**APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI**
**(APPELLATE JURISDICTION)**

**IA NO. 732 OF 2023 IN APPEAL NO. 369 OF 2023**

**<u>Dated: 13th July, 2023</u>**

**Present:** **Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson**
**Hon'ble Mr. Sandesh Kumar Sharma, Technical Member**

**<u>In the matter of</u>:**

**Tata Power Company Limited**
Through its Lead Associate-Legal,
Corporate Center B, 34 Sant Tukaram Road,
Carnac Bunder, Mumbai, Maharashtra-400 009 … **Appellant**

**Versus**

**Maharashtra Electricity Regulatory Commission**
Through its Secretary,
World Trade Centre, Centre No.1,
13th Floor, Cuffe Parade,
Colaba, Mumbai, Maharashtra-400005 … **Respondent**

Counsel for the Petitioner(s) : Mr. C. S. Vaidyanathan, Sr. Adv.
Mr. Basava. P. Patil, Sr. Adv.
Mr. Shri Venkatesh
Mr. Ashutosh Srivastava
Mr. Bharath Gangadharan
Mr. Shivam Kumar
Mr. Nihal Bharadwaj
Mr. Aashwyn Singh

Counsel for the Respondent(s): Mr. Ramji Srinivasan, Sr. Adv.
Mr. Arijit Maitra
Ms. Pratiti Rungta for R-1

# <u>ORDER</u>

**1.** In most appeals, filed by Distribution Licensees before this Tribunal, their complaint has invariably been that the concerned Regulatory

Commissions have computed their aggregate revenue requirement and the tariff far lower than what they had sought and were entitled to.

**2.** The present Appeal is however different, in that the complaint of the Appellant -Distribution Licensee is that the MERC has fixed their aggregate revenue requirement and their tariff far higher than what should have been determined; as against their estimated average cost of supply of Rs.7.03 per kwh, MERC has fixed their tariff at Rs.8.42 per kwh; and the substantial and uncalled for increase in tariff by Rs. 1.39 per kwh has, along with other factors, rendered them uncompetitive, has needlessly burdened consumers with a higher tariff, and would result in the flight of their consumers to the other Distribution Licensees operating in Mumbai.

**3.** The reliefs sought in this appeal are (a) admit the present Appeal against the MERC's Order dated 31.03.2023 ("Impugned Order") in Case No. 225 of 2022; (b) set aside the findings of the Impugned Order on the arbitrary consideration of the power purchase quantum and cost from TPC-G for FY 2023-24; (c) set aside the findings of the Impugned Order on the arbitrary disallowance of the power projected from short term/bilateral sources for FY 2023-24 and allow the proposed plan of TPC-D to procure 2325.63 MUs from short-term sources on a bilateral basis; (d) set aside the findings of the Impugned Order on the higher cost of power procurement from RE sources for FY 2023-24, and allow the proposed plan of TPC-D to purchase the additional RE power of 300 MW (700 MU) at the proposed rate; (e) direct the MERC to pass on the impact of refund of revenue surplus of TPC-G to TPC-D to the tune of Rs. 215.61 Crores; (f) set aside the findings, on category-wise tariff determination for TPC-D for FY 2023-24 and 2024-25, in the Impugned Order as being arbitrary, and direct the MERC to reconsider and redetermine the same in terms of the submissions made by TPC-D in its Petition; (g) set aside the findings of the Impugned

Order on the issue of arbitrary reduction of the TPC-D direct sales projection in LT category for FY 2023-24 and FY 2024-25 and allow the LT category of Direct Sales of TPC-D for FY 2023-24 i.e., 1686.68 MUs and FY 2024-25 i.e.,1940.80 MUs; (h) set aside the findings of the Impugned Order on the issue of erroneous consideration of normative security deposit for computation of working capital requirement and interest thereon for the true up of ARR for FY 2019-20, FY 2020-21 and FY 2021-22, and direct MERC to implement its own Regulations and allow working capital as has been projected by TPC-D in its Petition; (i) set aside the findings of the Impugned Order on the arbitrary disallowance of Income-tax on Return on Equity by considering effective tax rate as 'zero' for FY 2020-21 to FY 2024-25, and direct MERC to compute Income Tax on Return on Equity as per the applicable regulations; and/or (j) pass any such other or further orders as this Tribunal may deem fit and proper in the facts and circumstances of the case.

**4.** Facts, to the limited extent necessary, are that the Appellant had earlier filed a multi-year tariff petition, in Case No. 326 of 2019, for truing-up of the ARR for FY 2017-18 and FY 2018-19, and for provisional truing-up of ARR for FY 2019-20, in accordance with the MYT Regulations, 2015; and for approval of the ARR & Tariff for FY 2020-21 to FY 2024-25, in accordance with the MYT Regulations, 2019. The MERC had passed an order on 30.03.2020, approving the ARR and Tariff for FY 2020-21 to FY 2024-25. A corrigendum order was issued thereafter on 25.04.2020, to the earlier tariff order dated 30.03.2020.

**5.** In terms of Regulation 5 of the MERC Multi-Year Tariff Regulation, 2019, the Appellant had earlier filed a petition on 30.11.2022 to approve the truing up and the aggregate revenue requirement for FY 2019-20 to FY 2021-22, provisional truing-up of the ARR for FY 2022-23, and approval of the revised ARR and Tariff for FY 2023-24 and 2024-25. The Appellant, thereafter, submitted a revised petition on 18.01.2023 and, by the order dated 31.03.2023, (which is impugned in this appeal), the MERC approved the revised ARR and Tariff for FY 2023-24 and FY 2024-25. Aggrieved thereby, the Appellant has preferred the present appeal.

**6.** IA No. 732 of 2023 has been filed by the Appellant seeking *ex-parte ad-interim stay* on the tariff schedule for FY 2023-24 approved in the judgment of the MERC in Case No. 225 of 2022 dated 31.03.2023.

**7.** Elaborate oral submissions were put forth, both for and against grant of interim relief, by Sri C.S.Vaidyanathan and Sri B.P.Patil, learned Senior Counsel appearing on behalf of the Appellant, and Sri Ramji Srinivasan, Learned Senior Counsel appearing on behalf of MERC. Written submissions were also filed both on behalf of the Appellant and the MERC. It is convenient to examine the rival contentions, put forth by Learned Senior Counsel on either side, under different heads.

## I. APPLICABLE TESTS FOR GRANT OF INTERIM STAY:

**8.** The grant or refusal of interlocutory relief is covered by three well established principles viz., (1) whether the Appellant has made out a prima facie case, (2) whether the balance of convenience is in their favour i.e., whether it would cause greater inconvenience to them if interim relief is not granted than the inconvenience which the opposite party would be put to if it is granted, and (3) whether the Appellant would suffer irreparable injury. With the first condition as a sine quo non, at least two conditions should be satisfied by the Appellant conjunctively, and a mere proof of fulfilment of one of the three conditions does not entitle them to the grant of interlocutory relief in their favour. (*Nawab Mir Barkat Ali Khan V/s Nawab Zulfiquar Jah Bahadur and others:AIR 1975 AP 187*; *Gone Rajamma vs Chennamaneni*

*Mohan Rao:2010 (3) ALD 175; Kishoresinh Ratansinh Jadeja* v. *Maruti Corpn :* (2009) 11 SCC 229; *Best Sellers Retail (India) Private Ltd. v/s Aditya Birla Nuvo Ltd :(2012) 6 SCC 792;* State of Mizoram v. Pooja Fortune Private Limited, 2019 SCC OnLine SC 1741).

**9.** In **"The Law Quarterly Review" Vol 109, at page 432 (at p. 446), A.A.S. Zuckerman, under the title "Injunctions and Security for Judgment in a Framework of Interlocutory Remedies"** stated that the court (tribunal) considering an application for grant of interlocutory relief has four factors to consider : first, whether the plaintiff would suffer irreparable harm if the interim relief is denied; secondly, whether this harm outweighs any irreparable harm that the defendant would suffer from the grant of interlocutory relief; thirdly, the parties' relative prospects of success on the merits; fourthly, any public interest involved in the decision. The central objective of interlocutory relief should therefore be seen as reducing the risk that rights will be irreparably harmed during the inevitable delay of litigation". ***(Mahadeo Savlaram Shelke and Ors. Vs. Puna Municipal Corporation and Ors. : MANU/SC/0673/1995).***

## II. PRELIMINARY OBJECTIONS:

**10.** Before examining whether or not the tests for grant of interim relief are satisfied in the present case, it is necessary to consider the preliminary objections raised on behalf of the MERC.

### (i) SCOPE OF INTERFERENCE WITH THE ORDER PASSED BY MERC AS AN EXPERT BODY:

**11.** It is contended, on behalf of MERC, that price fixation is not a matter of investigation by the Court; and the Supreme Court, in **State of UP & Ors. Vs. Renusagar Power Company & Ors. (1988) 4 SCC 59 @ Paras 77, 78, 86, 92],** while examining the scope of interference, with the exercise of power by the State Government to fix different rates of Electricity Duty in relation to different classes of consumption of energy under Section 3(4) of the UP Electricity (Duty) Act, 1952, held that price fixation under Section 3(4), which is ultimately the basis for the rise in cost because of the rise in Electricity Duty, is not a matter for investigation of Court.

**12.** In ***State of U.P. v. Renusagar Power Co.*****, (1988) 4 SCC 59,** the appeal by special leave was directed against the judgment and order of the High Court of Allahabad. The 2nd respondent before the Supreme Court ie Hindustan Aluminium Corporation Ltd. (Hindalco) had entered into an agreement with the U.P.State Govt on October 29, 1959 for supply of 55 MW electrical power at the agreed rate which was inclusive of all charges, duties and taxes on electricity for 25 years. After commencing production in 1962, Hindalco requested the State Government on October 14, 1964 to grant sanction to Respondent 1- Renusagar Power Company Ltd. to supply electricity to them. On November 12, 1964 Respondent 1 was granted sanction under Section 28 of the Indian Electricity Act, 1910, to engage in the business of supply of electricity to Hindalco. There was an agreement on December 29, 1967 between Hindalco and the U.P. State Electricity Board to supply 5.5 MW and 7.5 MW of power. The rate of charges along with levy of Sales Tax etc. were to be paid by the consumer. On July 1, 1970 there was an agreement between Hindalco and the State Electricity Board to supply 7.5 MW of power. The rate of charges including levy such as Sales Tax etc. were to be paid by the consumer. On August 5, 1970, U.P. Ordinance 14 of 1970 was promulgated further to amend the U.P. Electricity (Duty) Act, 1952 which came into force from September 1, 1970. As a result of the Ordinance, electricity duty became leviable on industrial consumption as well as on the energy consumed by any person from his own source of generation. Thereafter a notification was issued on August 25, 1970 under which the rate of electricity duty, on the energy consumed for industrial purposes, was prescribed at one paisa per unit on consumption of electricity with effect from September 1, 1970. Electricity duty became leviable on Respondent 1 on the energy supplied to Hindalco for industrial purposes. On September 28, 1970, Hindalco, made an application to the State Government to grant exemption on the energy supplied to them by Respondent 1 for industrial purposes. On February 26, 1971, a report was submitted by the Three-Man Committee appointed to examine the request of Hindalco for grant of exemption from payment of electricity duty on the energy supplied by Renusagar Power Company Ltd. According to the Committee the burden, as a result of imposition of electricity duty, did not result in substantial or insufferable increase of the rate of duty for Hindalco. On August 27, 1971 a demand for payment of electricity duty, amounting to Rs 59,13,891.80, was raised on Respondent 1. On March 29, 1972, the application of Respondent 2 for grant of exemption was rejected by the State Government.

**13.** Aggrieved by the said rejection, the respondents filed a Writ Petition before the High Court of Allahabad. On March 17, 1973, the State Government granted exemption from payment of electricity duty on the energy consumed by any person from his own source of generation. Exemption was also granted on the energy sold to a consumer establishing a factory having capital investment up to Rs 25 lakhs in backward districts for five years. The Allahabad High Court, by its judgment on May 17, 1974 in Writ Petition No. 4521 of 1972, quashed the order of the State Government and directed them to reconsider the application of the respondents for exemption in the light of the observations made in that judgment. On September 6, 1975 Hindalco submitted an application again to the State Government for reconsideration of their previous application for exemption from payment of electricity duty. In the meanwhile, the State Government filed a special leave petition before the Supreme Court against the judgment and order of the High Court of Allahabad dated May 17, 1974 in Writ Petition No. 4521 of 1972. In the meantime, on November 13, 1976, an agreement was entered into between the State Electricity Board and Hindalco for supply of 85 MW main supply. The rate fixed was 11 paise per unit inclusive of all taxes on electricity. The Special leave petition was dismissed on March 28, 1977. In compliance with the High Court's judgment dated May 17, 1974, the respondents were given an opportunity of hearing by the State Government on April 5, 1977. For the purpose of considering the representation, the matter was examined at various levels. After examination, the Chief Advisor (Costs), Government of India, submitted his report that the effect of imposition of electricity duty on the margin of profit available to Hindalco was insignificant, it did not have any adverse effect on the profitability of Hindalco since such a levy has been included in the cost in fixing the selling prices of Hindalco's products by the Government of India, imposition of electricity duty did not result in reducing the normal profits of Hindalco to either an absolute loss or such a small margin of profit that Hindalco was turned into an uneconomic unit, and the claim of Hindalco for exemption from levy of electricity duty is not based on justifiable grounds of either low profitability or incapacity of resources with which to pay.

**14.** A personal hearing was given thereafter to the respondents in view of the directions given by the High Court, and a copy of the Report was made available to them. On January 28, 1980, the rate of electricity duty on the energy consumed for industrial purposes was revised from one paisa to two paise per unit applicable from the date of notification, that is, from February 16, 1980. There was an agreement on April 24, 1980 between the State Electricity Board and the Hindalco regarding 85 MW main supply and 60 MW stand by Emergency Supply. Rate of 28.42 paise per unit was fixed. The respondents submitted their comments on the report, which were duly considered by the State Government. Respondents were represented by Counsel during the course of hearing. After giving full consideration to the submissions made in the original and additional representations, the State Government came to the conclusion that the claim for exemption from levy of electricity duty was not justified, and accordingly the request for exemption was disallowed.

**15.** Aggrieved by the decision of the State Government, the respondent filed Writ Petition No. 3921 of 1982 in the High Court of Allahabad. The High Court allowed the Writ Petition holding that the impugned order of the State Government was not maintainable in law, and quashed the order of the State Government as well as the notice of demand. The State Government was also directed to consider the request of the respondents for exemption in accordance with the directions issued by the Division Bench in Writ Petition No. 4521 of 1972, and also in the light of the observations made in the judgment, after affording an opportunity of personal hearing to the respondents. Aggrieved thereby the appellants came up in appeal to the Supreme Court.

**16.** It is in this context that the Supreme Court observed that:-

> *"………...The High Court in the instant case reiterated the necessity of cheap electricity and if cheap electricity was not made available, the cost of indigenous aluminium would go up. It would necessitate import of aluminium causing drain on the foreign exchange of the country.* ***On the other hand, the learned Additional Advocate-General for the State of U.P. contended and in our opinion rightly that primary purpose of the Act as stated in the preamble was to raise the revenue for the development projects. Whether in a particular situation, rural electrification and development of agriculture should be given priority or electricity or development of aluminium industry should be given priority or which is in public interest, in our opinion, are value judgments and the legislature is the best Judge…*** *……….*
> ***…………*** *Referring to the aforesaid observations of the State Government the High Court was of the view that the said*

*observations of the State Government clearly showed that the State Government did not address itself to the need of promoting aluminium industry for increasing production of aluminium which would in the long run save foreign exchange. We are unable to agree.* ***What was paramount before introduction of the development programme and how the funds should be allocated and how far the Government considers a negligible increase and rise in the cost of aluminium for the purpose of raising monies for other development activities are matters of policy to be decided by the Government. It is true as the High Court has pointed out that the Question regarding public interest and need to promote indigenous industrial production was related with the question of exemption of duty. But what the High Court missed, in our opinion with respect, was that a matter of policy which should be left to the Government………***

*………..Price fixation, in our opinion, which is ultimately the basis of rise in cost because of the rise of the electricity duty is not a matter for investigation of court…………..Fixation of electricity tariff can also to a certain extent be regarded of this category……….*

*…………It appears to us that sub-section (4) of Section 3 of the Act in the set up is quasi-legislative and quasi-administrative insofar as it has power to fix different rates having regard to certain factors and insofar as it has power to grant exemption in some cases, in our opinion, is quasi-legislative in character. Such a decision must be arrived at objectively and in consonance with the principles of natural justice.*

*………….It is correct that with regard to the nature of the power under Section 3(4) of the Act when the power is exercised with reference to any class it would be in the nature of subordinate legislation but when the power is exercised with reference to individual it would be administrative………..*

***……….*** *If the exercise of power is in the nature of subordinate legislation the exercise must conform to the provisions of the statute. All the conditions of the statute must be fulfilled. The High Court was right only to the limited extent that all the relevant considerations must be taken into account and the power should not be exercised on irrelevant considerations but singular* *consideration which the High Court, in our opinion, seems to have missed in the judgment under appeal, is these factors, namely, the prevailing charges for supply of energy in any area, the generating capacity of any plant, the need to promote industrial production generally or any specified class thereof and other relevant factors cannot be judged disjointly. These must be judged in adjunct to the public interest and that public interest is as mentioned in the preamble to raise revenue…………..*

*……………The exercise of power whether legislative or administrative will be set aside if there is manifest error in the exercise of such power or the exercise of the power is manifestly arbitrary. Similarly, if the power has been exercised on a non-consideration or non-application of mind to relevant factors the exercise of power will be regarded as manifestly erroneous. If a power (whether legislative or administrative) is exercised on the basis of facts which do not exist and which are patently erroneous, such exercise of power will stand vitiated. See CIT v. Mahindra & Mahindra Ltd. [(1983) 4 SCC 392, 402-03 : 1983 SCC (Tax) 336 : (1983) 3 SCR 773, 786-87 : AIR 1984 SC 1182: (1983) 54 Com Cas 651] The present case relates to the particular facts and circumstances of an individual, namely, Hindalco. To that extent, its claim for exemption was entitled to the consideration. In our opinion, the facts and circumstances of the case were examined in consonance with the principles of natural justice. All relevant factors were given consideration but subject to public interest………*

*…………..The adequacy of the profits or whether it made much more profits is not a consideration which must prevail over public interest and the government having taken into consideration this factor, in our opinion, did not commit any error and the High Court was in error in setting aside the order of the government. It is true that the cost of power to similar industry in other States was a relevant factor and the State was under a mandatory duty to consider the same. The State has taken note of all those factors and has observed that M/s Hindalco is being supplied with electrical energy at a very nominal rate and taking into consideration the prevailing practice of levy of electricity duty in other States as well as the provisions stated in Section 3(4), the government have come to the conclusion that there is no justification for allowing exemption from electricity duty to M/s Hindalco. The government did not*

*commit any error which required interference by the High Court in the manner it did. The assurance of cheap power factor was there. But the assurance of cheap power factor does not foreclose the public interest of raising public revenue………..*

*…………The impugned order does not suffer from the vice of non-application of mind or non-consideration of the relevant factors and the High Court was in error in interfering with the order of the government. We are clearly of the opinion that High Court was in error in interfering with the order in the manner it did. The High Court should not have interfered; for interference by the High Court the matter should have been far less cloudy and far more clear…………*

***…….. This Court in CIT v. Mahindra and Mahindra Limited [(1983) 4 SCC 392, 402-03 : 1983 SCC (Tax) 336 : (1983) 3 SCR 773, 786-87 : AIR 1984 SC 1182: (1983) 54 Com Cas 651] at p. 786 of the report (SCC p. 402, para 11), dealt with the parameters of the court's power of judicial review of administrative or executive action or decision. Indisputably, it is a settled position that if the action or decision is perverse or is such that no reasonable body of persons, properly informed, could come to or has been arrived at by the authority misdirecting itself by adopting a wrong approach or has been influenced by irrelevant or extraneous matters, the court would be justified in interfering with the same. See also the observations at p. 787 of the report (SCC p. 403, para 11). In this case the parameters had been adhered to.*** *All relevant factors had been borne in mind. It is true that each factor had not been independently considered, but these had been borne in mind. In our opinion, the government did not act in violation either of the principles of natural justice or arbitrarily or in violation of the previous directions of the High Court…………..”* (emphasis supplied).

