said letter of requisition, the Competition Commission went into various aspects of the proposed action referred to in the said requisition and analysed the materials available on record and thereafter, sent the opinion and suggestions through its report dated 14.3.2011.
- xx) Thereupon, the State Commission after analysing the materials as well as the opinion and suggestions offered by the Competition Commission, issued impugned order dated 19.5.2011 holding that since the issues raised by Rlnfra in the said proceedings as against the Tata Power Company have already been considered and settled by the Hon'ble Supreme Court, there was no justification for dealing with the said issues again as there was no necessity to reopen those

issues again. However, in the concluding paragraph, the State Commission observed that Rlnfra, the Appellant was responsible for the present situation due to the various reasons like lack of planning, not entering into the contract with Tata Power Company as directed by the State Commission etc.,

7. Aggrieved by these adverse remarks, the Appellant has preferred this Appeal praying for expunging these remarks.
8. This Appeal is not against the merits of the order dated 19.5.2011 but it is confined to the challenge made as against the adverse remarks against the Appellant in paragraph-56 of the above order. The impugned remarks contained in paragraph-56 are as follows:-

“56. The findings of the Commission on the broad principles laid down by the Government of Maharashtra vide its “Memorandum” dated 7th May 2010, are as follows -

(1) TPC’s obligation to supply electricity from its generating stations at regulated / reasonable rates to distribution licensees of Mumbai on priority and not to take advantage of its dominant position in the absence of a Power Purchase Agreement (“PPA”) with Rlnfra to trade electricity, divert electricity to TPC (Distribution) (“TPC-D”) or to offer electricity to Rlnfra at higher rates, thereby adversely affecting the consumers of Rlnfra.

.....

Rlnfra is responsible for the present situation, because of the following reasons:

- ***lack of planning/poor planning of its power procurement requirement and for not contracting for adequate capacity,***
- ***insistence on getting 762 MW from TPC and not signing for even 500 MW in the process,***
- ***not contracting for the balance requirement even now and relying on costly short-term purchases***
- ***as early as 2003, Rlnfra wanted Open Access for 800 MW, so Rlnfra was well aware of the options available to it.***
- ***Depending exclusively on supply from TPC, despite several disputes between TPC and Rlnfra at various fora.....”***

AND

(2) Rlnfra’s obligation to ensure (subject to suitable penalties to be specified by the Commission) that its consumers do not have to suffer any increase in tariff only on account of its failure to procure electricity at reasonable costs over and above the quantum of electricity that TPC can be reasonably expected to supply to it after taking care of its commitments under the PPA with

Brihan-Mumbai Electricity Supply and Transport Undertaking (“BEST”) and requirement of TPC (Distribution).

RInfra has been repeatedly directed by the Commission to take all necessary steps to contract for the necessary power requirement expeditiously, in a manner that results into low power purchase rate, either through the competitive bidding process or bilateral contracts, in order to safeguard consumer interest.....”

9. The learned Counsel for the Appellant prayed for expunging these remarks on the following grounds:-
- a) The conclusions in the impugned order are in violation of the order of the High Court of Bombay dated 18.1.2011 passed in the Writ Petition.
 - b) The impugned observations against the Appellant are without any basis and are not supported by the reasons.
 - c) The said adverse observations have been made without considering the ASCI report as well as the order of the State Commission dated 9.9.2010 vacating the stay on the basis of the ASCI report which is in favour of the Appellant.
10. On these grounds, the learned Counsel for the Appellant argued at length. The learned counsel for the Respondents

also argued in detail in defending the impugned observations. As indicated above, this Appeal has not been filed as against the merits of the main order but only as against some portions of the adverse observations made in Paragraph 56 of the order dated 19.5.2011.

11. Before dealing with this issue, we may point out one other sad feature. It is noticed that in the Appeal, the Appellant has made several allegations as against the Tata Power Company and raised various grounds assailing the finding of the State Commission rendered in favour of the Tata Power Company in the order dated 19.5.2011. Unfortunately, the Appellant has not chosen to make the Tata Power Company as a party in this Appeal.
12. As a matter of fact, in various Paragraphs in the pleadings as well as in the grounds contained in the Appeal, the Appellant made specific allegations as against the Tata Power Company contending that only due to the intervention of the Tata Power Company, the Appellant was not able to discharge its obligation to ensure regular supply to its consumers at reasonable rates. Similarly, the grounds also have been raised in this Appeal on the basis of those specific allegations against the Tata Power Company. Those grounds urged in this Appeal, are as follows:

- (a) The Appellant was dependent upon the Tata Power Company for 80 years for supply of power. Therefore, the Appellant was entitled to equitable allocation of power from the Generation Station. However, the Tata Power Company wrongfully deprived the Appellant the right to avail power from its Generating Units by entering into Power Purchase Agreement with BEST and TPC-D to the exclusion of the Appellant.
- (b) The Tata Power Company has always ensured its monopoly for supply of power within the city of Mumbai. The Tata Power Company had defeated all the efforts of the Appellant to avail power from other sources or to set up its own units for getting supply.
- (c) The Tata Power Company has refused to supply power to the Appellant to deprive the Appellant of cheaper power and thereby compelled the Appellant to procure costlier power from other sources resulting in the increase of the consumer's tariff. The refusal on the part of the Tata Power Company to enter into the PPA with the Appellant had caused hardship to the Appellant's consumers who are ultimately subject to the electricity at higher tariff.

13. We find from the impugned order that the very same grounds accusing the Tata Power Company, were urged before the State Commission also. However, the State Commission in the impugned order has rejected all these arguments and gave a finding in favour of the Tata Power Company and observed in paragraph 56 of the impugned order that the Appellant was solely responsible for the poor planning and poor performance etc., When such a finding had been given by the State Commission in the adversarial proceedings between the Appellant and Tata Power Company and when the very same allegations have been levelled in this Appeal against Tata Power Company on the basis of which the adverse marks are sought to be expunged, the Appellant ought to have impleaded the Tata Power Company especially when the Tata Power Company was a party before the State Commission. This was not done. Why it was so, there is no reason.
14. On the date of the admission of this Appeal, the learned Counsel for the Tata Power Company appeared and pointed out this lacunae by submitting that when the objective of the Appellant in this Appeal is to establish that the Tata Power Company alone was responsible for causing disturbance to the conduct of the distribution business of the Appellant and not the Appellant, then Tata Power Company, being the

necessary party must have been made as a party in this Appeal and this was not done by the Appellant deliberately.

15. Though the Appellant in this Appeal has not challenged the order of the State Commission on merits, it seeks expunction of the impugned remarks alone made by the State Commission on the ground that it was not warranted as Tata Power Company was only responsible for the same. If the sole purpose of the Appeal is to expunge the impugned observation alone as there is no basis, then, there was no necessity for the Appellant to make extensive allegations as against the Tata Power Company that too without impleading it.
16. As correctly pointed out by the learned Counsel for the Tata Power Company, the Appellant is not entitled to obtain the ex-parte order so as to affect the interest of the Tata Power Company, we permitted Tata Power Company to file the Petition for impleadment. Accordingly, they filed the Petition for impleadment which was allowed making the Tata Power Company, as 6th Respondent in this Appeal.
17. We have heard the learned Counsel for both the parties including 6th Respondent on the grounds urged by the Appellant. Let us now deal with the grounds urged by the

learned Counsel for the Appellant for expunging those adverse remarks.

18. In regard to the **1st ground**, the learned Counsel for the Appellant would submit that the High Court quashed the Government Memorandum dated 7.5.2010 and directed the State Commission to deal with the matter, independent of the Memorandum dated 7.5.2010 and to consider whether a case has been made out for exercise of statutory and regulatory powers but, contrary to this High Court order, the State Commission without conducting further enquiry independent of the Govt Memorandum, passed the impugned order mainly on the basis of the principles referred to in the memorandum dated 7.5.2010 and thus, the State Commission has acted in violation of the order of the High Court which makes the impugned order invalid in law.
19. On the other hand, the learned Counsel for the Respondents contended that the Appellant itself as a Respondent in the Writ Petition prayed the High Court which inclined to quash the Government Memorandum requesting not to interdict the proceedings already initiated through the public notice dated 18.01.2010 and to allow the said proceedings to continue and decide the issues. On the basis of the said request made by the Appellant, the High

Court of Bombay passed the order quashing the Government Memorandum dated 7.5.2010 and permitted the State Commission to continue with the proceedings initiated in pursuance of the public notice dated 18.1.2010 and come to its own conclusion independent of the memorandum dated 7.5.2010 and in compliance with the said directions, the State Commission dealt with the issues referred to in the public notice and passed the impugned order independent of the said Memorandum dated 7.5.2010 and as such, there is no basis to contend that the order of the High Court has been violated.

