Appellate Tribunal for Electricity

(Appellate Jurisdiction)

Appeal No. 201 of 2010

Dated 30th May, 2012

Coram : Hon'ble Mr.Rakesh Nath, Technical Member
Hon'ble .Mr. Justice P.S. Datta, Judicial Member

Reliance Infrastructure Limited,
(formerly Reliance Energy Limited)
A public limited company incorporated
Under the provisions of the Indian
Companies Act, 1913 having its
Registered office at:-
Reliance Energy Centre,
Santacruz (East), Mumbai-400 055.

…. Appellant(s)

Versus

1. The Maharashtra Electricity Regulatory Commission,
   World Trade Centre No.1,
   13th Floor, Cuffe Parade Colaba,
   Mumbai – 400 001.

2. Mumbai Grahak Panchayat,
   Sant Dnyaneshwar Marg, Vile Parle (W),
   Mumbai-400 056.

3. Prayas,
   C/o Amrita Clinic, Athawale Corner,
   Karve Road, Pune-411 004.

4. Thane Belapur Industries,
   Post Ghansoli,
   Navi Mumbai -400 071.

5. Vidarbha Industries Association,
   Civil Lines, Nagpur – 400 041.

…. Respondent(s)

Counsel for the Appellant (s) : Mr.Akhil Sibal &
Mr. Hasan Murtaza

Counsel for the Respondent (s): Mr. Buddy A. Ranganadhan
for R-1

JUDGEMENT

HON'BLE MR. JUSTICE P.S. DATTA, JUDICIAL MEMBER

1. When the appeal was being heard continuously for a number of days the learned counsels for both the parties would for the sake of convenience and also ,of course ,in lighter vein term the appeal as a 'good will' case because the whole gamut of the appeal centres round the question whether the Maharashtra Electricity Regulatory Commission , the respondent no.1 herein, was legally justified in making some alleged adverse criticisms against the appellant ,namely Reliance Infrastructure Limited, a company under the Companies Act,

1956 in its 4-page order dated 9th. September, 2010 passed in case no 121 of 2008.

2. Maintainability of the appeal in its present form and prayer has been no doubt, questioned by the Commission which we will advert to at the appropriate place ; for the present the essence of the order as has been expressed in paragraph 7 thereof is reproduced below after which we will revert back to the background of the case in the context of which the proceeding arose.

''7. However, taking into account the facts stated in ASCI's investigation report that the retail supply tariffs of R Infra- D have substantially gone up due to procurement of large proportion of power from external sources and drawal from imbalance pool at high cost, the Commission does feel that power procurement by R-Infra- D should be better managed in an efficient and economical manner. The Commission does feel that the electricity purchase and procurement process of R- Infra including the price at which electricity is procured , requires to be streamlined. Electricity should not be purchased at unreasonable rates. The retail tariffs should reflect the relative efficiency of R Infra-D in procuring power at competitive costs. RInfra-D should, therefore, look into

all possible ways in which the above objective is met in order to ensure economic efficiency and protection of consumer interest.

In view of the above, the interim order dated July 15, 2009 stands vacated with immediate effect."

3. It is necessary now to look at the order dated 15th July, 2009 passed by the Commission in relation to the alleged performance of the appellant while considering the true up petition of the appellant for Financial Year 2007-08, annual performance review for Financial Year 2008-09 and tariff determination for Financial Year 2009-10.

"The Commission, in exercise of the powers vested in it under Section 61 and Section 62 of the Electricity Act, 2003 (EA 2003) and all other powers enabling it in this behalf, and after taking into consideration all the submissions made by RInfra-D, all the suggestions and objections of the public, responses of RInfra-D, issues raised during the Public Hearing, and all other relevant material, and after review of Annual Performance for FY 2008-09, determined the ARR and Tariff for RInfra-D for Financial Year 2009-10 vide its Order dated June 15, 2009 in Case No. 121 of 2008. Subsequently, the Government of Maharashtra (GoM), issued a letter ref:REL2009/CR 227/NRG-1, dated June 25, 2009 to the Commission inter-alia, stating as under:

> *"Whereas and in the circumstances referred to above, Government of Maharashtra is of the opinion that Government should seek advise from the Maharashtra Electricity Regulatory Commission and in order to protect the interest of common consumer from getting unreasonably burdened. &*

Therefore, under the powers delegated under section 108 read with section86(2), Government hereby directs Maharashtra Electricity Regulatory Commission to investigate as to whether M/s Reliance Infrastructure Ltd. has discharged its duties as envisaged in the Act in the most economical manner so as to not to result in unnecessary avoidable burden on the consumers of that area and take further action as may be considered necessary. The said investigation shall be carried out considering the above points and any other relevant point in that context.

...

The Government of Maharashtra also directs Maharashtra Electricity Regulatory Commission to take emergent steps as it may deem fit, relating to policy of Government of Maharashtra of protecting consumers interest in a monopoly situation, as may be necessary to ensure that no unreasonable and unjustified bills are collected in the intervening period in which this investigation is in progress." (Emphasis added)

Accordingly, as directed and called upon by the GOM and considering the special circumstances, and the direction to the Commission to undertake a detailed investigation on metering, power purchase expenses and transactions undertaken by RInfra-D, as well as capital expenditure schemes, the tariff increase as approved by the Commission in the above-said Order for the following consumer categories and sub-categories is hereby stayed till the Commission issues further orders :

- *LT I Residential*
- *LT II Commercial (A) and (B)*
- *LT III Industry below 20 kW*
- *LT V Advertisement & Hoardings*
- *LT VII Temporary Others*
- *HT I Industry*

It is clarified that the tariff of only such categories and sub-categories, where the tariffs have been increased vis-à-vis the tariff prevalent in the previous year (after including FAC and Additional FAC), has been stayed till the Commission issues further Orders in this regard. For these categories, the tariff as determined in the previous Tariff Order, i.e., Order dated June 4, 2008 in Case No. 66 of 2007 will be applicable. The tariff for the other consumer categories and sub-categories, where the tariffs

have been reduced vis-à-vis the tariff prevalent in the previous year (after including FAC and Additional FAC), will continue to be charged as determined in the Order dated June 15, 2009 in Case No. 121 of 2008."

4. This order makes it clear that the Government of Maharashtra was sceptical and critical of the performance of the appellant because it formed a doubt as to whether the appellant had really been discharging its duties in terms of the Act so that the ordinary consumers were not burdened with hardship; lest the appellant did not act in economical manner it gave a direction. The Government, therefore, in express terms directed that investigation should be made in order to ensure that no unreasonable and unjustified bills were meanwhile collected so long as the investigation would be in progress. This order of the Government as communicated to the Commission by a letter dated 25th June, 2009 as reproduced by the Commission in its order dated 15th. July,2009 necessitated the Commission to pass an order as to why an investigation was really necessary into the performance of the appellant. Then followed another order dated 8th September, 2009 passed by the Commission whereby it appointed and directed the Administrative Staff College of India (ASCI) of Hyderabad to investigate into the affairs of the appellant. The said order was passed purportedly under Section 128 of the Electricity Act, 2003 and we reproduce the relevant paragraphs of the said order in order that it would not be

necessary for us to repeat in our own words what the order was about, and this order dated 8th September,2009 would show that on 15.7.2009 the Commission submitted to the Government a report on the appellant's distribution business.

> *"The Government of Maharashtra ("GoM") has vide its letter dated June 25, 2009, issued directions to the Commission under Section 108 of the Electricity Act, 2003 ("EA 2003") to inter alia investigate whether M/s. Reliance Infrastructure Ltd., has discharged its duties as envisaged in EA 2003 in the most economical and efficient manner. The relevant extracts of the aforesaid letter is as follows:*
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> *"Therefore, under the powers delegated under Section 108 read with Section 86(2), Government hereby directs Maharashtra Electricity Regulatory Commission to investigate as to whether M/s. Reliance Infrastructure Ltd. has discharged its duties as envisaged in the Act in the most economical and efficient manner so as to result in unnecessary avoidable burden on the consumers of that area and taken such further action as may be considered necessary. The said investigation shall be carried out considering the above points and any other relevant points and any other relevant point in that context.*
> *.....*
>
> *The Government of Maharashtra also directs Maharashtra Electricity Regulatory Commission to take emergent steps as it may deem fit, relating to policy of Government of Maharashtra of protecting consumers interest in a monopoly situation, as may be necessary to ensure that no unreasonable and unjustified bills are collected in the intervening period in which this investigation is in progress."*
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> *2. Accordingly, the Commission has submitted its Report titled "A Report on Reliance Infrastructure Distribution Business" to the GoM vide its letter dated July 15, 2009. The Report submitted to the GoM states that the Commission has reasons to believe that there is a need to order an investigation into the power purchase transactions, accuracy of the electronic meters installed by RInfra-*

D, the steep increase in capital expenditure being undertaken by RInfra-D and related books of accounts. In this context, the Commission has powers under Section 128 of the EA 2003 to conduct an investigation into the functioning of the licensee and Generating Company. Section 128 of the EA 2003 provides as under:
Investigation of certain matters

"128. (1) The Appropriate Commission may, on being satisfied that a licensee has failed to comply with any of the conditions of licence or a generating company or a licensee has failed to comply with any of the provisions of this Act or rules or regulations made thereunder, at any time, by order in writing, direct any person (hereafter in this section referred to as "Investigating Authority") specified in the order to investigate the affairs of any generating company or licensee and to report to that Commission on any investigation made by such Investigating Authority:
Provided that the Investigating Authority may, wherever necessary, employ any auditor or any other person for the purpose of assisting him in any investigation under this section.

(2) Notwithstanding anything to the contrary contained in section 235 of the Companies Act, 1956, the Investigating Authority may, at any time, and shall, on being directed so to do by the Appropriate Commission, cause an inspection to be made, by one or more of his officers, of any licensee or generating company and his books of account; and the Investigating Authority shall supply to the licensee or generating company, as the case may be, a copy of his report on such inspection.