**17.** In ***State of U.P. v. Renusagar Power Co.*, (1988) 4 SCC 59**, the Respondents before the Supreme Court had invoked the Writ Jurisdiction of the Allahabad High Court under Article 226 of the Constitution of India, and the High Court had passed the order, which was the subject matter of appeal before the Supreme Court, in the exercise of its power of judicial review.

**18.** The parameters of the High Court's power of judicial review fell for examination in ***State of U.P. v. Renusagar Power Co.*, (1988) 4 SCC 59**, and reliance was placed by the Supreme Court on its earlier decision in ***CIT* v. *Mahindra and Mahindra Limited* [(1983) 4 SCC 392** wherein the parameters of the court's power of judicial review of administrative or executive action or decision was dealt with, and it was held that it was settled position that if the action or decision is perverse or is such that no reasonable body of persons, properly informed, could come to or has been arrived at by the authority misdirecting itself by adopting a wrong approach or has been influenced by irrelevant or extraneous matters, the court would be justified in interfering with the same.

**19.** Exercise of the power of judicial review by the High Court, under Article 226 of the Constitution of India, is limited in its scope. The jurisdiction conferred on the High Court to issue a writ of certiorari is a supervisory jurisdiction and the High Court exercising it is not entitled to act as an appellate Court. This limitation necessarily means that findings of fact reached by the inferior Court or Tribunal, as a result of appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a Writ Court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised. (***Syed Yakoob v. K.S. Radhakrishnan*, (1964) 5 SCR 64 : AIR 1964 SC 477;*Hari***

***Vishnu Kamath* v. *Syed Ahmad Ishaque* : (1955) 1 SCR 1104; *Nagandra Nath Bora* v. *Commissioner of Hills Division and Appeals Assam*: (1958) SCR 1240; and *Kaushalya Devi* v. *Bachittar Singh*: AIR 1960 SC 1168).** If a statutory provision is reasonably capable of two constructions and one construction has been adopted by the inferior Court or Tribunal, its conclusion may not necessarily or always be open to correction by a writ of certiorari. (***Syed Yakoob v. K.S. Radhakrishnan*, (1964) 5 SCR 64 : AIR 1964 SC 477).**

**20.** The underlying premise, on which the submission urged on behalf of the MERC is based, is that, while the MERC is an expert body, the Aptel is not and it should therefore defer to the expertise of the MERC and refrain from interference. This contention is devoid of merit, and necessitates rejection, in view of both Section 111, and Section 112 r/w Section 113, of the Electricity Act. Unlike exercise of the power of judicial review by the High Court, under Article 226 of the Constitution of India, the power exercised by this Tribunal, to interfere with the orders of Regulatory Commissions including the MERC, is an appellate power. Section 111 of the Electricity Act relates to an Appeal to the Appellate Tribunal and, under Sub-Section (1) thereof, any person aggrieved, among others, by an order made by the Appropriate Commission (which would include the MERC) under this Act (which would include the impugned Order) may prefer an appeal to the Appellate Tribunal for Electricity. Section 111(3) provides that, on receipt of an appeal under sub-section (1), the Appellate Tribunal may, after giving the parties an opportunity of being heard (such an opportunity has been given both to the Appellant and MERC), pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

**21.** The expression "appeal" has not been defined either under the Electricity Act or in the CPC. *Black's Law Dictionary* (7th Edn.) defines an appeal as "a proceeding undertaken to have a decision reconsidered by bringing it to a higher authority". It is a judicial examination of the decision by a higher court of the decision of a subordinate court to rectify any possible error in the order under appeal. **(Malluru Mallappa v. Kuruvathappa, (2020) 4 SCC 313).** The essential criterion of appellate jurisdiction is that it revises and corrects the proceedings in a cause already instituted and does not create that cause. The appellate jurisdiction may be exercised in a variety of forms and, indeed, in any form in which the legislature may choose to prescribe. An appeal is a process of civil law origin and removes a cause entirely, subjecting the fact as well as the law to a review and a retrial. **(*Shankar Ramchandra Abhyankar* v. *Krishnaji Dattatreya Bapat*, (1969) 2 SCC 74**; **Malluru Mallappa v. Kuruvathappa, (2020) 4 SCC 313).**

**22.** It is settled law that an appeal is a continuation of the proceedings of the original court/tribunal. In the first appeal, all questions of fact and law decided by the trial court/original tribunal are open for reconsideration. (***SantoshHazari*v. *PurushottamTiwari* :(2001)3SCC179; Madhukar v. Sangram, (2001) 4 SCC 756).** Appellate jurisdiction involves a rehearing, as it were, on law as well as fact and is invoked by an aggrieved person. **(Sri Raja Lakshmi Dyeing Works v. Rangaswamy Chettiar, (1980) 4 SCC 259; *B.M. Narayana Gowda* v. *Shanthamma*, (2011) 15 SCC 476; *H.K.N. Swami* v. *Irshad Basith*, (2005) 10 SCC 243; Malluru Mallappa v. Kuruvathappa, (2020) 4 SCC 313; Santosh Hazari v. Purushottam Tiwari: (2001) 3 SCC 179; Madhukar v. Sangram, (2001) 4 SCC 756).** A right of appeal carries with it a right of rehearing on law as well as on fact, unless the statute conferring a right of appeal limits the rehearing in some way. ***(Hari Shankar* v. *Rao Girdhari Lal Chowdhury*, AIR 1963 SC 698**;

**Vinod Kumar v. Gangadhar, (2015) 1 SCC 391;B.V. Nagesh v. H.V. Sreenivasa Murthy, (2010) 13 SCC 530;Malluru Mallappa v. Kuruvathappa, (2020) 4 SCC 313).**

**23.** This Tribunal is the first appellate authority and, in view of Section 111(3) of the Electricity Act, the whole case before the original authority (in the present case the MERC) is open for rehearing both on questions of fact and law. As a matter of law, if the appraisal of evidence by the original authority (in the present case the MERC) suffers from a material irregularity or is based on inadmissible evidence or on conjectures and surmises, the appellate court/tribunal is entitled to interfere with the findings of fact recorded by the original authority (MERC) in the order appealed against. ( **Santosh Hazari v. Purushottam Tiwari: (2001) 3 SCC 179; Madhusudan Das v. Narayanibai : (1983) 1 SCC 35 : AIR 1983 SC 114**).

**24.** Section 112 of the Electricity Act relates to the composition of the Appellate Tribunal. Section 112(2)(b) stipulates that, subject to the provisions of the Act, a bench may be constituted with two or more members of the Appellate Tribunal. Under the proviso thereto, every bench constituted under clause (b) of Section 112(2) shall include atleast one judicial member and one technical member. Section 113 relates to the qualification for appointment as Chairperson and member of the Appellate Tribunal. Under Section 113(1)(b)(iii), a person shall not be qualified as a technical member of the Appellate Tribunal unless he is or has been a person of ability or standing, having adequate experience in dealing with matters relating to electricity generation, transmission, and regulation or economics, commerce, law or management. More often than not, the technical member of this Tribunal is a person well versed in, and having long standing experience, in matters relating to Electricity. To arrogate to itself alone the expertise on the subject, and in condemning the Appellate

Tribunal for Electricity to lack any knowledge in this regard, does not show the MERC in good light.

**25.** In this context it is useful to refer to **UP Power Corp. Ltd. v. NTPCL and Others: (2009) 6 SCC 235,** wherein the Supreme Court took note of the submission that the Appellate Tribunal should not ordinarily interfere with an order of the Central Commission. While expressing its inability to agree, the Supreme Court observed that the jurisdiction of the Appellate Tribunal is wide; it is also an expert tribunal and, thus, it can interfere with the finding of the Central Commission both on fact as also on law; and both the Central Commission as also the Appellate Tribunal are expert bodies.

**26.** What applies to the Central Commission would undoubtedly apply to the MERC also. It is unnecessary for us, therefore, to say anything more. In the light of the aforesaid observations, this preliminary objection necessitates rejection.

### (ii) POWER OF MERC TO FIX A TARIFF HIGHER THAN THAT PROPOSED BY THE LICENSEE:

**27.** It is contended, on behalf of MERC, that, in the exercise of its regulatory power, MERC can prescribe a higher tariff than what has been sought by the licensee if it is satisfied that the tariff sought is unreasonably low; and, in **Amausi Industries Association & Ors. v Uttar Pradesh Electricity Regulatory Commission (Appeal Nos. 239,240,241,243 of 2012 & Appeal No. 11,12 & 160 of 2013)**, this Tribunal held that, in the exercise of its power as a regulator, the Commission is not bound by the proposals of the licensee; if the Commission feels that the licensee has underestimated a cost item, it may approve a higher number; and there is no principle of regulatory jurisprudence that the Commission must always approve a figure lower than what the licensee proposes.

**28.** In **Amausi Industries Association Vs. Uttar Pradesh Electricity Regulatory Commission: (Order in APPEAL NO.239 OF 2013 dated ),** this Tribunal held that, under the Scheme of the Electricity Act, the Commission is a Regulator; in exercise of its powers as a Regulator, the Commission is not bound by the proposals of the licensee; if the licensee proposes a figure (of any cost item) that the Commissions feel is too high, the Commission may reduce it; equally, if the Commission feels that the licensee has underestimated a cost item, it may approve a higher number; there is no principle of regulatory jurisprudence that the Commission must always approve a figure lower than what the licensee proposes; and, in **V. S. Rice Oil Mills ltd Vs State of Andhra Pradesh - (1964) 7 SCR 456,** the Supreme Court held that the word "regulate" is wide enough to confer power to regulate either by increasing the rate, or decreasing the rate, the test being what is it that is necessary or expedient to be done to maintain, increase, or secure supply of the essential articles in question and to arrange for its equitable distribution and its availability at fair prices; the power to regulate can be exercised for ensuring the payment of a fair price, and the fixation of a fair price would inevitably depend upon a consideration of all relevant and economic factors which contribute to the determination of such a fair price; and if the fair price, indicated on a dispassionate consideration of all relevant factors, turns out to be higher than the price fixed and prevailing, then the power to regulate the price must necessarily include the power to increase so as to make it fair.

**29.** There can be no quarrel with the submission that, in cases where the price sought by the Licensee is unreasonably low, the Regulatory Commission would undoubtedly have the power to fix a higher price. However, as held by the Supreme Court in **V. S. Rice Oil Mills ltd Vs State of Andhra Pradesh - (1964) 7 SCR 456**, and this Tribunal in **Amausi Industries Association & Ors. v Uttar Pradesh Electricity Regulatory**

**Commission (Appeal Nos. 239 of 2012** and batch **& Appeal No. 11 of 2013** and batch), the Commission, before doing so, should dispassionately take into consideration all relevant factors which contribute to the determination of a fair price.

**30.** Section 62(1)(d) of the Electricity Act requires the Appropriate Commission to determine the tariff in accordance with the Electricity Act for the retail sale of electricity. Section 61 requires the Commission to specify the terms and conditions for the determination of tariff and, in doing so, to be guided, among others, by (c ) factors which would encourage competition, efficiency and economic use of resources, (d) safeguarding of consumers interests and, at the same time, recovery of the cost of electricity in a reasonable manner, (e) the principles rewarding efficiency in performance, and (g) that the tariff progressively reflects the cost of supply of electricity and also reduces cross-subsidy in the manner specified by the appropriate commission. A tariff, higher than the one sought for by the Licensee itself, can only be fixed after the aforesaid, and other relevant factors, are taken into consideration. The Commission should exercise great caution, while permitting ARR and tariff higher than the one sought by the licensee, since that would result in the consumers being forced to pay a tariff higher than what the licensee has itself sought, and may fall foul of Section 61(d) whereby the Commission is required to safeguard consumer interests. Fixing a tariff, higher than that sought by the licensee itself, should be more in the nature of an exception, and not as a norm or as a matter of course.

### (iii) CHALLENGE ONLY TO THE SCHEDULE OF THE MTR ORDER: ITS EFFECT:

**31.** Learned Senior Counsel, appearing on behalf of MERC, would submit that the appellant has only sought stay of the Tariff Schedule, and not the

Impugned Order; the impugned order cannot be said to be manifestly arbitrary or erroneous or to suffer from non-consideration or non-application of mind to relevant factors or based on facts which do not exist or is perverse or unreasonable which the MERC, properly informed, could have arrived at or is influenced by irrelevant or extraneous matters necessitating interference of this Tribunal at the interim stage; in the main appeal, the appellant has sought increase in the cost on two other issues (Income Tax and Interest on Working Capital) which may result in the tariff reduction being claimed in the interim application; the validity of the impugned order has necessarily to be considered at the final disposal stage; and the decision of this Tribunal thereon will decide the issue and make it unnecessary, at interim stage, to interfere with the impugned order.

**32.** With regards the contention of MERC that the appellant has only sought stay of the Tariff Schedule, and not the Impugned Order, Learned Senior Counsel appearing on behalf of the appellant, would submit that such hyper technical arguments are being used as a smokescreen to dent the legitimate claims of the appellant; the tariff schedule is a part of the Impugned Order and is, in effect, the operative portion of the same, which sets out the applicable tariff for the appellant; even otherwise, the impugned order also comprises of true up orders for different financial years for the appellant, for which no interim relief has been sought; and it is fallacious for MERC to contend that the appellant should have sought stay of the entire Tariff order and not just the Tariff Schedule.

**33.** Annexure II of the Mid-Term Review Order is the Tariff Schedule for FY 2023-24 and FY 2024-25, whereby MERC determined the tariff for supply of electricity by the Appellant to various classes of consumers as applicable from 01.04.2023. Annexure II, evidently, is the operative part of the impugned order. as it details the tariff which the Appellant should charge for supply of electricity to various classes of its consumers. Such tariff fixation in the Schedule is based on the reasons assigned by MERC in the main Order. The Schedule can as well be called the operative part of the MTR Order. As the Appellant is aggrieved by the tariff so fixed in the Schedule to the MTR Order, they have sought stay of the tariff schedule alone, and not the MTR order in its entirety.

**34.** Further, the impugned MTR order dated 31.03.2023 is based on the petition filed by the Appellant seeking approval of truing up of the Aggregate Revenue Requirement (ARR) for FY 2019-20, FY 2020-21 and FY 2021-22, the provisional truing up of ARR for FY 2022-23, and approval of the revised ARR and Tariff for FY 2023-24 and FY 2024-25. The Appellant, in this interlocutory proceedings, has questioned only that part of the order of the MERC dated 31.03.2023, in so far as it related to their petition seeking approval of the revised ARR and tariff for FY 2023-24 and FY 2024-25 alone, and not with respect to the approval sought for truing up of the ARR of the earlier Financial Years as also for the previous truing up of ARR for FY 2022-23.

**35.** The objection taken, on behalf of MERC, to the maintainability of the interlocutory application on this score, necessitates rejection.

### III. PRIMA FACIE CASE:

**36.** The first of the three tests, to be satisfied for the grant of interlocutory relief, is whether the Appellant has made out a prima facie case. A prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the case were to be believed. While determining whether a prima facie case had been made out or not the relevant consideration is whether, on the evidence led, it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at on that evidence. Prima facie case means that the assertions on these aspects are bona fide (***Nirmala J. Jhala v. State of Gujarat and Another: (2013) 4 SCC 301***; ***Vidya Drolia vs Durga Trading Corporation - (2021) 2 SCC 1)***. The burden is on the plaintiff by evidence aliunde, by affidavit or otherwise, to show that there is "a prima facie case" in his favour which needs adjudication at the trial. Prima facie case is a substantial question raised, bona fide, which needs investigation and a decision on merits. (***Dalpat Kumar v/s Prahlad Singh: AIR 1993 SC 276; Mahadeo Savlaram Shelke and Ors. Vs. Puna Municipal Corporation and Ors. : MANU/SC/0673/1995)***.

**37.** For the purpose of determining whether or not a prima facie case has been made out, this Tribunal would not substitute its own judgement for that of the Respondent or weigh the material placed by them on record to arrive at a definite conclusion whether or not the averments made in the interlocutory application are true. All that this Tribunal should do, at this stage, is to satisfy itself that the averments in the interlocutory application, if taken to be true, is a possible view, and that it raises substantial questions which needs investigation at the trial, and a decision on merits.

