Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 32 of 2011

Dated 30th May, 2012

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

In the matter of

The Tata Power Company Limited
Represented by B.J.Shroff
Company Secretary
Bombay House
24, Homi Mody Street,
Mumbai-400 001.

…. Appellant(s)

Versus

1. Maharashtra Electricity Regulatory Commission
   World Trade Centre No.1, 13th Floor,
   Cuffe Parade, Colaba, Mumbai 400 001.
   (Through Secretary)

2. Maharashtra State Load Despatch Centre, Kalwa
   (Maharashtra State Electricity Transmission Company Limited)
   Office of the Chief Engineer
   State Load Despatch Centre
   Thane-Belapur Road, P.O. Airoli,
   Navi Mumbai – 400 708.

3. Government of Maharashtra
   Through the Principal Secretary (Energy Mantralaya)
   Mumbai – 400 032.

4. Reliance Infrastructure Limited,
   Reliance Energy Centre,
   Santa Cruz (East)
   Mumbai – 400 055.

5. Brihan-Mumbai Electric Supply and Transport Undertaking
   Electricity House,
   Colaba Causeway,
   Mumbai-400 020.

6. Managing Director
   Maharashtra State Electricity Transmission Co.Ltd.,
   C-19, E-Block, Prakashganga
   Bandra Kurla Complex, Bandra (East),
   Mumbai-400 051.

7. Tata Power Trading Company Limited,
   Corporate Centre, Á'Block,
   34, Sant Tukaram Road,
   Carnac Bunder, Mumbai-400 006.

……Respondent(s)

Counsel for the Appellant(s)	:	Mr. Jaideep Gupta , Sr.Adv. Ms.Nandini Gore,Ms.Aditi Bhatt, Ms.Mandakini Ghosh, Mr.Sankar
Counsel for the Respondent (s):		Mr.Hasan Murtaza, Mr.Gopal Jain for R-7, Mr.Buddy A.Ranganadhan for R-1(MERC),Mr.M.Y.Deshmukh For R-2 & 6, Mr.Ashish Alaspurkas, Mr.B.H.Gujratthi MSLDC, Mr.Yatin

JUDGEMENT

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

1. The Tata Power Company Limited which is owning four Hydro Power Stations and thermal power stations at four different places having total generation capacity of 2027 MW apart from having a segregated distribution business has preferred this appeal being aggrieved with the order dated 29.09.2010 passed in connection with case no. 37 of 2010 by the Maharashtra Electricity Regulatory Commission, respondent no. 1 herein, whereby it refused to quash four letters dated 16.05.2010, 18.05.2010, 12.06.2010 and 30.06.2010 issued by the Maharashtra State Load Dispatch Centre, Kalwa, the respondent no. 2 declining thereby to schedule and dispatch 160 MW and 100 MW of appellant's generation capacity which the distribution division of the appellant had contracted to procure through a Power Purchase Agreement to meet the load requirements of its consumers in its licensed area, and also refusing to pay compensation to the appellant on account of the losses said to have been suffered by the appellant on account of such illegal and unjustified refusal .

2. The respondent no. 7, Tata Power Trading Company Limited (TPTCL) was granted facility of availing itself of open access by the respondent no. 2 for supply of 160 MW power to Tata Power Distribution from 1st May, 2010 to 31st May, 2010 by approval no. MSDC/OA /March 10 / Tata /355 dated 30th March, 2010. On 7.05.2010 the Government of Maharashtra, the respondent no. 3, issued a Memorandum to the Commission containing certain directions in relation to the generation assets of the appellant without raising any objection to the appellant's supplying 100 MW of power since contracted to BEST, but suggested that the appellant should supply 360 MW of power to Reliance Infrastructure Limited (RInfra) till 30.06.2010 and then 200 MW of power to RInfra till 31st March, 2011.

3. On 13.05.2010, 15.05.2010 and 16.05.2010 the appellant requested the respondent no.2 (MSLDC) to schedule 100MW of power to BEST and 160MW of power to Tata Power-Distribution from 17.05.2010. In the said letters the appellant explained to the MSLDC the exigency of scheduling 160 MW to Tata Power Distribution in view of Tata Power Distribution's rising load and its mounting external power purchase cost. The appellant also

mentioned that the TPTCL was already granted open access for scheduling.

4. But the MSLDC refused to concede to the appellant's request for scheduling 160 MW of power to Tata Power Distribution on the ground that it had received instruction from the senior authority *" to await further instructions as the matter had been referred by the State Government to MERC".* According to the appellant, such refusal was guided by non-statuary considerations while it was bound to carry out the statuary duties. The appellant wrote back to say on 18.05.2010 to MSLDC that it was bound to function in terms of the Act and the Government of Maharashtra did not issue any direction in its Memorandum dated 7.05.2010 compelling the appellant to schedule the entire 360 MW of power to RInfra and that the Commission had not passed any order affecting the scheduling request of 160 MW of power to Tata Power Distribution. The appellant pointed out that there was financial burden of Rs. 60 lakh per day which the consumers would have to bear only because of the failure of the MSLDC to carry out its statutory duties. Now, the MSLDC allegedly adopted a most curious course of action by passing the matter in the hands of the

Maharashtra State Electricity Transmission Company Ltd.(MSETCL) which by letter dated 18.05.2010 referred the matter to the Government of Maharashtra to the effect that "*since no order is received from Hon'ble MERC, to kindly issue further instructions to SLDC Kalwa for scheduling power as per the provisions in the Electricity Act ,2003*"

5. In this situation the appellant filed a writ application on 19.05.2010 before the Hon'ble Bombay High Court (writ petition no. 71 of 2011) challenging the Memorandum dated 7.05.2010 issued by the Government of Maharashtra on the ground that the actions taken by the Government would in effect interfere with the right of the appellant. On 19.05.2010 itself the Government of Maharashtra issued another memorandum to MSLDC directing it to maintain status quo regarding scheduling of the appellant's power; consequently, the MSLDC informed the appellant that it would maintain status quo in the light of the Government's Memorandum.

6. The appellant challenged before the Commission the letters dated 16.05.2010 and 18.05.2010 issued by the MSLDC through the case no. 16 of 2010.

7. Before the Bombay High Court the Government of Maharashtra swore an affidavit on 11.06.2010 to the effect that the Government did not exercise its power under section 11 or section 37 of the Electricity Act, 2003 and that the Memoranda dated 7.05.2010 and 19.05.2010 are merely advisory in nature. The learned Advocate General of Maharashtra made this submission before the Bombay High Court and it was so recorded in the High Court's order dated 11.06.2010 and 16.06.2010 and in view of these orders there was no embargo on the part of the MSLDCL to schedule generation of the appellant .

8. Now, the appellant on 11.06.2010 requested the MSDCL to implement the schedule from 14.06.2010 for the power contracted by the appellant but the respondent no. 2 in its letter dated 12.06.2010 maintained that it would continue with the maintenance of status quo till it received further instructions either from the Commission or from the Government. The appellant again moved the Bombay High Court by a fresh writ application impleading the MSLDCL with prayer to reschedule power because of alleged repeated interference by the Government of Maharashtra.

9. On 26.06.2010 the respondent no. 7, Tata Power Trading Company Limited made an application before the MSLDCL for scheduling power to it but the MSLDCL refused to consider the application for scheduling 100 MW of appellant's power to Tata Power Distribution observing *"As the said matter is pending with Hon'ble Commission, this application cannot be considered, at this stage . It shall be considered in view of orders which shall be passed by Hon'ble Commission in the proceeding pending before it".*

10. Though the MSLDC had earlier allowed the appellant to schedule 160 MW of power to Tata Power Distribution through TPTCL with effect from 1.07.2010 concurrence for bilateral transaction of 100MW of appellant's power to Tata Power Distribution as per request of TPTCL was continued to be refused by the MSLDC. Now, in the counter affidavit dated 2.08.2010 the MSLDC pleaded before the High Court that it had refused the scheduling of appellant's generation in exercise of its power under section 33 (1) of the Electricity Act ,2003 in public interest . Again ,in its earlier affidavit in reply dated 9.07.2010 the MSLDC stated that it was not an autonomous body.

11. In the meantime, the Commission dismissed the appellant's petition in case no. 16 of 2010 by an order dated 3.08.2010 on the ground that the relief claimed by the appellant before the Commission was the subject matter in the writ application pending for final order before the High Court.

12. On 20.04.2010 the respondent no. 4, RInfra filed a petition, being case no. 7 of 2010 before the Commission with a prayer to specify mechanism for recovery of cross- subsidy losses and revenue gap of previous year from the consumers who choose to migrate to other distribution licensee. It also filed another petition, being case no. 9 of 2010 on the same day before the Commission praying that pending implementation of Intra-State ABT and Final Balancing and Settlement Mechanism (FBSM), the Commission might modify the existing interim mechanism by directing that all inter-discom exchange of power from the surplus available out of the appellant's generation capacity should happen at the weighted average regulated price of all the units of the appellant put together. It is stated that order of the Commission is yet to come on these two applications.

13. On 9.08.2010 the Bombay High Court passed an order holding inter alia that the appellant has an equally efficacious remedy of approaching the Commission in respect of its grievances in spite of pendency of the writ application. Then the appellant filed a petition being case no. 37of 2010 before the Commission assailing the legality and propriety of the letters dated 16.05.2010, 18.05.2010, 12.06.2010 and 30.06.2010 issued by the MSLDC refusing to schedule 160MW and 100MW of power and seeking compensation and penalty from MSLDC under the Act .On 29.09.2010 the Commission dismissed the petition allegedly on extra legal consideration.

14. Since the writ petition no. 71of 2011 was filed challenging the legality of Memoranda dated 7.05.2010 and 19.05.2010 before the Bombay High Court the appellant also challenged the order of the Commission dated 29.09.2010 by way of writ petition being no. 44 of 2011 before the High Court which by an order dated 18.01.2011 disposed of the said writ petition no.44 of 2011 granting leave to the appellant to challenge the order of the Commission dated 29.09.2011 before this Appellate Tribunal. Hence the appeal.

15. The Commission filed a counter affidavit on 3.05.2011 justifying its order dated 29.09.2010 through its Section Officer contending inter alia as follows:

a) The impugned order was passed in consideration of certain special circumstance and public interest. Paragraph 33 of the order which has been quoted extensively in the counter affidavit is said to be speaking for itself.

b) Though the two Government Memoranda were quashed by the Bombay High Court the effect of the said two Memoranda had to be considered.

c) The Memorandum of the Government dated 19th May, 2010 was consequential to the Memorandum dated 7th May, 2010 and that it was beyond any pale of doubt that the Government was directing the Chief Engineer at the State Load Dispatch Centre to maintain status quo in respect of scheduling 360 MW of power till further directives were received from the Commission or from the Government.

d) The Commission had to recognise that the Government at that point of time had given directions to the respondent no. 2, MSLDC. The Commission in the circumstance took the view that the MSLDC took a reasonable decision as the said MSLDC was entitled to act as per the Government's

Memoranda dated 7.05.2010 and 19.05.2010 issued in an extra ordinary situation of public exigency.

e) There was no direction of the High Court upon the Commission to the effect that the letters of the MSLDC were illegal.

f) The Commission passed the impugned order in its own wisdom.

g) The contention of the appellant that the State Government's Memoranda dated 7th May and 19th May, 2010 having been quashed by the Hon'ble High Court the impugned order automatically becomes unsustainable in law is entirely fallacious because the judgment was passed by the Hon'ble High Court on 18th January, 2011 whereas the impugned order was passed on 29th September 2010. The impugned order dealt with SLDC'S letters dated 16th May 2010, 18th May 2010 and 12th June 2010 and 30th June 2010. At the time the impugned order was passed, the High Court had not passed its judgment. Therefore, the contention of the appellant that the findings arrived at in the judgment subsequently by the Hon'ble Bombay High Court on 18th January 2011 would have a bearing to decide the validity of the impugned order is misconceived.