(3) It shall be the duty of every manager, managing director or other officer of the licensee or generating company, as the case may be, to produce before the Investigating Authority directed to make the investigation under subsection (1), or inspection under sub-section (2), all such books of account, registers and other documents in his custody or power and to furnish him with any statement and information relating to the affairs of the licensee or generating company, as the case may be, as the said Investigating Authority may require of him within such time as the said Investigating Authority may specify

(4) Any Investigating Authority, directed to make an investigation under subsection (1), or inspection under sub-section (2), may

examine on oath any manager, managing director or other officer of the licensee or generating company, as the case may be, in relation to his business and may administer oaths accordingly.

(5) The Investigating Authority, shall, if it has been directed by the Appropriate Commission to cause an inspection to be made, and may, in any other case, report to the Appropriate Commission on any inspection made under this section.

(6) On receipt of any report under sub-section (1) or sub-section (5), the Appropriate Commission may, after giving such opportunity to the licensee or generating company, as the case may be, to make a representation in connection with the report as in the opinion of the Appropriate Commission, seems reasonable, by order in writing-

(a) require the licensee or the generating company to take such action in respect of any matter arising out of the report as the Appropriate Commission may think fit; or

(b) cancel the licence; or

(c) direct the generating company to cease to carry on the business of generation of electricity."

(7) The Appropriate Commission may, after giving reasonable notice to the licensee or the generating company, as the case may be, publish the report submitted by the Investigating Authority under sub-section (5) or such portion thereof as may appear to it to be necessary.

(8) The Appropriate Commission may specify the minimum information to be maintained by the licensee or the generating company in their books, the manner in which such information shall be maintained, the checks and other verifications to be adopted by licensee or the generating company in that connection and all other matters incidental thereto as are, in its opinion ,necessary to enable the Investigating Authority to discharge satisfactorily its functions under section.

Explanation. - For the purposes of this section, the expression "licensee or the generating company" shall include in the case of a licensee incorporated in India-

(a) all its subsidiaries formed for the purpose of carrying on the business of generation or transmission or distribution or trading of electricity exclusively outside India; and

(b) all its branches whether situated in India or outside India.

(9) All expenses of, and incidental to, any investigation made under this section shall be defrayed by the licensee or the generating company, as the case may be, and shall have priority over the debts due from the licensee or the generating company and shall be recoverable as an arrear of land revenue."

As regards investigation of accuracy of meters installed by RInfra-D and to ensure that the electronic meters are well calibrated, the Commission has appointed NABL accredited M/s Institute for Design of Electrical Measuring Instruments (IDEMI), MSME-Technology Development Centre, Govt. of India, Mumbai, vide its letter MERC/TEC/TMT/1007/6164/1430 dated July 24, 2009 for undertaking the meter testing activity separately which is expected to be undertaken in the next five months duration.

3. In view of the foregoing and broad analysis of RInfra-D's business operation, the Commission is satisfied that there is a case to investigate the operations and books of RInfra-D under Section 128 of EA 2003 in respect of following broad areas, where RInfra-D has failed to comply with the provisions of EA 2003 and Regulations mentioned therein:

a) Power Purchase Cost: Despite the statutory provision under Section 86(1) (b) of the EA 2003 requires "agreements for purchase of power" to be regulated, RInfra-D has till date not intimated to the Commission regarding such agreements that it has executed. In fact, as recorded in the Commission's Order dated June 15, 2009, RInfra-D has yet not executed any such agreement with Tata Power Co. Ltd. Even the Supreme Court has in its judgment dated May 6, 2009 in Civil Appeal NOS. 3510 - 3511 OF 2008, 4269 OF 2008, 3593 OF 2008, 6098 OF 2008, 6099 OF 2008, observed as under:

"Regulation 23 mandates the distribution of licenses to prepare long term power procurement plan which should fulfill the requirements specified thereunder.

We may now notice that Regulation 24 provides for approval of power purchase agreement/arrangement."

"The proposal of TPC (G) that RInfra should enter with it a long term agreement assumes significance."

"The agreement of distribution (PPA) being subject to approval, indisputably the Commission would have the public interest in mind."
Each time the Commission has asked RInfra-D of such non-compliance, the later instead insisted on obtaining a much higher quantum of power based on its consumer demand which has been rejected by TPC keeping in view its continuing obligation to its own consumers and also those of BEST. No consensus was therefore reached with respect to the said PPA between TPC-G and RInfra. Other than a PPA with its own generation division, R-Infra-D has yet not submitted any PPA for approval of the Commission.

This is one of the main causes for significant increase in the power purchase cost of R-Infra-D, which is being borne by its retail consumers for no fault of theirs. There is no doubt that RInfra-D has failed to comply with the following statutory provisions:-

i. Regulation 8.3.3 of Maharashtra Electricity Regulatory Commission (General Conditions of Distribution Licence) Regulations, 2006:-

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

ii. Regulation 24 of Maharashtra Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2005 :-

"Regulation 24. Approval of power purchase agreement / arrangement
"24.1 Every agreement or arrangement for long-term power procurement by a Distribution Licensee from a Generating Company or Licensee or from other source of supply entered into after the date of notification of these Regulations shall come into effect only with the prior approval of the Commission:

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

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

The Commission is therefore satisfied of the necessity to investigate into the procedure adopted by R-Infra-D and the reasons for procurement or non-procurement of power through long term power purchase agreements and related transactions as reflected in the books of accounts maintained by RInfra-D to ensure the optimal impact on cost of supply and tariff charged by RInfra-D. The Commission is mandated under Section 86(1) (b) of the EA 2003 to regulate electricity purchase and procurement process of RInfra-D including the price at which electricity shall be procured from generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State. This is to protect the interests of consumers.

b) Capital Investment: RInfra-D has been submitting their investment plan with details of its proposed capital expenditure projects to the Commission for approval. The investment plan is required to be a least cost plan for undertaking investments on strengthening and augmentation

of the distribution system of the R-Infra-D. The investment plan is required to show the need for the proposed investments, alternatives considered, cost/ benefit analysis and other aspects that may have a bearing on the wheeling charges. The prudence of the proposed expenditure and estimated impact on tariff is required to be examined by the Commission. In accordance with the provisions of Regulation 59 of the MERC (Terms and Conditions of Tariff) Regulations, 2005, the Commission has accorded in-principle approvals to the investment plans submitted by R-Infra-D from time to time. RInfra-D has, along with its application for determination of tariff / annual performance review, was required to provide, details showing the progress of capital expenditure projects, together with such other information, particulars or documents as the Commission may require to assess such progress. Though, certain of such information has been provided, due to the steep increase in the capital expenditure by RInfra-D, there is a need to investigate and examine/undertake scrutiny of the actual scope, objective and procedure adopted for procurement of capital equipments and its installation for capital investment schemes undertaken by RInfra-D and evaluation of benefits stated at the time of in-principle approval vis-à-vis the actual benefits accrued to the operation of RInfra-D. This investigation will lead to the cause(s) as to why addition to the asset base of RInfra-D is neither commensurate with the increase in energy sale or increase in MW demand served by RInfra-D nor reflected in the performance of RInfra-D. Therefore, the prudence and rationale of this disproportionate sharp increase in the capital investment requires an investigation to be carried out under Section 128.

c) Expenses of Regulated Business vis-à-vis Other Business: In the past proceedings before the Commission under Section 64 of the EA 2003, stakeholders had raised the issue that RInfra-D is mandated under Section 51 to maintain separate accounts for "other businesses". The other statutory provisions that require RInfra-D to do so, are as follows:-

- *Regulation 8.4 of Maharashtra Electricity Regulatory Commission (General Conditions of Distribution Licence) Regulations, 2006 :-*

"8.4.2 The Distribution Licensee shall, in respect of the Licensed Business and in respect of any Other Business engaged in by the Distribution Licensee:

8.4.2(a) keep such accounting records as would be required to be kept in respect of each such business so that the revenues, costs, assets, liabilities, reserves and provisions of, or reasonably attributable to the Licensed Business are separately identifiable in the books of the Distribution Licensee, from that of Other Business in which the Distribution Licensee may be engaged;

8.4.2 (b) prepare on a consistent basis from such accounting records and deliver to the Commission periodic Accounting Statements supported by Auditor's certificates, which shall, unless otherwise directed by the Commission, show separately the amounts of any revenue, cost, asset, liability, reserve or provision, which has been either charged from the Licensed Business to any Other Business or from any Other Business to the Licensed Business, as the case may be, together with a description of the basis of that charge; or determined by apportionment or allocation between the Licensed Business and any Other Business of the Distribution Licensee together with a description of the basis of the apportionment or allocation."

Despite the above provisions as well as other provisions under MERC Tariff Regulations, RInfra-D has not been submitting separate Accounts for its regulated and unregulated business, and the Commission has had to rely on the consolidated Accounts of RInfra, which includes the expenses and revenue from other businesses, such as EPC business, electricity business in other States, infrastructure projects like Mumbai Metro, etc. The Commission has hence, sought and obtained allocation statements duly audited by the Company's Auditors, as well as a reconciliation statement between the consolidated Audited Accounts and the individual regulated businesses, at the time of determination of Aggregate Revenue Requirement (ARR) and tariff. The practical view has been taken, since the statutorily time bound process of tariff determination cannot be kept in abeyance till such time the separate Accounts are available and submitted.

Although, RInfra-D has, during past tariff determination processes submitted a brief affidavit stating therein that it does not have any other income, it is necessary, in view of the steep rise in the costs

of RInfra-D under various expense heads to undertake a detailed item-by-item examination of the various expense and revenue heads, to ensure that expenses of other businesses are not being passed on to the consumers under regulated business, and also that the complete and due income of the regulated business is being retained under the regulated business, as also to ensure that the assets being reported under regulated business are actually physically existing and are being used for the benefit of the regulated business. While doing so, the basic accounting records including basic vouchers would need to be examined and investigated into. Similarly, there is a need to investigate and examine/undertake scrutiny of accounts so as to find out whether Mumbai electricity consumers are being burdened with or saddled with any expenses incurred in RInfra-D's other businesses.

Therefore, an Investigating Authority is required to be appointed under Section 128 of EA 2003 to investigate in the matter on the above main three areas.