**38.** The interlocutory remedy is intended to preserve in status quo, the rights of parties which may appear on a prima facie case. **(Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd., (1999) 7 SCC 1).** A finding on "prima facie case" would be a finding of fact. While arriving at such a finding of fact, the court must arrive at a conclusion that a case for trial has been made out **(M. Gurudas v. Rasaranjan, (2006) 8 SCC 367).** A prima facie case means a case which can be said to be established if the evidence which is led in support of the same were believed. While determining whether a prima facie case had been made out the relevant consideration is whether, on the evidence led, it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at on that evidence. **(Martin Burn Ltd. v. R.N. Bangerjee, 1958 SCR 514).** The probability of the plaintiff's success must be comparatively higher **(Gujarat Electricity Board v. Maheshkumar & Co., 1982 SCC OnLine Guj 29).**

**39.** The appellant's grievance, in these proceedings, is that MERC had arbitrarily determined their AcoS for FY 2023-24 (including the quantum and cost of power purchase) far higher than their proposal, and had failed to ensure that the determined tariff is within the range of +/- 20% of the Average Cost of Supply ("**ACoS**"); the tariff of the appellant has been so designed by MERC that, despite having the lowest ACoS i.e., Rs.8.42/ kWh, the appellant has been made substantially expensive, so much so that out of the 24 categories, the tariff for 17 categories is higher for the appellant, as compared to its parallel competing licensees; and the consequences of such artificial increase in their tariff is such that the appellant's very existence has been endangered, it has been rendered extremely uncompetitive, and thereby the level playing field, in the parallel distribution regime in Mumbai, is destroyed which is against the scheme of the Act i.e., to promote consumer interest and competition in the market.

**40.** It is convenient to examine the elaborate oral and written submissions, put forth by Learned Senior Counsel on either side, under different heads.

## A. POWER PURCHASE QUANTUM AND COST:

### (i) APPELLANT'S CONTENTIONS:

**41.** Learned Senior Counsel for the appellant would submit that MERC has arbitrarily increased the power purchase quantum to be procured from

TPC-G from 1550.52 to 3369.94 MUs (a 53% hike) as compared to the projected quantum by the Appellant **(**Impact on tariff by 0.77 Rs./kWh**)**; and, while the tariff hike for other distribution licensees has only been in the range of 2-5%, the tariff hike for the appellant has been 11-12% which is substantially higher; MERC has essentially acted against its own directions to source power from economical/cheaper sources, following the principle of merit order despatch; Part C (Regulation 18 to Regulation 22) of the MYT Regulations 2019 provides for power procurement by a Distribution Licensee; Regulation 22.4 empowers a Licensee to undertake procurement from short term power sources to reduce its overall procurement cost; the appellant had sought to optimise its power purchase cost by proposing to procure power from other available cheaper short-term sources in the market, as the quantum of short-term bilateral power procurement during FY 2022-23 was more than one and half times the quantum procured during FY 2020-21, and more than two and a half times the quantum of FY 2019-20, despite the alleged transmission constraint to bring power from outside Mumbai; however, MERC substantially reduced the short term power purchase quantum projected by the appellant to around 365 MUs as compared to the approval of 626 MUs in MYT Order for FY 2022-23, on account of its unilateral determination of increased quantum of power purchase from TPC-G.

**42.** Learned Senior Counsel for the appellant would state that the the edifice of the MERC's objections to the appellant's claim are (a) there exists transmission constraints for procuring power from outside Mumbai. (b) procurement has been allowed based on the past procurement history of the appellant from TPC-G; the Mumbai peak demand is about 3851 MW, however for the rest of the year the average demand is around 2300 MW; the natural sequitur is that the transmission constraint scenario is not perineal, but is experienced only during specific periods, i.e., in seasons when there is higher power demand which is more particularly limited to the months of April, May, June and October; MERC ought to have followed the Merit Order Dispatch principle while fixing the procurement plan from embedded generation and from outside Mumbai, and the same ought to have been designed in such a manner that the appellant is permitted to procure less from the more expensive source i.e., TPC-G, and more from cheaper sources outside Mumbai, especially during non-peak demand seasons when transmission constraint is not a concern; the duration curve of Mumbai's gross exchange for FY 22-23 indicates that the period of high inter-change which may cause transmission constraints, if at all, is only for 5% of the time period in a year; the inter-change has been more than 2000 MW for around 17%, mainly during peak demand season i.e., April, May, June, and October; the appellant should have been permitted to procure more power from alternate sources at least during the non-peak period, which would have been without affecting the grid stability and at a cheaper rate; in the alternative, MERC ought to have allowed procurement limited to the technical minimum i.e., 55% of the TPC-G ***(Reduction in ACoS by Rs. 0.21/kWhl),*** which would have served the purpose of utilization of minimum embedded generation, and the remaining power could have been procured at a cheaper rate from outside; on 25.05.2023, MERC tendered a chart titled "Demand in (MW) and corresponding Energy Consumption (MU)" wherein MERC itself, at para 7 to 9, states that the internal generation capacity only needs to run at the technical minimum, and the balance can be sourced from external sources; the only reason provided by MERC, for rejection of the appellant's procurement from alternate sources, is that of the alleged transmission constraints; however, what is glaring is that MERC has overlooked the fact that, as a consequence of the Impugned Order, there shall be a mass migration of consumers of the appellant to the competing licensees, and it would be impossible even for the other competing licensees to purchase the increased quantum of electricity from outside sources to meet the increasing demand of consumers due to the alleged transmission constraints; no rationale has been provided as to how the available transmission corridor has been allocated by MERC which, *ex facie,* appears to be disproportionate and antithetical to promoting competition, maintaining a level playing field, and providing electricity at the cheapest rate to the consumers in Mumbai, which would have been in line with the objective of the Act; the chart tendered by MERC on 19.05.2023, titled "MYT approved v. MTR Petition v. MTR approved figures", evidences the arbitrariness in determination by MERC which is apparent from the following facts: (1) MERC, after approval of 1671 MUs in the MYT Order, has instead of considering the projected quantum of 4399 MUs from alternate sources for the appellant, has arbitrarily reduced the same to 2411 MUs for FY 2023-24, citing the issue of transmission constraint. (2) however MERC, despite the existing issue of alleged transmission constraint, has increased the projected quantum for another parallel licensee from 6772 MUs approved in the MYT Order, and 8478 MUs sought in the MTR Petition to 8849 MUs in the MTR Order, for FY 2023-24; (3) it is thus clear that MERC has selectively applied the alleged transmission constraint phenomenon over the appellant to arbitrarily curtail its right to procure power from alternate sources at the cheapest rate, whereas no such curtailment has been applied to other parallel licensee(s) which have been allowed an increase in its procurement quantum from outside Mumbai; there has been a substantial increase in the total procurement by Mumbai DISCOMs from outside sources from FY 2021-22; in fact, MERC itself has approved higher procurement from outside Mumbai during FY 2023-24 and FY 2024-25 for Mumbai DISCOMs put together by about 910.44 MUs over FY 2022-23, and additional 1553 MUs in FY 2024-25 with disproportionate allocation of the increased quantum between DISCOMs in spite of the claim of transmission constraint; even otherwise, as per Section 32 of the Act, maintaining grid stability is a function of the SLDC, and promoting competition and protecting interest of the consumers is the duty of the MERC; and, in the instant case, MERC has sought to clothe itself with the statutory function of the SLDC, and has failed to discharge its statutory functions as prescribed under the Act.

**43.** Learned Senior Counsel for the appellant would further submit that as per the BEST Order, during the time when maximum hourly Mumbai demand of 3851 MW occurred i.e., on 28th April 2022 at 16:00, the available transfer capability ("**ATC**") was 2260 MW, and embedded generation was 1591 MW (out of 1877 MW), despite which no congestion was reported; thus, at present, when the utilized ATC for LTAs and MTAs is 1340 MW, from the balance availability of ATC i.e., 920 MW, further allocation ought to have been considered for the appellant to allow it to procure power from outside Mumbai at a cheaper rate; as per the State of Maharashtra directive dated 03.11.2022, issued under Section 108 of the Act, the transmission capacity available for power flow into Mumbai is 2786 MW, as compared to the availability of 2522 MW suggested by MERC; the overt reliance on the Order dated 15.03.2023 passed by MERC, in Case No. 240 of 2022 ("**BEST Case**"), to contend that the claim of the appellant is not maintainable due to the alleged transmission constraint is erroneous as the said Order, at no point, decided that a DISCOM in Mumbai, like the appellant, is technically or physically precluded from sourcing power from outside Mumbai; to the best of their knowledge, as on date, no licensee has been denied outside procurement on short term basis on the ground of transmission constraints; the whole emphasis of the BEST Order, i.e to procure from embedded generation, is to meet the demand of Mumbai Consumers, so that no untoward incident like black outs take place; the prudent way would have been to ensure that the embedded generators run at technical minimum, which would have two-fold benefits: (1) in case of any contingency in the transmission line, the generators would have been in a position to ramp up their capability to overcome any shortcoming in supply of power and meeting the demand of Mumbai consumers. (2) the same would have enabled the appellant to procure cheaper power from alternate sources i.e., outside Mumbai, which would have been in the interest of the consumers; and, therefore, the objections raised by MERC are liable to be rejected by this Tribunal.

**44.** Learned Senior Counsel for the appellant would also submit that the tariff determined represents both the Power Purchase Quantum and Cost, where the quantum to be procured is directly proportional to the rate of procurement cost; while approving a higher quantum, and in considering the average quantum of purchase from TPC-G in the last 3 years, i.e., FY 2019-20 to FY 2021-22, MERC failed to consider that the procurement cost from TPC-G, during the said period, was visibly lower than the applicable rates for FY 2023-24 and FY 2024-25; the variable rate of procurement cost from TPC-G during FY 2019-20 to FY 2021-22 was in the range of around Rs. 3.57/- and 5.47/- which is substantially lower than the approved rate for FY 2023-24 which is Rs. 7.44/- and Rs. 7. 30/- for Units 5 and Unit 8 of TPC-G, respectively; for the current month of April 2023; the appellant has incurred an average cost of Rs. 7.59/kWh (variable+fixed charges) towards procurement from TPC-G Trombay Thermal Generating Units, as compared to the approved average rate of Rs. 8.58/kWh (variable and fixed charges); it is thus evident that MERC has arbitrarily designed the tariff for the appellant on the higher side, thereby unnecessarily burdening consumers, and prejudicially affecting the appellant’s competitiveness, while ignoring the submissions duly advanced by them; in the changed circumstances, when there has been such an astronomical increase in the cost of procurement from TPC-G, the appellant, being a prudent utility, had projected lesser quantum of power from TPC-G Trombay Thermal Generating units, which would have ultimately benefited its consumers; such a revised projection in quantum to be procured from TPC-G is in line with Regulation 5.1(b) read with 20.7 of the MYT Regulations 2019, which gives the Distribution Licensee (such as the appellant) the prerogative to apply for modification in its power procurement plan for the remainder of the Control Period; even, as per the MERC, the technical minimum procurement from embedded generation is 2900 MUs for the appellant which is actually 2095 MUs (Technical Minimum from TPC-G's Trombay Thermal Generating units) + 709.66 Mus from Hydro; thus MERC could not have approved 3369.94 MUs and 3376.70 MUs for FY 2023-24 and 2024-25 respectively, ignoring the high cost of procurement from TPC-G; the net effect is that 565 additional Mus, beyond the technical minimum of TPC-G Thermal, has been considered for FY 2023-24 and 2024-25; MERC has arrived at such an erroneous finding based on its observation that no explanation/justification has been provided by the appellant for projecting such lower purchase from TPC-G in FY 2023-24, as compared to past trends; on the contrary, the appellant had made detailed submissions with regard to its PPA with TPC-G coming to an end as the same was only valid till 31.03.2024; even otherwise, the cost of procurement from alternate sources was much less as compared to TPC-G, which would have ultimately benefited the consumers which is in line with Section 61(d) of the Act; and in any case, during the MTR Proceedings, MERC could have sought details / justification from the appellant in this regard, as is done in normal practice by way of data gaps.

### (ii) RESPONDENT'S CONTENTIONS:

**45.** On the other hand, Learned Senior Counsel appearing on behalf of MERC would submit that, for the purposes of projection for the ensuing FY

2023-24, MERC has considered the following: (i) the decision of MERC in its order dated 15.03.2023 in Case No. 240/2022 mandating embedded generation in view of transmission constraints, and for meeting electricity demand of Mumbai consumers; the Appellant was a party Respondent to the said proceedings, and this order dated 15.03.2023 has also been referred to in the impugned order; MERC took into consideration the expert views of the Maharashtra State Transmission Utility (STU), (a statutory authority under Section 39 of the Electricity Act, 2003), and the Maharashtra State Load Despatch Centre (MSLDC), (a statutory authority under Section 31 of the 2003 Act); both these statutory authorities have unanimously identified: (i) available transmission capacity of tie lines to bring power from outside to Mumbai as 2522 MW which, for contingencies at 400 kV Line, requires reduction in ATC to 1905 MW, (ii) as transmission projects are still at different stages of execution, there is no ATC margin available in the CTU-STU Network; (iii) taking out embedded generation of TPC-G at Trombay completely will affect the reliability of Mumbai, and it is necessary that the embedded generation of 1877 MW is fully brought on stream; (iv) the projected quantum of power to be procured from TPC-G by the Appellant as per the figures approved in the MYT order for FY 2019-20, FY 2020-21 and FY 2021-22, and the actual usage of power by the Appellant from TPC-G as contained in the impugned order, is summarized by way of a Table titled "Energy (MU)" MYT approved/ MTR Petition/ MTR Approved"**,** and FY 2022-23 was not considered since the audited data for only 6 months was available; while MERC had projected 3370 MUs in the impugned order for FY 2023-24, it is ultimately the system operator who will be controlling the generation plants i.e. embedded generation; if transmission constraints and other technical factors permit this quantum to be reduced, and the quantum from outside Mumbai sources to be increased, then the entire off-take of the Appellant will be planned by the system operator i.e. the SLDC keeping in view the "Real Time Operations for Grid control and dispatch"; and a tabulated data was submitted by MERC, during the course of hearing, regarding the demand of Mumbai consumers and the factor of bottlenecks of tie line capacity demonstrating that embedded generation is being utilized beyond the technical minimum capacity.

**(a) LONG TERM / MEDIUM TERM CONTRACTS OF MUMBAI DISCOMS:**

| **BEST** | | **TPC-D** | | **AEML-D** | |
|---|---|---|---|---|---|
| **Source** | **Capacity (MW)** | **Source** | **Capacity (MW)** | **Source** | **Capacity (MW)** |
| a) Capacity already commissioned | | | | | |
| TPC-G | 677 | TPC-G | 700 | AEML-G | 500 |
| RE Sources | 20 | RE Sources | 490 | Medium Term | 600 |
| Medium Term | 100 | **Total** | **1190** | RE Sources | 740 |
| **Total** | **797** | | | **Total** | **1840** |
| b) Contracted but capacity yet to be commissioned | | | | | |
| RE Sources | 400 | | | | |

**46.** Learned Senior Counsel would further submit that, if the appellant's argument of converting tie-line capacity from MW to MU is considered for allowing energy procurement, then: (a) MW x 8.760 = MU in a year (b) 2522 MW x 8.760 = 22092 MUs (c) total Energy requirement approved for Mumbai Discom for FY 2022-23 = 23088 MU (d) thus only 996 MU (23088 – 22092) is to be met from internal generation. Hydro, which is an internal generating plant is generating around 1450 MUs (e) Hence, if the appellant's argument is accepted then there is no requirement of internal thermal generating capacity, and it can be shut down immediately; SLDC had stated that based on simulation study result, and for reliable and secure operation of Mumbai grid, embedded generation is mandatory; the Appellant as well as TPC-G were party Respondents in Case No. 240/2022;

MERC has submitted a Table showing the Total Transmission Capacity of Mumbai Tie-Lines (ATC), embedded generation and allowable power from outside sources; statutory authorities, under the Electricity Act, had recommended the requirement of internal generation capacity; thermal generating capacities needs to be run at least on a technical minimum; in the past, depending upon consumer demand which varies in each hour of the day, higher percentage of internal generating capacity has been used; hence, while approving tariff, MERC has considered the average of actual utilization for FY 2019-20 to FY 2021-22, and has allowed around 476 MU higher than the technical minimum; however, if transmission constraints permit, the appellant is free to bring cheaper available power from outside and pass on reduced expenses to consumer on monthly basis through the FAC mechanism.