16. Respondent no. 2 and 6 namely MSLDC and the MSETCL filed a joint written submissions contending as follows:

a) The case no. 37 of 2010 filed before the Commission was not maintainable because the Tata Power Trading Company Limited was not the petitioner in that case and was merely the respondent but the relief claimed was for Tata Power Distribution Company Limited which was not the petitioner in case no. 37 of 2010.

b) Open access was granted not to the Tata Power Company Limited but to the Tata Power Trading Company Limited. Thus, the appellant had no cause of action in case no. 37 of 2010.

c) Despite the impugned order dated 29.09.2010 being appealable the appellant deliberately filed writ petition no. 44 of 2011 before the Bombay High Court and the High Court also took the view that the order was subject to appeal before this Tribunal.

d) The appellant cannot place reliance on the order dated 18.01.2011 passed by the High Court in writ petition

no. 71 of 2011 because the Commission had no occasion to consider the judgment of the High Court.

e) In writ petition no. 71 of 2011 the appellant did not challenge the letters dated 16.05.2010 and 18.05.2010 issued by the MSLDC.

f) It was only in case no. 37 of 2010 filed before the Commission on 20.08.2010 that the letters of the MSLDC dated 16.05.2010, 18.05.2010, 12.06.2010 and 30.06.2010 were challenged.

g) The appellant cannot place reliance on the order of the High Court dated 18.01.2011 passed in writ petition no. 71 of 2011 and for the purpose of the present appeal the events that occurred till the decision of the Commission in case no. 37 of 2010, that is the order 29.09.2010, are required to be taken into consideration.

h) The appellant cannot pray for penalty and compensation on behalf of the Tata Power Trading Company Limited and the Tata Power Distribution Company Limited which was not a party to any proceeding in case no. 37 of 2010.

i) MSLDC is not an independent authority and was not notified under section 31 (1) of the Electricity Act and is not an autonomous body and in view of the second proviso to section 31(2) of the Act to the effect that no State Load Dispatch Centre shall engage in the business of trading in Electricity.

j) The letter of the MSLDC cannot be challenged in view of section 33 (4) of the Act.

k) Prayers for penalty and compensation made before this Tribunal are hit by section 11 of the CPC because upon due consideration the same were rejected by the Commission in its order 3.08.2010 which had attained finality.

l) The respondent no. 2 was justified in maintaining status quo because a reference was pending before the Commission.

m) The appellant suppressed material facts and did not place on record the affidavit dated 24.06.2010 filed before the MERC in case no. 16 of 2010, as such the appellant has not come with clean hands.

n) On 20.05.2010 the appellant filed case no. 16 of 2010 but four prayers were not pressed and only the two

prayers namely imposition of maximum penalty under section 142 and directing entitlement of the Tata Power Distribution to compensation from the respondent no.2 were retained.

o) The case 37 of 2010 was filed challenging the letters dated 16.05.2010, 18.05.2010, 12.06.2010 and 30.06.2010 issued by the respondent no. 2 namely MSLDC, while case no. 16 of 2010 was filed challenging the letters dated 16.05.2010 and 18.05.2010. Since the case no. 16.of 2010 was dismissed and it was not appealed against the case 37 of 2010 was not maintainable.

p) In view of no notification under section 31 of the Act having been issued the MSLDC has been operating under the instructions of the State Government and is not an independent system operator, as such the MSLDC has to abide by the directions of the State Government under section 37 of the Act.

q) The Government of Maharashtra by issuing a memorandum directed the concerned parties by following arrangements specifying therein as an interim

solution to protect the interest of the consumers till the Commission would mandate any other interim solution.

r) The memorandum dated 19.05.2010 issued by the Government of Maharashtra was a clear direction to the respondent no. 2 under section 37 of the Act.

s) The statement of the learned Advocate General before the High Court to the effect that the memorandum dated 7.05.2010 was not the order under section 11 is required to be considered by minutely perusing the contents of the said memorandum coupled with the provisions of the Electricity Act, 2003. The two memoranda dated 7,05.2010 and dated 19.05.2010 read together make it clear that the Government of Maharashtra was exercising power under section 37 of the Act.

17. The MSLDC makes an interesting pleading which is quoted thus; *" despite the fact that by order dated 11.06.2010, passed by the Bombay High court in W.P. (L) No. 1224/2010 , in paragraph 3, the Advocate General referred the affidavit filed by Mr. Dilip Kharat ,Deputy Secretary to Government that the State Government has not exercised its powers under section 11 of the*

Act,2003 while issuing memorandum dated 19.05.2010 is correct but further observation that the memorandum dated 19.05.2010 is not in the form of directions u/s 37 of the Electricity Act, 2003 is totally misleading and an incorrect interpretation. Therefore, even if such an admission was given by the respondent no. 3 State Government, it is a fact on record that memorandum dated 19.05.2010 was issued only in exercise of powers u/s 37 of the said Act, 2003 and therefore the said amount or the concession by the Advocate has to be ignored considering the mandate of section 37 of the Act.". It is contended further that no concession of a counsel can override a mandatory statuary provision. Reference has been made to the decision of the Hon'ble Supreme Court in *Vijay Narayan Thatte and others –Vs State of Maharashtra and others reported in (2009) 9 SCC 92.*

18. Since the appellant challenged the letter dated 16.05.2010 and 18.05.2010 before the High Court the MSLDC understood that status quo should be maintained by all the parties and that pending the decision of the Commission the direction of the MSLDC should be complied with by the licensee or the generating company. The MSLDC exercised its power under section 33 (4) of the Act.

19. The MSLDC is a non profit system operator in view of section 31 of the Act and regulation 7 of State Grid Code Regulations, 2006 clearly provided that adequate autonomy shall be provided to the SLDC.

20. The very appeal before this Tribunal by the Tata Power Company Limited is not maintainable because it was not the aggrieved party, nor did it suffer from any loss and no appeal was preferred by the Tata Power Distribution Company Limited.

21. The MSLDC exercised its power under section 33 (1) by scheduling power on account of open access granted to the respondent no. 7, Tata Power Trading Company Limited with effect from 1.05.2010 for supply of 160 MW of power to Tata Power Distribution Company Limited .

22. Since the MSLDC was not a party to the writ petition no. (L) no. 1224 of 2010 the order dated 11.06.2010 passed by the High Court does not bind it. .

23. The memorandum dated 19.05.2010 was issued in the name of the Government of Maharashtra and it speaks for itself.

24. In view of the prayers A,B,C and E made in case no. 16 of 2010 having been withdrawn by the appellant there was no question of compensation being payable by the MSLDC which reiterates its contentions raised in its affidavits in reply dated 9.07.2010 and 2.08.2010 filed before the Bombay High Court.

25. No compensation was claimed in case no. 37 of 2010 and, moreover, if at all compensation is payable it could be claimed by the Tata Power Distribution Company Limited which was not a party before the MERC in case no. 37 of 2010 .

26. Since, the MSLDC is not a totally autonomous body no penalty can be imposed upon it under section 142 of the Act. Since it is working under the control of the Government of Maharashtra it had to obey and execute the two memoranda dated 7.05.2010 and 19.05.2010.

27. It is in the interest of the public that the Government was of the view that the MSLDC should schedule 360 MW of power to

M/s Reliance Infra till 30.06.2010 on being supplied by the M/s TPC.

28. The Commission rightly recorded a finding that the contention of the appellant that the respondent no.2 was responsible for determining as to on which party the title of the electricity is vested. The Commission rightly held that the MSLDC acted in an extraordinary circumstance in the public interest.

29. The appellant had already claimed power purchase cost to the MERC by way filing annual performance review and, therefore, claim for compensation in the present appeal amounts to enjoying the double claim for which, the appellant is not entitled and in this view of the matter the appeal is not maintainable.

30. The appellant filed a rejoinder to the counter affidavit of the Commission contending as follows:

a) It is a trite law that while courts have inherent powers, a quasi –judicial body like the respondent no. 1 Commission can only exercise power to be located in the statute of which it is a creation. When a statute provides for a thing to be done in a particular manner it has to be done in that manner

or not at all. In writ petition (L) No. 1224 of 2010 the Hon'ble Bombay High Court by its order dated 9.08.2010 held that the letters issued by the second respondent were directions under section 33 (1) of the Act, as such it directed the Commission to adjudicate upon the grievance of the appellant regarding non scheduling of power by MSLDC in terms of section 33 (4) of the Act.

b) The respondent no. 2 was required to act as per the parameters prescribed in the law but it acted on extraneous considerations declining to schedule appellant's power generation. Such act of the MSLDCL is beyond the provision of the section 33 of the Act. The MSLDC exceeded its authority and functions under the Act, and acted in complete disregard of the scheme and sprit of the Act.

c) The Commission also acted outside its jurisdiction as it relied upon extraneous and unrelated considerations to hold that the letter issued by the MSLDC was justifiable.

d) Before the High Court the Government of Maharashtra took the stand that memoranda were merely advisory and were not directions under section 11 or 37of the Act. The Commission failed to ensure that the MSLDC should act in accordance with the provisions of the Act. There was no

statutory obligation upon the MSLDC to act under the memorandum as the Government itself denied having issued any binding instructions and/or direction .The Commission misconstrued the provisions of section 33 (1) and 33 (4) while holding that the refusal of MSLDC to schedule appellant's power was justified under section 33 of the Act as public interest or public exigency is no ground for refusing scheduling and dispatching of power of generating company under the law.

e) In the case of *Tata Power Company Limited Vs Reliance Energy Limited & Ors., 2009 (7) Scale 513* the Hon'ble Supreme Court upheld the inviolable right of generating company to sell power to any person subject to exceptions provided under the Act.

31. The appellant also filed a rejoinder to the counter affidavit of the respondent no. 2 and 6 in the following terms:

a) The plea of the MSLDC that it was bound by the direction of the Government in discharge of its functions under section 31 of the Act is misconceived because the Government expressly told the Bombay

High Court that it did not exercise its power under sections 11 and 37 of the Act.

b) It was not open for the respondent no. 2 MSLDC to go back and suggest that their decision to defer scheduling the appellant's power was exercised in public interest. The respondent no.2 is responsible for optimal scheduling and dispatch of electricity within the State of Maharashtra and, therefore, it cannot interfere with commercial contracts for sale and purchase of electricity.

c) The respondent no. 2, it being an independent authority, has to decide on its own in accordance with section 33 of the Act. It can only refuse scheduling of power on grounds of non-availability of network or metering arrangement.

32. The respondent no. 7, Tata Power Trading Company Limited filed a written submission contending as follows:

a) It adopts the submissions of the appellant and emphasizes that a public statutory duty was cast on the MSLDC and its failure to discharge its duty resulted in loss and damage. In the present case punitive damages

needed to be imposed upon the MSLDC in addition to the damages they are liable to pay so as to prevent such future misfeasance on the part of the public statutory authority. The legislative intent behind introducing the new Electricity Act, 2003 was to ensure (a) open access, (b) to honour contractual obligations and (c) to ensure unhindered access of power for distributors as well as for power generating companies. The actions of the MSLDC have in effect defeated the purpose behind introducing the new energy policy of 2003. That is, the actions of the MSLDC, in view of section 32 (2), section 62 and section 11(2) of the Act, illustrate the breach of public statutory duty cast on the MSLDC under the Act.

b) Section 142 of the Act provides for punishment for non compliance with the directions of the Commission. The basis on which the Commission had refused to grant damages was removed by the order of the High Court dated 18.01.2011 whereby it set aside the Memorandum issued by the Government of Maharashtra.

33. The respondent no. 3, Government of Maharashtra, respondent no. 4, Reliance Infrastructure Limited and the

respondent no. 5, Brihan- Mumbai Electricity Supply and Transport Undertaking were served with notice of appeal but they did not enter appearance. Tata Power Trading Company Limited though it has been categorised as respondent no. 7 stands on the same boat as with the Tata Power Company Limited because it is through the respondent no. 7 that transmission of electrical energy was sought to be conveyed to the Tata Power Distribution Company Limited through open access with the approval of MSLDC, the respondent no. 2. Throughout the length and breadth of hearing it is the Commission, the respondent no. 1 and the MSLDC the respondent no. 2 who have been really the contesting respondents, each supplementing the other with harmonious chorus.

34. On perusal of the pleadings of the parties the following points arise for consideration:

a) Whether the order dated 29.09.2010 passed by the Commission is illegal and without jurisdiction as alleged by the appellant?

b) Whether the action of the MSLDC in refusing to schedule power was right in the light of the fact that the MSLDC is

an independent statutory body required to act independently within the four corners of the Electricity Act, 2003?

c) Is the MSLDC a body subordinate to the Government of Maharashtra as claimed by the MSLDC?

d) Whether in the eye of the law the two government memoranda dated 7.05.2010 dated 19.05.2010 had binding force to the knowledge of the MSLDC?

e) Are the two Memoranda dated 7.05.2010 and 19.05.2010 relatable to section 11 or section 37 or both or section 108 or neither?

f) Whether the Commission correctly interpreted the law on facts presented before it by the parties?

g) What relief is the appellant entitled to?