20. In the light of the above rival contentions, we have to consider the issue as to whether the impugned order passed by the State Commission is in accordance with the directions of the High Court. Let us first see the relevant portion of the order of the High Court dated 18.01.2011:

The object of the Legislation :

16. In evaluating the rival submissions which have been urged before the Court, this Court must at the outset advert to the rationale underlying the enactment of the Electricity Act of 2003. The Statement of Objects accompanying the introduction of the bill in Parliament noted that the electricity supply industry in India was governed by the Electricity Act of 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commission Act of 1998. Over a period of time, the

functioning of the State Electricity Boards set up under the Act of 1948 deteriorated. The SEBs were unable to take decisions on tariff in a professional and independent manner and tariff determination was in practice done by the State Governments. To address this problem, the Act of 1998 was enacted to provide for distancing of government from the determination of tariffs. The Act of 2003 was enacted with the policy of encouraging private sector participation in generation, transmission and distribution of electric power and in furtherance of the objective of distancing regulatory responsibilities from government to the regulatory commissions. The Act inter alia provided for a regime of open access.

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.....

The Affidavit of Government :

18. The State Government has filed an affidavit before this Court in reply to the Petition stating that:

(i) That the State Government has at present not exercised its powers under Section 11 of the Act and the memorandum does not contain any direction under Section 11;

(ii) The first part of the memorandum dated 7 May 2010 contains a request to MERC to take suitable measures and it is for MERC to decide what those measures for protecting the interest of the consumers should be;

(iii) The second part of the memorandum merely suggested a protem interim arrangement, described as a reasonable ad interim solution in public interest

and the memorandum merely records that the government expected the parties concerned to abide by it.

The position which the Government has adopted before the Court is that the Memorandum dated 7 May 2010 was not a statutory directive but constitutes only a request to MERC. When the Petition was admitted by this Court by a Division Bench of this Court on 11 June 2010, a statement was made, on the basis of the affidavit, by the Advocate General that the State Government has at that stage not exercised its powers under Section 11. The statement of the position which the Government has adopted before the Court is that the Memorandum dated 7 May 2010 was not a statutory directive but constitutes only a request to MERC. When the Petition was admitted by this Court by a Division Bench of this Court on 11 June 2010 a statement was made, on the basis of the affidavit, by the Advocate General that the State Government has at that stage, not exercised its powers under Section 11. The statement of the Advocate General also makes it clear that no statutory directive was issued by the State Government.

The nature of the power :

19. The submission which has been urged on behalf of the State Government is that it is always open to government to bring to the notice of a statutory regulator an emergent situation for taking necessary action. Now unquestionably, in a democratic state the government must be responsive to the needs of its constituents.

There cannot be any dispute about the position that it is open to government to take cognizance of emergent situations and, if necessary to bring them to the attention of the regulatory authorities. That, however, would not in itself sustain the legality of the memorandum dated 7 May 2010. That for one thing is not the import of the memorandum. The memorandum indicates the decision of government that MERC should take suitable measure after taking into account the report of the Committee and the considerations which the memorandum spells out. The memorandum spells out what according to government is a reasonable ad interim solution. The action of the government in this case has to be understood in the context of the object and scheme of the Electricity Act of 2003. The basis of the statutory provisions is to provide a distancing between the government and the State Electricity Commissions. The Act has provided for a comprehensive legislative framework in which generating companies are liberated from the restrictive features of the...

20. The power that is conferred upon the state government to issue directions is statutorily conditioned upon the existence of circumstances which warrant the exercise of statutory power. The validity of a statutory directive when issued would have to be decided with reference to the existence of those circumstances which condition the exercise of power. In the present case, no statutory directive has been issued. The difficulty in accepting the argument which has been urged on behalf of the state government that its memorandum is valid because it is only a request is that though the government, when it exercises a statutory directive is bound by the discipline of the Act, a government which makes a mere request in the terms which have been adverted to in the memorandum in question would be virtually bereft of the discipline of the Act. Such a

position cannot possibly be countenanced. The Government, in the garb of exercising what is termed as a mere request or advice cannot either confer jurisdiction upon a State Electricity Commission, which it lacks, nor can it persuade the Commission to assume jurisdiction on an area which it is not empowered to enter. Undoubtedly, the State Electricity Commission has wide powers but even those powers are structured by the Act as was observed by the Supreme Court in its decision in *Tata Power Company*. Even in the context of Section 86(1)(b) the Supreme Court observed that these provisions do not empower the State Electricity Commission to issue a direction to a generating company to supply electricity to a licensee who has not entered into a power purchase agreement. State governments are bound by the discipline and rigor of the legislation that has been enacted by Parliament in the *Electricity Act of 2003*. Accepting a submission which permits the state government to issue requests to regulatory authorities, contrary to the specific statutory scheme enacted in the legislation, would have disruptive consequences. This would result in the reintroduction of a fresh regime of licensing which in the first place the Electricity Act of 2003 was intended to disband.

21. The manner in which the State Government construed its own memorandum dated 7 May 2010 is apparent from the subsequent memorandum that it issued on 19 May 2010. Government by its subsequent memorandum noted that the Petitioner had, contrary to the advice of government in the memorandum dated 7 May 2010 applied to the State Load Despatch Center to schedule 160 MW of power to its distribution arm. The subsequent memorandum therefore left it beyond a pale of doubt that the State Government was directing the Chief Engineer at the State Load Despatch Center to maintain the status quo in respect of scheduling 360 MW

of power till further directives are received or obtained from the MERC or till further orders or directions in this behalf are issued by the State Government. If the State Government believed that circumstances justified the exercise of statutory powers, it ought to have taken the responsibility to issue a statutory directive. Government would then accept responsibility for its action and commit itself to a scrutiny of its action in judicial review. But once it came to the conclusion that the exercise of a statutory directive was not warranted at that stage, it would be impermissible for the State Government to issue what it termed as a request but which it treated as a binding advice by issuing a directive in its subsequent memorandum of 19 May 2010. The Memorandum of 19 May 2010 is consequential to the Memorandum of 7 May 2010.

22. For all these reasons, we are of the view that the memorandum that was issued by the State Government on 7 May 2010 is clearly ultra vires and would have to be quashed and set aside. There shall be an order in these terms. However, while doing so, it would be necessary for this Court to take note of the fact that subsequent to the memorandum dated 7 May 2010 MERC issued an order on 29 September 2010. That order is an appealable order and a remedy against the validity of that order may be espoused in accordance with law. We also clarify that the setting aside of the memorandum dated 7 May 2010 will not interdict the proceedings which have been conducted by the MERC in pursuance of its notice dated 18 May 2010. This would however have to be independent of the Memorandum of 7 May 2010 which is set aside. MERC would be at liberty to consider whether a case has been made out for the exercise of its statutory or regulatory powers independent of the memorandum dated 7 May 2010. This order shall not be construed as precluding the

exercise of statutory powers by the Commission in accordance with law."

21. The crux of the order of the High Court as quoted above is as follows:-

- (a) The Advocate General appearing for the State Government conceded that the Government Memorandum dated 7.5.2010 was not a statutory directive but, it constitutes only a request to the State Commission. Thus, it is clear that it is not a statutory directive so as to bind the State Commission.
- (b) It cannot be disputed about the position that it is open to the State Government to take note of the emergent situations and if necessary to bring them to the attention of the Regulatory authorities through the notification issued under Section 11 of the Electricity Act, 2003 giving the statutory directions indicating the existence of the circumstances which warrant exercise of statutory power. However, it is to be taken note of the fact that the objective of the statutory provisions under Act, 2003 is to provide the distance between the Government and State Commissions.
- (c) In the present case, admittedly, no statutory directive had been issued by the State Government under

Section 11 of the Act. Even, according to the Government, it is only a request with the terms, which have been referred to in the Government Memorandum in question. The Government under the garb of exercising the power to make a request to the State Commission, cannot confer jurisdiction upon the State Commission to assume jurisdiction on an area, which it is not empowered to enter.

- (d) If the State Government believes that the circumstances are justified for exercise of the statutory powers, it ought to have taken responsibility to issue such statutory directives. But, once it is noticed that the exercise of statutory directive was not warranted, it would be impermissible for the State Government to issue such a request or advice which can not be treated as binding on the State Commission. For these reasons, the Government Memorandum dated 7.5.2010 being ultra-vires, is quashed and set aside.
- (e) However, this Court takes note of the fact that subsequent to the Government Memorandum dated 7.5.2010, the State Commission on the strength of the said Memorandum initiated the proceedings and issued a public notice on 18.5.2010 inviting suggestions

regarding the principles mentioned in the Government Memorandum dated 7.5.2010. This court does not incline to interfere in the said proceedings which have been already initiated.

- (f) Therefore, the proceedings which have been initiated and conducted by the State Commission in pursuance of the said public notice dated 18.5.2010 on the basis of the Government Memorandum dated 7.5.2010, are not interdicted due to the order of this Court quashing the Government Memorandum dated 7.5.2010 and the same be allowed to be continued.
- (g) Accordingly, it is made clear that the State Commission is permitted to continue with the proceedings already initiated in pursuance of the Public Notice dated 18.5.2010 and decide the issue independent of the Government Memorandum dated 7.5.2010. In that proceeding, the State Commission would be at liberty to consider whether a case has been made out for exercise of statutory and regulatory powers and that this order would not preclude the exercise of statutory powers by the State Commission in accordance with the law.

(h) So, from the crux of the High Court order, as referred to above, the following aspects have emerged:-

(i) The Government Memorandum dated 7.5.2010 is ultra-vires and the same is set-aside.