**47.** Regarding the quantum of off-take from embedded generation, Learned Senior Counsel appearing on behalf of MERC, would submit that the comparative chart of generation projected by the Appellant in its MTR Petition, the technical minimum and the generation approved by the MERC in its Order dated 31.03.2023 is tabulated below:

| Unit | Energy as Per TPC-D Petition* (MU) | Energy approved by MERC* (MU) | Energy as per Technical Minimum @ 55% for Thermal Units (MU) |
|---|---|---|---|
| Unit 5 | 284 | 1375 | 1108 |
| Unit 7 | 325 | 541 | 413 |
| Unit 8 | 176 | 745 | 663 |
| Bhira | 475 | 433 | 432 |
| Bivpuri | 152 | 141 | 140 |
| Khopoli | 138 | 136 | 136 |
| **Total** | **1551** | **3370** | **2894** |

**48.** As seen from the above table, the energy projected by the Appellant in its MTR Petition, i.e. 1551 MU, is not only lower than its historical consumption from TPC-G, but is also lower than the technical minimum; as various authorities have recommended a must run status for embedded generation, projecting energy below the technical minimum is unacceptable; the stipulated energy procurement from TPC-G is slightly higher than the technical minimum based on the actual historical consumption for FY 2019-20 to FY 2021-22; MERC has been allowing utilization of embedded generation by the three Distribution Licensees in Mumbai based on their respective PPAs with the embedded generation capacity; and the table below indicates Distribution Licensee wise historical utilization of embedded generation:

| Year+A2:N20 | TPC-D Power Purchase (MU) | | | | BEST Power Purchase (MU) | | | | AEML-D Power Purchase (MU) | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | **TPC-G** | **others** | **Total** | **% internal Power** | **TPC-G** | **others** | **Total** | **% internal Power** | **AEML-G** | **TPC-G** | **others** | **Total** | **% internal Power** |
| FY 2008-09 | 2467 | 133 | 2601 | **95%** | 4622 | 133 | 4754 | **97%** | 4025 | 2836 | 2815 | 9676 | **71%** |
| FY 2009-10 | 2842 | 87 | 2929 | **97%** | 4312 | 454 | 4766 | **90%** | 4085 | 2712 | 2911 | 9708 | **70%** |
| FY 2010-11 | 3132 | 1470 | 4602 | **68%** | 4563 | 285 | 4848 | **94%** | 3741 | 1252 | 3608 | 8600 | **58%** |
| FY 2011-12 | 4947 | 1177 | 6125 | **81%** | 4543 | 306 | 4849 | **94%** | 3972 | 0 | 3474 | 7446 | **53%** |
| FY 2012-13 | 5245 | 1677 | 6922 | **76%** | 4725 | 181 | 4906 | **96%** | 3995 | 0 | 3350 | 7345 | **54%** |
| FY 2013-14 | 4194 | 2650 | 6845 | **61%** | 4059 | 760 | 4819 | **84%** | 3739 | 0 | 3779 | 7518 | **50%** |
| FY 2014-15 | 3462 | 2855 | 6316 | **55%** | 3411 | 1478 | 4889 | **70%** | 3642 | 198 | 4958 | 8799 | **44%** |
| FY 2015-16 | 3753 | 2267 | 6021 | **62%** | 3527 | 1531 | 5058 | **70%** | 3481 | 11 | 5687 | 9178 | **38%** |
| FY 2016-17 | 3845 | 799 | 4645 | **83%** | 3630 | 1209 | 4838 | **75%** | 3394 | 0 | 5600 | 8994 | **38%** |
| FY 2017-18 | 3815 | 733 | 4548 | **84%** | 3625 | 1341 | 4967 | **73%** | 3190 | 0 | 6203 | 9392 | **34%** |
| FY 2018-19 | 3775 | 906 | 4682 | **81%** | 3746 | 1179 | 4924 | **76%** | 3268 | 0 | 6105 | 9373 | **35%** |
| FY 19-20 | 3620 | 1112 | 4732 | **77%** | 3447 | 1502 | 4949 | **70%** | 3026 | 0 | 6407 | 9433 | **32%** |
| FY 20-21 | 3116 | 1254 | 4370 | **71%** | 3085 | 965 | 4050 | **76%** | 2897 | 0 | 5157 | 8055 | **36%** |
| FY 21-22 | 3474 | 1479 | 4953 | **70%** | 3285 | 1122 | 4407 | **75%** | 2975 | 0 | 5837 | 8812 | **34%** |
| FY 22-23 | 3162 | 2377 | 5539 | **57%** | 3013 | 1879 | 4892 | **62%** | 3027 | 0 | 8007 | 11033 | **27%** |
| FY 23-24 | 3370 | 2411 | 5781 | **58%** | 3231 | 1913 | 5145 | **63%** | 3684 | 0 | 8478 | 12162 | **30%** |

**49.** According to the Learned Senior Counsel, the following aspects become clear from the above Table: (1) AEML-D has always had the highest total power purchase requirement amongst the three distribution licensees; (2) in the year FY 2008-09, TPC-G generation was allocated to all three distribution licensees. Allocation of TPC-G to AEML-D was reduced in FY 2010-11 and became nil from FY 2011-12; (3) after consuming embedded generation, the balance power for meeting total energy requirement is met through external sources; (4) as AEML-D's share from embedded generation has reduced, it has to depend upon external power for meeting their consumer demand; (5) as the total energy requirement of all Distribution Licensees are increasing over the period, and embedded generation capacity is constant, increased demand is met through external generation. Therefore contribution of embedded generation, to the total energy requirement, is reducing for all three Distribution Licensees; (6) in Mumbai, transmission constraints are in Day Peak period only i.e there is no restriction on the Licensees to optimize their power procurement during the non-peak period; the maximum peak is observed during the day, whereas in the evening & night the demand is on the lower side; (7) accordingly, SLDC evaluates the transmission constraints on a day ahead basis, and may permit utilities / Licensees to maximize embedded generation only during peak hours; and during the rest of the period, the utility may procure from outside by backing down embedded generation based on economy; (8) allocation from TPC-G is in the same ratio & trend, and no exceptional steps have been taken by MERC; (9) imported coal prices were higher during last year, even then the appellant procured around the same generation without any intervention from MERC; the present marginal increase is because load has increased; as there has been no increase in the transmission capacity, hence supply has to come from embedded generation only; and despite this, and considering increase in load on RTC basis etc, MERC has allowed higher purchase to the appellant from outside Mumbai.

**50.** On reduction of the Appellant's projection, for procurement of power from outside sources (other than embedded generation in Mumbai (inter-state procurement) from 4399 MU to 2411 MU, Learned Senior Counsel for MERC would submit that the total source wise quantum, to meet the total requirement of 5781 MU, has to be approved; the source wise quantum is decided in the following sequence: (a) due to transmission constraints, TPC-G quantum is considered first based on the average of actual drawl in

FY 2019-20 to FY 2021-22. Accordingly, 3370 MU is approved for TPC-G. (b) RE quantum for meeting RPO is approved as projected by the Appellant i.e. 1346 MU @ Rs. 3.22/kWh. These are based on firm contracts, tariff for which has already been adopted in separate proceedings. (c) additional RE quantum of 700 MU, as projected by the appellant, is approved however @ 4.90/kWh. These are short term contracts to be entered during the year (d) after allowing for the above three sources, residual quantum i.e. 365 MU is approved for bilateral @ Rs 5.13/kWh. These are short term contracts to be entered during the year; and a similar approach, of considering embedded generation first, is adopted for all three distribution licensees in Mumbai.

### (iii) ORDERS OF MERC DATED 15.03.2023 AND 31.03.2023:

**51.** In its order dated 15.03.23, in the case of BEST, MERC noted that, as per corrected submission filed by STU, existing ATC of Mumbai Tie-lines was 2522 MW which had been reduced to 1905 MW in view of contingencies being faced at 400 kV line. It then held that, even if 400 kV contingency is not considered, then also the existing ATC of Mumbai Tie-line is limited to 2522 MW which is not sufficient to meet Mumbai Demand (@3851 MW achieved on 28$^{th}$ April 2022) without support of embedded generation; as submitted by BEST, on such date of Maximum demand, the Mumbai tie-line loading was 2260 MW and embedded generation was 1591 MW; even if on that day tie-lines was loaded to their full ATC i.e. 2522 MW, then also 1329 MW embedded generation would be required; and therefore, in the existing scenario, embedded generation was required for meeting electricity demand of Mumbai Consumers.

**52.** While examining the possibility of partial/phased reduction in embedded generation capacity, MERC noted that the STU and MSLDC, in its submissions, had also highlighted that non- availability of embedded generation in Mumbai would create low voltage issues which would limit power transfer capability of Mumbai Tie-lines. It therefore held that embedded generation is required for MSLDC for controlling grid voltages; in case some of the capacity of the embedded generation is not contracted, then such capacity remains out of reach of SLDC, as SLDC can give instructions to generating unit only if it has a valid PPA with any buyer; therefore when the system operator,, i.e. MSLDC, based on its expertise as a system operator backed up by the study, was recommending continuation of embedded generation for safe, secure and reliable system operation, MERC could not instruct against the same at least till the envisaged transmission capacity addition was achieved; considering the issue of transmission constraint, BEST needed to extend its existing PPA with TPC-G for FY 2024-25 i.e. till March 2025; the Government of Maharashtra was also concerned about the supply to Mumbai city, and it had also issued directions under Section 108 of the Electricity Act to MERC to extend PPA with embedded generation at least for 10 years, once the Distribution Licensee approaches for the same; taking note of the concerns of the Government of Maharashtra, MERC had conveyed to the Government that it would take appropriate and necessary steps with regards extension of the existing PPA so as to ensure reliable and secure power supply to Mumbai; through the present Order, MERC was directing extension of the existing PPAs only upto the end of this control period i.e 2024-25 (one year extension), because once transmission capacity/ addition projects are commissioned, Mumbai Distribution Licensees shall be free to explore cheaper alternative power supply; and this was necessitated since consumers of Mumbai cannot be exposed to the possibility of unsecured, unreliable and vulnerability to curtailment of power.

**53.** In the impugned MTR order dated 31.03.2023, MERC held that, in a recent Petition filed by BEST in Case No. 240 0f 2022 wherein all

Distribution Licensees of the State were made respondents, STU and SLDC had submitted that there was transmission constraint for getting power from outside Mumbai to within Mumbai and, although schemes for increasing transmission capacity are planned to be commissioned from FY 2024-25 in a gradual manner, embedded generation needs to be continued till such transmission projects are commissioned; as regards the quantum of purchase from TPC-G, the appellant has considered a much lower purchase from TPC-G in FY 2023-24, as compared to past trends, and no explanation/justification for the same has been provided; the appellant has considered all balance power requirement from short-term sources at Rs. 4.50/kWh; this is a deliberate attempt by the appellant to suppress its power purchase costs, in order to improve the competitiveness of its tariff vis-à-vis the tariff of other competing Licensees; while targeting competitive tariffs is the right of the Distribution Licensee, the same should not be achieved by artificially suppressing the power purchase costs, which will then have to be inevitably recovered through the FAC mechanism; considering the transmission constraints in getting power from outside sources in Mumbai, the appellant would be required to purchase power from TPCG based on the past trends; hence, for the purpose of the MTR Order, the quantum of purchase from TPC-G's thermal sources, equal to the average quantum of purchase from TPC-G in the last 3 years, i.e., FY 2019-20 to FY 2021-22, has been considered; and purchase from hydro sources of TPC-G has been considered based on the available quantum approved in TPC-G's MTR Order for FY 2023-24 and FY 2024-25.

**(iv) ANALYSIS:**

**54.** In its MTR Petition, the Appellant had proposed to procure 1550.52 MUs at Rs. 6.72/Kwh from TPC G, 1346.21 MUs at Rs. 3.22/Kwh from RE sources, 700 MUs at Rs. 3.04/Kwh from additional RE sources, and

2352.63 MUs at Rs. 4.50/ Kwh through bilateral sources ie for a total quantum of 5946.36 MUs at an average rate of Rs. 5.05/ KWh. In the MTR order, MERC however approved power procurement by the Appellant from TPC-G of 3369.94 MUs at Rs. 7.38/Kwh, from RE sources of 1346.21 MUs at Rs. 3.22/Kwh, from additional RE sources of 700 MUs at Rs. 4.90/ Kwh, and from bilateral sources of 3652 MU at Rs. 5.13/Kwh, i.e. for a total of 5781.40 MU at an average rate of Rs. 6.63/Kwh. Except for procurement of power from RE sources (where the quantum remains unchanged and the rate has been altered upwards), MERC has modified both the quantum and the rate of power procurement by the Appellant from all other sources.

**55.** On the issue of power purchase cost, the impugned MTR order records that the MERC had approved the power purchase arrangements of the Appellant of TPC-G after due regulatory process, which is valid till 31st March, 2024; both TPC-G and the Appellant are regulated entities, and the tariff of TPC-G has been determined through a separate Order in accordance with the MYT Regulations, which have been considered for determining the power purchase cost of the Appellant from TPC-G; although the Appellant and TPC-G are different Divisions of the same corporate entity, ie TPC, it was essential that they operate independently and ensure that their respective interests are protected; and the Appellant, as a Distribution Licensee, has to ensure procurement of power from the cheapest sources, irrespective of whether it is TPC-G or any other Generator to protect consumer's interest with a reasonable and competitive tariff. Even earlier, in its MYT Order dated 30.03.2020, MERC had opined that the Appellant, as a distribution licensee, had to ensure procurement of power from its cheaper sources irrespective of whether it was TDC-G or any other generator, to protect consumer interest with a reasonable and competitive tariff.

**56.** Having itself emphasized the need for the Appellant to procure power from the cheapest source, irrespective of whether it was from TPC-G or any other generator, in order to protect the consumers interest with a reasonable and competitive tariff, MERC has nonetheless forced the Appellant to procure 700 MW of costlier power from TPC-G at rates ranging between Rs. 7.30 / Kwh and 7.44 / Kwh though, even within the existing transmission constraints (as shall be elaborated hereinafter), the Appellant could have procured a larger quantum of cheaper power from outside sources.

**57.** In this context, it must be noted that it is, ordinarily, in the Distribution Licensee's realm to decide the source, the quantum and the rate of power to be procured to meet the demand of its consumers. In its Order, in **KPTCL vs KERC (Appeal No. 84 of 2006 dated August 29, 2006**), this Tribunal held that, to meet the ever increasing demand, consequent upon development and improvement in the status of the consumer public, industrialization, computerization, heavy industries etc, which has increased in geometric proportions, it is for the utility to estimate its future demands.

**58.** On the question as to who should estimate the power requirement, this Tribunal, in its order in **Bangalore Electricity Supply Company Limited & Ors. v/s Karnataka Electricity Regulatory Commission & Ors** (Appeal No. 250 of 2006 dated 07.02.2008), held that it is the responsibility of the appellant to ensure power supply and also give new connections required during the year; and DISCOMs have their own planning departments where experts assess the power requirements.

**59.** On the issue, whether the Commission was justified in interfering with the projection of the appellant for power procurement, this Tribunal, in its Order in **Bangalore Electricity Supply Company Limited & Ors. v/s**

**Karnataka Electricity Regulatory Commission & Ors. (Appeal No. 15 of 2008 dated 09.10.2009**), held that it is the responsibility of the distribution companies to arrange for power to supply to the consumers in the entire state; it is the appellant who projects figures of power available from various sources so as to ensure that it has adequate power supply to meet the demand of consumers in its area of license; by over projecting hydro based power, the Commission has reduced the cash flow of the appellant thereby debilitating it to procure power from available sources; as the appellant is responsible for meeting the power demand in its area, its projections – unless perverse or grossly wrong – should not be interfered; and it is not for the Commission to assume day to day duties and responsibilities of the appellant as it is the appellant alone who has to ensure power supply and who should estimate the requirement of power.

**60.** The justification put forth on behalf of MERC, for its interference with power procurement by the Appellant, is that of transmission constraints. The submission, in short, is that, since transmission constraints restrict the quantum of electricity to be imported from outside Mumbai, and the available transmission capacity would not suffice to meet the entire electricity demand of Mumbai City, procurement of power from embedded generation within Mumbai city is essential. Further, as the embedded generation is thermal, procurement from such a source must atleast be of a quantum to meet the "must run" situation of these thermal generating units, so as to prevent any possibility of supply constraints or a black out in Mumbai city.

**61.** While examining this aspect, it must be borne in mind that, embedded generation of TPC-G is based on imported coal, and its price is far higher than the power which can be procured from outside Mumbai.

**62.** We shall now take note of certain technical aspects which MERC claims to have factored in while passing the Impugned MTR Order. The Appellant is one of the distribution licensees operating parallel to BEST, the licensee supplying electricity to consumers of the island of Mumbai (old city of Mumbai), and in parallel to AEML-D in suburban Mumbai. It supplies electricity to consumers in the entire Mumbai Region. The Appellant procures power from the Thermal /Hydro Generating Stations of TPC-G, and renewable/ additional power from sources located outside Mumbai Region. From out of the total capacity of 1377 MW of TPC-G, the quantum allocated to the Appellant is 700 MW, whereas the balance capacity of TPC-G of 677 MW is allocated to BEST, the other distribution licensee. The submission of the appellant, that the Plant Load factor (PLF) of thermal generation is around 55 to 60 %, and the Technical Minimum for thermal generating plants of TPC-G is 55 %, has not been disputed by MERC.

**63.** To safeguard grid security and safety of the electricity supply system, one of the issues considered by MERC is the availability of embedded generation of Mumbai Region, and the extent it is required to ensure regular operation without interruption. The total embedded generation of Mumbai Region, in terms of the material placed on record including thermal and hydro generation, is 1877 MW, out of which 500 MW of thermal generation is owned and utilised by AEML for its distribution business. The balance 1377 MW, which is a mix of hydro and thermal generation, is owned by TPC-G and is shared by BEST and the Appellant.

**64.** Considering the total embedded generation as 1877 MW, the Long Term and Medium Term contracts as placed before us, are as under:

| **BEST** | | **TPC-D** | | **AEML-D** | |
|---|---|---|---|---|---|
| **Source** | **Capacity (MW)** | **Source** | **Capacity (MW)** | **Source** | **Capacity (MW)** |
| c) Capacity already commissioned | | | | | |
| TPC-G | 677 | TPC-G | 700 | AEML-G | 500 |
| RE Sources | 20 | RE Sources | 490 | Medium Term | 600 |

| | | | | | |
|---|---|---|---|---|---|
| Medium Term | 100 | **Total** | **1190** | RE Sources | 740 |
| **Total** | **797** | | | **Total** | **1840** |
| d) Contracted but capacity yet to be commissioned | | | | | |
| RE Sources | 400 | | | | |

**65.** In the Impugned Order, MERC has observed as under:

*"……..The Commission has approved the PPA between TPC-D and TPC-G, which is valid till 31st March 2024. Hence, the Commission has considered the long-term power purchase from TPC-G for FY 2023-24.*

*As regards the proposed purchase from 'Bundled Power Sources', the Petition filed by TPC-D is yet to be processed, and the same cannot be considered for the purpose of projecting the power purchase cost for TPC-D for FY 2024-25. Further, in a recent Petition filed by BEST in Case No. 240 0f 2022, wherein all Distribution Licensees of the State were made respondents,* ***the STU and SLDC have unequivocally submitted that there is a transmission constraint for getting power from outside Mumbai to within Mumbai and although schemes for increasing transmission capacity are planned to be commissioned from FY 2024-25 in gradual manner, embedded generation needs to be continued till such transmission projects are commissioned.*** *Hence, the Commission has directed BEST to extend its PPA with TPC-G by one more year, i.e., till March 2025.* ***Along the same lines, TPC-D will also have to extend its PPA with TPC-G till March 2025. Hence, for the purpose of this MTR Order, the Commission has considered power purchase from TPC-G in FY 2024-25 as per the ongoing PPA, even though no separate PPA has yet been entered into between TPC-D and TPC-G for FY 2024-25.***

***As regards the quantum of purchase from TPC-G, it is observed that TPC-D has considered much lower purchase from TPC-G in FY 2023-24, as compared to past trends, and no explanation/justification for the same has been provided.*** *As explained subsequently, TPCD has considered all balance power requirement from short-term sources at Rs. 4.50/kWh.* ***The Commission is of the view that this is a deliberate attempt by TPC-D to suppress***

***its power purchase costs, in order to improve the competitiveness of its tariff vis-à-vis the tariff of other competing Licensees.*** *The Commission is of the view that targeting competitive tariffs is the right of the Distribution Licensee, however, the same should not be achieved by artificially suppressing the power purchase costs, which will then have to be inevitably recovered through the FAC mechanism.*

***Considering the transmission constraints in getting power from outside sources in Mumbai, the Commission is of the view that TPC-D will be required to purchase power from TPCG based on the past trends. Hence, for the purpose of this MTR Order, the Commission has considered the quantum of purchase from TPC-G's thermal sources equal to the average quantum of purchase from TPC-G in the last 3 years, i.e., FY 2019-20 to FY 2021-22.*** *The purchase from the hydro sources of TPC-G has been considered based on the available quantum approved in TPC-G's MTR Order for FY 2023-24 and FY 2024-25. TPC-D is required to extend its PPA with TPC-G for purchase from the thermal and hydro sources till March 31, 2025………"*

**66.** From the afore-extracted portion of the impugned Order, it is evident that MERC has relied on the submissions of STU and SLDC that embedded generation is essential for Mumbai till the transmission system, connecting Mumbai to the outside grid, is strengthened, which would then result in increased transmission capacity for importing power into Mumbai. However, after taking note of such submissions, MERC decided that the appellant should purchase power from TPC-G based on past trends i.e. equivalent to the average quantum of purchase from TPC-G in the last 3 years, i.e., FY 2019-20 to FY 2021-22.