35. The appeal presents questions of both fact and law. Though there is not large mass of facts they are sought to be constructed by the parties through varied interpretation of law on such facts and the complexity developed only because of the stand of the MSLDC to the effect that it rightly declined to act against the demand of the appellant on the premises that it was merely an organ of the Government which, accordingly it was bound to serve, lacking legitimacy in law to act independently although it was not

unaware of the legal provisions and constructed the two Memoranda issued by the Government of Maharashtra to be legally binding on it as an institution subordinate to the Government. The Commission's approach was not different from the approach of the MSLDC and they acted in unison although, it is highly doubtful whether the Commission did not really understand the import of the law as it is purportedly to be so given to understand. This treatment seeks to analyse the different provisions of law touching upon the different statutory functionaries in order to examine whether in the light of the facts made available by the parties before the Commission it was possible for the latter to reach the conclusion which it so reached and whether what is called 'public interest' or 'public exigency' may entitle a statutory authority to act in a manner not sanctioned by the law and whether the statutory enactments are de hors what is called public interest. Whether, in other words, the statute permits a statutory authority to depart from the provisions thereof to serve what is called public interest except where power is explicitly conferred therefor? Before proceeding to analyse these questions it is incumbent upon us to record the submission of the parties.

36. The learned advocate for the appellant makes the following submissions:

a) In terms of section 10 (2) of the Electricity Act,2003 a generating company can supply electricity to any licensee which may include a distribution licensee or trading licensee or a consumer and in view of the decision of the Hon'ble Supreme Court in *Tata Power Company Limited Vs Maharashtra Electricity Regulatory Commission & Ors. (2009 ELR (SC) 246)* a generating company has complete freedom in respect of choice of site, buyer, investment etc. It has a freedom to enter into contract with distribution company subject to the provisions of the Act.

b) The MSLDC acted in derogation of a statutory duty to sub serve unlawful object. Though it is a creature of statute under section 31 (1) of the Act it conveniently forgot to act in terms of section 32 and 33 of the Act, and section 33 does not permit a statutory body like the MSLDC to breach the provision of the statute expressly in the name of public interest.

c) It was not unknown to the respondent no. 2 that the Government of Maharashtra through its affidavit filed before the Bombay High Court on 11.06.2010 has stated that its

Memorandum dated 7.05.2010 was not a statutory directive, that learned Advocate General categorically submitted before the Hon'ble High Court that it was not a directive at all that the High Court of Bombay in its order dated 11.06.2010 recorded the submission of the learned Advocate General made on 11.06.2010 itself, but even then the respondent no. 2 by letter dated 12.06.2010 still insisted on maintaining status quo till it received further directives either from the Commission or from the Government and this conduct of the MSLDC is deliberately arbitrary, unreasonable, malafide and capricious.

d) The 'state of flux' theory not advanced by the Government before the High Court but propounded by the Commission is merely a ploy to perpetuate an illegal act.

e) The stand of the MSLDC that it is under the control of the Government of Maharashtra and the Maharashtra State Electricity Transmission Company Limited is fallacious. Reference has been made to the decisions in ***VK Ahokan Vs Assistant Excise Commissioner & Ors. (2009) 14 SCC 85, Ashok Lanka & Anr. Vs. Rishi Dixit & Ors. (2005) 5 SCC 598 , M.P. Wakf Board Vs. Subhan Shah (D) By LRs. And Ors. (2006) 10 SCC 696, Joint Action Committee of***

Air Line Pilots' Association of India (ALPAI) & Ors. Vs Director General of Civil Aviation & Ors. (2011) 5 SCC, and the Purtabpore Co., Ltd. vs. Cane Commissioner of Bihar and Ors. 1969 (1) SCC 308. We shall read each of the decisions in course of our deliberation but the ratio of these decisions is that a statutory authority is obligated upon to act statutorily in terms of what is ordained in the statute independently and without being subordinate to any other person or authority even be such authority a superior one. and while acting within the four corners of law it is not answerable under the law to such person or authority.

f) When the Government of Maharashtra clarified before a Constitutional Authority, as the High Court is, that they have not issued any binding statutory direction it is unreasonable for the MSLDC to still go on claiming that they continue to be bound by such requests/ suggestions treating the same to be directions. The intense search for alleged real construction of the two Government Memoranda on the part of the MSLDC on the face of the submission of the learned Advocate General which was recorded in the High Court's Order was unwarranted.

g) The contention of the MSLDC that the statement of the learned Advocate General was a mere concession and is not binding upon the MSLDC is a perfect instance of perversity.

h) The Commission did not recognise that the action of the MSLDC is contrary to the provisions of the Act and the judgment of the Hon'ble Supreme Court in Tata Power Company Limited Vs MERC and Ors.

i) The reliance placed on the Government Memorandum by the respondent no. 2 even after the Bombay High Court had passed its order dated 11.06.2010 was unlawful and arbitrary, malicious and abuse of powers. The claim of the respondent no. 2 to be bound by illegal and wrongful Government Memoranda directing the appellant to supply power to another distribution licensee without the consent of the appellant is prima facie, illegal, misconceived and perverse.

j) There was achieved complete clarity regarding the nature of the Government Memoranda after the learned Advocate General made submission on 11.06.2010 before the High Court that the Memoranda were not directives in nature but merely suggestions or requests. Since the Government Memoranda otherwise did not have statutory backing it was

not open to the MSEDCL to claim that it was bound by the Government communications. So far as the Commission is concerned, it only added to the illegality by according seal of illegality already committed by the respondent no. 2.

k) The contention of the Commission and that of the MSEDCL that they were confused in respect of the Memoranda issued by the Government of Maharashtra is a mere ploy because the MSEDCL was fully conscious that it was not to be bound by the Government Memoranda and the Government can not act contrary to the law. The Commission also had no occasion to suffer from any confusion; and merely to perpetuate the illegality it introduced the concept of 'state of flux'.

l) The Commission and the MSEDCL cannot be said to had acted without having any knowledge of the legal provisions.

m) The conduct of the respondent no. 2 has been actuated by malice and in blatant disregard of the provisions of the Electricity Act and the decision of the Hon'ble Supreme Court dated 6.05.2009 and the decision of the Bombay High Court dated 11.06.2009.

n) That the MSEDCL was so mentally oriented to flout the provisions of law that even after the order of the Bombay

High Court dated 18.01.2011 was passed it continued to refuse scheduling the generation capacity of the appellant through communication dated 29.01.2011.

o) That the respondents acted malafide is evident from their conduct and it is not always possible to provide elaborate details of malafide conduct. Malice can be reasonably inferred from the circumstance of a given situation and the conduct of the party.

p) The appellant suffered from grave financial losses occasioned by the illegal act of the respondent no. 2; as such the appellant is entitled to be compensated for the losses. Malicious abuse of power and deliberate maladministration caused injury to the appellant. The argument that compensation is available only because of breach of the Article 21 of the Constitution is ex- facie illegal, and the decision has been referred to the *Common Cause, a registered society Vs Union of India,(1999) 6 SCC 667.*

q) The MSEDCL knew that it had no power to defer the scheduling of the appellant's generation capacity. Even then the MSEDCL consistently maintained that it acted at the behest of the Government Memoranda. The appellant suffered loss of Rs.92 crore. Reliance has also been placed

on the decision in *Lucknow Development Authority Vs. M.K. Gupta, AIR 1994 SC 787.*

37. The learned advocate for the respondent no 2 and 6 and the learned advocate for the Commission made separate oral submission but with complete unity between them. The learned advocate for the respondent no. 2 and 6 makes the following submissions:

a) The Tata Power Trading Company was not the petitioner in case no. 37 of 2010. The relief claimed in that case was for Tata Power Distribution Company Limited which also was not the petitioner in that case; nor is it the appellant in the present appeal.

b) The appellant, it being a generating company, had no cause of action in case 16 of 2010 or case no. 37 of 2010, nor does it have any cause of action to maintain the present appeal.

c) The appellant can not place reliance on the orders which were passed after the order dated 29.09.2010 was passed by the Commission.

d) The appellant's reliance on the order dated 18.01.2011 passed by the Hon'ble Bombay High Court in writ petition

is totally misplaced because the Commission had no occasion to consider the judgment and order of the Hon'ble Bombay High Court.

e) The appellant challenged before the High Court the Government Memorandum dated 7.05.2011and not the letters dated 16.05.2010 and 18.05.2010 issued by the MSEDCL.

f) In case no. 16 of 2010 the appellant challenged the letters dated 16.05.2010 and 18.05.2010 but in case no. 37 of 2010 the appellant challenged the letters dated 16.05.2010, 18.05.2010, 12.06.2010 and 30.6.2010 issued by the respondent no. 2.

g) The present appeal is liable to be dismissed because the prayers (d) and (f) regarding penalty and compensation were rejected by the Commission in the first round of litigation and the same attained finality.

h) In view of section 31 of the Electricity Act 2003 the MSLDC has not been notified by the Government under section 31 (2) of the Act, as such the MSLDC is not an independent system operator. As a result, the MSLDC has to abide by the directions/ orders issued by the Government under section 37 of the Act and therefore, it

obeyed the Government Orders in the form of Memoranda dated 7.05.2010 and 19.05.2010. In a word, the MSLDC is not an autonomous body.

i) The two Government Memoranda served the public interest and protected the interest of the consumer.

j) The Government also observed in the said Memoranda that as the Commission have issued a public notice asking for suggestions and fixed a public hearing the Government passed order under section 37 of the Electricity Act.

k) There was clear direction upon the Chief Engineer, State Load Dispatch Centre and all officers and employees to maintain *status quo* in respect of scheduling 360 MW of power till further directives were received from the Commission or the Government.

l) The submission of the learned Advocate General before the Bombay High Court has to be considered in the totality of situation of facts. It is clear that the two Government Memoranda were issued under section 37 of the Act. In *Vijay Narayan Thatte Vs State of Maharashtra and Ors., reported in (2009) 9 SCC 92* it was observed by

the Hon'ble Supreme Court that no statement or concession can override a mandatory statutory provision .

m) The MSLDC is a non profit system operator in view of section 31 of the Act and regulation 7 of the State Grid Code Regulations, 2006 clearly provided that adequate autonomy shall be provided to the State Load Despatch Centre.

n) Apart from the directions of the Government of Maharashtra the MSLDC exercised its powers under section 33 (1) of the Act by scheduling the power in view of open access granted to the respondent no. 7 with effect from 1.05.2010 for supply of power to Tata Distribution Company Limited .

o) The respondent no. 2 submits that in paragraph 7 of the order dated 3.08.2010 the Commission dismissed the petition.

p) The MSLDC submitted that a suo moto proceeding was initiated in respect of the memorandum dated 7.05.2011 and a public notice was issued.

q) The MSLDC refers to certain sections of the Electricity Act 2003 in support of its arguments, which we will notice as we will proceed with the discussion.

r) A five member committee was appointed by the Government for considering several representations and the Government took a decision that in the public interest the Commission should take suitable measures. Accordingly, the Government directed the appellant that 360 MW power should be continued to be supplied to M/s Reliance Infra till 30.06.2010 by M/s TPC at a regulated rate to be decided by the Commission and the Government further directed that from 1.07.2010 M/s TPC may sell 160 MW power to TPC distribution at regulated rate and thereby reducing its supply to M/s Reliance Infra from 360 MW to 200 MW.

38. Mr. Buddy A. Ranganadhan, the learned advocate for the Commission makes the following submissions :

a) The impugned order in consideration of disruption of public order, public exigency and public interest was not illegal.

b) In the perspective of the facts and circumstances the MSLDC was called upon to function in the larger public interest. Protecting the interest of consumers and supply of electricity to all the areas is mandate of the statute.

c) The administrative action of the MSLDC was reasonable in view of ‘state of flux’ prevailing in view of the Government’s

two Memoranda dated 7.05.2010 and 19.05.2010 which were issued in consideration of public exigency.

d) The Commission was correct in holding that the MSLDC was entitled to act in terms of the aforesaid two Government Memoranda and this is not diluted even in view of the submission made by the learned Advocate General before the Bombay High Court that the two Government Memoranda were simply a request to the Commission.

e) The Bombay High Court even observed that the memorandum dated 19.05.2010 left it beyond a pale of doubt that the State Government was directing the MSLDC to maintain the status quo. As such, the finding of the Commission was truly in line with the observation of the Bombay High Court.

f) Even if it is assumed for the sake of argument that the letters of the SLDC which were under challenge could not have been issued on a strict interpretation of section 33 of the Electricity Act 2003 the question that would remain to be answered is whether the SLDC could be directed to compensate Tata Power for having issued such letters.

g) Even a violation of statutory provision is not sufficient to attract award of damages. It requires proof that the public

authority which is alleged to have violated the statutory provision acted with malice or misfeasance or with view to cause loss to the claimant. Reference has been made to the decision in *Promod Malhotra and Ors. Vs. Union of India & Ors. reported in (2004) 3 SCC 415* . It is contended that the decision in *Common Cause, A Registered Society Vs. Union of India & Ors. reported in (1999) 6 SCC 667* does not help the appellant.