(ii) The order quashing the Government memorandum dated 7.5.2010, would not interdict or prevent proceedings already initiated by the State Commission in pursuance of public notice dated 18.5.2010 which was issued on the basis of the Govt Memorandum dated 7.5.2010.

(iii) However, the decision may be taken by the State Commission on its own independent of the Government Memorandum dated 7.5.2010. Thus, the State Commission is at liberty to consider and decide as to whether a case has been made out for exercise of its powers in accordance with the law.

22. The above aspects would make it evident that though the Government Memorandum dated 7.5.2010 had been quashed, the public notice issued on 18.5.2010 on the basis

of the Government Memorandum dated 7.5.2010 had not been quashed. Thus, the State Commission had been given a free hand to go into the question with reference to the principles mentioned in the public notice, by continuing the proceedings already initiated and come to its own conclusion.

23. According to the Appellant, subsequent to the order of the High Court, there were no further proceedings conducted by the State Commission in order to consider the issue independent of the Government Memorandum dated 7.5.2010.
24. We are of the view that this contention is misconceived. As a matter of fact, the State Commission after taking note of the High Court's order continued proceedings on the basis of the public notice issued on 18.5.2010.
25. As indicated above, in pursuance of the said notice, public hearing was already held for two days i.e. on 28.6.2010 and 3.7.2010. Several stakeholders appeared on these days, made submissions and filed their written submissions also. The Appellant filed written submissions on 21.6.2010. Similarly, Tata Power Company also filed the written submissions on 3.7.2010. Thus, the enquiry was held by the State Commission on both the days by allowing the

parties concerned to place the materials for deciding the issues referred to in the public notice dated 18.5.2010.

26. In view of the fact that the High Court while quashing the Government Memorandum dated 7.5.2010 did not chose to interdict the proceedings pursuant to the public notice issued on 18.5.2010 which was issued on the basis of the Government Memorandum dated 7.5.2010, all the materials collected by the State Commission during the proceedings by hearing all the parties concerned on two days were intact as they were not disturbed by the order of the High Court. The only condition imposed by the High Court was that the State Commission shall continue the enquiry and come to its own conclusion uninfluenced by of the Government Memorandum dated 7.5.2010.
27. In accordance with the order of the High Court, the State Commission continued the proceedings and decided to seek opinion and suggestions regarding further action proposed to be taken from the Competition Commission of India. Accordingly, the State Commission sent the requisition containing all the materials so far collected to the Competition Commission of India (CCI) seeking for its opinion and suggestions with reference to the proposed action on the identified issues along with a covering letter

dated 1.2.2011. Accordingly, Competition Commission analysed the materials and forwarded its opinion and suggestions through the report to the State Commission. After receipt of the said report, the State Commission considered all the materials available on record as well as the opinion of the Competition Commission of India and passed the impugned order. Therefore, it cannot be contended that further enquiry was not held by the State Commission subsequent to the High Court order. Relevant portions of the impugned order dated 19.5.2011 are as follows:

“22. As seen from the above extracts, the Hon'ble High Court has quashed and set aside the GoM Memorandum dated May 7, 2010, as being ultra-vires. However, the Hon'ble High Court has clarified that the setting aside of the GoM Memorandum dated May 7, 2010 does not interdict the proceedings conducted by the Commission in the present Case No. 13 of 2010. The Hon'ble High Court further ruled that the Commission would be at liberty to consider whether a case has been made out for the exercise of its statutory or regulatory powers independent of the memorandum dated May 7, 2010.

23. Based on the response given by the CCI on the reference made by the Commission to the CCI, the Commission decided to make a reference to the CCI for its opinion the proposed decisions with respect to the identified issues of relevant market and dominant position in the relevant market, in accordance with the

requirements of Section 21 of the Competition Act, 2002. The issues and the decisions proposed by the Commission in the Reference dated February 1, 2011 before the CCI were:

a) "Whether the following decision is contrary to the Competition Act, 2002 for determining the relevant market for Generation Business?"

"Thus, as per the criteria laid down for identification of the relevant geographic market, the market for Generation Business is the entire country, since the conditions of competition for supply of goods or demand of goods is distinctly homogenous throughout the country, and considering the absence of any regulatory trade barriers."

b) Whether the following decision is contrary to the Competition Act, 2002 for determining the relevant market for Distribution Business?"

"Thus, as per the criteria laid down for identification of the relevant geographic market, the market for Distribution Business is the Mumbai distribution license area, since the conditions of competition for supply of goods or demand of goods is distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas, considering the regulatory trade barriers and specific licence conditions."

c) Whether the following decision is contrary to the Competition Act, 2002 for determining

whether TPC or RInfra can be said to be a dominant position in the Generation Business?

"It is obvious that neither TPC nor RInfra can be said to have a dominant position in the Generation Business in the relevant market."

d) Whether the following decision is contrary to the Competition Act, 2002 for determining whether TPC or RInfra can be said to be a dominant position in the Distribution Business?

"In terms of consumer reach and connectivity, RInfra could be said to be in a dominant position. On the parameter of power purchase cost, TPC could be said to be in a dominant position, since, TPC has access to sufficient quantity of own generation at the present moment, and the average cost of power procurement of TPC is lower than that of RInfra. Also, on the parameter of tariff, TPC could be said to be in a dominant position in the relevant market for the Distribution Business."

28. As referred to in the impugned order, the Competition Commission, after analysing the materials submitted by the State Commission, sent its report dated 14.3.2011 giving the detailed suggestions over the issues as well as the opinion. Only thereafter, the State Commission after considering all the materials on record has passed final impugned order on

19.5.2011. The State Commission has specifically referred to this in para-25 of the impugned order dated 19.5.2011.

*25. In view of the above, and having heard TPC, RInfra, BEST, authorized consumer representatives and members of the public whose names appear in **Annexure-I** to this order, and after having considered Hon“ble High Court’s Judgment dated January 18, 2011, and the Opinion of the Competition Commission of India dated March 14, 2011, the findings of the Commission on the issues that have arisen in the course of proceedings in Case No. 13 of 2010, are as follows”.*

29. The above paragraph would indicate that the State Commission in the light of the High Court order considered the written submissions made by the parties, stakeholders including the Appellant and the Respondent authorized consumers representatives and the members of the public as well as the Competition Commission Report and thereafter passed the impugned order dated 19.5.2011.
30. As mentioned above, the State Commission while recording its findings in the impugned order has specifically referred to the High Court’s direction indicated in the order dated 18.1.2001 and on the basis of that direction, the State Commission has passed the impugned order. Thus, the State Commission was conscious about the nature of the order passed by the High Court while dealing with the

issues. The relevant portions of paragraph-26 are as follows:-

“26. The Commission has to assess whether a case has been made out for the exercise of its statutory or regulatory powers in the present matter, and if found in the affirmative, to exercise its statutory powers in this regard. Further, in accordance with the Judgment of the Hon'ble Bombay High Court, the Commission has to consider the issues independent of the GoM Memorandum dated May 7, 2010. Since the genesis of this Case No. 13 of 2010 was the GoM Memorandum dated May 7, 2010, the Commission has considered only the 'broad principles' laid out in the GoM Memorandum”.

31. As mentioned earlier, even though the Government Memorandum dated 7.5.2010 had been quashed, the State Commission had been specifically directed by the High Court to decide the issues which are mentioned in the public notice dated 18.5.2010. Hence, the State Commission had to necessarily consider the issues and principles referred to in the public notice.
32. The public notice issued on 18.5.2010 is reproduced as below:-

“MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
Centre No.1, 13th Floor, World Trade Centre, Cuffe Parade, Mumbai-400005.
Tel: 22163964/65 Fax:22163976

EMail:mercindia@mercindia.org.in
Website:www.mercindia.org.in

PUBLIC NOTICE
MERC Case No.13 of 2010

Reliance Infrastructure Limited (“Rlnfra”) made representations to the Government of Maharashtra (“GOM”) regarding supply of electricity from the generating stations of Tata Power Company Limited (“TPC”) to Rlnfra for distribution to its consumers. Consequently, the GOM appointed a five member committee (“Committee”) to examine the issues in regard to the above. The said Committee issued a report after considering representations made by both Rlnfra and TPC. The said reports forms part of a “Memorandum” dated 7th May, 2010 issued by the Government of Maharashtra to TPC, Rlnfra, BEST and to the Commission.

In the “Memorandum” dated 7th May, 2010, the GOM has taken the view that in public interest, the Commission should take suitable measures at the earliest taking into account the said report of the Committee on inter alia the following broad principles:-

- (i) “TPC’s obligation to supply electricity from its generating stations at regulated/reasonable rates to distribution licensees of Mumbai on priority and not to take advantage of its dominant position in the absence of a PPA with Rlnfra to trade electricity, divert electricity to TPC (distribution) or to offer electricity to**

Rlnfra at higher rates, thereby adversely affecting the consumers of Rlnfra;

- (ii) Rlnfra's obligation to ensure (subject to suitable penalties to be specified by the Commission) that its consumers do not have to suffer any increase in tariff only on account of its failure to procure electricity at reasonable costs over and above the quantum of electricity that TPC can be reasonably expected to supply to it after taking care of its commitments under the PPA with BEST and requirement of TPC (distribution);***
- (iii) The need to put in place a mechanism to ensure that subsidized consumers of Rlnfra do not have to suffer abnormal tariff rise only on account of the effect of migration of its cross-subsidizing consumers to PTC which is in a dominant position.***

The Electricity Act, 2003 mandates the Commission to protect the interests of consumers. At the same time, sub-section (3) of Section 86 requires the Commission to ensure transparency while exercising its powers and discharging its functions.