4. Hence, the Commission hereby appoints and directs Administrative Staff College of India (ASCI), Bella Vista, Raj Bhavan Road, Khairatabad, Hyderabad - 500 082, to act as an "Investigating Authority" to investigate the affairs of RInfra-D as per the provisions of Section 128 of EA 2003 on the aforesaid three broad areas, which would include following broad tasks, inter-alia:

a. The Investigating Authority shall scrutinise Petitions, Record of Proceedings/Minute of meetings and data submitted to the Commission by RInfra-Distribution Business (including Petitions and data submitted by the erstwhile BSES Ltd and Reliance Energy Limited) during the period from 1st April 2003 to 31st March 2009 so as to relate the same to the actual results of the investigation, and to report to the Commission regarding discrepancy, found if any.

b. Considering the above, the Investigating Authority shall verify the physical vouchers for each transaction/actual expenses recorded in the books of accounts related to the investigation areas referred to above for the aforesaid period (i.e. Period from 1st April 2003 to 31st March 2009), so as to examine the correctness and appropriateness of the transactions reflected in the books of accounts.

c. Examine the procedure adopted for procurement of power and its related transactions reflected in the books of accounts maintained by RInfra-D to ensure the optimal impact on cost of supply and tariff being charged by RInfra-D to its retail consumers.

d. Examine/undertake scrutiny of actual scope, objective and procedures adopted for procurement of equipments for capital investment schemes undertaken by RInfra-D and evaluation of benefits stated at the time of in-principle approval vis-à-vis the actual benefits accrued in the operations of RInfra-D.

e. Undertake detailed item-by-item examination of the various expense and revenue heads, to examine that expenses of other businesses are not being passed on to the consumers under regulated business, and also that the complete and due income of the regulated business is being retained under the regulated business, examine as to whether the assets being reported under regulated business are actually physically existing and are being used for the benefit of the regulated business. While doing so, the basic accounting records including basic vouchers shall be examined.

5. The investigating Authority shall endeavour to submit its Report to the Commission within 16 weeks from the date of its appointment hereunder.

6. The Commission hereby directs RInfra-D to cooperate with the Investigating Authority i.e., Administrative Staff College of India, Bella Vista, Raj Bhavan Road, Khairatabad, Hyderabad - 500082, in its investigation and make available all the required data as desired.

7. The Investigating Authority shall act as per Section 128 of the EA 2003, as directed by the Commission and authorised by the Commission to do so under this Section including whenever necessary employ any auditor or any other person for the purpose of assisting it in the investigation."

5. The following points emerge from the aforesaid order:

a) On 15th July, 2009 when the Commission made an order staying in part its own order of increase in tariff of certain categories of consumers it submitted at the same time a report to the Government regarding the affairs of the appellant.

b) The appellant is said to have failed to comply with the provisions of the Act, 2003 and the regulations framed thereunder by the Commission regarding power purchase cost.

c) Despite repeated directions the appellant was not executing any power purchase agreement with Tata Power Company Ltd. and even though there was an observation of the Supreme Court in a decision dated 06.05.2009.

d) The appellant insisted on obtaining a much higher quantum of power based on its consumer demand which has been rejected by the TPC keeping in view its continuing obligation to its own consumers and others.

e) The provision of regulation 8.3.3 of the Distribution License Regulations, 2006 which we have reproduced above has not been complied with .

f) Similarly, Regulation 24 of the Tariff Regulations, 2005 has not been complied with.

g) Purchase and procurement process including the price of purchase was questionable.

h) There was sharp increase in capital investment which prudence does not approve of.

i) Regulation 8.4 of the Distribution Licence Regulations, 2006 was violated.

k) The appellant had not been submitting separate accounts for its regulated and unregulated business.

6. Accordingly, as we find from the paragraph 4 of the order the terms of reference for the purpose of investigation into the affairs of the appellant were specified. ASCI conducted investigation and prepared a report on 9th July, 2010 and then forwarded the same to the Commission. A copy of the voluminous report was made available with the appellant by the Commission which directed the appellant to submit its comments thereon.

7. The appellant had accordingly submitted its comments / representations on certain issues in ASCI's report and the same were received by the Commission on 6th. August, 2010. It stated that the tariff rates for some categories has ceased to exist and since the investigation has not yielded any adverse findings, the said order staying the tariff order partially ought to be vacated. It was also pointed out that the tariff for Financial Year 2009-10 had already been approved by the MERC after conducting regulatory scrutiny as is required under the Act,2003

and the Tariff Regulations in question and was only be stayed pending investigation. Accordingly, by the order dated 9.9.2010 as mentioned above the Commission lifted the stay order, but the observations made in the last paragraph of the impugned order was according to the appellant purely unwarranted because of the fact the report of the ASCI does not constitute any ground or premise for making the observations and as such the said observations which are not based on evidence are absolutely unsustainable and must be quashed, or else these observations will seriously reflect on the conduct and performance on the part of the distribution business of the appellant. Furthermore, the remarks so made were made without giving any opportunity to the appellant of being heard. When by the same order dated 9.9.2010 the stay order dated 15.7.2009 was vacated there was no existence of any ground for making the aforesaid observations and more particularly, the tariff order for the Financial Year 2009-10 was reinstated by the Commission without any modification whatsoever.

8. The Commission in its counter affidavit has submitted as follows:-

a) The appeal is not maintainable in law because the appeal has been filed against merely certain observations/remarks of the Commission. Reference has been made to the order dated 26th. May, 2009 passed by this Tribunal in the Appeal no 37 of 2009

where the Tribunal observed that the core of the order has not been challenged.

b) There has been sharp opposition to steep increase in the bills of the common consumer's tariff as well as public agitation in connection therewith.

c) There was justifiable reason to stay the tariff increase for certain consumer categories and sub-categories in view of the order of the Government of Maharashtra.

d) The Commission referred to its earlier order dated June15,2009 wherein there is reference to the Hon'ble Supreme Court's order dated May 6,2009 in TPC vs.REL. In this order the Hon'ble Supreme Court referred to the regulation 23 of the Tariff Regulations and observed that the proposal of the TPC-G that the appellant should enter with it a long term agreement assumed significance.

e) The Commission warned the appellant of non compliance with statutory obligations and observed further that other than Power Purchase Agreement with its own generation division the appellant has not submitted any Power Purchase Agreement for approval of

the Commission, and this was one of the reasons for increase in the power purchase cost of the appellant.

f) The appellant failed to comply with the regulation 8.3.3 of the MERC (General Conditions of Distribution License) Regulation,2006 which inter alia require that power procurement shall be made in an economical manner and under a transparent power purchase and procurement process.

g) The appellant also failed to comply with the regulation 24 of the Tariff Regulations which requires long term power procurement to be approved by the Commission. Therefore, in the circumstances an investigation into the affairs of the appellant's business was found necessary nad accordingly it was ordered.

h) The Investigating Authority also came to the finding that the appellant should have brought to the notice of the Commission from time to time the circumstances under which they could not enter into Power Purchase Agreement with TPC.

i) The appellant has not been prejudiced in anyway and the appeal should be dismissed.

9. Besides the Commission which is the respondent no 1 in this appeal there are four other respondents namely, Mumbai Grahak

Panchayat, Prayas, Thane Belapur Industries and Vidarbha Industries Association, respondents no 2,3,4 and 5 but none of them despite service did enter appearance to contest.

10. The only point for consideration is whether the Commission was justified in recording its observations in the impugned order which we have quoted in the very beginning of this judgement.

11. The submission of the learned counsel for the appellant is short and simple. The appeal does not present any complexity of facts. It must not be lost sight of the fact that in this appeal there is no scope of consideration as to whether the appellant in discharge of its distribution business failed to carry out any order of the Commission or whether the appellant has or has not deliberately complied with the provisions of the tariff regulations in the interest of the consumers. It is not an appeal where we are to consider whether any direction of the Hon'ble Supreme Court has or has not been complied with or followed or not. Both the Government and the Commission thought in their wisdom that the appellant by not entering into long term power purchase agreement with TPC and other generators except its own generation division and by

purchasing power from external sources at a very high cost it was sacrificing the interest of its own consumers and that it was deliberately flouting the express provisions of the relevant Regulations which are intended to protect the interest of the consumers. The matter of the fact is that upon finding some seemingly irregularities the Commission stayed in part the tariff increase order pending investigations in to the affairs of the appellant's distribution business and when about 350 -page order came from the ASCI the Commission made a study of it and upon perusal of the report and upon publication of the report for information of the general public it accepted the report and vacated its own stay order which we have earlier quoted . The relevant observations of the report of the ASCI we also have quoted and as they speak for themselves, they need not require any amount of further interpretation, analysis and discussion. Be it carefully noted that the Commission at no stage of the proceeding made any order dissenting from any observation of the ASCI and secondly, all the terms of reference were answered by the ASCI and no part thereof was left out . It is also not within the scope of our appeal to deliberate as to whether in the light of the two orders of the Commission preceding the investigation of the ASCI the report of the ASCI has been a reasonable one or not because it is not the case of the Commission in this appeal that the report of the ASCI is subject to criticism and that the Commission or for

that matter the Government is not in agreement with the investigation report of the ASCI and accordingly the observations/ comments of the Commission in the last paragraph of the impugned order is perfectly in order. On the contrary, it is the consistent stand of the Commission in this appeal that whatever has been commented upon by the Commission in its last paragraph of the impugned order is perfectly in terms of the provisions of the Electricity Act, 2003 whereunder the State Commission does not lose its jurisdiction to make direction whenever it feels that any such direction is in the interest of the large number of the public necessary and will serve the very purpose of the Act. It has been the primary argument of the appellant through its learned counsel that a decree follows a judgement , an order follows a detailed reasoning; but when there is no premise, major or minor, there cannot be any conclusion because a conclusion in an adversarial proceeding has to be based on ratiocination and where there is no foundation of facts , no ground to assail a charge, an observation on an imaginative charge must not find place in a judicial proceeding and it requires judicial intervention to quash an unsubstantiated observation/comments which are unable to stand alone on their own footing. It has been argued extensively that given a reading between the lines of the investigation report of the ASCI it does not appear at all that there is any whisper that in any field there was an illegality or irregularity committed by the

appellant and the ASCI has observed as to under what circumstances the appellant had to make purchase of power from external sources and as to under what circumstances there was constraint on the part of the appellant to enter into power purchase agreement with the TPC.