39. The pivotal point that arises for consideration is whether the appellant is entitled to damages or compensation on account of loss said to have been occasioned by the conduct of the MSLDC in refusing to scheduling power to the respondent no. 7, Tata Power Trading Corporation Limited with whom the appellant had an agreement to that effect. A volley of questions have arisen, the principal being whether the MSLDC, the respondent no. 2 herein, was justified in saying that it is bound to act in terms of the directions of the Government, as a Government organ, no matter whether what is provided in the statute requiring of the MSLDC to do; and that the submission of the learned Advocate General before the Bombay High Court as recorded in the High Court's Order which is said to be contrary to the observation of the

Commission in the impugned order or contrary to the contention in the counter affidavit of the respondent no. 2 & 6 in this present appeal does not bind the Commission or the MSLDC because the concession given by the learned Advocate General is contrary to the law. Such a dangerous proposition emanating from a statutory authority and recorded in black and white presents a horrible state of affairs and needs therefore a close examination. Arguendo, the two Memoranda dated 7.5.2010 and 19.05.2010 are in essence directions to the MSLDC to do in a particular manner, two questions are left to be answered. The first one is whether the Government can make such a direction and secondly whether the MSLDC is too infant to stand alone on its foot when the foot is provided by the statute. Together with these two, there is a third associated question: whether the MSLDC is a subordinate organ of the Government as is vociferously argued by the learned counsel for the respondent no. 2 . Malice and misfeasance sometimes lie in dormant position and has to be found out through the facts and circumstances of a case and conduct of the parties. Compensation or damage can be claimed even in absence of malice and misfeasance. An important point has been raised that the two Government Memoranda were issued for compliance by the MSLDC in public interest and in public exigency and it is

argued that an act done in pursuance of public exigency cannot call for award of damages. This bold assertion by the MSLDC and the Commission as well raises a fundamental point as to what is called a public interest. Whether statutory provisions which every statutory authority is by the terms of a particular statute called upon to exercise and implement would be justifiably ignored on the grounds of its against public interest? Whether a parliamentary enactment is de hors the public interest? Can it be said that if the MSLDC had acted in terms of the law its actions would have been in derogation of the public interest? Is public interest an extra-legal consideration necessary to be reckoned with contrary to the law or whether public interest or preservation thereof is inherent in statutory enactment? How far the doctrine of concession invoked by the MSLDC is acceptable? Whether the submission of the learned Advocate General before the Bombay High Court was contrary to the law? How would the MSLDC justify its action in refusing scheduling power even after the Bombay High Court quashed the two Government Memoranda and communication of the same to the MSLDC? Would the MSLDC still be justified in saying that it would maintain status quo till it received further communication from the Government or the Commission. Broadly, these are the questions that focussed in the margin of our

consciousness as we proceeded to hear the appeal. For the present, certain important events require to be mentioned.

40. On 30.03.2010, the Tata Power Trading Company Limited, respondent no. 7 was granted permission for open access by Maharashtra State Load Dispatch Centre, Kalwa (MSLDC) to supply 160 MW power to Tata Power Distribution from 01.05.2010 till 31.05.2010. It is not the case of the MSLDC that it granted open access only at the behest or request of the Government of Maharashtra. The Tata Power Company Limited which is the appellant herein, the Tata Power Distribution Company Limited and the Tata Power Trading Company Limited serve different functions though they may belong to the Tata Group of Industries, more particularly under the Companies Act, 1956 as amended, these business concerns are all separate juristic entities. However, on the very next day that is 31.03.2010, the Tata Power Company requested the MSLDC to maintain status quo in the matter of scheduling generation of TPC to the Distribution Companies of Mumbai till further advice. As it will be seen shortly, this letter dated 31.03.2010 by TPC to the MSLDC is of no consequence because of subsequent correspondences by TPC to MSLDC requesting for scheduling in favour of the TPC-D. On

20.04.2010 Reliance Infra filed two petitions before the Commission. In one petition it requested the Commission to specify appropriate mechanism for recovery of its cross subsidy losses, and in the second petition it prayed for modification of the existing interim balancing and settlement mechanism by directing that all inter-distribution companies' exchange of power from surplus available out of the appellant's generation capacity should happen at the weighted average regulated price of all the units of the appellant together. The Commission's order on the two prayers did not follow immediately but on 7.05.2010 the Government of Maharashtra (GOM) issued a Memorandum containing various decisions/directions on the respondent no. 1 Maharashtra Electricity Regulatory Commission (MERC) in relation to the generation assets of the appellant, further suggesting that Tata Power Company Limited, appellant herein would supply 360 MW to RInfra till 30.06.2010 and thereafter 200 MW to Rinfra till 31.03.2011. On 13th May, 2010, the TPC addressed a letter to the MSLDC requesting it to schedule 160 MW power to TPC-D and 100 MW power to BEST with effect from 17.05.2010. On 14.05.2010 the Government of Maharashtra issued a letter to TPC saying that it did not seek to impose any solution on any one. It may be mentioned in this connection that the Secretary to the

Government of Maharashtra addressed a letter on 14.5.2010 to the TPC with copy to MSLDC and other authorities including MSLDC saying that an extra ordinary situation has arisen that may adversely affect a very large number of cross subsidised consumers of Rinfra and inter- alia referred to the Government Memorandum dated 7.05.2010 reiterating Government's view that the TPC should sell to out side of Mumbai and when any licensee of Mumbai would be in deficit an interim solution suggested by the Government to the TPC and the Rinfra seeking cooperation of TPC with the Government. But at the same time the Government by the letter dated 14.05.2010 pointed out that it did not seek to impose any solution on any one. On the very same day, the TPC addressed a letter to Rinfra stating that the TPC was making an arrangement to schedule to 200 MW of power to a willing buyer and should advise the MSLDC accordingly. On 16.05.2010, the MSLDC refused to accede to the request of the appellant for scheduling 160 MW of power to Tata Power Distribution on the ground that it had received instructions from senior authority to await further instructions as the matter had been referred to the Commission by the Government. On18.05.2010 the appellant wrote to the MSLDC stating that the Government of Maharashtra by letter dated 14.05.2010 did not seek to impose

any solution on any party and that the Commission did not pass any order affecting the scheduling of 160 MW to Tata Power Distribution and there is unnecessary financial burden of Rs.60 lakh per day on the consumers because of failure on the part of the MSLDC to carry out its duties. The MSLDC by letter dated 18.05.2010 informed the appellant that it had referred the matter to MD, MSETCL, who in turn referred the matter to the Secretary Energy, Government of Maharashtra vide letter dated 18.05.2010 stating "*… since no order is received from Hon'ble MERC, to kindly issue further instructions to SLDC Kalwa for scheduling power as per the provisions in the Electricity Act, 2003*. "Then on 19.05.2010 the appellant filed a writ petition being no. (L) 1224 of 2010 assailing the Government Memorandum dated 7.05.2010 on the ground that the said memorandum purported to interfere with, restrict or otherwise circumscribe the legal rights of the appellant over its generation capacity. By way of interim relief in the said Writ Petition, the appellant also prayed before the Hon'ble High Court for an order to restrain the Government of Mahrashtra from giving any effect to or acting on the said memorandum. Interestingly, on the very same day i.e. 19.05.2010 the Government of Maharashtra issued another Memorandum to MSLDC directing it to maintain status quo regarding scheduling of

appellant's power. Thus, the two Government Memoranda dated 7.05.2010 and 19.05.2010 are the core issues and before we proceed to the other events chronologically it is better to reproduce the two Memoranda issued by the Government. The Memorandum dated 7.05.2010 is as follows:

MEMORANDUM

1.Background.

1.0 Whereas the Government received several representations to intervene in public interest as M/s Tata Power Company's (Generation) decision to stop supplying 460 MW of power from 1st 2010 to M/s Reliance Infrastructure (Distribution) would have resulted in tariff shock for consumers of M/s Reliance Infra or load shedding, resulting in disruption of public order and

1.1. Whereas the Government advised M/s T.P.C. to maintain the status-quo in public interest and appointed a five member committed to study all aspects of the matters and submit a report to the Government : and

1.2. Whereas the five member committee inter-alia considered (a) facts and arguments presented to it by M/s TPC and M/s Reliance Infra (b) the provisions of the Electricity Act 2003 : (c) the background of the dispute between M/s TPC and M/s Reliance Infrastructure with regard to sinning of Power Purchase Agreement: (d) the conflict of interest arising from the grant of parallel license to M/s TPC (Distribution) to supply electricity to consumers in the existing license area of M/s Reliance Infrastructure (D) : (e) the dominant position of M/s TPC (D) vis-à-vis M/s Reliance Infra (D) ,and more specifically, its cross-subsidized consumers in the absence of any mechanism to counter balance the effect of cherry- picking of cross-subsidizing consumers by M/s TPC(D): (f) the significant difference in the existing mix of consumer categories between M/s TPC (D) and M/s Reliance Infra which puts M/s T[PC (D) in a position of

advantage in situation of competition (g) the fact that M/s TPC (Generation) was committed to signing a PPA for 500 MW with M/s Reliance Infra until it was granted a parallel license :and

1.2. Whereas M/s Reliance Infrastructure has not made arrangements for procurement of adequate power at reasonable cost in anticipation of failure to enter into a PPA with M/s TPC (Generation : and

1.3. Whereas protection of interest of consumers is primary objective of the Electricity Act 2003

2. <u>Decision of the State Government:</u>

2.0 Therefore, the Government is of the view that in public interest the MERC should take suitable measures at the earliest, taking in to account the report of the five members committee, (Annexure-I), and more particularly, the following broad principles, as well as any other fact, principle or legal provision which needs to be taken into account for protecting the interest of consumers, and more particularly, the cross-subsidized consumers of M/s Reliance Infrastructure:

i)M/s TPC's (Generation) obligation to use its generation capacity (of specified units) to supply power at regulated/ reasonable rates to distribution licensees of Mumbai on priority and not to take advantage of its dominant position in the absence of a PPA with M/s Reliance Infra to trade power, divert power to TPC (Distribution) or to offer power to M/s Reliance Infra at higher rates , thereby adversely affecting the consumers of M/s Reliance Infrastructure,

ii)M/s Reliance Infra's obligation to ensure (subject to suitable penalties to be specified by MERC) that its consumers do not have to supper any increase in tariff only on account of its failure to procure power at a reasonable cost over and above the quantum of power that M/s TPC can be reasonably expected to supply to it after taking care of its commitments under the PPA with BEST and genuine requirement of TPC (D).

iii)The need to put in place a mechanism to ensure that subsidized consumers of M/s Reliance Infra do not have to suffer abnormal tariff rise only on account of the effect of migration of its cross subsidizing consumers to M/S TPC, which is in dominant position.

iv)The need to assure that if here is any surplus from the power generation meant for Mumbai licenses at anytime, it should be supplied to deficit distribution licenses of Mumbai at the average cost of purchase of any the reasonable rate to be determined by MERC.

2.1 Further, the Government expects the concerned parties , to abide by the following arrangements, as a reasonable ad-interim solution in public interest until MERC mandates any other interim or long-term solution to protect the interest of consumers as discussed above or the Government considers it necessary to issue any directives in public interest:

i)M/s TPC have already been informed by the Secretary, energy to honour its PPA with the BEST and supply 100 MW of power accordingly, BEST in turn will utilize this for its own requirements. Whenever there is a surplus, the same should be given to Mumbai licensees only at rates to be decided by MERC.

ii)The remaining 360 MW power should be continued to be supplied to M/s Reliance Infra till June 30.2010 by M/s TPC at a regulated rate decided by the MERC.

iii)With effect from 1.07.2010, M/s TPC may sell 160 MW power to TPC (Distribution) at regulated rates, thereby reducing its supply to M/s Reliance Infra from 360 MW to 200 MW.

iv) Whenever, there is any surplus from the generation as mentioned above, the same should be used to meet the deficit of Mumbai licensees

.

v)M/s Reliance Infra has given in writing to Secretary, Energy that they have got bids for 315 MW of Power from next year as midterm arrangement. They are confident of meeting the

growing requirement of power for Mumbai from 2014 onwards (M/s Reliance Infra's letter to the State Government is at Annexure –II.

vi) In view of the commitments of M/s Reliance Infra, M/s TPC may be advised to continue to supply of 200 MW until 31st March 2011 i.e. until M/s Reliance Infra starts getting its supply of 315 MW under the PPA, which is in the offing.