**67.** This conclusion of the MERC does not, prima facie, merit acceptance. In case of transmission constraints, MERC, in discharging its obligations under Section 61(d) of the Electricity Act of safeguarding consumer interests, and on application of the merit order principle, should have first ascertained the quantum of cheaper power which can be imported from outside Mumbai, and should have permitted the appellant to procure such power, subject to procurement of the minimum quantum required to be obtained from embedded generating units operating on a must run situation or the technical minimum. By first fixing the quantum of procurement of power from the costlier embedded generation, and only the balance from cheaper imported power, MERC has not only violated the merit order principle, but has also forced consumers of the appellant to pay a far higher tariff than they would otherwise have been required to pay or, in the alternative, to migrate to the other distribution licensees.

**68.** In the impugned Order, MERC observed that the appellant had projected a much lower purchase quantum from TPC-G for FY 2023-24, as compared to past trends. What has however been glossed over is that, since TPC-G is an imported coal based thermal generating unit, the cost of power procurement from them at Rs.7.30 / Kwh and 7.44 / Kwh, is far higher than the cost of power from outside Mumbai sources; and the Appellant was not amiss in proposing to procure power from cheaper sources as that would not only ensure its competitiveness but also serve the interests of its consumers by way of a lower tariff.

**69.** The submission on behalf of MERC, in short, is that, according to the STU and SLDC, while the available transmission capacity for importing power from outside Mumbai is 2522 MW, due to the contingencies at the 400 kV Line, the capacity should be reduced to a safe limit of 1905 MW, till such time the new transmission projects are commissioned which are at different stages of execution; and, as no ATC margin is available in the CTU-STU Network, taking out embedded generation of TPC-G at Trombay at one stroke will affect the reliability of power supply in Mumbai, necessitating embedded generation of 1877 MW to be fully brought on stream.

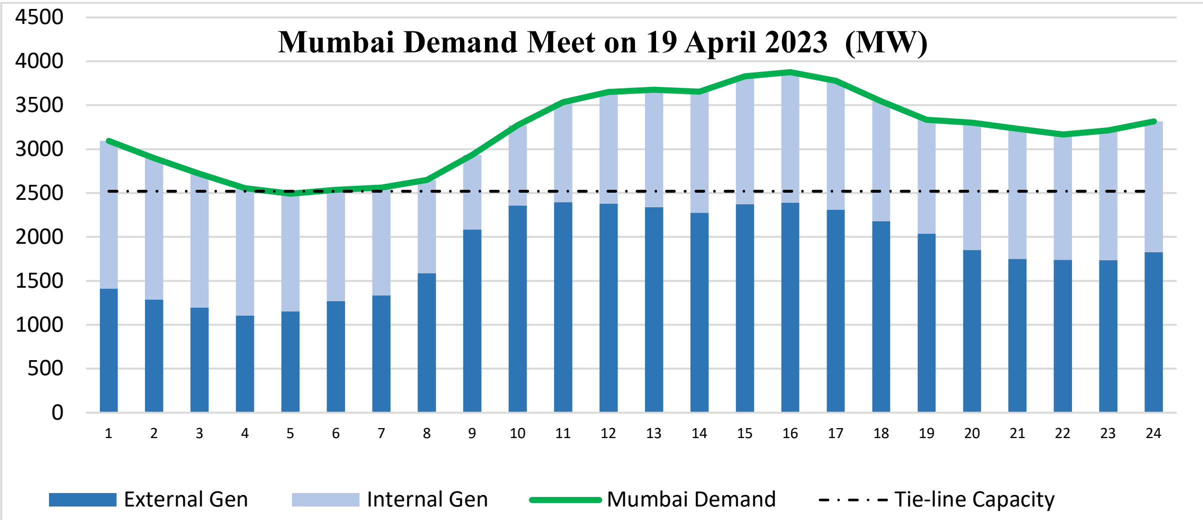
**70.** While the Govt of Maharashtra in its directive issued to the MERC under Section 108 of the Act, vide letter dated 03.11.2022, has stated that the transmission capacity available for power flow into Mumbai is 2786 MW, it is submitted, on behalf of MERC, that the total transmission capacity, of the Transmission lines connecting Mumbai to other parts of Maharashtra for sourcing power within Mumbai other than embedded generation, is 2522 MW; the safe operating limit, for the transmission system, is limited to 1905 MW; and utilisation of the available embedded generation in Mumbai is essential for the Mumbai Region. The relevant portion of the MERC order dated 15.03.2023 reads as under:

> *"16.8 In this regard, the Commission notes that as per corrected* ***submission filed by STU, existing ATC of Mumbai Tie-lines is 2522 MW which has been reduced to 1905 MW in view of contingencies being faced at 400 kV line. But even if 400 kV contingency is not considered then also existing ATC of Mumbai Tie-line is limited to 2522 MW which is not sufficient to meet Mumbai Demand (@3851 MW achieved on 28 April 2022) without support of embedded generation. As submitted by BEST on such date of Maximum demand Mumbai tie-line loading was 2260 MW and embedded generation was 1591 MW. Even if on that day tie-lines was loaded to their full ATC i.e. 2522 MW then also 1329 MW embedded generation would have required.*** *Therefore, in existing scenario, embedded generation is required for meeting electricity demand of Mumbai Consumers.*
>
> *16.10 The Commission looked at the possibility of partial/phased reduction in embedded generation capacity.* ***However, STU and MSLDC***

***in its submission has also highlighted that non availability of embedded generation in Mumbai would create low voltage issue which will limit power transfer capability of Mumbai Tie-lines****.* *Therefore, embedded generation is required for MSLDC for controlling grid voltages.* ***In case some of the capacity of the embedded generation in not contracted then such capacity remains out of reach of SLDC as SLDC can give instruction to generating unit only if it has valid PPA with any buyer.*** *Therefore, when system operator i.e. MSLDC based on its expertise as a system operator backed up by the study is recommending continuation of embedded generation for safe, secure and reliable system operation, the Commission cannot instruct against the same at least till the envisaged transmission capacity addition is achieved."*

**71.** MERC has, however, not recorded a specific finding on the minimum quantum of energy required from embedded generation. The peak demand of 3851 MW, referred to in the afore-extracted portion of the order, was for a very short period and the transmission capacity utilised during the said period was lower than the transmission capacity available for importing power from the grid outside Mumbai. While there can be no two views that utilisation of embedded generation is required till such time that alternative transmission systems are developed and put under operation, we cannot ignore the fact that utilisation of costlier embedded generation should be confined to the minimum extent necessary to meet the required contingency conditions ie the capacity which should be made and kept available to enable the plant to be put under operation and increase generation, whenever required, on the directions of SLDC. In addition, sufficient transmission capacity, for importing power into the Mumbai Region, should also be kept available for utilisation in case of failure/ shut down of a part of the embedded generation.

**72.** MERC has furnished the data for 19th April, 2023 when Mumbai recorded the peak demand of 3879 MW at 1600 hours, as also when the transmission corridor, connecting Mumbai to the region outside, was loaded up to around 100%, details of which are as under:




*(Source: Daily System Report dated 19 April 2023 from Maharashtra SLDC)*

**73.** Its equivalence with 'MUs' [MW x Hr/1000] as furnished is as below:

| Hour | External Gen (MW) | Internal Gen (MW) | Mumbai Demand (MW) | External Gen (MU) | Internal Gen (MU) | Mumbai Demand (MU) |
|---|---|---|---|---|---|---|
| 01:00 | 1411 | 1684 | 3095 | 1.41 | 1.68 | 3.10 |
| 02:00 | 1287 | 1609 | 2896 | 1.29 | 1.61 | 2.90 |
| 03:00 | 1197 | 1520 | 2717 | 1.20 | 1.52 | 2.72 |
| 04:00 | 1104 | 1451 | 2555 | 1.10 | 1.45 | 2.56 |
| 05:00 | 1154 | 1340 | 2494 | 1.15 | 1.34 | 2.49 |
| 06:00 | 1268 | 1270 | 2538 | 1.27 | 1.27 | 2.54 |
| 07:00 | 1334 | 1228 | 2562 | 1.33 | 1.23 | 2.56 |
| 08:00 | 1587 | 1064 | 2651 | 1.59 | 1.06 | 2.65 |
| 09:00 | 2083 | 850 | 2933 | 2.08 | 0.85 | 2.93 |
| 10:00 | 2357 | 914 | 3271 | 2.36 | 0.91 | 3.27 |
| 11:00 | 2394 | 1139 | 3533 | 2.39 | 1.14 | 3.53 |
| 12:00 | 2379 | 1270 | 3649 | 2.38 | 1.27 | 3.65 |

| Hour | External Gen (MW) | Internal Gen (MW) | Mumbai Demand (MW) | External Gen (MU) | Internal Gen (MU) | Mumbai Demand (MU) |
|---|---|---|---|---|---|---|
| 13:00 | 2340 | 1336 | 3676 | 2.34 | 1.34 | 3.68 |
| 14:00 | 2273 | 1380 | 3653 | 2.27 | 1.38 | 3.65 |
| 15:00 | 2372 | 1457 | 3829 | 2.37 | 1.46 | 3.83 |
| **16:00** | **2389** | **1490** | **3879** | **2.39** | **1.49** | **3.88** |
| 17:00 | 2310 | 1469 | 3779 | 2.31 | 1.47 | 3.78 |
| 18:00 | 2179 | 1365 | 3544 | 2.18 | 1.37 | 3.54 |
| 19:00 | 2037 | 1295 | 3332 | 2.04 | 1.30 | 3.33 |
| 20:00 | 1850 | 1450 | 3300 | 1.85 | 1.45 | 3.30 |
| 21:00 | 1750 | 1482 | 3232 | 1.75 | 1.48 | 3.23 |
| 22:00 | 1739 | 1426 | 3165 | 1.74 | 1.43 | 3.17 |
| 23:00 | 1736 | 1479 | 3215 | 1.74 | 1.48 | 3.22 |
| 24:00 | 1827 | 1487 | 3314 | 1.83 | 1.49 | 3.31 |

**74.** From the aforesaid chart, it is evident that, at its peak, the demand was met by around 62 % from external sources whereas only 38% of embedded/ internal generation was utilised. Cheaper power from outside, including renewable power, should have been permitted to be procured up to the maximum, balancing it with the minimum embedded generation to be kept under reserve as secure power to meet the contingency conditions on the directions of the SLDC, in order to avoid making the tariff uneconomical for consumers, and instead to make the tariff viable for consumers in Mumbai.

**75.** Even, at the safe limit for import of power of 1905 MW, the available transmission capacity considering 100% availability, would be equivalent to 16687 MUs for one year (1905 x 8.76=16687), or 15019 MUs at 90% availability. If, however, the available transmission capacity is taken as 2522 MW, (since it is evident from the data placed before us that SLDC has not attached any sanctity to the limit of 1905 MW, and has permitted import of power far beyond this limit), the total quantum of power which can be imported from outside Mumbai would be 22092 MUs at 100% availability, and 19882 Mus.

**76.** In Para 11.6 of its order in Case No. 248 of 2022 dated 15.03.2023 (BEST Order), MERC took note of the submission of the STU that the Maximum Hourly Mumbai demand of 3851 MW had occurred on 28th April 2022 at 16:00 hrs with exchange between MSETCL and Mumbai as 2260 MW (excluding MSEDCL demand of about 240 MW fed through TPC's network), and embedded generation was 1591 MW; and no congestion in the network was reported. It is evident therefrom that, even when utilization of the available transmission capacity was 2260 MW and embedded generation was 1591 MW (out of total of 1877 mw), there was no congestion in the network. The submission, urged on behalf of the Appellant, is that, as at present when the utilized ATC for LTAs and MTAs is 1340 MW, further allocation ought to have been considered for the appellant from the balance availability of ATC of 920 MW, to allow it to procure power from outside Mumbai at a cheaper rate.

**77.** It is relevant to note that, even during the peak condition scenario of 19th April, 2023, import of power into Mumbai Region was around 2389 MW which goes to show that SLDC has permitted import of power to even exceed 2522 MW on that day, and it does not appear to have, at any time, restricted imports to the so called safe and secure limit of 1905 MW.

**78.** The total energy requirement for FY 2023-24, from outside Mumbai, as considered by MERC for all the three distribution licensees in Mumbai, is only 13,173 Mus, (i.e. 2411 MUs for TPC-D, 8849 MUs for AEML and 1913 MUs for BEST, totalling to 13,173 MUs), which is even lower than the so called safe and secure import of 1905 MW equivalent to 16687 Mus. As

SLDC has allowed use of the available transmission capacity far beyond 1905 MW and upto 2522 MW, it is clear that 22092 Mus of cheaper power can be imported from outside Mumbai, and more than enough margin is therefore available for additional import of power of upto 8,919 MUs ( on the total transmission capacity being taken as 2522 MW). Even at the limit of 1905 MW of transmission capacity, the margin still available for further import of power is equivalent to 3514 MUs and, therefore, such spare capacity can, safely and securely, be allocated to the appellant and BEST (AEML-D having been permitted procurement of power from outside Mumbai even beyond what they had sought in their MTR petition).

**79.** The difference, between the energy requirement projected by the Appellant in its MTR petition for import, and their energy requirement as approved by MERC, is 1988 MUs (while projected energy requirement is 4399 MUs, the approved energy requirement is 2411 MUs), and for BEST the difference between the two is 375 MUs (projected energy requirement – 2288 MUs, approved energy requirement - 1913 MUs). Accordingly, the additional quantum sought by the Appellant and BEST, which has not been approved by MERC, is only 2363 MUs, which is much below the quantum of 3514 MUs as available even under the safe limits of 1905 MW.

**80.** It is thus clear that, even if the entire quantum of energy sought to be imported by the Appellant from outside Mumbai is allowed, further spare transmission capacity, in terms of MUs for import of power into Mumbai Region, would still be available. If only MERC had considered such technical possibilities, the tariff would have been much lower for the consumers of Mumbai Region, as cheaper power, at the cost of around Rs. 3.0 to Rs. 3.5 per kWh, would have been available resulting in a much lower tariff being determined for consumers in Mumbai.

**81.** MERC would, however contend, that, besides the above, the other factor which it had considered was that embedded generation is a "must" for Mumbai, at least till the transmission projects under execution are commissioned. In this context, it is relevant to note that the STU and SLDC had only advised that embedded generation be maintained on bar so that, whenever it is required, it can be put under operation. This issue can optimally be considered as operation of the embedded generation at its technical minimum. MERC has placed a Comparative Chart of the generation projected by the Appellant in its MTR Petition, the technical minimum and the generation approved by the MERC in its Order dated 31.03.2023, which reads as under:-

| Unit | Energy as Per TPC-D Petition* (MU) | Energy approved by MERC* (MU) | Energy as per Technical Minimum @ 55% for Thermal Units (MU) |
|---|---|---|---|
| Unit 5 | 284 | 1375 | 1108 |
| Unit 7 | 325 | 541 | 413 |
| Unit 8 | 176 | 745 | 663 |
| Bhira | 475 | 433 | 432 |
| Bivpuri | 152 | 141 | 140 |
| Khopoli | 138 | 136 | 136 |
| **Total** | **1551** | **3370** | **2894** |

**82.** The submission, urged on behalf of MERC in this regard, is that the energy projected by the Appellant in its MTR Petition, i.e. 1551 MU, is far lower than its historical consumption and is even below the Technical Minimum; as a must run status is required to be maintained for embedded generation, there is no justification for the appellant to project its procurement of energy from TPC-G even below the technical minimum; and, therefore, it had allowed procurement of energy by the appellant from

TPC-G slightly higher than the technical minimum based on the actual historical consumption for FY 2019-20 to FY 2021-22.

**83.** The embedded thermal capacity (coal based) of TPC-G (unit 5 and unit 8), which is under operation, is 750 MW and is shared by the Appellant and BEST. Considering a technical minimum of 55%, the total energy generation would be equivalent to: 750x 0.55 x 8.76 = 3613.5 MUs ( say 3614 MUs). Save in case of maintenance or downtime for the two thermal units, the requirement to maintain the plant availability, for meeting any contingency, would only be 3614 MUs equivalent to 412.5 MW. Separately, thermal capacity of 500 MW (coal based) owned by AEML is also available as embedded generation and utilised for supply to consumers of AEML-D in the Mumbai Region. In addition to the above, TPC-G also has hydro capacity including 300 MW (Bhira) as embedded generating capacity. According to the Appellant, its utilisation factor is around 60 % and, therefore, it would result in availability of another 1400-1500 MUs. Considering the thermal generation at around the technical minimum of 55%, and hydro generation at 60 % utilisation factor, the total embedded generation of TPC-G would be around 5100-5200 MUs, which is to be distributed/ shared amongst BEST and the Appellant.