12. Now, the learned counsel for the appellant has argued assiduously that in a post-facto attempt to somehow justify the stay of tariff increase on 8.9.2009 the Commission exercised its powers under section 128 of the Act to direct an investigation into the operations and books of account of the appellant and it is significant to note that the power purchase cost, the procedure adopted for procurement of power and the reasons for procurement or non- procurement of power through long term power purchase agreements, were expressly made part of the terms of reference for the investigation to be conducted by the ASCI. As a matter of fact, no adverse conclusion was drawn against the appellant, and on the contrary, the findings recorded the circumstances in which the appellant was constrained to avail itself of power at high cost and the role played by the TPC in this outcome. The report further records that the procedure followed by the appellant in its procurement process was entirely transparent. The issue of power procurement, it is argued, was specifically examined in great detail and the appellant was exonerated

and there were no adverse findings against the appellant . Since there was no adverse finding against the appellant in the report the Commission was not justified in making observations which in fact do partake of the character of stricture upon the distribution business of the appellant and accordingly, such observations/remarks which reflect the conduct of the appellant and affects its goodwill and reputation must be set aside or quashed.

13. It is argued that section 128 of the Act under which the impugned order has been purportedly passed provides in sub-section (6) the adverse orders that may be passed pursuant to the investigation, but paragraph 7 of the impugned order does not fall within any of the possible adverse orders, and is therefore beyond the jurisdiction and powers of the Commission under section 128 .The languages in which the impugned order has been coached only entail that by necessary implication the observations are adverse and they tell upon the health of the appellant which sans the unnecessary observations are quite sound. The management of the appellant's business has been although efficient and power procurement and purchase policy is quite economical and prejudicial to none, and the apprehension of the Commission or of the Government was thus totally unfounded as has

been attested to by the investigation report of the ASCI . The Commission purports to justify the above adverse findings with reference to the report in as much as the said findings are preceded by the sentence '' *However, taking into account the facts stated in ASCI's investigation report that the retail supply tariffs of RInfra-D have substantially gone up due to procurement of large proportion of power from external sources and drawl from the imbalance pool at high cost,….''* But this observation is entirely at variance with the report which exonerates the appellant. The Commission makes reference to one conveniently selected fact in the report while ignoring all other facts, findings and conclusions. The Commission provides no reason whatsoever for disagreeing with the conclusions arrived at in the report, and the findings in paragraph 7 are therefore unreasoned and non-speaking.

14. It is further submitted that even if we disregard the form it is evident that the impugned order cannot be one under section 129 since the application of mind and the satisfaction required to be recorded are entirely absent from the impugned order because to be an order under section 129 of the Act it would have had to identify a specific contravention of the Act and contain a direction which would be

necessary for the purpose of securing compliance with that condition or provision.

15. The learned counsel for the appellant in support of his arguments seeks to rely upon the decisions in Mohinder Singh Gill and another vs. the Chief Election Commissioner, New Delhi, reported in AIR 1978 SC 851, the Commissioner of Police, Bombay vs Gordhandas Bhanji, reported in AIR (39) 1952 SC 16 which has been referred to in AIR 1978 SC 851.

16. The learned Advocate for the respondent Commission submitted that the impugned observations/ findings are merely directions or advice to the appellant to manage its power procurement in a better way and in a more efficient and economical manner and to streamline such process. If the appellant's contention is to be accepted then it would amount to saying that the Commission does not under the law any jurisdiction to guide an utility and direct compliance with the provisions of the statute so that the purpose of the Act is strictly carried out .Under section 86(1)(b) of the Act the Commission is duty bound to regulate the electricity purchase and power procurement process of a distribution

licensee. It is submitted that under regulation 23 of the Tariff Regulations, 2005 the licensee is duty bound to prepare a long term power procurement plan and to purchase power in accordance with such plan . Further, under regulation 8.3.3 of the Distribution Licence Regulations, 2006 the licensee is bound to procure and purchase power to meet its obligations under the Act in an economical manner in accordance with the regulations and directions of the Commission. It is argued in very express words that the impugned findings/observations are nothing more than a sort of directions or advice because the power of the Commission to regulate the power procurement process of the distribution licensee would certainly include within its ambit the power to direct the licensee to comply with the obligations under the Act and the Regulations framed thereunder. The learned counsel for the Commission refers to the decisions in B. Prabhakara Rao vs. Desari Panakala Rao & ors., (1976)3 SCC 550, Grindlays Bank Ltd. Vs. Central Government Industrial Tribunal and ors.,, 1980 (Supp) SCC 420, J.K. Synthetics Ltd. Vs. Collector of Central Excise, (1996)6 SCC 92, Cellular Operators Association of India & ors vs. Union of India and ors, (2006)13 SCC 753, Central Power Distribution Co. & ors. Vs. Central Electricity Regulatory Commission and another, (2007) 8 SCC 197, MERC vs REL, (2007) 8 SCC 381, and Uttar Pradesh Power Corporation Ltd., vs. National Thermal Power Corporation Ltd. & ors, (2009) 6 SCC 235. The

second aspect of the argument of the learned counsel for the Commission is that the factual basis for the impugned findings/observations is contained in the report of the ASCI because the investigation report took cognisance of the fact that the appellant procured large proportion of power from external sources and drawl from imbalance pool at high cost . It is submitted that imbalance pool cannot be used as a source of power procurement and the appellant has been purchasing a large proportion of its procurement from short term bilateral sources such as traders, power exchanges etc., only because it did not have any long term power procurement or PPA with any supplier. The learned counsel chronologically refers to the followings, namely a) Tariff Regulations of the Commission, b) order of the Commission in case no 4 of 2003 directing the appellant to enter into a long term PPA, c) the Distribution Licence Regulations under which a distribution licensee is bound to procure power in an efficient and economical manner , d) the MYT Order for the appellant's distribution business, e) the order dated 6.11.2007 involving approval of the PPA between BEST and TPC-G recording the failure of the appellant to come up with any long term power procurement arrangement, f) the Tariff Order dated 4.6.2008 in respect of the appellant wherein it has been noted that the appellant was still unable to enter into a long term PPA , g) the order of the Hon'ble Supreme Court in TPC vs MERC wherein it was inter alia held

that in absence of a PPA the generator could not be directed to sell power to a distributor h) Tariff Order dated 15.6.2009 for the appellant for the year 2009-10 whereby the retail tariff was considerably increased due to the increase in power purchase costs on account of short term purchase from bilateral sources, power exchanges and drawl from imbalance pool etc., i) the order dated 25.6.2009 passed by the Government of Maharashtra alleging various discrepancies in the accounts and power procurement of the appellant, j) Commission's order dated 15.7.2009 staying tariff of the appellant, k) order dated 8.9.2009 passed by the Commission appointing the ASCI for investigation into the affairs of the appellant's distribution business , l) report of the ASCI, and m) the impugned order of the Commission.

17. Before recording our analysis we should reproduce section 86, of the Act as this section has been referred to by the learned counsels for both the parties which on the facts and circumstances of the case will be relevant. Fundamentally , we must not miss to note that efficiency in performance, economical use of resources , optimum investments, distribution of electricity on commercial principles safeguarding the interests of the consumers while at the same time recovery of cost in a reasonable manner as enshrined in section 61 of the Act must guide

every utility engaged in the business of distribution, and so far as the role of the State Commission is concerned , it cannot be gainsaid that its jurisdiction qua a distribution licensee is administrative, quasi-legislative, quasi-judicial and advisory. It is for the Commission to determine as to under what circumstances it will exercise its jurisdiction in a most appropriate manner. Sections 61 and 62 cannot be read in isolation of section 86 of the Act, and again section 128 and section 129 of the Act are the logical corollary of the powers and functions of the Commission as laid down in section 86 of the Act. Now, we read the relevant section as under before we proceed further.

18. Section 86 of the Act..

86. (1) The State Commission shall discharge the following functions, namely:-

(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:

Provided that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;

(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;

(c) facilitate intra-state transmission and wheeling of electricity;

(d) issue licences to persons seeking to act as transmission licensees, distribution licensees and electricity traders with respect to their operations within the State;

(e) promote co-generation and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licence;

(f) adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration;

(g) levy fee for the purposes of this Act;

(h) specify State Grid Code consistent with the Grid Code specified under clause (h) of sub-section (1) of section 79;

(i) specify or enforce standards with respect to quality, continuity and reliability of service by licensees;

(j) fix the trading margin in the intra-State trading of electricity, if considered, necessary; and

(k) discharge such other functions as may be assigned to it under this Act.

(2) The State Commission shall advise the State Government on all or any
of the following matters, namely :-.

(i) promotion of competition, efficiency and economy in activities of the electricity industry;

(ii) promotion of investment in electricity industry;

(iii) reorganization and restructuring of electricity industry in the State;

(iv) matters concerning generation, transmission, distribution and trading of electricity or any other matter referred to the State Commission by that Government.

(3) The State Commission shall ensure transparency while exercising its powers and discharging its functions.

(4) In discharge of its functions the State Commission shall be guided by the National Electricity Policy, National Electricity Plan and tariff policy published under section 3.

19. Before we speak out finally, it is necessary to see the relevant observations of the ASCI which we reproduce as under:-

4.3 SUPPLY

The Tata Power Company (TPC) has been supplying electricity as a "Bulk Licensee"to R-Infra (erstwhile BSES) and BEST, to meet the demands of the consumers of the two licensees in Mumbai. TPC has been supplying electricity to BEST since 1907 and to RInfra (erstwhile BSES) since 1926 and has been adding additional capacity over a period to meet the growing demand of the consumers of RInfra and BEST as well as its own. This was an arrangement provided in the respective licenses issued by the Government of Maharashtra to TPC, RInfra and BEST. There was no quantum specified in the agreement between TPC and BEST and there was no separate agreement between TPC and RInfra since the need had never arisen and the required power was being supplied only by TPC. In addition to supplying electricity to RInfra and BEST, TPC was permitted under its license to supply electricity to certain consumers directly from time to time. TPC at a later stage started selectively supplying to commercial, industrial and high-end residential consumers in areas serviced by BEST and RInfra till the restraint order of MERC dated July 3, 2004 was issued whereby they were not permitted to supply to consumers below 1000 KVA, until a level playing field was established. TPC's consumers are predominantly bulk consumers such as railways, textile mills, refineries etc. However, consequent to the judgment

of the Supreme Court dated July 8, 2008, TPC, being a distribution licensee, is required to meet Universal Service Obligation.