Secretary (Energy)
Government of Maharashtra

41. The other Memorandum dated 19.05.2010 issued by the Secretary to the Government of Maharashtra is as follows:

MEMORANDUM

Whereas, Memorandum no. TPC 2010/CR-131/NRG-1 dated 7th May, 2010 was issued by the government, inter-alia requesting MERC to look into the facts, issues and suggestions in the report of the Five Member Committee appointed by the State Government with the objective of protecting the interest of consumers in the extra ordinary situation arising from Tata Power decision to stop supply of 360 MW to R-Infra.

And whereas, the MERC has issued a public notice asking for suggestions and fixed a public hearing on 28th June,2010 in this matter.

And whereas in the mean while Tata Power has taken cognizance of the government's concerns about the larger consumers interest and sent some suggestion to the government by its letter dated 16th May ,2010 and the government in turn is forwarding the same to the MERC as the MERC is now seized of the matter,

And whereas, Tata Power Company has applied to the State Load Dispatch Centre (SLDC) to schedule 160MW power to Tata

Power Company (Distribution) contrary to advice of the government in the aforementioned memorandum,

And whereas the MD, MSETCL vide letter no. MD/MSETCL/7580 dated 18th May,2010 has requested to the government for instructions with regard to Tata Power's aforementioned request for scheduling of 160 MW power as no order has been received from the MERC,

And whereas the government has considered the fact that although MERC is now seized of the matter, it is expected to take some time before arriving at final decision in the matter,

And whereas , the government is of the view that any change in power allocation while MERC has already initiated the process for considering this issue and keeping in mind the extraordinary situation which may likely to result, creating lot of public unrest and inconvenience to the consumers, the government has decided in the larger interest of consumers to issue following directions to MSETCL:

ORDER

The Chief Engineer, State Load Dispatch Centre, Kalwa and all the officers and employees working under him are hereby directed to maintain status-quo in respect of scheduling of 360 MW power under reference till further directives are received or obtained from MERC or till further orders/ directions in this behalf are issued by State Government.

By order and in the name of the Governor of Maharashtra

(Subrat Ratho)

Secretary to the Government of Maharashtra

42. Consequent upon the issuance of the above Memorandum of the Government of Maharashtra the MSLDC wrote a letter on

20th May, 2010 to the appellant stating that it would maintain status-quo in the light of the Memorandum. The appellant separately challenged the letter dated 16.05.2010 and 18.05.2010 of MSLDC before the MERC under section 86 (1) (c) and 33 (4) of Act, 2003 and also lodged complaint in case no. 16 of 2010 before the Commission under section 142 of the Act. On 11.06.2010 the matter came up for hearing before the Bombay High Court and, meanwhile, a counter affidavit was also filed by the Government whereupon the High Court passed two orders on 11.06.2010 and 16.06.2010 observing after recording the submission of the learned Advocate General that the State Government had not exercised its powers under section 11 or 37 of the Act 2003 and that the two memoranda in question were merely advisory .The Hon'ble High Court further held that there was no embargo on the MSLDC on the scheduling of appellant's generation capacity. Unquestionably, the order of the Bombay High Court dated 11.06.2010 was communicated by the appellant to the MSLDC on 11.06.2010 itself by a letter and requested the MSLDC to implement the schedule with effect from 14.06.2010 for the power contracted by the appellant including 160 MW of power which was refused by the MSLDC to be scheduled earlier.

43. In response to the appellant's letter dated 11.06.2010 the MSLDC on 12.06.2010 wrote back to say that it would still continue to maintain status quo with respect to scheduling appellant's generation capacity till it received further instructions from the Commission or from the Government of Maharashtra . Meanwhile, the Bombay High Court made a formal order correcting the date of the memorandum as 7.05.2010 instead of as 18.05.2010 which was wrongly typed .Then on 23.06.2010 the appellant filed Chamber Summons in the writ petition before the Bombay High Court for amendment of the writ petition so as to implead the MSLDC and the Commission and to include additional prayers on account of repeated interference of the Government of Maharashtra and consequent refusal of the MSLDC to schedule the power.

44. In this connection, three letters written by the MSLDC to the appellant require mentioning. The letter dated 16.05.2010 is posterior by a little over a week to the Government's Memorandum dated 7.05.2010 whereby the MSLDC wrote to the appellant in these words : *I have been advised by Senior Authority to await till further instructions as the matter has been referred by the State Government to MERC, till that time your Open Access has been*

deferred . The second letter from MSLDC to the appellant is dated 18.05.2010 wherein it has been written: "*M.D. MSETCL Mumbai has forwarded the subject matter to Secretary (Energy) Government of Maharashtra with copy to ED (Op) TPCL Mumbai vide letter and reference no.2. As such regarding scheduling status quo will be maintained".* Then the third correspondence of the MSLDC is dated 20.05.2010 whereby the Chief Engineer of MSLDC forwarded a copy of memorandum issued to the Managing Director MSETCL Mumbai by the Secretary to the Government of Maharashtra for maintaining status quo regarding scheduling of power. That memorandum is dated 19.05.2010 which we have quoted above and which was the subject matter of challenge before the Bombay High Court.

45. Now, on 20.05.2010 Tata Power Company Limited filed a petition before the State Commission being case no. 16 of 2010 against MSLDC and the Government of Maharashtra amongst others praying for the following relief:-

"a. direct the Respondent No.1 to comply with the provisions of the Electricity Act, 2003, the Maharashtra Electricity Regulatory Commission (State Grid Code) Regulations, 2006 and Scheduling

and Despatch Code of 16.01.2008 and withdraw the letter dated 16.05.2010 and that 18.05.2010 issued by Respondent No.1 deferring the open access granted to the Respondent no.2 and refusing to schedule 160 MW power to Tata Power- Distribution from 00 hrs of 17.05.2010;

b. direct the Respondent No.1 to schedule 160 MW of power to Tata Power-Distribution through Respondent No.2 in accordance with the open access approval granted by the Respondent no.1 by its approval No. MSLDC/OA/Mar10/Tata/355 dated 30.03.2010;

c. declare that the impugned letter dated 16.05.2010 and that 18.05.2010 issued by Respondent no.1 deferring the open access granted to the Respondent No.2 and refusing to schedule 160 MW power to Tata Power-Distribution from 00 hrs of 17.05.2010 are in violation of the provisions of the Act and the Regulations of this Hon'ble MERC;

d. direct the Respondent No.1 to show cause and thereafter impose the maximum penalty under section 142 of the Act.

e. pass appropriate interim orders directing the respondent no.1 to schedule 160 MW of power to Tata Power-Distribution with immediate effect till the disposal of the present petition;

f. direct that Tata Power-Distribution shall be entitled to compensate from the Respondent No.1 for the power bought from

the spot/UI/ short term power market, up to 160 MW not scheduled to the Petitioner from 00 hrs on 17.05.2010 until such power is finally scheduled;

g. pass ex-parte ad interim order in terms of prayer (e) above;

h. pass such other and further orders / directions as the Hon'ble Commission may deem appropriate in the facts and circumstances of the case."

46. In this petition being case no. 16 of 2010 filed on 20.5.2010, the Commission passed an order on 3.8.2010 wherein there is a reference to the writ petition filed before the Bombay High Court challenging the two Government Memoranda and also the High Court's order dated 11.06.2010 and correctional order dated 16.06.2010. There is also a reference to the filing of Chambers Summons which was pending. In view of the pendency of writ petition, the prayers a) to c) and e) made in case no.16 of 2010 lacked immediacy.

47. The case no. 16 of 2010 lost its importance to some extent because of the writ petition remaining pending before the Hon'ble Bombay High Court. Irrespective of the question whether the Commission was justified in rejecting the petition of the appellant

we simply quote the conclusive part of the order dated 3.08.2010 passed in case no. 16 of 2010. The order runs thus:

"The genesis of the present petition arises from letters dated 16-5-2010 and 18-5-2010 issued by MSLDC. However, the Petitioner is not pressing before this Commission for a direction upon MSLDC to withdraw the said letters as being illegal or a direction upon MSDLC to schedule 160 MW of power to TPC-D, nor interim orders directing MSLDC to schedule the 160 MW of power, by not pressing prayer clauses (a), (b), (c), and (e). In the circumstances, the remaining prayers to direct MSLDC to show cause and impose penalty or to direct that TPC-D shall be entitled to compensation from MSLDC and other ex-parte ad interim orders, cannot and ought not be kept in abeyance pending the decision in Writ Petition Lodging No. 1224 of 2010 as there is no live dispute pending between the Petitioner and Respondent No. 1 before this Commission. In this view of the matter, the present petition is liable to be and is hereby dismissed".

a. On 26.06.2010, the Tata Power Trading Company Limited, the respondent no. 7 made an application to the MSDCL requesting for scheduling of power to be drawn by TPC-D through TPC-T for the period from 1.07.2010 to 31.07.2010. The MSDCL

rejected the application of the respondent no. 7 on the margin of that application itself by a hand written note saying *"As the said matter is pending with Hon'ble Commission, this application cannot be considered, at this stage. It shall be considered in view of orders which shall be passed by Hon'ble Commission in the proceeding pending before it."*

b. On 9th July, 2010 the MSLDC filed an affidavit in response to the Chamber Summons maintaining that it was not an autonomous body. On 2.08.2010 the MSLDC filed another affidavit before the Bombay High Court stating that the MSLDC had refused scheduling of appellant's generation capacity in exercise of its powers under section 33(1) of the Act, 2003 and that such decision was taken by the MSLDC in "public interest" . On 9th August,2010 the Hon'ble Bombay High Court after hearing all the parties in the Writ Petition passed an order holding:

i. That the appellant herein has an equally efficacious remedy for approaching the respondent no. 1 in respect of its grievance against the impugned letters on the respondent no. 2 and that pendency of the writ petition shall not come in the way of the appellant availing the remedies available to it under the law;

ii. That the appellant can approach the Commission in respect of the dispute about the impugned letters, notwithstanding the fact that the appellant had not pressed case no. 16 of 2010 before the respondent no. 1 and also notwithstanding the fact that the respondent no. 1 has referred the dispute in case no. 13 of 2010 to the Competition Commission of India: and

iii. That impugned letters written by the respondent no. 1 though couched in the form of communications are directions under section 33 (1) of the Electricity Act, 2003 .

Thus, High Court granted leave to the appellant to approach the Commission challenging the impugned letters of respondent no. 2 dated 16.05.2010, 18.05.2010, 12.06.2010 and the letter dated 30.06.2010.

50. After the order dated 9.08.2010 was passed by the High Court the appellant and the respondent no. 7 filed a petition before the Commission against the alleged arbitrary and illegal rejection of the application of the respondent no. 7 dated 30.06.2010 seeking concurrence for sale of power at power exchange by the MSLDC and for seeking directions for grant of no objection/ concurrence/ standing clearance to the appellant and the

respondent no. 7 in accordance with regulation 8 (3) of the CERC (Open Access in inter-state transmission) Regulations, 2008.

51. In terms of the order of the High Court the appellant preferred case no. 37 of 2010 before the Commission assailing the legality and propriety of the letters dated 16.05.2010, 18.05.2010, 12.6.2010 and 30.06.2010 whereby the MSLDC refused to schedule 160 MW and 100 MW power and further prayed for compensation and penalty against MSLDC. The Commission by order dated 29.09.2010 dismissed the case no. 37 of 2010. The appellant again moved the Bombay High Court against the order of the Commission dated 29.09.2010 and the High Court disposed of two writ petitions (L) No. 1224of 2010 (Writ Petition No. 71 of 2011) and (L) No. 2504 of 2010 (Writ Petition No. 44 of 2011) on 18.1.2011 holding two things namely a) the Government Memorandum dated 19.05.2010 which was consequential to the Government Memorandum dated 7.05.2010 is ultra vires and b) the Commission's order dated 29.09.2010 being it an appealable order can be appealed against before this Tribunal.

52. On 18.05.2010 the MSETCL wrote to the Government with reference to the Government Memorandum dated 7.05.2010

saying: *"Accordingly, C.E. SLDC, Kalwa replied vide reference that SLDC will maintain the status quo and await for instruction in writing from MERC as the matter had been referred to them by State Government . As M/s Tata Power Company Limited have again applied for scheduling of 160 MW power to the Tata (distribution) for 18.05.2010 and hence the issue needs to be resolved shortly: In view of the above and as no order is received from Hon'ble MERC , kindly issue further instructions to SLDC Kalwa for scheduling of power as per the provisions of the Electricity Act, 2003* .

53. Before the Bombay High Court, the MSLDC in its counter affidavit took the stand categorically that whatever actions it did in relation to the request of TPC for scheduling of power to TPC-D through TPTCL was by virtue of power under section 37 of the Electricity Act, 2003. It further maintained in its affidavit to the amended petition to the TPC that the stand of the Government that communications by the MSLDC were not under section 37 was made without consulting the MSLDC and it is that section alone that permits the MSLDC to issue communications.