In line with the above requirement, the Commission will hold a public hearing at Rangsharda Natya Mandir, Bandra Reclamation, Bandra (W), Mumbai-400 050 on 28th June, 2010 at 11:00 hours to

consider suggestions and objections on the following broad areas:

- (i) The role of the Commission to take measures in regard to the broad principles indicated in the “Memorandum” dated 7th May, 2010 along with the report of the Committee.**
- (ii) The Statutory provisions under which the Commission can take measures, if any;**
- (iii) The measures that the Commission can take which would be suitable in public interest.**

The said “Memorandum” dated 7th May, 2010 along with the report of the said Committee is available on the website of Commission www.mercindia.org.in. The same may also be obtained from the office of the Commission during office hours, on request and on payment of nominal reproduction charges of Rs.1 per page.

Any person who intends to file suggestions or objections may submit the same to the Secretary, Maharashtra Electricity Regulatory Commission, 13th Floor, Centre No.1, World Trade Centre, Cuffe Parade, Mumbai-400 005 (Fax: 22163976 E Mail: mercindia@mercindia.org.in) by 21.06.2010. Suggestions and objections can be submitted in English or Marathi, in six copies, and should carry the full name, postal address and e-mail address, if any, of the sender. It should be indicated whether

the suggestions/objection is being filed on behalf of any organization or category of consumers. It should also be mentioned if the sender wants to be heard in person, in which case opportunity would be given by the Commission at the aforesaid public hearing, for which no separate notice will be given.

Date: 18.05.2010

Place: Mumbai

***Sd/-
(P.B. Patil)
Registrar***

33. In pursuance of this public notice, the stakeholders, members of the public who employed consumer's representatives, made suggestions and objections to the following broad areas as referred to in the public notice. The three issues in the public notice for which suggestions were invited are referred to here:-

- a) The role of the State Commission to take measures in regard to the broad principles indicated in the Government Memorandum dated 7.5.2010 along with the report of the committee.
- b) The statutory provisions the State Commission take measures, if any.

- c) The measures the State Commission can take which would be suitable in the public interest.
34. On these broad issues as indicated above, the public as well as the stakeholders made their submission on two dates i.e. on 28.6.2010 and another on 3.7.2010. In fact, the learned Counsel appeared for the Appellant, BEST and other consumer representatives made elaborate submission on the issues referred to in the Public Notice before the State Commission.
35. On this basis, the conclusion has been arrived at by the State Commission in the impugned order.
36. In view of the above, the ground urged by the learned Counsel for the Appellant that the impugned order is in violation of the High Court order is baseless. It is pointed out by the learned Counsel for the State Commission that this ground has been urged by the learned Counsel for the Appellant only for the first time that too, during the oral hearing and not pleaded in the Appeal grounds. It is true. However, we allowed the Appellant to argue this point though not pleaded in the Appeal since the learned Counsel for the Appellant has cited the decision of the *Hon'ble Supreme Court in the judgment in M K Ranganathan and Anr vs Government of Madras, reported in AIR 1955 SC*

604, *State of Uttar Pradesh and Others vs Dr. Anupam Gupta and Others* reported in 1993(1) SCC 594 and *Grasim Industries Ltd vs Collector of Customs, Bombay* reported in (2002) 4 SCC 297 in which it is held that **“A party may be allowed to raise a question even at Appellate stage when it is a pure question of law”**. Further, we wanted to find out whether the State Commission has given due respect to the order of the High Court in letter and spirit while passing the impugned order.

37. As indicated above, the State Commission continued the proceedings which had already been initiated in which the enquiry has been conducted by the State Commission by taking further action in the matter by referring the matter for the opinion of the Competition Commission of India and finally came to the conclusion. Thus, in our view, the State Commission has followed the direction of the High Court in letter and spirit and complied with by considering the issues independent of the Government Memorandum dated 7.5.2010. There is one more aspect to be noticed in this context. If this ground urged by the Appellant is accepted, then the entire impugned order has to be set-aside. As stated above, the Appeal is not against the merits of the impugned order but only against the impugned

observations. Therefore, we reject the submission of the learned Counsel for the Appellant **on the 1st Issue**.

38. The **second contention** urged by the learned Counsel for Appellant is that the impugned observations as against the Appellant contained in Paragraph-56 of the impugned order are without any basis and not supported by the reasons. It is further contended by the learned Counsel for the Appellant that in the absence of any reasons for the impugned observations/adverse remarks in the impugned order, the State Commission cannot be allowed to point out new reasons now before this Tribunal by placing various additional documents which were not referred to and not considered in the impugned order.
39. On the other hand, the learned Counsel for the State Commission as well as Respondent-6 strongly defended the impugned observations stating that the reasons for making those observations on the strength of the relevant documents are referred to in the impugned order and as such the point urged by the learned Counsel for Appellant, is misconceived.
40. In the light of the above rival contentions, we will now see as to whether the impugned observations made against the Appellant by the State Commission in paragraph-56 of the

impugned order, are supported by the reasons mentioned therein.

41. We will again quote that relevant portion of the impugned observations in paragraph-56. They are as follows:-

“56. The findings of the Commission on the broad principles laid down by the Government of Maharashtra vide its “Memorandum” dated 7th May 2010, are as follows -

(1) TPC’s obligation to supply electricity from its generating stations at regulated / reasonable rates to distribution licensees of Mumbai on priority and not to take advantage of its dominant position in the absence of a Power Purchase Agreement (“PPA”) with Rlnfra to trade electricity, divert electricity to TPC (Distribution) (“TPC-D”) or to offer electricity to Rlnfra at higher rates, thereby adversely affecting the consumers of Rlnfra:

Rlnfra is responsible for the present situation, because of the following reasons:

- lack of planning/poor planning of its power procurement requirement and for not contracting for adequate capacity,*
- insistence on getting 762 MW from TPC and not signing for even 500 MW in the process,*
- not contracting for the balance requirement even now and relying on costly short-term purchases*

- *as early as 2003, RInfra wanted Open Access for 800 MW, so RInfra was well aware of the options available to it*
- *Depending exclusively on supply from TPC, despite several disputes between TPC and RInfra at various fora.*

AND

(2)RInfra’s obligation to ensure (subject to suitable penalties to be specified by the Commission) that its consumers do not have to suffer any increase in tariff only on account of its failure to procure electricity at reasonable costs over and above the quantum of electricity that TPC can be reasonably expected to supply to it after taking care of its commitments under the PPA with Brihan-Mumbai Electricity Supply and Transport Undertaking (“BEST”) and requirement of TPC (Distribution).

RInfra has been repeatedly directed by the Commission to take all necessary steps to contract for the necessary power requirement expeditiously, in a manner that results into low power purchase rate, either through the competitive bidding process or bilateral contracts, in order to safeguard consumer interest...”

42. According to the learned Counsel for the Appellant, the impugned observations as referred to above are not supported by the reasons given in the impugned order and

therefore, they are non-speaking and unsustainable under law.

43. On the other hand, the learned Counsel for the State Commission refuting this contention has submitted that the impugned order contains the reasons for the impugned observations made in Para-56.
44. The learned Counsel for the State Commission further placed some of the orders passed by the State Commission earlier on various dates for the perusal of this Tribunal, in support of his contention that the impugned observations are justified. According to the learned Counsel for the Appellant, the copies of these orders cannot be placed now since these orders have not been referred to by the State Commission in the impugned order.
45. However, let us first see those documents:

The first order is dated 9.12.2005 passed by the State Commission in case No.4 of 2003, directing the Appellant to enter into a long term PPA. The relevant portion is as follows:-

“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 authorised 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.*
46. The next order is MYT Tariff Order dated 23.4.2007 passed by the State Commission for the Appellant's distribution business giving the direction. The relevant portion is as follows:-

“r. As regards the short term power procurement, the Commission does not recognize the arrangement wherein TPC-D would procure short term power for REL-D & BEST and hence directs REL-D to ensure procurement of its full requirement of power”.

12.3 Commission's Ruling

The Commission clarified that as per the Electricity Act, 2003 and the MERC (Terms and Conditions of Tariff) Regulation, 2005, the Commission has no power to interfere regarding the quantum of power for which each licensee needs to enter into a PPA. Hence, the Commission cannot advice the licensee on any issue on which the licensees has to enter into a PPA. The Commission after taking due notice of the matter, hereby directs all licensees i.e. BEST, TPC and REL-D to enter into respective PPA's at the earliest after resolving the issue of respective shares in the total quantum of electricity”.