Despite opposition by TPC RInfra had set-up a 500MW thermal power station at Dahanu (DTPS) in 1995 near Mumbai to meet a part of the demand of its consumers. This was in pursuance of an amendment to their distribution license by the Government of Maharashtra, which mandated setting up of a power plant. Under the existing arrangement, RInfra continued to buy approximately 42% of the energy generated by TPC even after commissioning of the power station. It would be pertinent to reiterate that no agreement had been entered between TPC and RInfra.

The tariff rates of TPC (Cost of power) to both RInfra and BEST have remained unchanged. TPC has been adding generating capacity in Mumbai to meet the requirement of consumers in the area served by TPC, RInfra and BEST. In addition, since the demand of Mumbai consumers is locally met through generation by TPC and RInfra, appropriate islanding arrangements have been made to insulate Mumbai in the event of a grid disturbance.The Electricity Act 2003 came into force with effect from June 10, 2003. MERC had notified the tariff regulations in August 2005 and in terms of Regulation 24, prior approval of the Commission was required to give effect to the existing arrangement or agreement. MERC in its order dated December 9, 2005 directed RInfra and TPC to execute power purchase agreement within 3 months. While RInfra was in correspondence with TPC for entering into an agreement, in January 2006 TPC entered into an agreement with BEST for supply of 800MW of power for a period of 10 years. TPC further allocated 477 MW to its own distribution business and the balance 500 MW of its total capacity of 1777 MW was offered to RInfra, despite RInfra's request to make allocation to the two licensees based on coincident maximum demand. In April 2006, at an APEX Committee meeting, RInfra was made aware of the agreement between TPC and BEST. RInfra had contested this allocation of 500 MW as it would have adverse impact on the tariffs of RInfra consumers. Meanwhile, in the absence of approved PPA, MERC directed the 3 DISCOMs to share the available generation capacity in a specific ratio, based on the share of non-coincident peak demand for 2006-07. Subsequently, when the coincident peak demand data was available, the ratio was revised for 2007-08 based on the share of the coincident peak demand.

The Commission by its orders No. 87 and No. 88 dated November 6, 2007 had approved the Power Purchase Agreement (PPA) between TPC and BEST for supply of 800 MW, and an arrangement between TPC-G and TPC-D for 477MW. The Commission had also maintained in the order that it had the authority under Section 23 of the Act to revise the allocation despite the existence of approved PPAs, in certain circumstances.

Aggrieved by the MERC Order on approval of PPAs with the above allocation of capacity RInfra had appealed to APTEL. BEST and TPC have also appealed to the APTEL against the provision for MERC to invoke Section 23. The APTEL in its judgment dated May 6, 2008 accepted the appeal of RInfra that the allocation is inequitable and remanded the matter to the Commission for re-determination after hearing all parties, especially in view of their historical relationship. TPC and BEST filed appeals before the Supreme Court and by its judgment dated May 6, 2009, the apex court set aside a portion of MERC order which had held that it could change the allocation in certain circumstances under Section 23. The Court also set aside the APTEL orders and held that according to the provisions of the Electricity Act 2003, generation activity is de-licensed and MERC has no power under Section 23 of the Act to direct TPC as a generating company. The Supreme Court further observed that, "Fairness or otherwise of the supply of electricity to different distribution companies being outside the jurisdiction of the Commission."

Presently, the power that is available to RInfra from its established sources is 500MW from RInfra generating station and 500 MW from TPC. In view of the judgment of the Supreme Court, TPC has conveyed its intention to withdraw even the 500 MW w.e.f. April 1, 2010 vide its letter dated 25th June 2009. Even during the period when the issue was pending in Supreme Court, RInfra and TPC were in correspondence on executing the power purchase agreement. The average price at which RInfra purchased is marginally higher than purchase by MPMG. It is observed that the prices during the second half of the year are generally high; moreover RInfra had initiated action late for procurement of 250 MW. The total bilateral purchases excluding intra state transmission losses by RInfra-D for the years 2007-08 and 2008-09 are 466 MU and 1718 MU respectively. The quantum of energy purchase and quantum delivered, the total cost paid and average rate of purchase and average rate of energy delivered are given below. The difference in energy purchased and delivered is the loss in interstate and intrastate transmission system.

Item	***2007-08***	***2008-09***
Energy purchased (MU) by MPMG	*1168.63*	*1972.95*
Total Cost paid (Rs. Crores)	*559.98*	*1563.45*
Average rate (Rs. / kWh) paid	*4.79*	*7.92*
Energy demand of RInfra (MU)	*466.00*	**1718*
Total cost paid by RInfra (Rs. crore)	*239.88*	**150272*
Average rate of energy delivered (Rs./kWh)	*5.15*	*8.75*

** Includes energy purchased by RInfra-D directly.*

As discussed earlier, the power purchase from external sources was handled by the Power Management Group (MPMG) of the three utilities and by RInfra following a transparent procedure. The purchase from external sources is mainly to meet the demand from 9.00 to 24.00 hours. The prices at which the MPMG and RInfra procured power during 2008-09 as detailed above have been compared with the prices published by the Market Monitoring Cell of CERC for the transactions through traders, power exchanges and UI charges. The price at which the MPMG and RInfra purchased power are in line with the prices published by the Marketing Monitoring Cell of CERC for 2008-09 (from August 2008 to March 2009). The prices were also compared with those at which APTRANSCO had procured power during 2008-09 and were found to be competitive. The prices published by the Cell for 2009-10 (Upto December 2009) were also obtained which showed a downward trend.

The data published by CERC cell is the rate at which market trends, and supplies are made. The purchase cost by MPMG includes open access charges etc. Since the purchase is to meet the demand from 9.00 to 24.00 hours, particularly, peak hour demand, the prices are marginally higher.

The information published by Market Monitoring Cell, CERC and Power Purchase by APTRANSCO are given in Annexures-4.9 and 4.10.

4.6.5 Power Drawal from Imbalance Pool

As discussed in para 4.5.3 above, the energy drawn from imbalance pool by each of the distribution companies and the price paid by each DISCOM is furnished by the State Load Despatch Centre, Kalwa under MERC order in Case No. 31 dated September 29, 2006 and Case No. 42 dated May 17, 2007.

The price is the Weighted Average System Marginal Price (WASMP) for the month. This is in contrast to the UI charges under ABT, which is priced based on integrated energy drawal during every 15 minutes based on system frequency. WASMP is arrived at over a month irrespective of the system conditions. This naturally impacts the overall cost of power purchase by any of the four utilities who draw power from the pool, more so the RInfra which was facing considerable shortage during 2008-09. Such drawal from imbalance pool becomes inevitable for the DISCOM, which is facing shortage in the absence of assured source of supply or when supply from assured source is curtailed due to outage of units or due to any other reason, when the DISCOM is committed to provide continuous supply to its consumers.
************(Tables are omitted)*

The contribution from TPC-D and BEST had been possible because of higher allocation of capacity from TPC-G.

The month wise energy drawal and the marginal price as furnished by SLDC, Kalwa under 'Interim Energy Balancing and Settlement Account under Intra State ABT' are provided in Annexures 4.11, 4.12 and 4.13 for the years 2006-07, 2007-08 and 2008-09.

4.6.6 Power Drawal under Standby Arrangement

In order to maintain uninterrupted power supply in Mumbai, the three DISCOMs of Mumbai namely TPC, RInfra-D and BEST have an arrangement with Maharashtra State Electricity Distribution Co. Ltd (MSEDCL) to avail supply during the times of outage in any of the generating facilities of RInfra-G or TPC-G. The standby arrangement requires the three DISCOMs to pay annual standby charges to MSEDCL (Rs.396 crore) irrespective of whether any

energy under the standby arrangement has been availed during the financial year or not. The energy drawn during the standby arrangement is charged at marginal cost of MSEDCL for the month. Though the standby arrangement is linked to the generation capacity, the annual standby charges are however shared among the three DISCOMs in the ratio of their coincident peak demand rather than the capacity allocated to the respective DISCOMs from the generation capacity.

The standby support is limited to 550 MVA, which is the maximum size generating unit of Mumbai generation (500 MW). This is also reflected in MSEDCL's submission as reproduced in the Commission's Order dated August 17, 2009, in Case No. 9 of 2008:

"Therefore, MSEDCL approached the Commission regarding the dispute/ disagreements between the utilities on such issues. It was further submitted on behalf of MSEDCL that one issue is for the exact quantum of standby requirement. The standby requirement of 550 MVA is primarily based on the outage of maximum size unit either in TPC system or REL system and 550 MVA is therefore the guaranteed support from MSEDCL's system. …"

In effect, the stand-by support from MSEDCL is not available in case of any failure of power availability from external sources or sources other than TPC-G or RInfra-G. RInfra-D's procurement consists of a large quantum from external sources to meet the demand of its consumers and MSEDCL is not obligated to render any support in the event of failure of any such source. From FY 2008-09, RInfra's allocation from TPC-G reduced from 762 MW to 500 MW. However, since the sharing of standby charges is linked to Coincident Peak Demand, RInfra paid standby charges of Rs.220.40 crore during 2008-09.

4.6.7 Total Cost of Power

The total cost of power includes purchases from RInfra-G, TPC-G, RPS, Bilateral / External purchases, drawal from Imbalance Pool, Fuel Cost Adjustment, Transmission charges and other costs. These costs are added to arrive at the total power purchase cost for determination of retail supply tariff to the consumers.

*********(Table is omitted)*

It is seen from the table above, that the power purchase costs have considerably gone up during the years 2007-08 and 2008-09. This is mainly due to increase in purchase from external sources at high cost, drawal from imbalance pool priced at system marginal cost which is high and with no corresponding reduction in standby charge. This was particularly significant during the year 2008-09 due to reduced allocation from TPC-G, from 762 MW to 500 MW. The impact of the cumulative increase in power purchase cost on the retail supply tariffs is significant and is discussed later.