54. But, the order of the Division Branch of the Bombay High Court in Writ Petition (Lodging) No. 1224 of 2010 dated 11.06.2010 contains recording the submission of the learned Advocate General to the effect that the Government Memoranda which were challenged by the TPC were not made either under section 11 or under section 37 of the Electricity Act, 2003 . It further recorded the submission that the communication is only a request to the Commission to take suitable measures to protect the interest of the consumers and the Government was only seeking cooperation of the parties including the petitioner who is the appellant herein .This order dated 11.06.2010 did not fritter away the jurisdiction of the MSLDC to act in terms of the powers conferred on it under the law. The last order of the Bombay High court dated 18.01.2011 in Writ Petition no. 71of 2011 which is a speaking one declares the Government Memoranda dated 7.05.2010 as ultra vires and made the Rule absolute.

55. It is the order dated 29th September, 2010 passed by the Commission whereby the Commission dismissed the prayer of the appellant for compensation against MSLDC is now under challenge in appeal before us.

56. Before the High Court in Chamber Summon the MSLDC took the stand that all its actions were justified by virtue of power under section 37 of the Act even though, long before such stand was taken by the MSLDC before the High Court through counter affidavit the Government through learned Advocate General had made it categorically clear before the Hon'ble Court that powers neither under section 11 nor under section 37 were exercised and it would be silly to argue that the learned Advocate General being a functionary recognised by the Constitution under Article 165 could not conceive of the distinction between the two provisions or other relevant provisions of the statute and would make a submission which can be said to be a concession and contrary to the law. The learned Advocate General if he had made submission that the Govt. Memoranda were clear direction upon all concerned under Section 11 or Section 37, then such a submission upon a harmonious construction of the said provisions with other provisions of the Act would have been subject to debate. Before the High Court the MSLDC lamented that the submission of the Government did not follow consultation with the MSLDC. But, before this Tribunal the MSLDC maintained a stand that it was an organ of the Government with no notification having been issued by the Government to be an independent statutory authority.

Together with this the MSLDC put forth in writing that the submission of the learned Advocate General was a mere concession of what has not been authorized by the law. It further maintained before this Tribunal that the two Government Memoranda were in fact directions under section 37 of the Act. The stand of the Commission is really a strong advocacy of the cause of the MSLDC but the stand is untenable in law.

57. In view of somewhat extraordinary and unusual submissions of the two principal respondents it is first necessary to read once again certain relevant provisions of the law lest we fail to perceive in correct perspective the legal situation obtaining in the given case.

58. Part V of the Electricity Act, 2003 deals with transmission of Electricity and Section 33 which is much talked of by the MSLDC is reproduced here under:

33. (1) The State Load Despatch Centre in a State may give such directions and exercise such supervision and control as may be required for ensuring the integrated grid operations and for achieving the maximum economy and efficiency in the operation of power system in that State.

(2) Every licensee, generating company, generating station, substation and any other person connected with the operation of

the power system shall comply with the direction issued by the State Load Despatch Centre under subsection (1).

(3) The State Load Despatch Centre shall comply with the directions of the Regional Load Despatch Centre.

(4) If any dispute arises with reference to the quality of electricity or safe, secure and integrated operation of the State grid or in relation to any direction given under sub-section (1) , it shall be referred to the State Commission for decision:

Provided that pending the decision of the State Commission, the direction of the State Load Despatch Centre shall be complied with by the licensee or generating company.

(5) If any licensee, generating company or any other person fails to comply with the directions issued under sub-section(1), he shall be liable to penalty not exceeding rupees five lac.

59. If we anatomize the provision of section 33 we find that it deals with the power of the State Load Despatch Centre in giving directions, exercising such provision and control as would be necessary for smooth management of grid operations and for achieving maximum economy and efficiency. Thus, directions and supervisions are in relation to the management of the grid system. Each licensee, generating company, generating station etc. who are having co-relation with grid system are bound by the directions of the SLDC as may be issued from time to time. Vis-à-vis the SLDC a duty has been cast upon the State Commission to decide in case of a dispute relating to quality of electricity or safe, secure and integrated operation of the State Grid or in relation to the

direction of the SLDC. This section 33 does not make any whisper to the effect that directions referred to in section 33 (1) are subject to any direction to be made by the State Government. The directions as may be made by the SLDC under section 33 (1) are statutory directions in relation to maintenance of the grid system and nothing more. The provision of this section can not be interpreted in such a manner so as to restrict the scope and ambit of the other provisions of the Act. Section 33 (1) does not explicitly or implicitly override or supersede the provision of curtailing the right of open access or of denial of the same particularly when permission was earlier already granted. Each statutory authority performs or discharges its functions in the manner as laid down in the statue and no statue conceives of any conflict between two or more statutory authorities mandated to perform their respective functions under a composite statue. If a statutory authority is designed to be subordinate to another statutory authority under the same statue then express provisions therefor would be found in the statue itself. Section 33 does nowhere say that it has its discretion to refuse scheduling power when requested by generating company or a trading company through open access system. In the same Part V of the Act, there also stands section 37 which provides that *"The Appropriate Government may issue*

directions to the Regional Load Despatch Centres or State Load Despatch Centres, as the case may be, to take such measures as may be necessary for maintaining smooth and stable transmission and supply of electricity to any region or State". The direction by the appropriate Government upon the SLDC or RLDC is restricted to smooth and stable transmission and supply of electricity to any region or state. Neither of the two sections referred to above confers any power either upon the SLDC or the Commission or the Government to negate scheduling power at the request of a generating company for distribution through open access. Nor these provisions restrict and control the ambit and scope of section 42. Scheduling through open access cannot be said to be dehors the public interest.

60. The very thesis of the MSLDC which has been subscribed to by the Commission that the MSLDC is subordinate to Government or that it is an organ of the Government and it is obliged to act as a subordinate authority is unknown to the law. The scheme of the Act does nowhere provide that the Legislature intended that the SLDC or RLDC would be acting not independently, not as an autonomous statutory body but as being a subordinate department of the Government. If in the counter affidavit the MSLDC or the

Commission would have elaborated their imaginary doctrine as to how it is a mere department of the Govt., it would have been better so as to appreciate their stand. The stand of the MSLDC is stultifying in this that if it was the consistent stand of the MSLDC that it was a subordinate organ of the Government and is designed to serve the Government, then it does not lie in their mouth to say even on 12.6.2010 after the Government has made it clear before the High Court that the two memoranda were not issued under section 11 or 37 of the Act that it would still await further order of the Government, and again say in this Appeal that the Government stand made through the learned Advocate General before the High Court does not bind the MSLDC and all their letters in question even after such stand of the Government was made known to the MSLDC were issued under section 33 of the Act which as we have seen above does not authorize the MSLDC to do so. This speaks in volume the conduct of the statutory body and it is not difficult to decipher that all its actions after the High Court's first order clearly indicating the position of the Government were unlawful. Again, the position maintained by the MSLDC in this Appeal that the statement of the learned Advocate General who represented the Government was a mere concession and does not bind the MSLDC is thoroughly unacceptable. It has been argued

by the learned counsel for the MSLDC that the said two Memoranda speak for themselves regardless of whatever submission has been made by the learned Advocate General with regard to them. The question is put: 'Do not they reveal that irrespective of what the law provides for so far as the role of the Government vis-à-vis the MSLDC or the Commission is concerned the two Government Memoranda contain in no uncertain terms the directions upon the MSLDC or the Commission and in such circumstances was it not incumbent upon the MSLDC to act accordingly even though the law is contrary to what it really did?' This is begging the question, for on 11.6.2010, it was made clear to the MSLDC that the Government made its position clear that despite the languages employed therein the two Memoranda of the Government were not issued under section 11 or 37 of the Act. Nor was it the case of the Government at any point of time that they were to be treated as directions under section 108 of the Act. Then, in such circumstances, after 11.6.2010, there was no justification on the part of the MSLDC to say that it should treat the two Memoranda as directions and still go on refusing scheduling. . The conduct subsequent to the High Court's Order dated 18.1.2011 cannot, however, be kept out of context, and the

Commission will deal with petition, if filed ,subsequent to the High Court's final order dated 18.1.2011 according to the law.

61. For better appreciation of the submission of the MSLDC, it is necessary to read Sections 11, 31 & 37 of the Act which are reproduced below:-

11. (1) The Appropriate Government may specify that a generating company shall, in extraordinary circumstances operate and maintain any generating station in accordance with the directions of that Government.

Explanation. - For the purposes of this section, the expression " extraordinary circumstances" means circumstances arising out of threat to security of the State, public order or a natural calamity or such other circumstances arising in the public interest.

(2) The Appropriate Commission may offset the adverse financial impact of the directions referred to in sub-section (1) on any generating company in such manner as it considers appropriate.

31(1) The State Government shall establish a Centre to be known as the State Load Despatch Centre for the purposes of exercising the powers and discharging the functions under this Part.

(2) The State Load Despatch Centre shall be operated by a Government company or any authority or corporation established or constituted by or under any State Act, as may be notified by the State Government.

Provided that until a Government company or any authority or Corporation is notified by the State Government, the State Transmission Utility shall operate the State Load Despatch Centre:

Provided further that no State Load Despatch Centre shall engage in the business of trading in electricity.

37. The Appropriate Government may issue directions to the Regional Load Despatch centres or State Load Despatch Centres, as the case may be, to take such measures as may be necessary for maintaining smooth an stable transmission and supply of electricity to any region or State.

62. On the facts and in the circumstances of the case, the two Govt. Memoranda which were ultimately quashed by the Hon'ble High Court of Bombay did not emanate under Section 11 because the alleged extra-ordinary circumstances as we find from the Explanation to sub-Section (1) of Section 11 were not pleaded in justification under Section 11 of the Act. What is called 'public interest' must not, therefore, be a slogan. The objective situation and the circumstances that constitute public interest must be analysed before an action taken by public authority is termed as public interest. The appellant also has pleaded public interest in support of the prayer for scheduling of its generation capacity to TPC-D through Tata Power Trading Company Ltd. It also pleaded that it had been suffering a loss of Rs. 60 lakh per day as a result of non-scheduling of power in favour of the TPC-D for distribution to its licensed area. It was not the case of Govt. of Maharashtra that it was exercising any of the powers provided in the Act, meaning thereby it was making clear to all the statutory organs that they were free to act independent of any directions or suggestions or requests in terms of the provisions of the Act. In

the face of the submission of the Learned Advocate General of Govt of Maharashtra, the High Court did not upon recording of such submission think it necessary to give any interim order on the application of the appellant. If the MSLDC was of the opinion that it was not an independent organ but was a department of the Govt. then it does not lie in the mouth of the MSLDC to say that what the learned Advocate General had submitted before the Bombay High Court does not bind the MSLDC. The MSLDC cannot blow hot and cold at one and the same time. It cannot approbate and reprobate. The MSLDC, it cannot be questioned, is an independent statutory authority constituted under Section 31 of the Act and is responsible for carrying out optimal scheduling and despatch of electricity within the State. It is a State Load Dispatch Centre whose function is to ensure integrated operation of the power system in the State. The functions of the State Load Despatch Centre is to optimize scheduling and despatching of electrical energy in accordance with the contracts entered into with the licensees or generating companies operating in the State and to monitor Grid system. It is true that Section 33 gives power to the State Load Despatch Centre to give such directions and exercise such supervision and control which would be necessary for ensuring the integrated grid operations and for achieving the

maximum economy and efficiency in the operation of the power system. Under sub-section (4), if any dispute arises with reference to the quality of electricity or safe, secure and integrated operation of the state grid or in relation to any direction given under sub-section (1), it shall be referred to the State Commission for decision. Section 32 or Section 33 does not restrict and control or take away the power of MSLDC to schedule generation capacity of a generator through open access. The decision of the MSLDC to defer scheduling the appellant's generation capacity allegedly in the public interest is clearly contrary to the provision of Section 33 of the Act. It is important to remember that the Commission in the impugned order has made it clear that the letters issued by the MSLDC were beyond the scope and ambit of Section 32 and Section 33 of the Act.