47. Third order is dated 6.11.2007 passed by the State Commission giving the warning to the Appellant and deprecating its recalcitrant attitude. The relevant portion is as follows:

“However, even after the expiry of the mandated three months from the date of notification of the said Regulations (August 23, 2005), REL has not taken any steps towards execution of PPA. This failure continued even after the issuance of specific directions by the Commission under its Order dated December 9, 2005 in Case No.4 of 2003. These acts of wilful non-compliance establish the absence of bona-fide in the case of REL.

Accordingly, the Commission has issued several directives to the distribution licensees to this effect in its various orders. The Regulations as pointed out, make the submission of power purchase agreements, mandatory. The objective is also to remove any uncertainty that may be faced by consumers of a distribution licensee that does not have any written terms and conditions through a power purchase agreement in place for purchase of contracted power.

*As is clear on the fact of it from the correspondences referred to above, REL could have submitted an application under the aforesaid Regulation only if there was any power purchase agreement or an agreed arrangement with TPC (G). **However, RFEL-D has also not submitted for the approval of the Commission any power purchase agreement for long term power procurement with any other generator/supplier, and in fact, has not even submitted for approval any written arrangement for procurement of power from its own generation divisions (REL-G) as well as REL’s recalcitrant attitude in seeking***

approval of the terms and conditions of its power procurement, deserves to be deprecated and the Commission administers a warning on REL. REL being a distribution licensee and a generator, it is for REL to file the power purchase agreements for purchase of power from generating companies early and written arrangements for procurement from its own generation division immediately, for approval of the Commission as prescribed by the provisions of the Electricity Act, 2003 and in terms of the Regulations framed by the Commission. The Commission may take stern action in the event of such failure on the part of REL, in future”.

48. Fourth order is the Tariff Order dated 4.6.2008 for the year 2008 for the Appellant in case No.66 of 2007 passed by the State Commission expressing its displeasure over the non-compliance of the directions earlier issued by the State Commission. The relevant portion is as follows:-

“2.25 Non-Compliance with Commission’s Directives

Shri Samant submitted that the Commission has given several directives to REL-D, which have not been complied with by REL, which have adversely affected the interest of consumers. Some of the directives are replacement of the old meter system, detailed study of the technical losses in the system and entering into PPA with TPC-G within three months of the Order dated December 9, 2005.

Shri Samant, in his rejoinder, submitted that the Commission should ensure that all the directives given in the MYT Order for the Control Period from FY 2007-08 to FY 2009-10 are complied with by REL within a specific time period. Further, Shri Samant requested the Commission that

in case of failure to comply with its Order/directives, the Commission should take penal action against REL under Section 146 of the EA 2003.

49. Fifth order is dated 15th June, 2009 passed by the State Commission in case No.121 of 2008 indicating the Appellant's failure to enter into the long term PPA. The relevant portion is as follows:-

“Jain Sweets & Bhelpuri House (JSBH) objected that the power purchase cost of Rlnfra-D has gone up by 66% in FY 2008-09 over FY 2007-08 levels, and the same trend seems to be continuing on account of Rlnfra's inability to execute long term Power Purchase Agreement (PPA). As a result, the consumers are being burdened to the extent of Rs. 725 Crore every year. Incremental expense for procurement of expensive power should not be recovered from the consumers as despite repeated directions by the Commission, Rlnfra-D has failed to sign any long-term PPA.

The Commission is of the view that there is merit in the suggestions of the objectors, given that the Commission has given repeated directives to all the distribution licensees to enter into long-term contracts for their power purchase requirement, at reasonable rates, rather than relying on costly short-term sources. However, the Commission has to consider the power purchase expenses in accordance with the provisions of the MERC Tariff Regulations, which categorize the power purchase expenses under uncontrollable factors and any variation in the power purchase cost is to be allowed as pass through in the ARR”.

50. These orders passed by the State Commission would indicate that the State Commission on various occasions

directed the Appellant to enter into a PPA. On some occasions, on noticing that the Appellant did not comply with the said directions, the State Commission deprecated the attitude of the Appellant as recalcitrant and accordingly administered a warning too.

51. The crux of the directions issued by the State Commission in these order is as follows:

(a) As per the conditions imposed by the State Commission on RInfra, it shall purchase the electricity from the Generating Companies or other licensees under the PPA approved by the State Commission.

(b) As per the Electricity Act, 2003, the State Commission has no power to advise a licensee on any issue with whom the licensees have to enter into a PPA. So, the licensees including the RInfra are bound to enter into a respective PPA at the earliest with generating company and accordingly directed.

(c) Even after the expiry of three months from the Notification of the Regulations, 2005, the RInfra has not taken the steps towards the execution of the PPA. This failure continued even after the issuance of specific directions issued by the State Commission by its order dated 9.12.2005. These acts of non-compliance of

the directions by the RInfra show the absence of bona-fide on the part of RInfra.

- (d) The RInfra has not submitted for the approval of the State Commission any Power Purchase Agreement for long term power procurement with other supplier. It has not even submitted for approval any written arrangement for procurement of power from its own generating divisions. This conduct of RInfra reflecting the recalcitrant attitude in submitting the written arrangement for procurement and seeking approval of the terms and conditions of its power procurement deserves to be deprecated.
- (e) RInfra, being a Distribution Licensee and a Generator has to submit the power purchase agreement for purchase of power from Generating Companies early. However, the written arrangements for procurement of power even from its own generating divisions have not been submitted before the State Commission for approval. Therefore, the State Commission administered a warning on RInfra to the effect that the State Commission will take stern action in the event of a failure on the part of the RInfra in future.

(f) On behalf of the consumers, it was submitted that the State Commission had given several directives to RInfra which had not been complied with and this conduct adversely affected the interest of the consumers. It is also prayed by the consumers that the State Commission should ensure that all their directions given by the State Commission earlier, are complied with by the RInfra within a specified time frame. They further requested that in case of any failure, the State Commission should take penal action against RInfra u/s 146 of the Electricity Act, 2003. The State Commission is of the view that there is merit in the grievance expressed by the consumers.

52. The directions with these observations issued by the State Commission in various orders are found available in all these documents. Admittedly, the genuineness of these documents has not been questioned or disputed by the Appellant. But, the Appellant strenuously submits that except the order dated 23.4.2007 passed by the State Commission; other orders have not been referred to and considered by the State Commission in the impugned order. He has also cited the Judgment of Hon'ble Supreme Court in the case of *Mohinder Singh Gill vs The Chief Election Commissioner, New Delhi* reported in AIR 1978 SC 851 to

show that the **“validity of the impugned order must be judged by the reasons mentioned in the said order and cannot be supplemented by fresh reasons in the shape of affidavit”**.

53. We are not able to appreciate this submission of the Appellant. The documents in the form of various orders referred to above are the public documents which are very much in the knowledge of the State Commission which passed those orders periodically on various dates. Admittedly, these orders have not been challenged by the Appellant in the Appellate Forum and as such, they attained finality. On that basis, the State Commission expressed its view taking note of the MYT tariff order dated 23.4.2007 referred to in the impugned order as well as the other orders which have been passed by the State Commission on various occasions. Furthermore, as rightly pointed out by the learned Counsel for the State Commission, the aspects relating to the non-compliance of the orders passed by the State Commission on various dates have been dealt with and discussed by the State Commission from Paragraph 36 onwards of the impugned order. The said discussion is as follows:

“36. The electricity that is supplied to consumers by RInfra, TPC and BEST comes from the following sources:

a. RInfra

1) Till the year January 1995, the entire requirement of RInfra to supply electricity to its consumers was supplied by TPC from the generating stations of TPC at Trombay, Thermal Power Station and Hydro Power Stations at Khopoli, Bhivpuri and Bhira. Subsequently, RInfra in February 1995 installed and commissioned its 500 MW power generating station in Dahanu. However, supply from Dahanu generating station was given to the erstwhile MSEB due to the absence of interconnection facilities. In 1998, subsequent to the Principles of Agreement entered into between RInfra and TPC, under the aegis of the State Government, the 220 kV inter-connection point at Borivali was charged and 500 MW of generation from Dahanu was given to RInfra, with the balance being supplied by TPC. There was no problem till around FY 2005-06, when the power generated by TPC and RInfra was sufficient to meet the combined power requirements of RInfra, TPC and BEST. For FY 2006-07, due to the increase in demand, there was a demand-supply gap, and TPC procured the additional power requirement from outside the State to meet the overall gap in Mumbai. **In its Order dated October 3, 2006 for Reliance Energy Limited (REL) for FY 2005-06 and FY 2006-07 (Case No. 25 of 2005 and 53 of 2005), the Commission had ruled as under:**

"7.4.3 Power Purchase from Tata Power Company...

The total generation from TPC Generation Business is not sufficient to meet the total demand and energy input requirement of three Distribution Licensees in Mumbai i.e., TPC-D, REL-D and BEST, and hence additional energy needs to be procured for meeting the overall energy requirement of Mumbai system. TPC, in its ARR and Tariff

Petition for FY 2006-07, has proposed that TPC-D will procure the additional energy requirement of Mumbai System for meeting the requirement of its own distribution network as well as for supplying power to other two Distribution Licensees, i.e., REL-D and BEST to meet their overall energy requirement.