**84.** Though the submission, put forth before us on behalf of MERC, was that the minimum electricity to be procured by the appellant from embedded generation would be around 2900 MUs annually for safe and secure operation of the Mumbai Grid, it is clear that, in the impugned MTR Order, MERC has considered procurement by the appellant as 3370 MUs for 2023-24, which is far higher (ie by 470 Mus) than the quantum required to be procured from embedded generation for the safe and secure operation of the grid. This decision of the MERC has resulted in an increase in the tariff for the consumers of the appellant in the Mumbai region, as the cost of embedded thermal generation, of Rs. 7.44 per unit, is far higher than the cost at which power can be procured from other sources.

**85.** It cannot also be lost sight of that MERC has allocated a higher quantum of embedded generation to the appellant from its own generating source, (both the Appellant and TPC-G form part of the same company), which is far costlier than the power available for procurement from outside Mumbai. Transmission constraints apart, allowing the Appellant to source power from TPC-G would result in its being permitted to pass on commercial benefit to its generating unit. MERC should therefore have ensured that any quantum, beyond a must run situation, is kept available with SLDC only to meet exigencies, and not to confer commercial benefits on TPC, of which both the appellant and TPC-G form part of.

**86.** As noted hereinabove MERC, in its order dated 15.03.2023, has recorded that the existing ATC of Mumbai Tie-lines is 2522 MW which is not sufficient to meet Mumbai Demand @3851 MW achieved on 28th April 2022 without support of embedded generation; on such date of Maximum demand, Mumbai tie-line loading was 2260 MW and embedded generation was 1591 MW; and, even if on that day tie-lines was loaded to their full ATC i.e. 2522 MW, then also 1329 MW embedded generation would be required.

**87.** The Appellant submitted that the peak demand of Mumbai is about 3851 MW, as against the average yearly demand of around 2300 MWs and, therefore, transmission constraints, considering the peak demand of 3851 MW, cannot be extended for the entire year, and MERC ought to have considered the Merit Order Dispatch principle while fixing the procurement plan for the appellant, thereby permitting them to procure a lesser quantum of costlier power from TPC-G as compared to the cheaper power available from sources outside Mumbai, especially during non-peak demand seasons when transmission constraint is not a concern.

**88.** As observed earlier in this order, MERC ought to have considered procurement of cheaper power from outside Mumbai to the maximum extent technically possible, and provided for procurement of only the balance from the embedded generation subject, of course, to the technical minimum of “must run”, thereby ensuring utilization of minimum embedded generation and the remaining power from cheaper sources outside Mumbai.

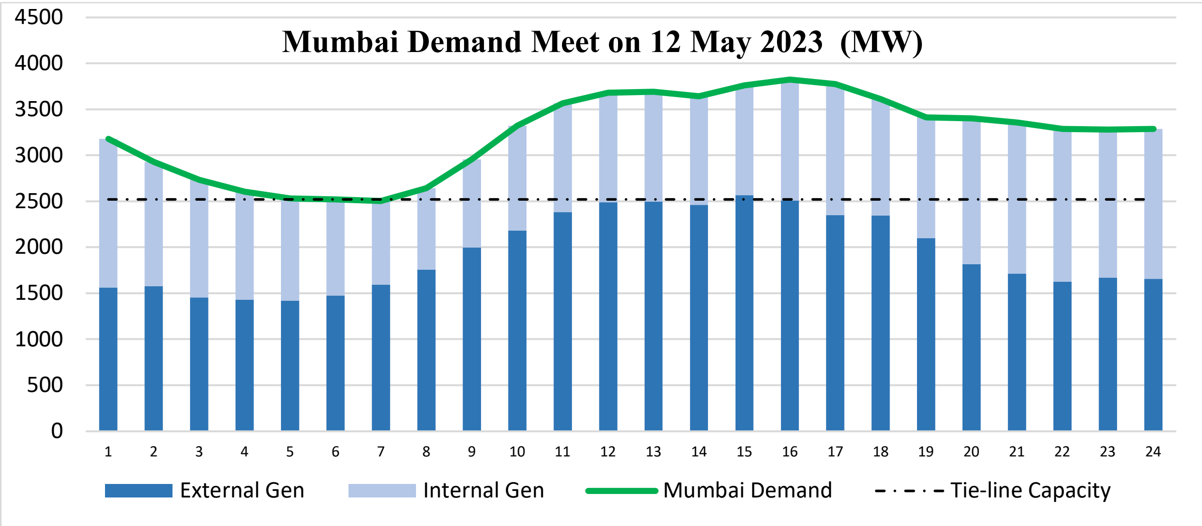
**89.** A chart was submitted, on behalf of MERC, on 25.05.2023 titled “Demand in (MW) and corresponding Energy Consumption (MU)” wherein it is recorded that the internal generation capacity only needs to run at technical minimum and that the balance can be sourced externally. In the said chart, MERC submitted that: (a) thermal plants of Internal Generation capacity need to be run at least on technical minimum load (55% of installed capacity) which is around 787 MW, and the balance power can be sourced from external sources subject to availability of tie-line capacity. (b) SLDC as a system operator, is continuously monitoring tie-line loading and issues instructions to internal generation to ramp-up generation to control flow on tie-lines.(c) further, consumer demand is not fixed and is varying on hourly basis. Based on demand to be met, after factoring internal generation balance power can be taken from external generation. (d) it is also important to note that on 19 April 2023 and 12 May 2023, maximum utilisation of 1877 MW internal generation was 1684 MW (90%) and 1663 MW (89%) respectively. This indicates that internal generation is being utilised beyond technical minimum capacity.

**90.** Except to contend that this aspect is decided independently, by the SLDC, MERC has not been able to show any rational basis on which it had allocated the available transmission corridor among the three distribution licensees of Mumbai City. It was also admitted, on their behalf, that no Regulations or guidelines have been framed by MERC in this regard. No data on the availability of spare transmission capacity has also been placed before us on behalf of the MERC.

**91.** Referring to the chart submitted by MERC on 19.05.2023, titled “MYT approved v. MTR Petition v. MTR approved figures”, it was argued on behalf of the Appellant that this chart indicates the arbitrariness in determination by the MERC, as: (a) after approval of 1671 MUs in the MYT Order, MERC had, instead of considering the projected quantum of 4399 MUs from alternate sources for the appellant, reduced the same to 2411 MUs for FY 2023-24, citing the issue of transmission constraint. (b) on the other hand MERC, despite the existing issue of alleged transmission constraint, had increased the projected quantum for another parallel licensee from 6772 MUs approved in the MYT Order, and 8478 MUs sought in the MTR Petition, to 8849 MUs in the MTR Order, for FY 2023-24, i.e. even more than what had even been projected.

**92.** While this submission, urged on behalf of the appellant, does not appear to be unjustified, we defer, for the present at the interlocutory stage of these appellate proceedings, to the submission urged on behalf of MERC that the Tariff Orders for other licensees are independent, and the decision taken therein cannot be considered while examining the validity of the Impugned Order in an appeal filed by the appellant. It must also be borne in mind that the tariff orders, passed for the other distribution licensees in Mumbai, have not been subjected to challenge by the appellant, and, as the competing distribution licensees are also not parties to the present appeal, we may not be justified in recording any finding, which may prejudicially affect them, behind their back and without giving them an opportunity of being heard.

**93.** On behalf of MERC, the data/ chart of 12th May 2023 was placed for our consideration, when the Highest Tie-line loading of 2565 MW was reached on at 1500 Hrs, even beyond the transmission capacity, the Demand Curve for that day is as below:




*(Source: Daily System Report dated 12th May 2023 from Maharashtra SLDC)*

**94.** The corresponding hourly data in 'MW', for 12th May 2023, is converted into 'MU' [MW x Hr/1000] which would be as follows:

| Hour | External Gen (MW) | Internal Gen (MW) | Mumbai Demand (MW) | External Gen (MU) | Internal Gen (MU) | Mumbai Demand (MU) |
|---|---|---|---|---|---|---|
| 01:00 | 1561 | 1617 | 3178 | 1.56 | 1.62 | 3.18 |
| 02:00 | 1576 | 1351 | 2927 | 1.58 | 1.35 | 2.93 |
| 03:00 | 1455 | 1277 | 2732 | 1.46 | 1.28 | 2.73 |
| 04:00 | 1431 | 1171 | 2602 | 1.43 | 1.17 | 2.60 |
| 05:00 | 1421 | 1109 | 2530 | 1.42 | 1.11 | 2.53 |

| Hour | External Gen (MW) | Internal Gen (MW) | Mumbai Demand (MW) | External Gen (MU) | Internal Gen (MU) | Mumbai Demand (MU) |
|---|---|---|---|---|---|---|
| 06:00 | 1475 | 1046 | 2521 | 1.48 | 1.05 | 2.52 |
| 07:00 | 1595 | 910 | 2505 | 1.60 | 0.91 | 2.51 |
| 08:00 | 1758 | 885 | 2643 | 1.76 | 0.89 | 2.64 |
| 09:00 | 1998 | 957 | 2955 | 2.00 | 0.96 | 2.96 |
| 10:00 | 2183 | 1138 | 3321 | 2.18 | 1.14 | 3.32 |
| 11:00 | 2381 | 1182 | 3563 | 2.38 | 1.18 | 3.56 |
| 12:00 | 2487 | 1194 | 3681 | 2.49 | 1.19 | 3.68 |
| 13:00 | 2496 | 1194 | 3690 | 2.50 | 1.19 | 3.69 |
| 14:00 | 2462 | 1179 | 3641 | 2.46 | 1.18 | 3.64 |
| 15:00 | 2565 | 1193 | 3758 | 2.57 | 1.19 | 3.76 |
| 16:00 | 2506 | 1317 | 3823 | 2.51 | 1.32 | 3.82 |
| 17:00 | 2351 | 1421 | 3772 | 2.35 | 1.42 | 3.77 |
| 18:00 | 2347 | 1264 | 3611 | 2.35 | 1.26 | 3.61 |
| 19:00 | 2098 | 1313 | 3411 | 2.10 | 1.31 | 3.41 |
| 20:00 | 1818 | 1584 | 3402 | 1.82 | 1.58 | 3.40 |
| 21:00 | 1711 | 1643 | 3354 | 1.71 | 1.64 | 3.35 |
| 22:00 | 1624 | 1663 | 3287 | 1.62 | 1.66 | 3.29 |
| 23:00 | 1670 | 1610 | 3280 | 1.67 | 1.61 | 3.28 |
| 24:00 | 1655 | 1630 | 3285 | 1.66 | 1.63 | 3.29 |
| | | | | **46.62** | **30.85** | **77.47** |

**95.** It is evident, from the aforesaid tables/charts, that a substantial part of the total demand of Mumbai is met from external sources, SLDC has permitted tie-line loading far beyond the safe limit claimed by MERC of 1905 MW and, except during the 15:00 hour block, loading was below 2522 MW. It is thus clear that there was enough transmission capacity available for the Appellant to be permitted by the MERC to import the projected quantum of energy from outside sources at much cheaper rates while maintaining the technical minimum for embedded generation.

**96.** We are, prima facie, of the view that, even if the entire quantum of energy sought to be imported by the Appellant from outside Mumbai had been allowed by MERC, further spare transmission capacity, in terms of MUs for import of power into Mumbai Region, would still have been available. Permitting procurement of cheaper power from outside Mumbai to the maximum extent possible, while at the same time ensuring minimum embedded generation (though far costlier) to be kept under reserve as secure power to meet the contingency conditions on the directions of the SLDC, would have resulted in a reasonable and economical tariff being imposed on consumers in Mumbai.

### B. RATE FOR PROCUREMENT OF ADDITIONAL RENEWABLE ENERGY:

**97.** Learned Senior Counsel appearing on behalf of the Appellant, would submit that MERC has erroneously considered the tariff of Rs. 4.90/kWh for procurement of Renewable Energy ("**RE**") power of 300 MW (700 MU) for FY 2023-24, instead of at an average rate of Rs. 3.04/kWh as was proposed by the appellant, i.e., 61% higher than the average rate proposed; MERC failed to consider the procurement plan of RE power, and the LoIs submitted by the appellant, which has led to an increase in their power purchase cost in the ARR for FY 2023-24 to the tune of Rs. 130 Crores; instead of considering the procurement plan of RE power submitted by the appellant, MERC fixed the cost of short term RE procurement on the basis of the Green Day Ahead Market ("**GDAM**") indices from July, 2022 to December, 2022, which is contrary to the entire object of Section 62, and equates contracted short-term procurement with Power Exchange procurement, both of which are not comparable (impact on tariff -Rs. 0.23/kWh); undisputedly, the price discovery on the exchange is dynamic as the tariff discovered is on a 15 Minute Time Block basis between generator and procurers on the basis of market forces, which is in complete variance with the scheme of contracted procurement; in the former case the rate of tariff will always be volatile, whereas in the latter the rate of tariff is fixed for the contracted period; as a prudent exercise, MERC ought to have considered that the appellant had already tied up with sources for 21.75 MW (50 MUs) at Rs. 2.52/kWh or the recently discovered tariff through competitive bidding, and adopted by it for other distribution licensees, instead of considering the GDAM rate, for the short term RE procurement; and MERC has thereby meddled with the appellant's prerogative of procuring power for supply to its consumers (admittedly cheaper) which is in teeth of law laid down by this Tribunal in **BESCOM v. KERC & Anr. (Judgment in Appeal No. 15 of 2008 dated 09.10.2009),** ***Karnataka Power Transmission Corporation Limited v. Karnataka Electricity Regulatory Commission & Ors. (*****judgment in Appeal No. 84 of 2006)** and ***Bangalore Electricity Supply Company Limited & Ors. v. Karnataka Electricity Regulatory Commission & Ors.*****(Judgement in Appeal No. 250 of 2006).**

**98.** In the impugned MTR order, MERC records that the Appellant was called upon to submit the basis and justification for considering the rate for purchase of additional RE power of 700 MU from bilateral sources at Rs.3.04/kWh in FY 2023-24; in its reply, the Appellant submitted that it had discussed with multiple generators/traders to contract with existing wind generators in Maharashtra whose contracts had expired, there was sufficient untied quantum available in the State of Maharashtra, it estimated to contract such power at rates ranging from Rs 2.25 to Rs.2.52/kWh, and it had already tied up 21.75 MW (50 MU) at Rs.2.52/kWh from January 2023 onwards. The average rate of Rs.3.04/kWh, estimated by the Appellant, is recorded in the form of a table in terms of which the Appellant had indicated that they would procure 50 MU at Rs.2.52/kWh, 250 MU at Rs.3.20/kWh, and 40 MU at Rs.3.00/kWh, thereby arriving at an average rate of Rs.3.04/kWh.

**99.** In their Appeal before this Tribunal, the Appellant stated that it had already issued a Letter of intent (LoI) dated 27.02.2023 to Tata Power Trading Company for purchase of 100 MW power on RTC basis for FY 2023-24; and the price at which such power was to be supplied was in the range of Rs.2.25/kWh (for Group-I wind plants) and Rs.2.52/kWh (for Group-II, III and IV wind plants). In the reply filed thereto, MERC stated that the Appellant had placed a copy of the said LoI along with their letter dated 17.03.2023, which was received by e-mail only on 28.03.2023 and a hard copy on 29.03.2023; and, since it had to issue 24 tariff orders on 31.03.2023, submission of last-minute details could not be considered.

**100.** In its letter addressed to MERC on 17.03.2023, the Appellant stated that, on $24^{th}$ and $27^{th}$ February 2023, it had received offers to purchase wind power from M/s Tata Power Company Limited-Wind Division, M/s Tata Power Trading Company Limited and M/s Manikaran Power Limited, through the Appellant's web portal, for 30.95 MW, 100 MW, 60 MW respectively at Rs. 2.25/2.52 per kW; this rate was lower than the average power purchase cost proposed by the Appellant in the MTR petition as well as the approved power purchase cost for FY 2023- 24 in the MYT Order; the landed cost of power procurement from these sources may also be lesser than the proposed renewable bilateral power purchase rate of Rs. 3.04/kWh in the MTR Petition of the Appellant; and the Appellant had accepted the offers, and had issued LOI to M/s Tata Power Company Limited-Wind Division, M/s Tata Power Trading Company Limited and M/s Manikaran Power Limited for purchase of Wind RE power. A copy of the LOIs were enclosed as annexures to the said letter.

**101.** In its letter dated 17.03.2023, the Appellant further stated that the contracted capacity, from the above LOIs, was upto 190.95 MW; in a similar way, it expected to add an additional 100 MW of wind capacity by the end of March 2023; they were in discussion with various traders for contracting short-term power of around 80 MW to 90 MW from the wind generators whose PPAs were expiring in May-23, and same capacity could be tied up from June-23 onwards; the expected energy, from such short term RE wind contract for FY2023- 24, would be around 700 Mus in line with the quantum proposed in the MTR Petition. The Appellant requested MERC to consider this arrangement of Power Purchase while approving the power purchase quantum and cost proposed in the MTR petition by the Appellant, and while finalizing the MTR Order.

**102.** While there is no whisper of this letter dated 17.3.2023, submitted on 28.03.2023, in the impugned MTR order, in the reply filed by MERC before this Tribunal, it is stated that this letter was not considered by MERC on the ground that it was submitted very late, just three days before the MTR order was passed on 31.03.2023.

**103.** It is relevant to note that, in the Impugned MTR Order, MERC had also observed that, through their additional submissions, (ie in their letter dated 30.03.2023), the Appellant had stated that it had re-assessed future coal prices as per the recent trend and the Commission should consider the rate of Rs. 6.93/kWh and Rs.6.84/kWh for procurement of power from Unit 5 and Unit 8 of TPCD-G respectively, for the purpose of ARR and Tariff determination for FY 2023-24. MERC, thereafter, extracted the contents of Para 4 to 6 of the said letter dated 30.03.2023, and held that, since it had already determined the tariff after due regulatory process, it could not deviate from such tariff approved in its own Order; and, accordingly, it had considered the cost of power purchase from TPC-G for FY 2023-24 and FY

2024-25 as approved in TPC-G's MTR Order dated 31.03.2023 in Case No.221 of 2022.