63. The Electricity Act, 2003 has brought about a radical change in the business of the Power Sector. There has been a delicensing in respect of generation of power and a generator is under the law free to supply power to any entity or person and the functions of the State Commission have been expressively provided for in Section 86 of the Act. Power Sector has been placed in the open market and under the Act the transmission

utilities are obligated upon to provide non-discriminatory open access to its transmission system when a generator in order to supply power approaches transmission utilities for such open axis. Section 39 (2) (d) provides as follows:-

(2) The functions of the State Transmission Utility shall be -
(d) to provide non-discriminatory open access to its transmission system for use by-
(i) any licensee or generating company on payment of the transmission charges ; or
(ii) any consumer as and when such open access is provided by the State Commission under sub-section (2) of section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the State Commission:
Provided that such surcharge shall be utilised for the purpose of meeting the requirement of current level cross-subsidy:
Provided further that such surcharge and cross subsidies shall be progressively reduced and eliminated in the manner as may be specified by the State Commission:
Provided also that such surcharge may be levied till such time the cross subsidies are not eliminated:
Provided also that the manner of payment and utilisation of the surcharge shall be specified by the State Commission.
Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use.

Again, in Section 40 (c), we find the following:-

(c) to provide non-discriminatory open access to its transmission system for use by-
(i) any licensee or generating company on payment of the transmission charges; or
(ii) any consumer as and when such open access is provided by the State Commission under sub-section (2) of section 42, on

payment of the transmission charges and a surcharge thereon, as may be specified by the State Commission.

Further, Section 42 (2) casts an obligation upon the State Commission to introduce open access in these words.

(2) The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross subsidies, and other operational constraints:

64. It is not that the MSLDC was unaware of all these legal provisions. In fact, it allowed open access to the appellant in the matter of scheduling the appellant's generation capacity in favour of TPC-D. Therefore, the arguments advanced to the effect that MSLDC is a subordinate organ of the Govt. with no independence is not acceptable. Therefore, in terms of the decision of the Hon'ble Supreme Court in Tata Power Company Ltd. Vs. Maharashtara Electricity Regulatory Commission and others reported in 2009 ELR (SC) 246 a Generating Company has complete freedom with respect to choice of site, investment of the generation unit, choice of buyer and total freedom from tariff regulation when the generating company supplies to a trader or

directly to a consumer. Under the law, a generating company is permitted to enter into contract including a long term contract with a distribution company subject to the regulatory provisions of the Act. In this connection, it is most appropriate to read the words of the Hon'ble Supreme Court which we quote in Para 78, 81, 83, 84, 98, 107, 108 & 116.

"78. Electricity is not an essential commodity within the meaning of the provisions of the Essential Commodities Act, 1955 or any other statute. It is, however, in short supply. As the number of consumers as also the nature of consumption have increased many fold, the necessity of more and more generation of electrical energy must be given due importance. The preamble of the 2003 Act, although speaks of development of electricity industry and promotion of competition, it does not speak of equitable distribution of electrical energy. The statutes governing essential and other commodities in respect whereof the State intends to exercise complete control, provide for equitable distribution thereof amongst the consumers.

81. De-licensing of generation as also grant of free permission of captive generation is one of the main features of the 2003 Act. It is clearly provided that only hydro-generating projects would need the approval of the State Commission and the Central Electricity Regulatory Authority. It recognized the need of prohibiting transmission licensees. It also for the first time provided for open access in transmission from the outset. It even provides where the distribution licensee proposes to undertake distribution of electricity for a specified area within the area of supply through another person, that person shall not be required to obtain separate licence.

83. The primary object, therefore, was to free the generating companiesfrom the shackles of licensing regime. The 2003 Act encourages freegeneration and more and more competition amongst the generatingcompanies and the other licensees so as

to achieve customer satisfaction and equitable distribution of electricity. The generation company, thus, exercises freedom in respect of choice of site and investment of the generation unit; choice of counter-party buyer; freedom from tariff regulation when the generating company supplies to a trader or directly to the consumer.

84. If de-licensing of the generation is the prime object of the Act, the courts while interpreting the provisions of the statute must guard itself from doing so in such a manner which would defeat the purpose thereof. It must bear in mind that licensing provisions are not brought back through the side door of Regulations.

98. Accordingly, the word `supply' contained in Section 23 refers to supply to consumers only' in the context of Section 23 and not to supply to licensees. On the other hand, in Section 86(1)(a) `supply' refers to both consumers and licensees. In Section 10(2) the word `supply' is used in two parts of the said Section to mean two different things. In the first part it means `supply to a licensee only' and in the second part `supply to a consumer only'. Further in first proviso to Section 14, the word `supply' has been used specifically to mean `distribution of electricity'. In Section 62(2) the word `supply' has been used to refer to `supply of electricity by a trader'.

105. Section 86 provides for the functions of the Sate Commission, clause (a) of sub-section (1) whereof empowers it to determine the tariff for generation, supply, transmission and wheeling of electricity. Clause (b) empowers it to regulate electricity purchase and procurement process of distribution licensees. Inevitably it speaks of PPA. PPA may provide for short term plan, a mid term plan or a long term plan. Depending upon the tenure of the plan, the requirement of the distribution licensee vis-a`-vis its consumers; the nature of supply and all other relevant considerations, approval thereof can be granted or refused. While exercising the said function necessarily the provisions of Section 23 may not be brought within its purview. While even exercising the said power the State Commission must be aware of the limitations thereto as also the purport and object of the 2003 Act. It has to take into consideration that PPA will have to be dealt with only in the manner provided therefor.

107. While exercising its power of `Regulation' in relation to purchase of electricity and procurement process of distribution, it is not permissible for the Commission to direct allocation of electricity to different licensees keeping in view their own need. Section 86(1)(b) read with Section 23 if interpreted differently would empower the Commission to issue direction to the generating company to supply electricity to a licensee who had not entered into any PPA with it. We do not think that such a contingency was contemplated by the Parliament.

108. A generating company, if the liberalization and privatization policy is to be given effect to, must be held to be free to enter into an agreement and in particular long term agreement with the distribution agency, terms and conditions of such an agreement, however, are not unregulated. Such an agreement is subject to grant of approval by the Commission. The Commission has a duty to check if the allocation of power is reasonable. If the terms and conditions relating to quantity, price, mode of supply the need of the distributing agency vis-a`-vis the consumer, keeping in view its long term need are not found to be reasonable, approval may not be granted.

116. For the purpose of interpretation and/or application of a statute, this Court cannot base its decision on any hypothesis. Construction of a statute, save and except some exceptional cases, cannot be premised on the hardship of a party which may be suffered by one of the licensees. Enabling provisions are made for entering into a free contract. A company incorporated under the Companies Act being not a citizen of India does not have any fundamental right to carry on business in terms of Article 19(1)(g) of the Constitution of India; its shareholders and directors have. Even otherwise in a free market economy right to enter into contract by and between two private parties are not to be discouraged in absence of any statute or statutory regulation."

65. As already stated, the Govt. of Maharashtra in affidavit before the Bombay High Court on 11.6.2010 clarified that the Memorandum dated 7.5.2010 was not any statutory directive but constituted only a request to the Commission. The High Court

recorded in the order dated 11.6.2010 that the Govt. did not exercise any power under Section 11 or Section 37 of the Act. It was argued by the learned Advocate for the Commission as well as by the learned Advocate for the MSLDC that a plain reading of the two Govt. memoranda would clearly reveal that they were not coached in the form of request or suggestions but were clearly directions upon the Commission as well as the MSLDC. As such, the submission of the learned Advocate General was of no consequence, was a mere concession not binding upon the MSLDC or upon the Commission regardless of what has been recorded in the order of the Bombay High Court the fact simply is that the two Govt. memoranda were but directions upon the MSLDC and the Commission. Even if the memoranda are seen to be directives, the argument is not acceptable. It was not beyond the knowledge of the MSLDC or of the Commission that open access was granted in favour the appellant already for scheduling its generation capacity in favour of the TPCD and when such open access was granted, they did not consult the State Govt. as it was not legally necessary. It cannot be argued or assumed that whatever was submitted before the High Court by the learned Advocate General was not for consumption of the MSLDC or for the Commission and that such submission was made only to avoid

any adverse order from the High Court. It cannot be argued that the submission of the learned Advocate General could be construed to be a concession. The learned Advocate General through the submission made for the High Court did not transgress the law so that there is no scope to argue that alleged concession allegedly contrary to law cannot be reckoned with. It cannot be said that the learned Advocate General made such submission without being instructed by the Govt. Therefore, by no stretch of imagination, it can be said that the submission of the Learned Advocate General was simply a concession against the law and that what the MSLDC or the State Commission would say would be the law for all time to come. It must not have been difficult either for the MSLDC or for the State Commission to decipher that the first order of the Bombay High Court that recorded the submission of the learned Advocate General was a clear indication to the MSLDC and the Commission that the two Govt. memoranda were of no effect and since open access had already been granted in favour of the appellant, there must not be any further deferring of scheduling the appellant's generation capacity in favour of the TPC-D. It is noticeable that the High Court did not record any finding that there had existed really any public exigencies or public interest behind issuance of the two Govt's memoranda. When

open access was already granted to the appellant in view of Section 39, 40 and 42 of the Act, it must be said that these provisions do not come into conflict with any public interest and there is no express provision in the law that exercise of powers under Section 39, 40 and 42 will be subject to express restriction and limitation that can be imposed by the State Govt. The MSLDC pleads public interest; so also is the pleading of the appellant because it is its case that a lawful contract was entered into with a distribution company for distribution of electrical energy through open access to the consumers of the licensed area of the distribution company. The moment the Govt. took the stand before the High Court through the Learned Advocate General that the two Govt. memoranda were simply request or suggestions the very thesis that public interest was of so paramount in nature that deferment of scheduling was a necessity lost its force. The MSLDC or the Commission has not been briefed by the Govt. of Maharashtra to plead in this appeal that the two Govt. Memoranda contrary to the submission of the Learned Advocate General were orders/directions upon the Commission or the MSLDC. The Govt. of Maharashtra is also a party respondent in this Appeal but it did not enter appearance to plead contrary to the submission of the learned Advocate General in the Bombay High Court. On close

reading of the Counter-Affidavit of the MSLDC, it would appear that it is taking contradictory stand in the sense that once it says that it acted at the behest of the Govt. orders as it is subordinate to the Govt. and at the same time, it submits that all its actions including the four letters in question were in exercise of power under Section 33 of the Act. Section 33 does not have any connection with the deferring of Scheduling of generation capacity of the appellant and the Commission observed that the letters issued by the MSLDC were not under the ambit of Section 32 or Section 33 of the Act. When on 11.6.2010, the appellant communicated to MSLDC about the High Court's order wherein the submission of the learned Advocate was recorded, there was no legal justification on the part the MSLDC to say that it would still continue to maintain status quo till it received further instruction, either from the Commission or from the Government. This is important to note that the Government did not before the High Court justify its two memoranda from legal point of view. Therefore, when on 12.6.2010, the MSLDC was still reluctant it was crystal clear that it determined to abide the Government Memoranda.

66. The 'state of flux' theory propounded by the Commission is a very unique expression without describing as to what was the

'state of flux'. Had there been any 'state of flux', it would have been the stand of the Govt. before the High Court in course of the hearing of the writ application. The MSLDC is undoubtedly a statutory body designed to ensure integrated operation of power system and it acts in terms of Section 33 of the Act. It was not the case of the MSLDC that there was network constraint or congestion and lack of required metering infrastructure. The grounds of refusal must be within the parameters of the law and any action which is not within the domain of the authority would be without jurisdiction. The Act does not contemplate that in the matter of scheduling power any statutory authority other than the transmission utility can interfere with the jurisdiction and authority of that authority which is entrusted under the law with the task of scheduling of power. When the authority having jurisdiction to issue binding direction clarifies before a court of law and that too a Constitutional Court that they have not issued any binding direction, it was definitely unreasonable on the part of the MSLDC to still claim that it was bound by such directions. The decision of the Hon'ble Supreme Court in Tata Power Company Ltd. Vs MERC & Ors. leaves no manner of doubt that the subject to the provisions of law a generating company cannot be by the side door subjected to the wishes of the transmission utility or of the

Commission. The MSLDC had full knowledge that the Government memorandum were not binding on them but still it went on refusing to schedule generation of appellant's power. It has been rightly submitted that the two Govt. memoranda were in violation of the regulatory reforms introduced by the Hon'ble Supreme Court in the decision in Tata Power Company Ltd. Vs. M.E.R.C. & Ors.. Ultimately, the two Govt. memoranda were by order dated 18.1.2011 declared ultra vires. The MSLDC contrary to the Spirit of Law and the decision of the Hon'ble Supreme Court attempted to regulate in the guise of public interest the allocation of the generation capacity of the appellant by directing it to supply its capacity to a particular licensee. The Govt. closed the issue by saying before the High Court that the two Memoranda were not directions but the MSLDC was so deliberate in refusing to schedule the generation capacity of the appellant that it deliberately chose not to read the writing of the wall. Thus, unreasonableness which is repugnant to the rule of law was manifest in the conduct of the MSLDC. What is more shocking is that the Hon'ble High Court by order date d 18.1.2011 quashed the two Govt. Memoranda to be ultra vires but still the MSLDC by the letter dated 29.1.2011 continued to refuse scheduling the generation capacity of the appellant. This letter has been

produced before this Tribunal and there is no valid answer to the issuance of the letter.