4.6.8 Shortfall during 2007-08, 2008-09 and 2009-10

Despite the availability of 500 MW from RInfra-G and 762MW from TPC-G, there was a shortfall during 2007-08 and 2008-09. RInfra-D explained that based on the load duration curves for the years 2007-08, 2008-09 and 2009-10, the shortfall was only for short duration of a few hours a day during peak hours and the quantum required varied between 0 to 300 MW and average power required was upto 100 MW. If the allocation of 762MW and 100 MW from Unit-8 (250 MW) was available there would have been no requirement to seek medium / long term procurement from external sources. Purchases on short-term basis would have been required only for the peaking power.

4.7 THE IMPACT OF POWER PURCHASE COSTS ON RETAIL TARIFFS

As discussed earlier, RInfra-D was able to meet its demand for power from its own generation at Dahanu and from TPC upto the year 2005-06 as per the allocation and price fixed by MERC.

In view of the increase in demand there was marginal shortage of about 136 MU during 2006-07 despite normal allocation of about 719 MW from TPC-G. TPC-D had provided about 66 MU through purchase from of external sources and the balance was drawn from imbalance pool. In view of further increase in demand during 2007-08, the shortage for RInfra-D had gone up to 369 MU over and above the drawal from RInfra-G (500 MW) and TPC-G (762 MW). The short fall was met by purchase of 466 MU from external sources and 80 MU by drawal from imbalance pool. About 177 MU was sold outside licensee area.

The power supply scenario had worsened during 2008-09 with the reduction of availability from TPC-G from 762 MW during 2007-08 to 500 MW. The short fall was met by procuring 1718 MU from external sources at an average cost of about Rs.8.75/kWh and by drawing 1075 MU from imbalance pool at an average cost of about Rs.8.94/kWh.

*********(Tables and figures are omitted)*

4.8 Power Purchase Agreement by RInfra-Distribution

4.8.1 As part of the investigation, the Investigating Authority examined the arrangement for supply of power between RInfra-D and TPC with specific attention to study whether the absence of long-term Power Purchase Agreement between the parties had impacted supplies in meeting the requirement of power on sustained basis. During the course of the examination, the Investigating Authority looked at carefully whether the steep increase in power purchase costs and corresponding sharp increase in retail tariffs during 2007-08, particularly during 2008-09 was attributable to absence of a long-term power purchase agreement between the parties. If so why it had happened and to what extent RInfra-D is responsible as a distribution licensee.

It is relevant to recall, as analyzed earlier in the Report, the sharp increase in retail tariff is due to purchase of about 30% of energy requirement from external sources on short term basis through traders and power exchanges at an average cost of about Rs. 8.75 / kWh and drawal of substantial power from imbalance pool at a cost of about Rs.8.94/ kWh during 2008-09. The examination of the existing arrangement and available materials are discussed further below:

4.8.2 Statutory Requirement

MERC Regulations: The Commission had notified MERC (Terms and Conditions of Tariff) Regulations 2005 on August 23, 2005. The relevant extracts of the MERC Tariff Regulations specify the need for a power purchase agreement / arrangement as under:

"7.1.2 Where, as at the date of notification of these Regulations, the power purchase agreement or arrangement between a

Generating Company and a Distribution Licensee for supply of electricity from an existing generating station has not been approved by the Commission or the tariff contained therein has not been adopted by the Commission or where there is no power purchase agreement or arrangement, then the supply of electricity by such Generating Company to such Distribution Licensee after the date of notification of these Regulations shall be in accordance with a power purchase agreement approved by the Commission in accordance with Part- D of these Regulations:

Provided that an application for approval of such power purchase agreement or arrangement shall be made by the Generating Company or the Distribution Licensee to the Commission within a period of three (3) months from the date of notification of these Regulations."

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

The Commission in its order dated December 9, 2005 in Case No.3 of 2003 in the matter of dispute between TPC and RInfra-D on Principles of Agreement (PoA) dated January 31, 1998 had ruled as under:

"……. The Principles of Agreement (PoA) was executed prior to implementation of Electricity Act, 2003, though PoA required with the parties enter into an agreement in a time bound manner, no agreement was entered into. The Commission is of the opinion that this PoA would not be valid under the provision of EA 2003. However, in the absence of any agreement for supply of power, the PoA is the only agreement available for supply of power from TPC to REL at 220 kV inter connection".

In another order dated December 9, 2005 in Case No.4 of 2003 in the matter of additional outlets for drawal of power by REL from TPC, the Commission ruled as under:

"……. Therefore, the Commission hereby directs both the parties to enter into an agreement within three months of the order to ensure long term availability of power to Mumbai consumers."

As per the MERC (Terms and Conditions of Tariff) Regulations, an arrangement between the generation company and the licensee has to be considered by the Commission. The word arrangement has been said to be identical with agreement in writing. The arrangement under which TPC has been supplying power for over 80 years, and the developments that took place over the period are discussed below:

***********(4.8.3 and 4.8.4 are omitted)*

4.8.5 Post Electricity Act, 2003 Scenario

Even before the Electricity Act, 2003 came in to force, RInfra had taken the initiative to sign the power purchase agreement (PPA) with TPC and Mr. S.S. Dua, the then Deputy Chairman and Managing Director, BSES addressed a letter to the Managing Director, Tata Power Company on May 3, 2002 indicating their interest to sign the PPA and enclosed a draft agreement for comments. This was followed up by another letter dated June 30, 2003, drawing attention to the radical changes anticipated in the power sector consequent to the enactment of EA, 2003. This was acknowledged by Tata Power vide letter dated 24th July 2003.

In a confidential letter dated September 13, 2003, RInfra while confirming its discussions with TPC on the subject, indicated that it (RInfra) had come out with an open advertisement for sourcing power to its Mumbai license area. TPC in its letter dated September 19, 2003 had taken strong exception to this letter of RInfra inviting open offers for supply of power to its Mumbai license area and clearly stated that RInfra is authorized to purchase supplies only from the Bulk Licensee i.e. TPC. BSES (RInfra) had been called upon to withdraw the invitation for offers from other sources for supply in its licensed area. In view of this letter from TPC, RInfra appears to have not taken further action probably to avoid legal complication. The above correspondence is appended as Annexure-4.14.

On December 9, 2005 the Commission had given a direction to TPC and RInfra to enter into an agreement as mentioned in 4.8.2 above, which is reproduced below:

"……. The Principles of Agreement (PoA) was executed prior to implementation of Electricity Act, 2003, though PoA required with the parties enter into an agreement in a time bound manner, no agreement was entered into. The Commission is of the opinion that this PoA would not be valid under the provision of EA 2003. However, in the absence of any agreement for supply of power, the PoA is the only agreement available for supply of power from TPC to REL at 220 kV inter connection".

In another order dated December 9, 2005 in Case No.4 of 2003 in the matter of additional outlets for drawal of power by REL from TPC, the Commission ruled as
under:
"……. Therefore, the Commission hereby directs both the parties to enter into an agreement within three months of the order to ensure long term availability of power to Mumbai consumers."

The principles of Agreement relating to Boravili interconnection was signed by TEC and BSES (RInfra) on 31st January 1998 as per the orders of Government of Maharashtra. The Agreement mainly deals with utilization of transmission facilities standby charges, energy charges, minimum off take from TEC supply points etc. Both the parties had agreed in the Agreement that a detailed power supply agreement on mutually agreed basis incorporating the above will be executed by 2nd April 1998. But this had not materialized.

RInfra received a draft PPA from TPC on December 21, 2005 to which RInfra responded on March 9, 2006. While RInfra was negotiating with TPC about the quantum of power for which PPA was to be entered, TPC is stated to have informed RInfra in one of the Apex level meetings held on 24th April 2006 that TPC had already executed a PPA with BEST for 800 MW for a period of 10 years, and allocated 477 MW for TPC-D and offered balance 500 MW to RInfra, RInfra contested this allocation as it adversely affects its consumers. It is stated that the PPA between BEST and TPC was signed in January 2006. Later TPC and RInfra came to an understanding and finalized a draft PPA on 5.4.2007 for 500 MW, with a provision for RInfra to approach MERC for higher

allocation. This was given in the tariff petition of RInfra for 2009-10 as exhibit-VI It is said that PPA could not be signed as the hearing on PPA between TPC and BEST was going on before the Commission.

MERC in its order dated November 6, 2007 approved the PPA between TPC (G) and BEST for 800 MW and the arrangement between TPC-G and TPC-D for 477 MW. While approving the PPA, the MERC in the same order had also held that it has powers under Section 23 of the Act to direct TPC to change the allocation which it will in the event of shortage to ensure that the consumers of all three distribution licensees in Mumbai city are treated equitably for equitable distribution of electricity.

During the hearing before the Commission, the counsel to REL had pleaded for equitable allocation which existed over 80 years and also quoted the Bombay High Court judgment in the case of Dhabol Power Company Vs. MSEB and stated that the Commission can change the terms and conditions of PPA under Section 86 (1) (b) of the EA, 2003. However, the Commission has not changed the allocation in the Power Purchase Agreement between TPC and BEST and arrangement between TPC and TPC (D) but qualified its order stating that it has powers under Section 23 of the Act to change the allocation when there is shortage.

In the same order the Commission has recorded as under:

"…… However, REL-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 division (REL-G) as well. 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."

Aggrieved by the decision of the Commission, REL approached APTEL challenging the approval of PPAs by the Commission. BEST and TPC also filed appeals against the provision of the said order wherein MERC had asserted it had powers to change the allocation in approved PPAs.

APTEL by its order dated May 6, 2008 acceded to the contention of RInfra and commented that the interests of REL have been adversely affected by the Commission in violation of natural justice. According to the order, the Commission ought to have considered the claims of REL for allocation of power while considering the approval of PPAs between TPC (G) and BEST and arrangement between TPC-G and TPC-D.

The order of MERC dated November 6, 2007 was set aside and the commission was directed to consider afresh the arrangements and quantum of allocation approved in the PPAs. TPC and BEST filed appeals before the Supreme Court which in its order dated May 6, 2009 set aside the APTEL order and portion of MERC order and held that as per the provision of the Electricity Act, 2003, generation activity is delicensed and MERC had no powers under Section 23 of the Act to direct TPC, a generating company. The Apex Court has further held that "Fairness or otherwise of the supply of electricity to different distribution companies being outside the jurisdiction of the Commission."