**104.** While MERC may well be justified in stating that no explanation was forthcoming from the Appellant as to why it took them so long to place a copy of the LoA dated 24th and 27th February 2022 before it, it must also be noted that MERC had, in the MTR order dated 31.03.2023, itself considered the additional submissions made by the Appellant in its letter dated 30.03.2023 regarding the TPC-G (generation cost) cost of Rs. 6.84/unit. It does not therefore stand to reason that MERC, having taken note of the additional submissions made by the Appellant in its letter dated 30.03.2023 while passing the impugned order on 31.03.2023, should have ignored the earlier letter of the Appellant which was, admittedly, received by MERC prior thereto on 28th / 29th March, 2023.

**105.** The only justification given by MERC, for not accepting these submissions of the Appellant, is that it would not be appropriate to assume that the Appellant would be able to tie-up with such un-tied sources at such low rates; and, for the purpose of the MTR Order, such additional RE purchase was being considered at the rate of Rs.4.90/kWh, based on the weighted average rate of GDAM for the period from July to December 2022. Having so held, MERC then observed that the Appellant should make all efforts to tie-up additional RE power from such sources at lower rates, which would help to reduce its power purchase costs. No reasons are discernible from the impugned order as to why MERC did not, at least, take the already tied-up rate of Rs.2.52/kWh for 50 MU for which the Appellant already had a tie-up arrangement for short term procurement, more so in the light of Regulation 22.4.

**106.** In this context it is useful to note that Regulation 22 of the MYT Regulations, 2019 relates to additional power procurement, and Regulation

22.1 enables the Distribution Licensee to undertake additional power procurement during the year, over and above the power procurement plan for the Control Period approved by the Commission, in accordance with this Regulation. Regulation 22.4 stipulates that, if the Distribution Licensee has identified a new short-term source of supply from which power can be procured at a Tariff that reduces its approved total power procurement cost, it may enter into a short-term power procurement agreement or arrangement with such supplier without the prior approval of the Commission. Regulation 22.6 stipulates that, within fifteen days from the date of entering into an agreement or arrangement for short-term power procurement for which prior approval is not required, the Distribution Licensee shall submit to the Commission its details, including the quantum, Tariff computations, duration, supplier particulars, method of supplier selection and such other details as the Commission may require so as to assess that the conditions specified in this Regulation have been complied with. Regulation 22.7 stipulates that where the Commission has reasonable grounds to believe that the agreement or arrangement entered into by the Distribution Licensee does not meet the criteria specified in Regulations 22.2 to 22.5, it may disallow any increase in the total cost of power procurement over the approved level arising therefrom or any loss incurred by the Distribution Licensee as a result, from being passed through to the consumers.

**107.** Adoption by MERC of the Green Day Ahead Market (GDAM) rate (from July to December 2022), in fixing the cost of additional short term RE procurement by the appellant, may not be justified, since the tariff discovered on the exchange is on a 15 minutes time block basis arrived at between generators and procurers on the basis of demand and supply. Unlike in the case of GDAM where the tariff rate is volatile, the tariff fixed at a contracted rate would not only be more stable, but also more reliable and cheaper.

**108.** No reasons are also forthcoming from MERC as to why they chose to adopt the weighted average rate, ignoring the fact that the Appellant had already tied-up with sources for 50 MU at Rs.2.52/kWh. In any event, MERC could have at least adopted the tariff discovered through competitive bidding, which it appears to have adopted for other distribution licensees, instead of fixing a higher rate of Rs.4.90/kwh based on the weighted average GDAM rate, as it would have reduced the Appellant's ACoS, and consequently in a lower tariff being fixed for its consumers.

### C. CLAIM FOR POWER PROCUREMENT FROM TPC-G AT A LOWER TARIFF: APPELLANT'S UNDERTAKING:

**109.** The Appellant has also assailed the Impugned Order contending that MERC had erroneously approved a higher rate of Rs. 7.44/kWh and Rs. 7.30/kWh for power procurement from Unit 5 and Unit 8 of TPC-G, respectively as against the rate of Rs. 6.93/kWh and Rs. 6.84/kWh sought by it for procurement of power from Unit-5 and Unit 8 respectively of TPC-G for FY 2023-24; this has resulted in a higher ACoS which, in turn, has resulted in a higher retail tariff for their consumers; the cost of procurement of power from TPC-G is dependent on the cost of imported fuel, which is on the decline; they proposed a lower cost on account of the declining trend of coal prices; and they intend to pass on the benefit to the end consumers in the form of reduced tariff.

**110.** Learned Senior Counsel for the appellant would submit that an undertaking was given by the appellant to consider the rate of Rs. 6.93/kWh and Rs. 6.84/kWh for power procurement from Unit 5 and Unit 8 of TPC-G respectively for FY 2023-24, considering the interest of its consumers, and to procure and supply power to its consumers at a competitive rate; MERC has arbitrarily proceeded to approve a higher rate of Rs. 7.44/kWh and Rs. 7.30/kWh for power procurement from Unit 5 and Unit 8 of TPC-G respectively***;*** the undertaking given by the Appellant in this regard ought to have been considered by MERC, especially in view of the material placed on record by the appellant showing the declining trend in the cost of coal; the objection of MERC, that *inter-se* consensus between the appellant and TPC-G to cap the procurement cost is alien to applicable regulations, is not valid as it is settled law that, even in the absence of a corresponding provision under the Regulations, i.e., for allowing the capping of procurement cost, the power of the Regulatory Commission cannot be rendered nugatory, as the word 'regulate' employed under Section 86 (1)(b) of the Act, is wide enough to confer power on the MERC, to deal with the given situation; as held in ***PTC India Limited v CERC & Ors.,*** **2010 (4) SCC 603,** making of a regulation under Section 178/181 is not a pre-condition to the Central/State Commission taking any steps/measures under Section 79(1)/86(1); and no rationale is discernable as to how the proposed total power purchase quantum of 5949.36 MUs, has arbitrarily been reduced by the MERC to 5781.40 MUs.

**111.** The submission, urged on behalf of MERC, however is that the generation tariff was determined vide the True-up/ ARR and Tariff Order of TPC-G dated 31.03.2023 in Case No. 221/2022 on a Petition filed by TPC-G and, therefore, such tariff cannot be challenged in the present appeal unless the said tariff order is also subjected to challenge; MERC cannot deviate from its own tariff Order issued after due regulatory process; as it is bound by its own tariff order, MERC cannot permit any deviation based on any such undertaking; as per the Act, the tariff order should allow recovery of prudent expenses by the generating company, and also for the distribution licensee, after considering such generation tariff; allowing lower power purchase cost may lead to under recovery of expenses, and affect the financial viability of the distribution licensee; MERC has considered a lower imported coal price by exercising its power to remove difficulties, which can be made out from the order dated 31.03.2023 in the ARR/ Tariff of TPC-G.

**112.** With regards the Appellant's contention that MERC failed to consider the rate of Rs. 6.93/kWh and Rs. 6.84/kWh for procurement of power from Unit-5 and Unit 8, respectively of TPC-G for FY 2023-24, and has irrationally approved a higher rate of Rs. 7.38, which ultimately has led to a much higher tariff for TPC-D, Learned Senior Counsel appearing on behalf of MERC, would submit that, without a challenge to the True-up/ ARR and Tariff Order of TPC-G dated 31.03.2023 in Case No. 221/2022, the Appellant cannot, in the present appeal, assail the Tariffs determined by MERC in the aforesaid order of TPC-G; MERC has, in fact, considered a lower imported coal price, by exercising its power to remove difficulties, in the tariff Order of TPC-G dated 31.03.2023; as stated in the impugned Order, MERC cannot deviate from its own Tariff Order issued after due regulatory process; accepting such an undertaking will vitiate the sanctity of the tariff determination process, as any entity may come with such undertaking, and request the Commission not to consider its own Order so as to reduce the tariff; MERC is mandated to allow recovery of prudent expenses through the electricity tariff; once it has determined the tariff for generation of electricity, it has to allow power purchase expenses of the distribution licensees after considering such generation tariff; and allowing power purchase expenses at a lower tariff would lead to under recovery of expenses, and may hamper the financial viability of the Distribution Licensee.

**113.** The Appellant has assailed the Impugned Order contending that MERC had erroneously approved a higher rate of Rs. 7.44/kWh and Rs. 7.30/kWh for power procurement from Unit 5 and Unit 8 of TPC-G, respectively as against the rate of Rs. 6.93/kWh and Rs. 6.84/kWh sought by it for procurement of power from Unit-5 and Unit 8 respectively of TPC-G for FY 2023-24; this has resulted in a higher ACoS which, in turn, has resulted in a higher retail tariff for their consumers; the cost of procurement of power from TPC-G is dependent on the cost of imported fuel, which is on the decline; they proposed a lower cost on account of the declining trend of coal prices; and they intend to pass on the benefit to the end consumers in the form of reduced tariff.

**114.** The submission, urged on behalf of MERC, however is that the generation tariff was determined vide the True-up/ ARR and Tariff Order of TPC-G dated 31.03.2023 in Case No. 221/2022 on a Petition filed by TPC-G and, therefore, such tariff cannot be challenged in the present appeal unless the said tariff order is also subjected to challenge; MERC cannot deviate from its own tariff Order issued after due regulatory process; as it is bound by its own tariff order, MERC cannot permit any deviation based on any such undertaking; as per the Act, the tariff order should allow recovery of prudent expenses by the generating company, and also for the distribution licensee after considering such generation tariff; allowing lower power purchase cost may lead to under recovery of expenses, and affect the financial viability of the distribution licensee; MERC has considered a lower imported coal price by exercising its power to remove difficulties, which can be made out from the following extract of the order dated 31.03.2023 in the ARR/ Tariff of TPC-G:

> *"As discussed earlier, the average imported coal price for the latest three months from December 2022 to January 2023 as per the provisions of MYT Regulations, 2019 works out to be around* ***Rs.***

***14072/MT**. However, based on the analysis of the ICI 4 index for the past 9 months, the extreme volatility in the imported coal market and in the interest of the consumers, the Commission by exercising its **Power to Remove Difficulties under Regulation 106 of MYT Regulations, 2019** has considered the imported coal price of **Rs. 12500/MT** for approving the energy charges for FY 2023-24 and FY 2024-25. This approach of considering imported coal price in deviation to approach as per MYT Regulations, 2019 is in very specific/ isolated condition due to volatility of imported coal prices and hence cannot be taken as precedence."*

**115.** It is further submitted that the MERC, vide the Impugned Order, has held as under*:*

"*As stated above, in their additional submission, TPC-D has requested to consider rate of Rs. 6.93/kWh and Rs. 6.84/kWh for procurement of power from Unit 5 and Unit 8 of TPCG for FY 2023-24 with undertaking that it shall consider such rate for computation of FAC till actual energy charge of these Units does not increase beyond tariff approved by the Commission to these Units as per provisions of the Regulations and as per the Order of TPC-G and that it will levy FAC to consumers only for actual energy charge beyond such tariff approved by the Commission. **In this regard, the Commission notes that it can either determine the tariff under Section 62 of the Electricity Act 2003 or adopt the tariff, which has been discovered through transparent process of competitive bidding as per Guidelines notified by the Central Government. Above mentioned tariff proposed by TPC-D does not fulfil these criteria. TPC-G Unit 5 and Unit 8 has PPA with BEST and TPC-D, and tariff for electricity generation from these Units are governed by MYT Regulations 2019. Accordingly, vide TPC-G's MTR Order dated 31st March 2023 in Case No.221 of 2022, the Commission has already approved***

> ***tariff for Unit 5 and Unit 8 of TPC-G. Hence, when the Commission has determined a tariff after due regulatory process, it cannot deviate from such tariff approved in its own Order.*** *Accordingly, the Commission has considered the cost of power purchase from TPC-G for FY 2023-24 and also for FY 2024-25 as approved in TPC-G's MTR Order dated 31st March 2023 in Case No.221 of 2022."*

**116.** The undertaking given on behalf of the Appellant, by the Learned Senior Counsel appearing on their behalf, is that the Appellant would not seek any increase in tariff even at the true up stage, for procurement of power from Unit-5 and Unit 8 respectively of TPC-G for FY 2023-24 beyond Rs. 6.93/kWh and Rs. 6.84/kWh, so long as the tariff determined by MERC, i.e. Rs. 7.44/kWh and Rs. 7.30/kWh for power procurement from Unit 5 and Unit 8 of TPC-G, is not revised upwards; and, even in case of any such upward revision beyond the tariff determined for TPC-G, they would not claim the difference between the tariff determined by MERC, i.e. Rs. 7.44/kWh and Rs. 7.30/kWh for power procurement from Unit 5 and Unit 8 of TPC-G, and Rs. 6.93/kWh and Rs. 6.84/kWh sought by them for procurement of power from Unit-5 and Unit 8 respectively of TPC-G for FY 2023-24.

**117.** While this submission would undoubtedly result in a lower tariff, and generally benefit consumers, it cannot be lost sight of that the cost of procurement of thermal power (coal based) from TPC-G is based on the tariff of TPC-G which is determined separately under Section 62 of the Act, and procurement of power by any of the distribution licensees can only be in terms of the tariff so determined. In any event, it would not be appropriate for us to permit any downward revision, based on such an undertaking, at the interlocutory stage of the present appellate proceedings. Suffice it to record the undertaking given by the appellant, and to hold that they would be bound thereby irrespective of in whose favour the main appeal is finally decided later.

**D. IMPACT OF THE CORRIGENDUM ORDER REGARDING THE APPELLANT'S SHARE OF REVENUE SURPLUS OF TPC-G OF RS. 215.61 CRORES:**

**118.** Learned Senior Counsel, appearing on behalf of the appellant, would submit that MERC, despite admitting that it has committed an error, while passing the impugned order, has refused to extend the benefit of the same within the present control period, and has arbitrarily decided to adjust the impact of recovery/refund of Rs. 215.61 Crores from TPC-G, in the Power Purchase cost of the appellant for FY 2023-24, at the time of true-up in next tariff determination process; the surplus due to the appellant and BEST was determined by MERC in the tariff order of TPC-G; curiously, only BEST was granted the benefit and MERC, despite acknowledging its error, is not inclined to grant the same benefit to the appellant; no cogent reasons have been provided by the MERC in the impugned order for deciding to prolong the legitimate claim of the appellant, and therefore the same cannot be supplemented by fresh reasons at this stage *vide* its Reply; such non-consideration by MERC, to give the impact of Rs.215.61 Crores, has further led to an artificial increase in the ARR of the appellant to an extent which has an impact of Rs. 0.39 /kWh; and the said event establishes the *prima facie* case in favour of the appellant for grant of interim relief.

**119.** Learned Senior Counsel, appearing on behalf of MERC, would submit that MERC issued the corrigendum order dated 21.04.2023 suo motu rectifying the impugned order arising out of certain computational corrections that were required to be carried out in the impugned order; the Appellant is seeking to selectively apply the revenue surplus of TPC-G of

Rs. 215.61 crores in the impugned order whereas, at the same time, there are other corrections also made in the corrigendum order which the Appellant does not wish to be carried into effect immediately in the impugned order; in the review order, in Case No. 96 of 2020 dated 01.07.2020, MERC had accepted the Appellant's stand that pass through of the UI charges need not be given effect immediately as it is contrary to Section 62(4) of the 2003 Act, and ought to be considered at the time of true-up of 2018-19; MERC directed the Appellant to claim consequential impact of the said review order along with corresponding carrying / holding cost in the upcoming mid-term review proceedings; in its rejoinder, the Appellant stated that, in the aforesaid review order dated 01.07.2020, MERC had re-calculated cross subsidy surcharge and made it applicable from the date of the MYT order i.e. 01.04.2020 and, following the same approach, even the amount of Rs. 215.61 crores, in the corrigendum order dated 21.04.2023, ought to be also made applicable from the date of the impugned order i.e. 01.04.2023; the Appellant's submission is erroneous as recalculation of cross-subsidy surcharge, in the review Order dated 01.07.2020, was an "arithmetical error and not an aspect arising out of review of any order", as can be clearly made out from the following extract:

> ***"14.19 Above revised approved CSS shall be applicable from date of applicability of MYT Order i.e. 1 April 2020. Although in the subsequent part of the Order for the reasons stated therein, the Commission has not allowed revision in tariff on account of impact of other review issues allowed in this order, but in case of recalculation of CSS, as it is just a correction or arithmetical error without affecting any other part of the tariff structure, the Commission is allowing it to be effective from 1 April 2020 without waiting until the MTR Process."***

**120.** Whereas giving effect to the corrigendum order from 01,04,2023 would impact the tariff structure, and is not a simple arithmetical error; the net impact of various errors, recognized in the corrigendum Order, would result in reduction in ACoS of 0.20/kWh for FY 2023-24; whereas similar corrigendum, for various errors, have been issued in case of AEML-D also and its net impact is reduction in ACoS of Rs. 0.45/kWh for FY 2023-24; if at all effect of the corrigendum Order is to be given, it needs to be given to both the licensees and, in that case, the appellant may not have any competitive advantage as being claimed in present appeal as reduction in AEML-D is more than theirs.

**121.** In its corrigendum order dated 21.04.2023, MERC held as follows:

> "*6. The above aspects are all related to the projection period of FY 2023-24 and FY 2024-25, and the impact of the same shall be addressed at the time of true-up of respective year in the next tariff determination process.* ***This is consistent with the approach adopted in the past for all review Orders especially stated in review Order dated 1 July 2020 issued in Case No. 96 of 2020 in respect of review of certain aspects of MYT Order dated 30 March 2020.***"

**122.** It is well settled that, when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. Orders are not like old wine becoming better as they grow older **(Mohinder Singh Gill & Anr vs The Chief Election Commissioner: AIR 1978 SC 851).** Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to, do. Public orders made by public authorities are meant to have public effect and are intended to effect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself. (**Commissioner of Police vs Gordhandas Bhanji**: **AIR 1952 SC 16**; **Mohinder Singh Gill & Anr vs The Chief Election Commissioner: AIR 1978 SC 851).** While several submissions, put forth on behalf of MERC, are not reflected in the impugned MTR Order dated 31.03.2023, and applying the law declared in the aforesaid judgements, may justify not being considered, the fact remains that several charts, brought on record for the first time in these appellate proceedings, were furnished at our behest. We had sought several details, both from the Appellant and MERC, to satisfy ourselves on the issue of whether the increase in the ACOS of the Appellant, far beyond what they had submitted in their MTR petition, and the cross-subsidy structure determined for different categories of its consumers, was justified or not. We see no reason, in such circumstances, not to consider the submissions urged by both sides, some of them for the first time at the appellate stage.