The Commission opines that each Distribution Licensee should meet its power requirement by entering into appropriate contracts for sourcing of power. However, in the absence of formal agreements, the Commission has considered this additional power available to Mumbai system, for the purposes of this Order. *The Commission has allocated this power purchase to the three Distribution Licensees/Businesses to meet the overall projected energy requirement. Accordingly, the energy allocated to REL-D out of power purchase from other sources through TPC-D is projected as 501 MU at a total cost of Rs 221.07 Crore..."*

2) For FY 2007-08, in the MYT Order for REL dated April 23, 2007 in Case No. 75 of 2006, the Commission ruled as under:

12. POWER PURCHASE AND SALES

12.1. Objections Received

TPC in its submission stated that in light of the recent PPAs between TPC-G & BEST and TPC-G & TPC-D, the Company will be able to supply only 500 MW of power to REL-D, subject to signing of a power purchase agreement between the parties and the power purchase cost as projected by REL-D needs to be revised accordingly.... TPC further highlighted that the Electricity Act 2003 as well as the MERC (Terms and Conditions of Tariff) Regulation, 2005

*envisage that every distribution licensee should make its own arrangement to procure the required power. **Thus the assumption by REL-D in its MYT petition that the balance requirement of 787 MUs to 1000 MUs will be procured by TPC-D for REL-D is not correct.** TPC clearly stated that it will not take any responsibility for procuring power on behalf of REL-D...*

12.2. REL-D's Response...

.....Further REL-D also stated that they are in the process of signing a PPA with TPC but both the parties are not able reach a consensus on the quantum of contracted power. Thus, REL-D requested the Commission to advice the licensee mainly TPC, BEST and REL-D on the quantum of electricity for each licensee, for which each of the licensee should sign the PPA. Further, REL-D also requested the Commission to allow them some time to respond on the short term purchase.

12.3. Commission's Ruling

The Commission clarified that as per the Electricity Act 2003 and the MERC (Terms and Conditions of Tariff) Regulation, 2005 the Commission has no power to interfere regarding the quantum of power for which each licensee needs to enter into a PPA. Hence the Commission cannot advice the licensee on any issue on which the licensees has to enter into a PPA. The Commission after taking due notice of the matter, hereby directs all licensees i.e. BEST, TPC and REL-D to enter in to respective PPA's at the earliest, after resolving the issue of respective shares in the total quantum of electricity. The Commission also rules that in the first year of the control period, the Commission will allocate the capacity of TPC-G based on ratio of coincident

peak demand but from the second year of the control period onwards the Commission will allocate the capacity of TPC-G based on the available approved PPAs.

Further the Commission agrees with TPC that it is the responsibility of the licensee to procure its energy requirement and thus directs REL-D to make arrangements for procurement of its short term power purchase requirement."

"2.5 Power Purchase Expenses Power Purchase from REL-G.

.....Power Purchase from TPC-D & Short term Power purchase REL-D in its petition has submitted that REL has authorized TPCD to procure short term power for REL-D. REL has also submitted that it intends to procure all the additional power from TPC-D. However, TPC-D in its objection to REL-D's public notice has submitted that it would not procure short term power on behalf of REL-D.

The Commission opines that as per universal service obligation, every licensee is responsible to procure power to serve its own consumers and a licensee cannot absolve of its statutory responsibility, by its mere authorizing other licensee to procure short term power on its behalf. The Commission hence does not recognize the arrangement wherein TPC-D would procure short term power for REL-D & BEST. The Commission directs REL-D to ensure procurement of its full requirement of power on its own. The Commission has considered the short term power purchase requirement at 14 MUs for FY 2007-08 and since the sources of short term power purchase have not been specified by REL-D, the Commission has considered the rate of Rs 4.41 per unit as

proposed by REL-D for procurement of short term power in its petition."

3) **For FY 2008-09 and FY 2009-10, TPC continued to supply 500 MW of electricity to Rlnfra, for the Rlnfra to supply to its consumers, though there was no PPA between Rlnfra and TPC. By letter dated June 25, 2009, TPC communicated its refusal to supply 500 MW to Rlnfra with effect from April 1, 2010, on the grounds that:**

i. TPC has committed 800 MW to BEST and 477 MW to its own distribution system;

ii. Hon^{ble} Supreme Court vide its Judgment dated 8th July 2008 vindicated the position of TPC to supply all consumers in Mumbai and accordingly the power requirement of their own distribution business is expected to grow significantly for which they have to make arrangement in near future, and Rlnfra has not entered into and signed a Power Purchase Agreement with TPC.

Presently, Rlnfra sources electricity from the following sources in order to serve its consumers:

- i. 500 MW from its own generating station at Dahanu;
- ii. 200 MW from TPC, in accordance with the GoM Memorandum, which TPC wishes to withdraw with immediate effect.
- iii. Balance (around 650 MW) from other sources such as (through the Power Management Group formed by the Mumbai distribution licensees, directly from bilateral sources, trading, IBSM, etc)....."

54. The analysis made by the State Commission as quoted above, would clearly indicate that the State Commission has dealt with its earlier orders as also the judgment of the Hon'ble Supreme Court for making the impugned observation as against the Appellant at Para 56 of the order.
55. In fact, in Para 57 of the impugned order, the State Commission has clearly held that it would not to go to re-open the issue which had already been settled by the Hon'ble Supreme Court in the judgment dated 6.5.2009. As a matter of fact, the State Commission although made these impugned observations, did not think it fit to impose penalties on account of RInfra's failure. On the other hand, it merely observed that the issue as to whether the penalty should be imposed by the State Commission on account of RInfra's failures would be examined later in case No.72 of 2010. The Relevant observations are as follows:

“RInfra-D's Petition for approval of Aggregate Revenue Requirement and tariff for FY 2010-11 is currently pending before the Commission in Case No. 72 of 2010. The issue of RInfra's obligation to ensure that its consumers do not have to suffer any increase in tariff only on account of its failure to procure electricity at reasonable costs is being examined in the said tariff fixation exercise. The issue of whether any suitable penalties or disincentives should be imposed by the Commission on account of RInfra's failure to procure electricity at reasonable costs is also being examined in the tariff fixation exercise in Case No. 72 of 2010”.

56. So, under these circumstances, it cannot be contended that without any basis these impugned observations have been made.
57. On the other hand, it has been brought to our notice by the learned Counsel for the State Commission that while the State Commission took upon the exercise of tariff fixation in case No.72 of 2010, at a later date, the State Commission simply let off the Appellant without imposing any penalty on the Appellant in spite of the impugned observations made in the impugned order earlier. This is not disputed by the Appellant. Therefore, there is no merit in the contention urged by the Appellant that the State Commission's observation was unwarranted and without any basis. This point also is answered against the Appellant.
58. In regard to the **3rd point** urged by the Learned Counsel for the Appellant, it is submitted that the failure on the part of the State Commission while passing the impugned order to consider the ASCI Report absolving the Appellant from the charges as well as the order passed by the State Commission dated 9.9.2010 accepting the said report, would vitiate the impugned observations.
59. On this point, the learned Counsel for the Appellant would make the following submissions:

“In view of the Government Memorandum earlier issued, the State Commission by its order dated 15.7.2009 stayed the operation of tariff orders earlier passed in favour of RInfra-D for the Financial year 2009-10. Thereupon it appointed ASCI as an investigating authority to investigate into the affairs of RInfra-D. In the said order dated 8.9.2009 passed by the State Commission, the investigating agency was directed to go into the reasons for procurement or non procurement of power by the RInfra-D through the long term power purchase agreement. Accordingly, after the investigation, the ASCI submitted the report before the State Commission in favour of the RInfra D. Thereupon, the State Commission passed the order dated 9.9.2010 on the basis of the conclusions arrived at in the ASCI report and consequently vacated the stay of the operation of the tariff order passed by the State Commission earlier. In the report, ASCI did not give any adverse finding as against the RInfra-D. This report, in fact, had been accepted by the State Commission by the order dated 9.9.2010. Having accepted the said findings which are in favour of RInfra, the State Commission, in the impugned order, ought not to have made adverse observations against the Appellant even without referring to the said report and the order passed by the State Commission accepting the said report. Hence, the

failure on the part of the State Commission to consider the ASCI report and the order dated 9.9.2010 passed by the State Commission accepting the said Report would make the impugned observations unwarranted and therefore, they are liable to be expunged.

60. In reply to the above submissions, the learned Counsel for the Respondents submitted the following:

“The ASCI report was rendered by the Agency on an investigation as directed by the State Commission u/s 128 of the Electricity Act, 2003 in independent separate proceedings in case No.121 of 2008 initiated on a Government Memorandum. The current impugned order has been passed on a completely different proceedings initiated on the basis of a different Government Memorandum in case No.13 of 2010. The ASCI was directed by the State Commission in the other proceedings to investigate the books and documents of the Appellant on the broad issues mentioned in the order dated 8.9.2009 and the same was limited to the Appellant only. The present proceedings were commenced on the basis of the different Government Memorandum with full public participation inviting the suggestions of the various stake holders including the Appellant, TPC and BEST etc., As such, the

present proceedings before the State Commission was to consider the interplay inter se between the various stake holders in the Mumbai Power scenario whereas the investigation u/s 128 in the other proceedings was to enquire into only the books, affairs and documents of the Appellant alone. Therefore, the impugned order in that different proceedings initiated under the different Government Memorandum could not be linked to the ASCI report as well as the order dated 9.9.2010 passed by the State Commission which are connected with another proceedings and therefore, these documents, which are not germane to the present proceedings, need not be considered”.