The Honourable Court has limited the judgment to the issue of Section 23 only while mentioning Sections 11, 60 of the Act, which the State Government and the Commission can invoke in extraordinary situations.

The extracts of the APTEL order and judgment of the Supreme Court are appended to this Report as Annexure-4.1 and 4.2 respectively.

While the issue was before APTEL and the Supreme Court, RInfra was in correspondence with TPC and a number of letters were exchanged between the two on executing the PPA. As late as April 2009 TPC and RInfra were prepared to come to an agreement to sign the PPA for 500 MW and file joint application before the

Supreme Court. In the meantime, Supreme Court judgment of May 6, 2009 has totally changed the scenario and TPC had not shown any interest to sign the PPA even for the 500 MW.

Tata Power Company vide their letter dated June 25, 2009 have informed RInfra-D as under:

"……. We consider it commercially inexpedient to enter into a contractual arrangement with RInfra, given the track record, which is apparent inter alia from the continuous spate of litigation indulged by it, be it in connection with the payment for energy charges, take or pay commitment by RInfra, standby arrangements provided by Tata Power the challenge to our licenses and even the recent litigation in respect of the Power Purchase Agreements signed with BEST and Tata Power (Distribution). Needless to add that it is not on account of these alone that we have decided not to continue with the supply of power to RInfra, but it is one of the commercial factors that have been taken into account.

Thus keeping in view a host of reasons, an important reason being our own projected need of power, Tata Power has taken a decision that it would not be in its interest to enter into any contractual arrangement with RInfra for supply of power from its generation facilities.

However, without prejudice to the foregoing, and solely in larger public interest, we offer to continue to supply electricity upto 500 MW till 31st March 2010, thereby giving RInfra time to make alternative arrangements. Your attention is drawn to MERC directives, which require a distribution licensee to tie up power for supplying to its consumers. The intervening period should be utilized by RInfra to make alternative arrangement for meeting the power requirements of its distribution system effective 1st April 2010."

TPC though earlier committed 100 MW from unit-8 (250 MW) as mentioned in TPC tariff petition for 2008-10, had informed RInfra-D on December 31st 2007 that the 100 MW of unit-8 is already committed to sell to others as RInfra-D had not signed the PPA. RInfra had however, informed TPC in its letter dated January 14, 2008 that the case of allocation of power from TPC-G is before the APTEL and not to take any precipitate action.

"TPC in its submission dated March 25, 2008 to the Commission had stated that out of 250 MW capacity of unit-8, as per approved PPA, 100 MW has been allocated to BEST and 50 MW has been allocated to TPC-D……. TPC has tied up the remaining 100 MW to a trading company.

Thus as things stand no power is available to RInfra from TPC from 1st April 2010.

TPC proposes to sell the power outside through its Trading Wing

The above analysis on entering power purchase agreement by RInfra is based on the information and documentation available to the Investigating Authority.

Power Purchase from Other Sources

One view was that RInfra-D would have procured power from other sources under the provisions of Electricity Act, 2003 which allows a Distribution licensee to procure power from any source.

As mentioned earlier RInfra had intention of sourcing power from outside and approached the Commission for open access on the transmission lines of TPC and MSEB. TPC opposed this and submitted to the Commission that BSES are precluded by their licence from sourcing power from any generating company other than TPC. The Commission had ruled in its order dated 29th January 2004 (Case No.20 and 21 of 2003) as under:

"20. Thus, unless there is something in the BSES licence which expressly debars them from seeking access to another licensee's intervening transmission facilities, the framework of EA, 2003 mandates transmission open access right from the coming into force of the Act and even before the period of one year referred to in the first proviso to Section 14. Clause 11 of BSES' license permits them to source power only from bulk licensees and from their own generation. Thus, before June 2004, and even in the absence of any application for pre-ponement under the proviso, BSES would be entitled to access to MSEB's and TPC's intervening transmission facilities for sourcing power from bulk licensees or their generating station. In the absence of any specific provision to that effect in the BSES licence, the Commission is of

the view that TPC cannot claim that they are the only bulk licensee from whom BSES can source power and can therefore not seek intervening transmission facilities for the purpose of obtaining power from some other bulk licensee or their own generating stations."

"23. By this order, therefore, the Commission requires MSEB and TPC, under Section 35 of the EA, 2003, to provide the use of their intervening transmission facilities to BSES to the extent of surplus capacity available with them. However, such use shall be limited to the sourcing of power by BSES from any bulk licensee or their own generating stations within or outside the State."

The Electricity (Supply) Act 1948 defines the "Bulk Licensee" as a licensee who is authorized by his licence to supply electricity to other licensees for distribution by them."

"Licensee" is defined as "Licensee" means a person licensed under part-II of the Indian Electricity Act 1910 to supply energy …….. does not include the Board or a Generating Company. As such there was no other Bulk licensee from whom RInfra could obtain power in bulk at that time.

8.9 FINDINGS OF INVESTIGATION

The following is the summary of findings related to the Terms of Reference

(TOR) for the Investigation:

1. Tariff Petitions Filed by RInfra-D

The tariff petitions, record of proceedings, minutes of the meetings and data were scrutinized. In the initial years 2003-04 to 2005-06 there were some data gaps to be supplemented after technical validation. Later, after completion of Technical validation no data gaps are observed.

On reconciliation with Books of Accounts it is found that in the data furnished by RInfra-D for the true-up, there are no significant variations.

2. Power Purchase

The retail supply tariffs during 2008-09 have substantially gone up due to procurement of large proportion (about 27%) of power from external sources and drawal from the imbalance pool at high cost. This was necessitated due to reduction of supply by TPC from about 760 MW to 500 MW.

The power procurement procedure adopted by the Mumbai Power Management Group (MPMG) which managed the external purchases for the three utilities in Mumbai was found to be transparent under the prevailing shortage conditions.

The cost at which the power had been purchased compare favourably with the cost paid by APTRANSCO during the same period as well as the prevailing rates as per Market Monitoring Cell of CERC.

In regard to reduction in allocation of power by TPC to 500 MW stating that RInfra had not signed power purchase agreement, as discussed in the body of the report it is found that taking into account the earlier developments it would be unreasonable to infer that RInfra-D is solely responsible for not entering into a power purchase agreement. However, RInfra should have brought to the notice of MERC from time to time the circumstances under which they could not enter PPA with TPC.

3. Capital Investment

Considering the infrastructure required (i) to meet the growth in consumer base and load growth, (ii) IT and automation, (iii) streetlights, (iv) the investment on metering etc., and also the increase in equipment / material costs and increase in RI charges paid to Municipal Corporation etc., over the last six years, the capital investment is commensurate with demand growth and other requirements for improving the system performance & reliability and it cannot be said it is an over investment.

The capital investments have translated into major physical assets which are available on site and are under beneficial use.

4. Verification of Physical Vouchers

The physical vouchers are verified for substantial transactions and they do not indicate any discrepancy with Books of Accounts.

5. Expenses of Regulated Business vis-à-vis Other Business RInfra's SAP system ensures that various expenses are placed under correct heads of account, hardly there is any possibility of charging the expenses of other business to regulated business except common expenses such as corporate office etc. The common expenses are allocated based on revenue earned by each division. The allocation is found reasonable after verification of allocation for the years 2007-08 and 2008-09."

20. Thus the ASCI conducted a very thorough investigation and audit of the appellant's accounts and various business processes and profit centres for a period of six years from 1.4.2003 to March 31,2009 and there were no adverse findings therein which clearly establishes beyond any doubt that the appellant has always acted in the best interest of its consumers and is an efficient, economic, transparent and accountable organisation. The Commission in its order dated 15th. July, 2009 itself observed :-

''6. After considering the contents of the investigation report and the representation received from Rinfra as aforesaid, the Commission is of the view that the partial stay of the

order dated June15,2009 in case no 121 of 2008 as stated above vide order dated July,15,2009 has to be vacated.''

The ASCI found that during 2006-07 there was marginal shortage of 136 MU, of which TPC-D partly provided 66MU as a bulk licensee and the balance was met from the imbalance pool. The shortage for R- Infra had gone up to about 369 MU over and above the drawl from R- Infra –G and TPC-G during the year 2007-08. The position had worsened during the year 2008-09 with the reduction of power availability from TPC-G. R-Infra had to resort to purchase about 1718 MU from open market through traders etc. and draw 1075 MU from the imbalance pool at high cost. In doing so, R-Infra procured power from whichever source it could be available to provide continuous power supply to its consumers. The report states that with effect from September, 2008, R-Infra was to procure 250 MW directly and that R-Infra has also followed the same procedure as was followed by MPMG for direct procurement. It also stated that for short term power purchases in 2008-09 R-Infra had followed similar procedure for procurement of 250 MW independently outside the MPMG procurement, which is similar to the procedure being followed by APTRANSCO. The ASCI had enquired the procedure followed by the APTRANSCO, which has purchased substantial power from the open market during 2008-09 and found that they were following similar procedure like sending enquiries to traders. It also found that

power procurements by the R-Infra including the cost of power purchase were approved by the Commission. It also found that the purchase of power from renewable power sources is mandatory and that the appellant had to purchase certain percentage of its total energy requirement from RE sources at price determined by the Commission. The report further states that power purchase from external sources by the appellant was done by following a transparent procedure and the price at which MPMG and the appellant procured power from various sources during 2008-09 were compared with the price published by the Market Monitoring Cell of the Central Electricity Regulatory Commission and also with the price at which APTRANSCO purchased power during the Financial Year 2008-09. The ASCI observed that TPC, BEST and MSEDCL contributed energy to the pool and realized considerable amount at the cost of the appellant's consumers, primarily due to allocation from TPC-G to TPC-D and to BEST. For ensuring continuous power supply the appellant had to resort to high cost purchases of large quantum of power. The energy drawn from pool is priced at WASMP, which is in total variance to primary mechanism fixed by the Central Electricity Regulatory Commission for power drawl under UI. The report also says:- '' ***Looking at the developments that had taken place as detailed in chapter-4 it would be unreasonable to infer that RInfra is solely responsible for not entering into a Power Purchase***

Agreement with TPC.'' There has been no finding in the report that electricity has been purchased at unreasonable rates or that the appellant has passed on costs which were other than those spent towards procurement of power. No malafide motive on the part of the appellant has been attributed. These costs in any event are subject to the scrutiny and approval of the Commission in the Aggregate Revenue Requirement of every year. Accordingly, there is nothing on record to show that any adverse criticism or remarks can be made. A judicial order must not speak out more than what is really necessary. This we say because what is before us is simply a 4- page order containing seven paragraphs. The first paragraph records the gist of the earlier order dated 15.7.2009 which incidentally referred to the Government's order dated 25.6.2009, second and third paragraphs record the terms of references of investigations proposed by the ASCI, the 4th. paragraph records receipt of representation of the appellant with reference to the report of the ASCI, the fifth paragraph records satisfaction of the Commission that the ASCI discharged its functions assigned to it, the sixth paragraph of the impugned order dated 9.9.2010 records necessity of vacating the Commission's earlier stay order dated 15.6.2009 in case no 121 of 2008 and the last paragraph no 7 is what is called the controversial portion of the order complained of.