67. The Respondent No.2 & 6 have raised the question whether the appellant as a generating company can have any cause of action for filing of Case No.16 of 2010 and Case No. 37 of 2010 particularly when the Tata Power Trading Company Ltd. was granted open access and Tata Power Distribution Company Ltd. was not a party in Case No.37 of 2010. It is true that Tata Power Distribution Company Ltd. was not a party in Case No.37 of 2010 but that is immaterial. It is true that the Tata Power Trading Company Ltd. was also not the petitioner in Case No.37 of 2010 and the relief claimed in that case was in favour of Tata Power Distribution Company but the Tata Power Trading Company Ltd. was one of the respondents in that case. It is a fact that open access was granted to the Tata Power Trading Company Ltd. but by this, it cannot be said that the appellant has no cause of action. The appellant carries on generation business and the law is very well settled that subject to section 42 (2), a Generation Company may supply electricity to any licensee in accordance with the provisions of the Act. It was only through Tata Power Trading Company Ltd. through which generation by the appellant was

required to be conveyed to the Tata Power Distribution Company Ltd.. Therefore, the mere fact that the Tata Power Distribution Company Ltd. was not a party in Case No. 37 of 2010 is of little significance. In the TPC Ltd. vs. MERC & Ors., 2009 ELR (State Commission) 246, it has been clearly held that generation of electricity being a delicensed activity, the generator has complete freedom to selector a buyer. Therefore, the argument is not sustainable.

68. The argument that in Writ Petition No.71 of 2011, the appellant did not challenge the letters dtd. 16.5.2010 and 18.5.2010 is of no avail because the Bombay High Court clearly made order that despite the pendency of the writ application, the appellant was eligible to challenge the letters in question before the Commission.

69. The argument that the letter of the MSLDC cannot be challenged in view of section 33 (4) of the Act is purely unsustainable because the said provision relates to making reference to the Commission in case of any dispute relating to quality of electricity or safe, secure and integrated operation of the

State grid or in relation to any direction given under sub-section-1 of that section.

70. The argument that in case no.16 of 2010, only the letters dated 16.5.2010 and 18.5.2010 and not the other two letters namely 12.6.2010 and 30.6.2010 is purely unacceptable in view of the High Court's Order.

71. The argument that the MSLDC is not an independent system operator and it has to abide by the directions or orders issued by the Government under section 37 of the Act and that it is not an autonomous body has been repelled in the preceding paragraphs.

72. Therefore, the four letters in question namely 16.5.2010, 18.5.2010, 12.6.2010 and 30.6.2010 issued by the MSLDC refusing to schedule 160 MW and 100 MW of appellant's Generation Capacity cannot be sustained. So, also the Impugned Order dated 29.9.2010 passed by the Commission is liable to be set aside.

73. Now, the question is whether the appellant is entitled to compensation against Respondent No.2. When the hearing was

concluded, it was submitted with reference to the materials furnished before the Tribunal that the appellant suffered loss of Rs.92 crores because of failure on the part of MSLDC to schedule appellant's generation capacity in favour of TPC-D. It has been the stand of the MSLDC that its refusal to schedule power has been actuated not by malice, not by misfeance but out of public exigencies. The Learned Advocate for the appellant has referred to a number of decisions. Reference has been made to the decision in M.Sankaranarayanan, IAS Vs. State of Karnataka & Ors., AIR 1993 SC 763, where it was observed as follows:-

"It may not always be possible to demonstrate malice in fact with full and elaborate particulars and it may; be permissible in an appropriate case to draw reasonable inference of mala fide from the facts pleaded and established. But such inference must be based on factual matrix and such factual matrix cannot remain in the realm of insinuation, surmise or conjecture"."

In Ahokan Vs. Assistant Excise Commissioner & Ors. at (2009) 14 SCC 85, it has been held that a statutory authority when it exercises its jurisdiction conferred on it by a statute has to apply the procedure to be followed by it by application of mind. This decision has refererence to the decision in Ramana Dayaram Shetty Vs. the International Airport Authority of India and Ors.[(1979)3 SCC 489] where it was observed that an executive

authority must be rigorously held to the standards by which it professes its actions to be judged and must observe those standards on pain of invalidation of an act allegedly done in violation of the law. In Ahokan (ibid), there is a reference to the decision in A.S.Ahluwalia Vs. State of Punjab (1975)ILLJ228SC and Sukhdev Vs. Bhagatram (1975)ILLJ399SC where it has been held that it is a rule of administrative law that an executive authority must afford the standards by which it professes its actions to be judged and this is independent of Article 14. In Ashok Lanka & Anr. Vs. Rishi Dixit & Ors (2005) 5 SCC 598, it has been held that the Commissioner of Excise as a statutory authority is bound to exercise his power within the four corners of the Act. The decision in M.P. Wakf Board vs. Subhan Shah (D) by LRs. And Ors., (2006) 10 SCC 696 is more appropriate because here in this case, it has been held that where a statute creates different authorities to exercise their respective functions under it, then each of such authorities must exercise the functions within the four corners of the statute. The decision in Joint Action Committee of Air Line Pilots' Association of India (ALPAI) & Ors. Vs. Director General of Civil Aviation & Ors., (2011) 5 SCC 435 makes it very clear that if any decision is taken by a statutory authority at the behest of or on the suggestion of a person having no statutory role

to play the same would be patently illegal and a senior official cannot provide for any guideline or direction to the authority under the statute to act in a particular manner. In the decision in The Purtabpore Co. Ltd. vs. Cane Commissioner of Bihar an Ors, 1969 (1) SCC 308, the facts were not absolutely different from the facts of the present appeal. In the reported decision, the Chief Minister directed the Cane Commissioner to divide a certain reserved area into two portions and allot one portion to one of the Respondents. The Cane Commissioner, though he was statutory authority obliged the Chief Minister, it was held by the Hon'ble Supreme Court that unless explicit statutory provision is found giving authority to a statutory functionary to be guided by instructions issued from a superior authority, a statutory authority is not absolved of acting statutorily. The Learned Advocate for the Commission refers to the decisions in Pramod Malhotra and Others Vs. Union of India & Ors.(2004) 3 Supreme Court Cases 415, it was a case where the RBI was alleged to have acted in violation of statutory duties. The Hon'ble Supreme Court held that though RBI undoubtedly functions a statutory function, it has to make a balance between general public interest and the interest and the needs of the financial institutions. It was held that relationship of RBI with creditors or depositors of Sikkim Bank Ltd.

was not such that it would be just or reasonable to impose a liability in negligence on RBI. There is an observation at Para 26 of the judgment to the effect "*However, as observed above, compensation for violation of a statutory duty to enable individuals to recoup financial loss has never been recognised in India*". It is this observation which is sought to be made not applicable by the Learned Advocate for the appellant with reference to the decision in Common Cause, A Registered Society Vs. Union of India & Ors. (1999) 6 SCC 667. This decision is 82- page decision on review preferred by the Minister upon whom, there is a direction to make payment of exemplary damage of Rs.50 lakh. The original judgment imposing damage can be seen at (1996) 5 SCC 593. It was a case where a Minister allotted petrol outlets to various persons out of his discretionary quota. The Hon'ble Court found that the Minister's action was wholly arbitrary, malafide and unconstitutional. Upon review, the Hon'ble Court referred to the decision in S.Nagraj Vs. State of Karnataka, 1993 supp (4) SCC 595 where it was held that mistake is accepted as valid reason to recall an order. Learned Advocate for the appellant heavily relies on the decision in Lucknow Development Authority Vs. M.K. Gupta (1994) I SCC 243. In this decision, the Hon'ble Court while construing the word 'service' under Consumer Protection Act held

that the administrative law of accountability of public authorities for their arbitrary and even ultra vires action has taken many strides and it is now accepted that the State is liable to compensate for loss or injury suffered by a citizen due to arbitrary action of his employees. It was held that public authorities who are entrusted with statutory function cannot act negligently. In this decision, there was direction for payment of damages on account of abuse of power. The decision in Pramod Malhotra and Others Vs. Union of India & Ors.(2004) 3 Supreme Court Cases 415, is sought to be distinguished by the Learned Advocate for the appellant from the Lucknow Development Authority case. Having considered all the decisions referred to by the Learned Advocate for both the parties, it appears to us that the question of damages on account of unlawful action on the part of the MSLDC will be a far-fetched one. Award of damages against a public authority for unlawful exercise of power has no doubt been vindicated in Lucknow Development Authority Case. In Pramod Malhotra and Others Vs. Union of India & Ors. case, we do not find any reference to the decision in Lucknow Development Authority. Learned Advocate for the appellant has also referred to the English decision in Rookes Vs. Bernard, [1964] 1 AII E.R. 367, M/s Delhi Airtech Services Pvt. Ltd. & Anr Vs. State of U.P. & Anr., 2011(9) SCALE 201. The last

decision would be of no avail because this is a split verdict. In the English decision, the first category of cases where damage can be awarded is the cases where action of the Govt. servant is found oppressive, arbitrary on unconstitutional, but in the case of the Govt., it is different because the servants of the Govt. are also the servants of people. However, a case for award of damage can be made only when in the case of the statutory authority, the actions are actuated by malice, misfeasance mala fide motive and negligent discharge of duties. Even in the Lucknow Development Authority case, it has been held that where exercise of discretion was mala fide and the complainant is entitled to compensation for mental and physical harassment then, the officer can no more claim to be under protective cover. The Government Memoranda dtd. 7.5.2010 and 19.5.2010 are so exhaustive and speaking that there was no doubt, the directions were given upon the MSLDC to maintain status quo. In such circumstances it was difficult for MSLDC to act otherwise. Although, it should have corrected its course of action subsequently, after the submission was made by the Learned Advocate General for the Bombay High Court that they were not directives and merely requests or suggestions. The High Court while quashing the memoranda to be illegal and ultra vires observed in its order dated 18.1.2011.

" …21. The manner in which the State Government construed its own memorandum dated 7 May 2010 is apparent from the subsequent memorandum that it issued on 19 May-2010. Government by its subsequent memorandum noted that the Petitioner had contrary to the advice of Government in the memorandum dated 17 May, 2010 applied to the State Load Despatch centre to schedule 160 MW of power to its distribution arm. The subsequent memorandum therefore left it beyond a pale of doubt that the State Government written submission directing the Chief Engineer at the State Load Despatch Centre to maintain the status quo in respect of scheduling 360 MW of power till further directives are received or obtained from the MERC or till further orders or directions in this behalf are issued by the State Government. If the State Government believed that circumstances justified the exercise of statutory powers, it ought to have taken the responsibility to issue a statutory directive. Government would then accept responsibility for its action and commit itself to a scrutiny of its action in judicial review. But once it came to the conclusion that the responsibility to issue a statutory directive. Government would then accept responsibility for its action and commit itself to a scrutiny of its action in judicial review. But once

it came to the conclusion that the exercise of a statutory directive was not warranted at that stage, it would be impermissible for the State Government to issue what it termed as a request but which it treated as a binding advice by issuing a directive in its subsequent memorandum of 19 May 2010. The Memorandum of 19 May 2010 is consequential to the Memorandum of 7 May 2010."

In view of this finding of the High Court doctrine of malice, malafide, and misfeasance cannot be invoked to award damage although, the MSLDC's claim that it was not an autonomous and independent body is summarily liable to rejection. An act does not make a person guilty unless mind is guilty. Malafide conduct, malice and misfeasance arise out of guilty mind. In the circumstances, the prayer for compensation is difficult to accept. While saying so, we have no manner of doubt that after the High Court quashed the two Memoranda, there was hardly any scope on the part of the MSLDC to defer scheduling appellant's Generation Capacity in favour of the TPC-D.

74. In the result, we allow the Appeal in part but without cost. The impugned order dated 29.9.2010 is set aside. The four letters in question namely 16.5.2010, 18.5.2010, 12.6.2010 and 30.6.2010 issued by the MSLDC refusing to schedule 160 MW and

100 MW of appellant's Generation Capacity are set aside. The appellants shall be entitled to scheduling of power in terms of the open access granted by the Respondent No.2 in favour of the TPC-D. The Commission shall pass necessary consequential order and also dispose of any petition, if pending, before it subsequent to the passing of the impugned order in the light of this decision, and in the event of refusal to comply with directive of the Commission it shall proceed against the respondent no 2 according to the law.

(P.S. Datta)
Judicial Member

(Rakesh Nath)
Technical Member

Reportable/Not-reportable

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