61. In the light of these submissions made by the parties on this issue, let us now consider the question as to whether the failure to consider the ASCI Report and the order passed by the State Commission dated 9.9.2010, accepting the said report would vitiate the impugned observations in the impugned order.
62. According to the Appellant, the State Commission while making the impugned observations ought to have taken into consideration the ASCI report as well as the order passed by the State Commission on 9.9.2010 and in that event, the

State Commission would not have made these adverse observations against the Appellant.

63. According to the Respondents, the ASCI report and the consequent order passed by the State Commission on 9.9.2010 had arisen from a different proceedings on the basis of different Government Memorandum and as such, the impugned observations made in an altogether different proceedings on the basis of the different Government Memorandum will have no bearing on the ASCI Report as well as the order by the State Commission. That apart, the Respondent has cited the judgment of the Hon'ble Supreme Court in the case of *T T Antony Vs State of Kerala & Ors (2001) 6 SCC 181* in which it is held that **“the courts are not bound by mere reports of the Commission of Inquiry. They have to arrive at their own conclusions on the evidence placed before them”**.
64. In order to verify as to whether these proceedings are different and as to whether the result of the earlier proceedings is relevant to the impugned proceedings, it is necessary to refer to the relevant facts relating to each of these proceedings.
65. It cannot be debated that the First proceedings which resulted in the ASCI report and the consequential order

passed by the State Commission would relate to case No.121 of 2008. The impugned observations made in the present matter which is the subject matter of this Appeal would relate to proceedings in Case No.13 of 2010.

66. Let us first deal with the summary of events relating to case No.121 of 2008 which involves the ASCI report and the order of the State Commission dated 9.9.2010. The relevant chronological facts are as follows:

- (a) The State Commission on 15.6.2009, in the Tariff Application filed by the Appellant for the Financial Year 2009-10 in case No.121 of 2008, issued the tariff order increasing the tariff as prayed for almost all the subsidizing consumers substantially over the then prevailing tariff.
- (b) On the basis of the various representations made by the consumers expressing the grievance over the tariff increase, the Government of Maharashtra issued the Government Memorandum on 25.6.2009 to the State Commission under Section 108 of the Act, 2003 referring to the unjustified burden on the consumers of the Appellant and directing the State Commission to investigate as to whether the Appellant, RInfra had discharged its duties as envisaged under the Act in the

most economical and efficient manner so as not to result in unnecessary burden on the consumers of the area.

- (c) On receipt of the said Government Memorandum from the Government of Maharashtra dated 25.6.2009, the State Commission felt that there shall be proper investigation into the affairs of the Appellant through an independent agency and therefore, the State Commission in the proceedings in case No.121 of 2008 in which tariff was determined, promptly passed the order on 15.7.2009 staying the operation of the tariff order dated 15.6.2009 indicating that the investigation would be made by the appropriate agency to go into the affairs of the Appellant in compliance with the Government Memorandum dated 25.6.2009 issued under section 108 of the Act, 2003.
- (d) Accordingly, the State Commission by the order dated 8.9.2009 appointed Administrative Staff College of India (ASCI) Hyderabad, as an investigating authority to carryout investigation over the affairs of the Appellant by going into the books of accounts and business operation of the Appellant as per Section 128 of the Act, 2003 and to submit the report.

- (e) In pursuance of the said directions, the ASCI conducted an investigation and sent a report on 9.7.2010 to the State Commission giving the opinion that from the materials collected by them, it would be unreasonable to infer that the Rlnfra was solely responsible for the situation.
- (f) Thereupon, the State Commission called for the comments from the Appellant on the ASCI report. The Appellant thereupon submitted their comments. After receipt of the comments, the State Commission in the light of the ASCI Report, passed an order on 9.9.2010 vacating the stay order earlier passed and disposed of the proceedings in case No.121 of 2008. While disposing of these proceedings by vacating the stay, the State Commission made some observation regarding the performance of the Appellant in its order dated 9.9.2010 which are as follows:

“Commission does feel that power procurement by Rlnfra-D should be better managed in an efficient and economical manner. The Commission does feel that the electricity purchase and procurement process of Rlnfra-D including the price, at which the electricity is

procured, requires to be streamlined. Electricity should not be purchased at unreasonable rates”.

Laying the importance for the better performance in the future in the above observations, the State Commission closed the proceedings in Case No.121 of 2008 by the order dated 9.9.2010.

- (g) However, the Appellant felt aggrieved over these observations. Hence, the Appellant filed an Appeal in Appeal No.201 of 2010 in this Tribunal against this order passed in case No.121 of 2008 dated 9.9.2010 praying for expunging those observations. However, this Tribunal, after hearing the parties, disposed of the said Appeal by the judgment dated 30.5.2012 holding that these observations made by the State Commission are merely advice and guidelines given to the Appellant for better performance in the future and hence the said observations need not be expunged.

67. The above events would indicate that the State Commission in the Tariff proceedings in Case No.121 of 2008 entertained the Government Memorandum dated 25.6.2009 u/s 108 of the Act, 2003 indicating the burden on the consumers due to the tariff increase in favour of the Appellant and directing for the investigation over the affairs of the Appellant and

accordingly, the State Commission directed for investigation and after receipt of the investigation report disposed of the said proceedings on 9.9.2010 by vacating the stay of tariff increase. In the said order, the State Commission made some observations giving suitable advice and directions to the Appellant for better management in future. However, the Appellant having felt that those observations were unwarranted filed the Appeal for expunging those observations. Ultimately, this Tribunal having not inclined to expunge those remarks disposed of the said Appeal after observing that those directions were merely advice and guidance for future better management. With these, the said proceedings were closed.

68. Let us now refer to the other proceedings relating to Case No.13 of 2010 which culminated into the present impugned order. The facts of the same, are as under:

(a) The State Government issued a Government Memorandum on 7.5.2010 directing the State Commission to take suitable steps in the interest of consumers of Mumbai with regard to the obligation of the Tata Power Company as well as the Rlnfra-D, so as to ensure supply of power at a regulated and reasonable rates to the consumers so that they do not

have to suffer from any increase in tariff on account of the failure to procure power at a reasonable rate.

- (b) On receipt of this Government Memorandum dated 7.5.2010, the State Commission initiated a separate proceedings in Case No.13 of 2010 and issued public notice on 18.5.2010 inviting the comments and suggestions from various stake holders on the broad principles contained in the Government Memorandum dated 7.5.2010. In pursuance of the receipt of the said public notice dated 18.5.2010, both the Rlnfra-D and Tata Power Company as well as the other stake holders including Public, filed their statements and objections before the State Commission.
- (c) In the meantime, Tata Power Company filed a Writ Petition before the Bombay High Court challenging the Government Memorandum dated 7.5.2010 praying for quashing the same to the extent that the Government Memorandum sought to interfere with the rights of Tata Power over its generating capacities. Though the said Writ Petition was entertained by the High Court, no stay was granted. Therefore, the State Commission continued with the proceedings and held public hearing in case No.13 of 2010 on 28.6.2010 and

3.7.2010 in which all the stake holders including the Rlnfra and Tata Power participated and filed their respective written submission.

- (d) At this stage, the Writ Petition came up for final hearing before the Bombay High Court. After hearing both the parties, the Bombay High Court passed the final order dated 18.1.2011, quashing the Government Memorandum dated 7.5.2010 but permitting the State Commission to go on with the proceedings already initiated and conducted in pursuance of the public notice dated 18.5.2010. In other words, the High Court though quashed the Government Memorandum dated 7.5.2009, allowed the State Commission to continue with the proceedings which was already initiated in case No.13 of 2010 by issuing public notice on 18.5.2010 and directed the State Commission to come to its own conclusion independent of Government Memorandum dated 7.5.2010.
- (e) Accordingly, the State Commission on the basis of the materials already available on record and the documents furnished by the stake holders during the public hearing decided to send those materials to Competition Commission of India for getting its opinion

and suggestions. Accordingly, they sent these documents along with their requisition to them. Thereupon, the Competition Commission after considering the materials and proposal sent their report giving their opinion with suggestions on various proposals referred to in the requisition sent by the State Commission to the Competition Commission. After receipt of the same, the State Commission passed the impugned order dealing with the respective contentions of the parties in relation to the Appellant's obligation to ensure that its consumers do not have to suffer from increase in tariff on account of its failure to procure electricity at reasonable cost. In that context, the State Commission passed the impugned observations. This is the subject matter of this Appeal.

69. The above chronological events in both these proceedings in Case No.121 of 2008 as well as in Case No.13 of 2010 would reveal the following factual aspects:

- (a) **The State Commission, pursuant to the Government Memorandum dated 25.6.2009 felt that proper investigation had to be made into the affairs of the Appellant. On that basis, the State Commission passed the order on 15.7.2009 staying**

the operation of the order dated 15.6.2009 issued in Case No.121 of 2008. Thereupon, the State Commission by the order dated 8.9.2009 appointed ASCI to go into the affairs of the Appellant by perusing books of accounts and business affairs of the Appellant, Rlnfra-D u/s 128 of the Electricity Act and submitted the report.