21. It must be made clear with the support of the Mohinder Singh Gill Case (ibid) that the justification of the order impugned must be sought and based on the order itself and a judicial authority is not permitted to lend support to some other decisions or facts to support an order assailed of or take extraneous help to give an appearance that what has been complained of is legally justified. Irrespective of the question whether the paragraph 7 of the order complained of can really be called a stricture in judicial parlance which is altogether a different question , and whether secondly, ordinarily under the law at extant the State Commission has its legitimate power to record what it has recorded in the impugned order it must be said that it is not the case or plea or finding of the Commission that the contents of the paragraph 7 of the order is the result of ratiocination of the series of events or the series of orders passed by the Commission earlier in the past preceding the investigation to be made by ASCI extensively or of violation of the provisions of the Distribution License Regulations or the Tariff Regulations or of the alleged violation of any direction or order of the Hon'ble Supreme Court. The grounds, allegations, complaints, etc. necessitating an order under section 128 of the Act for investigating into the affairs of the Appellant which were evident from the Order dated

8.9.2009 could no longer be used by the Commission in its impugned order culminating in what has been directed in paragraph 7 thereof. In fact, the Commission did not make use of the grounds in its Impugned Order dated 9.9.2010 which it alleged in its order dated 8.9.2009. The question whether on the facts and in the circumstances of the case there was really any justification of making an order for investigation into the affairs of the distribution business of the appellant has now become academic in view of the fact that the order directing an investigation by the ASCI was not questioned by the appellant and further the order dated 8.9.2009 is a speaking order truly covered under section 128 of the Act and now that after a thorough investigation when more than 350-page report has already been submitted it is of no use now cavilling that the order directing an investigation did really suffer from not a bonafide belief or that the ingredients enumerated in section 128 of the Act were non-existent at that time. However, as stated above, the series of the grounds dovetailed by the Commission and as summarized in the order dated 8.9.2009 do not and cannot form the premise behind the conclusion which is the paragraph no 7 now under reference in the Impugned Order dated 9.9.2010. If the Commission was of the view that a stricture was necessary against the appellant in view of its alleged defiant conduct and reluctance to behave according to the law then in the impugned order itself it would have referred to the series of the

previous orders earlier passed by the Commission and the Government and the attenuating circumstances in order to show that a critical order reflective of the conduct of the appellant would be warranted in the circumstances of the case. It did not do so, and more so it would have been impermissible after the ASCI's report which was published unless of course the Commission was not in agreement with the final outcome of the investigation. It recorded its satisfaction in the work of the Investigating Authority and further recorded that lift of stay was now really necessary and accordingly it did do so though, of course, only after writing something which according to the appellant has the effect of affecting the good will and reputation of the activities of the appellant. Noticeably, the Commission did not make out a case in the impugned order that it was not agreeable with the detailed reasoning of the ASCI and that what it found in its earlier orders were perfectly in order given that the conduct of the appellant, according to the Commission was not really above board.

22. As a bilateral contract has to be read as a whole, as a statute has to be given a harmonious interpretation after reading it integrally, so also a judicial order or a report of investigation based on oral and documentary evidence has to be read as a whole so as to find out its essence. A paragraph here and there cannot be culled out selectively

against its true import and purpose. It is not that the ASCI has not found out that there was no PPA existing between the appellant and a generator or that the appellant purchased electrical energy sometimes at an uncomfortable and high price, but given a thorough reading between the lines of the report it does not appear at all that it justified the apprehensions of the Commission or that it castigated the appellant or that it expressly recorded its deep anxiety that the appellant had been consistently defying the provisions of the Act and the Regulations framed thereunder by the Commission to sub-serve any ulterior purpose. We have extensively extracted the findings of the ASCI and it is not difficult to decipher that it has not made any adverse comments against the appellant; on the contrary its observations are based on objectivity of facts, and evidence collected from different sources. Its approach has been dispassionate. A judicial approach does not suggest that after analysing the entire report what is necessary is a blanket criticism of the utility in question and, indeed, it is also not the finding of the Commission to that effect. Therefore, legally speaking, beginning part of the observations in Paragraph 7 of the Impugned Order cannot be said to have been expressly and logically derived from the summation of the report of the ASCI, and it is also not the finding of the Commission that its finding is made on the basis of its own previous orders and records. The Commission also did not observe that the last paragraph is the

logical outcome of the entire report of the ASCI. That is to say, the impugned observation/ comments in such circumstances cannot be linked with the finding and evidence collected by the ASCI because the summary and the conclusion of the report may not match the entire contents of the paragraph 7 of the impugned order if the matching is sought to be in the nature of making any adverse observation against the utility is question. In the conspectus of the case, the common place argument against the maintainability of the Appeal on the ground that a piece of observation cannot be appealed against as it is not a decree or order does not stand to reason because the law is well settled that an observation or a structure or a remark if not founded on evidence can be assailed against in as much as if it is allowed to remain, it will unjustifiably entail attacking a person or an entity which it may not deserve.

23. Very fairly speaking, the language is not at all harsh, it is not at all a criticism , it is not a castigation, it is not of the nature of censoring an utility, it is not a stricture in judicial parlance, it is not a critique of the appellant's business conduct , it is not in the nature of recommending to any appropriate authority to initiate any appropriate disciplinary proceeding, it does not speak of revoking license, it does not say in

express orders that it has violated the relevant laws or directions, it does not say that the whole conduct of the utility is susceptible to questioning the integrity of the business house, or that it deserves punishment according to the law. It speaks neither. At least as a judicial body we are unable to read it as such. In essence, it says what the law has commanded to the Commission to say. If a question is put as to whether the observation/remarks were really justified in the light of the final and conclusive part of the report of the ASCI then possibly one might be not found faulty if he is inclined to be aligned to the line of reasoning of the appellant because the report is not the report of an accused being found guilty of committing offence and more particularly, when the summary of investigation on all the five issues does not go against the appellant. Yet, the matter of the fact is that the issues concerning which investigation was ordered are the very issues over which the observations/remarks were made by the Commission in the impugned order and by the observations in question the Commission was reminding the appellant, rightly in our mind, of the statutory obligations which the appellant as a distribution licensee must carry out , and considered in that spirit and light, no exception can be taken to the observations made in the last paragraph of the order and, in fact, the Commission by making the observations in question is also carrying out its statutory obligations, as such the question of withering away the

observations by a judicial order is totally uncalled for and unwarranted. Even if, the investigation report was not there, the jurisdiction of the Commission by virtue of the provisions of the statute was not lost , and the Commission has its power to exercise its powers under the Act , and this is what the Commission has actually done in the present case, notwithstanding the fact that upon perusal of the voluminous report of investigation it thought it fit vacate the stay granted by it in its earlier order and did not find anything to comment against the appellant on perusal of the report.

24. The decision in B. Prabhakara Rao (ibid) we also have a leaning to emphasize upon because an administrative body or a quasi- judicial authority has to enjoy more liberal powers to sub-serve public interest and it must adopt flexible processes. The Grindlays Bank case (ibid) deals with a case under the Industrial disputes Act and it has been held that a Tribunal or body should be considered to be endowed with such ancillary or incidental powers as are necessary to discharge its functions effectively for the purpose of doing justice between the parties. J.K.Synthetics Ltd. (ibid) speaks of inherent power of the Tribunal to do justice. It refers to the decisions in Grindlays Bank case (ibid). The Cellular Operations Association case (ibid) deals with the powers,

functions, duties of a Tribunal, and it does not appear that this decision does render any assistance to us. The Hotel Association case in its paragraph 55 and 56 deals with the role of a regulator, and that a regulator while discharging diverse functions has to take care of a number of factors in the interest of consumers. In the Central Power Distribution co (ibid) the role of the regulator has been comprehensively dealt with and it is a case under the Electricity Act,2003. Again, in MERC vs. REL (ibid) powers and functions of the regulator under the Electricity Act, 2003 has been highlighted. The same was also dealt with in the Uttar Pradesh case (ibid) in course of discussion on determination of tariff. The learned Advocate for the Commission while relying upon the aforesaid decisions seeks to convey that the alleged adverse finding is not to be read as adverse; because it is the statutory duty of the Commission to give statutory directions, like entering into power purchase agreement with a generator so that the common consumer is not affected unnecessarily and that purchase of electrical energy at high cost because of absence of PPA is avoided. We are, however, not unmindful that right from the year 2005 the Commission has been giving diverse directions upon the appellant on power purchase and power procurement.

25. Should we wipe out the observation/remarks on the alleged ground that the premise is lacking? To our minds, we should not do so although in express terms and in so many words we have said that the observations/remarks cannot be construed to be adverse criticism on the activities of the distribution business of the appellant. Ex facie, they are not. Given that qua the distribution licensee the State Commission has plethora of statutory functions to perform we must on the facts and circumstances of the case read the observations/remarks as advice or guidance or directions flowing from the statute and the appellant must also read as such.

26. It is, therefore, not a question of success or failure of either of the sides. In the light of what we have said in paragraphs 23, 24 and 25 dispose of the appeal accordingly, and nobody is expected to ask us to make any order as to costs although sometimes awarding cost acts as a panacea of hardship.

(P.S. DATTA)
Judicial Member

(RAKESH NATH)
Technical Member

Reportable/not reportable

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