- (b) The ASCI, after investigation, sent the report to the State Commission on 9.7.2010 in favour of Rlnfra. The State Commission then passed the order on 9.9.2010 vacating the stay order earlier passed and disposed of the said proceedings in case No.121 of 2008 in pursuance of the Government Memorandum issued on 25.6.2009 after giving some advice to the Appellant for the better management in future. These details or the events would relate to proceedings in case No.121 of 2008.
- (c) The other proceedings in which the impugned observations were made is in relation to Case No.13 of 2010. This is suo-moto proceedings initiated by the State Commission separately on receipt of yet another Government Memorandum dated 7.5.2010 directing the State Commission to

take steps to ensure supply of power at regulated and reasonable rates to the consumers by the Tata Power Company as well as the Rlnfra-D, the Appellant.

- (d) In pursuance of the said proceedings, public notice was issued by the State Commission on 18.5.2010. In this public hearing, the stake holders and the public including the Appellant and Tata Power Company participated and filed their respective written submissions.**
- (e) In the meantime, the Tata Power Company filed a Writ Petition to quash Government Memorandum dated 7.5.2010 on the ground that the Government has no power to give such directions u/s 108 of the Electricity Act, 2003. The High Court, after hearing the parties and upholding the contention of the Tata Power Company, quashed the Government Memorandum dated 7.5.2010 and however allowed the State Commission to go on with the present proceedings and come to its own conclusion on the issue referred to in the public notice dated 18.5.2010, independent of the Government Memorandum dated 7.5.2010. In pursuance of the**

said liberty, the State Commission continued with the proceedings and obtained opinion from the Competition Commission and passed the impugned order dealing with various issues and gave directions to the Appellant to ensure its obligation to see that its consumers would not suffer from any increase in the tariff on account of its failure to procure electricity at reasonable cost.

- (f) The ASCI report submitted in the earlier proceedings, is only a report for the benefit and use of the State Commission in deciding whether any further action u/s 128 of the Electricity Act, 2003 was called for as against the Appellant. The findings were rendered by the ASCI in that proceedings which had culminated into an order of the State Commission dated 9.9.2010 vacating the stay order and advising the Appellant for the better management in future. That order was passed by the State Commission which arose out of the request made by the State Government to find out the truth of the factual situation as against the Appellant alone and accordingly State Commission directed ASCI who conducted investigation and sent the report. After considering the said report of

investigation, the Commission disposed of the said proceedings and closed the matter. Thus, it is clear that this proceeding relating to ASCI Report, is only relating to the allegations as against the Appellant alone in a different proceedings.

- (g) But, the present proceedings initiated in case No.13 of 2010 was on the basis of different Government Memorandum dated 7.5.2010. This Government Memorandum would relate to discharge of the obligation relating to the allegations with regard to discharge of obligation by both the Tata Power Company as well as the Rlnfra-D, the Appellant.
- (h) Therefore, the issue in the proceedings initiated in Case No.13 of 2010, which culminated in the impugned order which is subject matter of this Appeal, is completely different from that of the issue in case No.121 of 2008 which culminated in the order dated 9.9.2010 which was confirmed by this Tribunal earlier.

70. The above factual aspects would indicated that the State Commission, while passing the order on 9.9.2010 considered only the ASCI report relating to the Appellant

and disposed of the matter in the said proceedings in case No.121 of 2008 by giving the advice and guidelines to the Appellant for the proper management in the future. These proceedings had already attained finality through the judgment of this Tribunal in Appeal No.201 of 2010. But in the present proceedings in case No.13 of 2010 which was initiated on the basis of the different Government Memorandum dated 7.5.2010 with reference to the different issue relating to both the Tata Power Company as well as the RInfra-D, the Appellant, the State Commission finally arrived at the final conclusion by conducting separate proceedings in which various materials have been collected from the stake holders including the Tata Power Company and the RInfra-D, the Appellant as well as from Competition Commission of India which resulted in the impugned order with the impugned observations.

71. The main issue in case No.121 of 2008 related to the investigation and scrutiny into the internal operation and functioning of the Appellant alone.
72. In view of the above, the State Commission while appointing the ASCI as investigating agency, made emphasis in terms of reference to examine the books of accounts, physical vouchers and other records of the Appellant alone.

Therefore, the investigation by the ASCI, contemplated to be in the nature of prudent check, annual revenue requirement submitted by the RInfra that had led to the high tariff and consequential directions by the State Commission. That was the reason as to why the State Commission stayed the operation of the increase in tariff order during the investigation by the ASCI. As mentioned above, the ASCI report was primarily initiated at the instance of the Government Memorandum dated 25.6.2009 u/s 108 of the Act to investigate into the books of accounts of the Appellant mainly to verify whether there was over charging of consumers. This has been referred to in the State Commission's order dated 8.9.2009 setting out the terms of reference for investigation by the ASCI.

73. In so far as the case No.13 of 2010 is concerned, two issues were raised for consideration:
- (a) Whether the Appellant, RInfra had breached its obligation towards its consumers?
 - (b) Whether RInfra is correct in saying that it was helpless because of the Tata Power Company's withdrawal of the power supply?
74. These issues cannot divert from each other. The findings on these issues cannot be on the basis of the ASCI report.

The acceptance of the ASCI report by the State Commission under order dated 9.9.2010 was to be read objectively with reference to the Government Memorandum dated 25.6.2009 and the terms of reference as referred to in the State Commission's order dated 8.9.2009.

75. The State Commission's acceptance of the ASCI report cannot come in the way of State Commission subsequently taking a decision regarding the question as to whether the Appellant had breached its obligation towards the consumers to arrange for a long term power purchase contract at reasonable price and whether the Appellant became helpless because Tata Power's withdrawal of supply of power to it.
76. In the present case, it squarely falls under consideration by the State Commission whether the shortage of power with Appellant was on account of Tata Power's breach of duty or whether the Appellant had not met its obligation to ensure that its consumers do not suffer from any increase in tariff on account of the Appellant's failure to procure electricity at reasonable cost. Case No.121 of 2008 was an independent proceedings in which the Appellant alone was involved. Hence, the findings in the ASCI report on which the Appellant has relied upon now, cannot be considered in the

present proceedings as they are not relevant and germane to the present issue.

77. In view of the above, we have to hold that the reliance on the ASCI report and the order passed by the State Commission on 9.9.2010 is misconceived as they do not in any manner fetter the power of the State Commission to make the impugned observation which are based on factual aspects in the present proceedings referred to in the impugned order.
78. According to the Appellant, the ASCI report was received by the State Commission on 9.7.2010 exonerating the Appellant from the allegations but even without giving opportunity to the Appellant with regard to this report, the final order had been passed in the present case on 19.5.2011 without referring the ASCI report dated 9.7.2010.
79. On the other hand, the learned Counsel for the Respondent would vehemently contend that the ASCI report cannot be considered in the present proceedings as the same is not the subject matter of the present proceedings and moreover, the findings given in the ASCI report dated 9.7.2010 which is not binding on the State Commission, are contrary to the judgment of Hon'ble Supreme Court dated 6.5.2009 as the very same issues have been raised by the Appellant before

the Hon'ble Supreme Court. While rejecting the contention of the Appellant, it is submitted that the State Commission in the impugned order has quoted that all these issues have already been decided by the Hon'ble Supreme Court and therefore, the State Commission had decided not to re-open those issues which have already been settled.

80. In short, as indicated above, following factors would emerge out of the discussions made in the preceding paragraphs:
- (a) The ASCI report has not been called for in the present proceedings.
 - (b) The ASCI report had been separately considered by the State Commission in other proceedings and the final order had been passed in those proceedings on 9.9.2010. In spite of the ASCI Report, the State Commission made some remarks about the Appellant's performance giving advice for the better management in the future in spite of the ASCI report in the said order.
 - (c) These observations about the performance of the Appellant in the other proceedings had also been confirmed by this Tribunal in Appeal No.201 of 2010.

81. Under these circumstances, we hold that the ASCI report which is connected with the earlier proceedings, is not a relevant document in the present proceedings for deciding the issues raised in case No.13 of 2010 as in these proceedings, the State Commission dealt with the obligation of both Tata Power Company and RInfra-D and as such the non-consideration of the ASCI Report and consequent order of the State Commission in this case, would not vitiate the impugned observations made against the Appellant.

82. **Summary of Our Findings**

- i) **The State Commission has followed the directions of the High Court in its order dated 18.01.2011 by considering the issues, independent of the Government Memorandum dated 7.5.2010.**
- ii) **We do not agree with the contention of the Appellant that the impugned observations have been made by the State Commission without any basis as there are enough materials.**
- iii) **Non consideration of ASCI report and consequent order of the State Commission would not vitiate the impugned observations made by the State Commission against the Appellant. Hence, those observations cannot be expunged.**

83. In view of our findings, we do not find merit in this Appeal. Hence, the Appeal is dismissed. However, there is no order as to cost.

(RakeshNath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 17th April, 2013

√REPORTABLE/~~NON-REPORTABLE~~