**123.** In the Appeal filed before this Tribunal on 17.04.2023, the Appellant raised several grounds in their challenge to the Mid-Term Review ("**MTR**") Order passed by the Maharashtra Electricity Regulatory Commission ("**MERC**") on 31.03.2023, including that MERC had failed to consider the already determined surplus of Tata Power Company-Generation ("**TPC-G**") (in Case No. 221 of 2022) for passing it to the consumers of the Appellant, but the same had been considered for the Brihanmumbai Electricity Supply and Transport Undertaking ("**BEST**"), the other Distribution Licensee, procuring power from TPC-G; and, by truing up the ARR for FY 2019-20 to FY 2021-22 in the impugned order, MERC had approved the cumulative

Revenue Gap/(Surplus) for recovery/refund of Revenue Gap/(Surplus) to the beneficiaries of TPC-G (ie Appellant and BEST) in proportion to the energy sold during the respective years.

**124.** The Appellant further contended that the said amounts had to be considered in the tariff determination of BEST and the Appellant for FY 2023-24 in their respective MTR orders; the impact had been duly considered, while determining the tariff of BEST in its order in Case No. 212 of 2022 dated 31.03.2023, wherein MERC had approved the cost of power purchase from TPC-G of Rs.2293.36 Crores, the impact of past period truing-up of Rs.200.50 Crores to be recovered in FY 2023-24, and refund of Standby Charges of Rs.36.64 Crores as approved in the TPC-G's MTR order in Case No. 221 of 2022; however, for reasons best known to it, MERC had failed to give the impact of Rs.215.61 Crores in the power purchase cost of the Appellant for FY 2023-24, but had considered it in the power purchase cost of BEST for FY 2023-24; such non-consideration had led to an artificial increase in the ARR of the Appellant to the extent of Rs.215.61 Crores; non-consideration of the recovery/refund of Revenue Surplus, accrued to the Appellant while determining its tariff, had a substantial impact on its Average Cost of Supply (ACoS) and tariff; and MERC should be directed to consider the impact of reduction in power purchase cost for FY 2023-24 of the Appellant, and accordingly revise the tariff due to reduction in ACoS.

**125.** After the present Appeal was filed before this Tribunal on 17.04.2023, MERC issued a corrigendum order four days thereafter on 21.04.2023 making corrections to the MTR Order of the Appellant dated 31.03.2023. The said Order dated 21.04.2023 records that, in the MTR order dated 31.03.2023 in Case No. 221 of 2022 for TPC-G, MERC had approved Revenue Surplus of TPC-G, and recovery/refund of the approved revenue gap/(surplus) to the distribution licensees in proportion to the energy sold during the respective year as shown in the table; MERC had considered the said amounts in the tariff determination of BEST and the Appellant for FY 2023-24; however, by oversight, the Appellant's share of revenue surplus of TPC-G, amounting to Rs.215.61 Crore (148.51 + 67.10), had not been considered in the Supply ARR of the Appellant. In this context, it is relevant to note that the Revenue Gap/(Surplus) of BEST was Rs.200.50 Crores (155.72 + 44.78), and that of the Appellant was Rs.215.61 Crores.

**126.** Curiously, while the said Revenue Gap/(Surplus) of Rs.200.50 Crores was considered in the MTR order of BEST dated 31.03.2023, the Revenue Surplus of Rs.215.61 Crores was not considered in the MTR order of the Appellant which was also passed on the same day ie 31.03.2023, resulting in the Appellant's Average Cost of Supply increasing significantly. The only explanation given by MERC, in its corrigendum order dated 21.04.2023, is that it had failed to consider the revenue surplus of the Appellant by oversight.

**127.** While it is still not clear as to how the said amount, reflected in the order of BEST, was not reflected in the order of the Appellant, though both the MTR Orders were passed on the same day ie 31.03.2023, what is even more disconcerting is that MERC should have held that the impact of this Revenue Gap/(Surplus) would be addressed at the time of true-up of the respective year in the next tariff determination process. As MERC is statutorily obligated to protect consumer interests, their failure to give effect to their error immediately, and in postponing giving effect thereto till the true-up stage, would result in consumers having to pay a higher tariff as at present, with the fond hope that there may be a reduction in tariff later at the true-up stage of the proceedings.

**128.** The justification given by MERC, in their reply to the Appellant's contentions in this regard, is that, by not allowing immediate revision in the tariff on account of the corrigendum, it was consistent with its earlier order on similar matters; this approach is consistent with the approach adopted in the past for all review orders, especially the order dated 01.07.2020 in Case No. 96 of 2020 in respect of review of certain aspects of the MYT Order dated 30.03.2020.

**129.** It is useful to note that Case No. 96 of 2020 was filed by the Appellant seeking review of certain aspects of the MYT order dated 30.03.2020 in Case No. 326 of 2019; and Case No. 98 of 2020 was filed by AEML-D seeking review of certain aspects of the MYT order dated 30.03.2020 in Case No. 326 of 2019. While the Appellant had requested the Commission to approve the impact of Rs.98.40 crores for its distribution business, AEML-D had requested MERC to give effect to the financial impact in the Appellant's tariff at the review stage itself, instead of waiting for the true-up stage during MTR proceedings, as it directly impacted tariff competitiveness, and would cause irreparable harm if it was not addressed immediately. This request of AEML-D was opposed by the Appellant contending that no tariff or part of any tariff can, ordinarily, be amended more frequently than once in any financial year. MERC had relied upon Section 62 (4) to hold that it had adopted the practice of deferring the impact of the review orders till the next tariff determination process by allowing corresponding carrying/holding cost, and this practice was being uniformly adopted for all generating companies and licensees in the State.

**130.** Relying on these observations, it is now contended before us, on behalf of MERC, that the Appellant had itself opposed immediate pass through in its tariff, and having done so earlier, they cannot now be heard to complain that the error should be rectified, and their tariff reduced forthwith.

**131.** It is relevant to note that MERC had, in its order dated 01.07.2020, thereafter opined that, although three issues would have an impact of increasing expenses, the revised computation of CSS would increase the revenue of the Appellant, thereby neutralizing the impact of increased expenses to some extent; further, correcting double allowance of FBSM charges may further neutralize the impact of increased expenses on account of the review order; and in fact, instead of increase in tariff, the tariff would have to be reduced. Having so held, MERC expressed its disinclination to undertake revision in tariff at that stage, by allowing immediate pass through of the review impact.

**132.** Reliance placed by MERC, on its order dated 01.07.2020, is prima facie misplaced. Firstly, unlike in its order dated 01.07.2020 which was passed on review petitions being filed both by the Appellant and AEML against the MYT order dated 30.03.2020, in the present case, MERC has undertaken a correction exercise on its own accord, having realised its error in not adjusting the Revenue Gap/(Surplus) of the Appellant in its MTR order dated 31.03.2023, while providing for such adjustment in the order of BEST passed on the same day. Secondly, unlike the review order in Case No. 326 of 2019 which was passed more than three months after the original MYT order dated 30.03.2020, the corrigendum order, in the present case, was passed on 21.04.2023 within three weeks of the MTR order dated 31.03.2023, and within four days of the present Appeal having been filed on 17.04.2023. Thirdly, in its order dated 01.07.2020, the MERC has itself acknowledged that, making the necessary corrections would, instead of increase in the tariff of the Appellant as sought by AEML-D, the would result in reduction of the . In this context, it is relevant to note that, in the

Review Petition, AEML-D had sought immediate pass through of the adjustments made in the Appellant's tariff on the premise that it would result in a higher tariff and their contentions was negative by the MERC holding that it would actually not result in increase in tariff, but would result in reduction in the Appellant's tariff. In the present case, it is MERC which had itself realised its error. As it is obligating to protect consumers interest in terms of Section 61(d), it ought to have given effect, to the correction, from 01.04.2023 itself, and thereby reduce the tariff payable by the Appellant's consumers.

**133.** By the use of the word "ordinary", in Section 62(4), Parliament has not prohibited the Regulatory Commissions, in exceptional circumstances, from amending the tariff order more than once in a Financial Year. In this context, it is relevant to note that the MTR order dated 31.03.2023 is in itself an amendment to the MYT Order dated 30.03.2020, and MERC has itself in its review Order dated 01.07.2020, while correcting one of its errors, given effect thereto from 01.04.2020.

**134.** In Case No.96 and 98 of 2020, AEML-D, in its Review Petition, had pointed out the error in calculation of CSS for the Appellant for the $4^{th}$Control Period; upon verification of the financial model underlying the impugned MYT Order, MERC had observes that, while working out the per unit Transmission Charges, it had inadvertently considered only Direct Sales of the Appellant, instead of the total sales including Change-over Sales; as a result, the per unit Transmission Charges had been considered higher for the purpose of computing category-wise CSS; consequently, the CSS for some categories had been approved lower than what they should have been; and, therefore, there was an error apparent on the face of the record in calculation of CSS because of non-consideration of Change-over Sales in computation of the Transmission Charges.

**135.** While allowing the review raised by AEML-D on this issue, MERC revised Tables 6.41 to 6.43 of the MYT Order, in order to correct the CSS on account of revised Transmission Charges per kWh, and held that the above revised approved CSS shall be applicable from date of applicability of the MYT Order i.e. 1st April 2020. While doing so, MERC opined that, although in the subsequent part of the Order for the reasons stated therein, it had not allowed revision in tariff on account of impact of other review issues allowed in this order, but in case of recalculation of CSS, as it was just a correction of arithmetical error without affecting any other part of the tariff structure, it was allowing it to be effective from 1st April 2020 without waiting until the MTR process.

**136.** It does not stand to reason that the MERC should hold the error in calculation of CSS for the Appellant for the 4thControl Period, (which it had itself held to be an error apparent on the face of the record), to be a mere arithmetical error justifying its being given effect to from 01.04.2020 onwards.

**137.** Section 114 r/w Order 47 Rule 1 CPC enables the Court/Tribunal to correct its earlier Order, among others, if it suffers from an error apparent from the record. Section 152 CPC enables the Court/Tribunal, either suo motu or on an application, to correct an arithmetical or clerical mistake in its order which had occurred on account of an accidental slip or omission. The distinction between the two is clear. Having exercised its jurisdiction, in terms analogous to Section 114 r/w Order 47 Rule 1 CPC, to correct an error apparent from the record, MERC has justified giving effect to its correction retrospectively from 01.04.2020, calling it an arithmetical error. In any event, even if the error in calculation of CSS for the Appellant, for the 4thControl Period, is presumed to be an arithmetical error, there is no reason why failure of MERC to consider the Appellant's share of revenue surplus of TPC-G, amounting to Rs.215.61 Crore (148.51 + 67.10), in the Supply ARR of the Appellant, should also not be treated as an arithmetical or clerical error warranting its being given effect to from 01.04.2023.

**138.** As no appeal has been filed against the MTR order of AEML-D, and since they are not even parties to these appellate proceedings, it would not be proper to examine, behind AEML-D's back, whether the effect of the corrigendum Order should be given to them also.

### E. ARBITRARY DETERMINATION OF CROSS-SUBSIDY:

**139.** Learned Senior Counsel, appearing on behalf of the appellant, would submit that the Tariff Policy mandates that the tariff should be progressively reduced and brought within the range of +/- 20% of the ACoS; despite such express mandate, cross subsidy of the appellant has been considered up to as much as 131% of their ACoS; the same is increased in all Tariff Categories compared to the Existing cross subsidy for FY 2022-23; this has led to a situation where, despite the ACoS of the appellant being the lowest amongst all licensees, the appellant's tariff has been designed to be uncompetitive; in the MYT Order for the appellant, in Case No. 326 of 2019 dated 30.03.2020, the cross subsidy applicable was within the prescribed band for the year FY 2020-21; however MERC, for reasons best known, increased the band from Year FY 2021-22 onwards (even though the ACoS of the appellant for FY 2021-22 was similar to FY 2020-21); after increasing cross subsidy for FY 2021-22, MERC then started progressively reducing the same; even after applying cross subsidy above the prescribed bandwidth, the appellant had remained competitive and, therefore, there was no occasion or legal basis for the appellant to challenge the said order; however, in present instance wherein the MERC has applied cross subsidy beyond the prescribed bandwidth, it has made the appellant highly uncompetitive in the distribution market, and thus the appellant is constrained to challenge the same; the appellant's case is not only that the provisions under the Tariff Policy has not been adhered to by the MERC, but is also that, on account of selective application of the said provision over the parallel distribution licensees, the appellant has become uncompetitive; the selective application of cross subsidy upon the appellant by the MERC is evident from the chart wherein, in five categories, cross subsidy of the appellant has been considered beyond the range of +/- 20%, as compared to the other competitive licensees, and the same has made the appellant uncompetitive as compared to the other competing parallel distribution licensees; MERC has erroneously contended that the appellant, in its MTR Petition, has itself proposed cross subsidy of 134% for the LT-II B category; the same had been proposed keeping in view the considerable difference in the Tariff of S3 and S4 of LT Residential Category of consumers amongst the parallel Distribution Licensees; such a contention is liable to be rejected in as much as the same was proposed seeing that it was fixed at an even higher rate of 161% in the previous financial year; despite MERC's contention that it has applied the same methodology for determination of cross subsidy for each component of tariff for various distribution licensees, the consumer category *viz.* EHT IV-Railways / Metro / Monorail has been categorised as subsidising category for the appellant, for which cross subsidy has been computed at 126%; on the other hand, it has been categorised as a subsidised category for the another parallel distribution licensee with cross subsidy computed as 85%; this clearly demonstrates that the contention of MERC is fallacious and is liable to be rejected.

**140.** Learned Senior Counsel, appearing on behalf of MERC, would submit that the Electricity Act, 2003 mandates gradual reduction in cross-subsidy; the tariff Policy mandates reduction in cross-subsidy to bring tariff within ± 20% of the Average Cost of Supply (ACoS) so that category wise tariff is reflective of cost of supply- Example – If Average Cost of Supply is Rs.

8/kWh, ± 20% band will be Rs. 6.40/kWh (80% of Rs. 8/kWh) to Rs. 9.60/kWh (120% of Rs. 8/kWh); if category-wise tariff is within ± 20% of ACoS, it is compliant of the tariff policy mandate; if category wise tariff is lower than 80%, and higher than 120%, then the same needs to be gradually changed to bring it within ± 20% band; percentage cross-subsidy is computed by dividing the Average Billing Rate (ABR) of a category by the Average Cost of Supply of the Licensee; average billing rate is computed by dividing total revenue of the category by total sales of that category; total revenue includes revenue from fixed charges and revenue from variable charges such as wheeling charges and energy charges; variable charges are computed by applying approved tariff on energy sales approved by the Commission; fixed charges are computed by applying approved fixed tariff/demand tariff on the demand submitted by the licensee. Demand charges plays important role in computing ABR as illustrated below:

| | Tariff | | Bill Computation | | | | |
|---|---|---|---|---|---|---|---|
| | Fixed Charge (Rs/Month) | Variable Charge (Rs/kWh) | Consumption (kWh) | Fixed Charge (Rs) | Variable Charge (Rs) | Total Billed Amount (Rs) | ABR (Rs) |
| | A | B | C | D | g = b x c | f = d+g | g = f/c |
| Case A | 100 | 5 | 50 | 100 | 250 | 350 | 7.00 |
| Case B | 100 | 5 | 100 | 100 | 500 | 600 | 6.00 |
| Case C | 100 | 5 | 200 | 100 | 1000 | 1100 | 5.50 |

If consumption is more for given fixed charges, contribution of fixed charges in ABR goes on reducing.

**141.** Learned Senior Counsel, appearing for the MERC, would further submit that MERC has been approving tariff which has three main components.(1) Demand/Fixed Charge which is linked to peak demand recorded by consumer or monthly fixed charges irrespective of demand, (2) energy charge which is linked to energy consumed, and (3) wheeling charges which is also linked to energy consumed; wheeling charges are being determined voltage wise i.e. LT – uniform for all LT categories, HT – uniform for all HT categories and EHV – 'Nil' as consumers are directly connected to the transmission system; further, energy charge is the same for consumers of a category (say industrial) connected on HT or EHT level; in effect, tariff difference between consumer connected on HT and EHT level is wheeling charge; no wheeling charge is applicable to EHT consumers; therefore, tariff of EHT consumer is lower than HT consumer under the same consumer category; and due to such lower tariff, cross-subsidy of EHT consumers may go below 100%.

**142.** Learned Senior Counsel for the MERC would state that, in the MYT Order, the Commission has worked out cross subsidy reduction trajectory; for certain category of consumers, cross-subsidy was above 120%, but the Appellant has never challenged the same as tariff declared in their MYT Order was lower than the other competitive licensee; in the MTR Order of the appellant, as against the above trajectory of cross-subsidy reduction, MERC has approved cross subsidy for FY 2023-24; the Appellant, in its MTR Petition, has itself projected cross subsidy for certain categories above 120%; this is when the Appellant had understated its ARR by projecting lower quantum and rate from TPC-G; after due regulatory scrutiny, MERC has allowed prudent expenses in ARR which requires around 12% year-on-year increase which means 24% increase in FY 2024-25; while determining tariff for such high tariff increase, it is difficult to maintain cross-subsidy within 120%; the MERC has, as indicated in the following table, progressively reduced the cross subsidy from their "current level" i.e. from the trajectory given in the MYT Order:

> **NOTE:** As far as the MERC knows, in the various States of India the cross-subsidy has yet not been brought below 20% of the tariff for various consumer categories.

| Consumer Categories | | Existing in MYT Order | | | As per MYT Orders | | | | | | | | | | | | | | | As per MTR Order | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | FY 2020-21 | | | FY 2021-22 | | | FY 2022-23 | | | FY 2023-24 | | | FY 2024-25 | | | FY 2023-24 | | | FY 2024-25 | | |
| | | TPC-D | AEML | BEST | TPC-D | AEML | BEST | TPC-D | AEML | BEST | TPC-D | AEML | BEST | TPC-D | AEML | BEST | TPC-D | AEML | BEST | TPC-D | AEML | BEST | TPC-D | AEML | BEST |
| | | I | II | III | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 | 13 | 14 | 15 | 16 | 17 | 18 | 19 | 20 | 21 |
| A. | EHT CATEGORIES | | | | | | | | | | | | | | | | | | | | | | | | |
| B. | EHT I -Industry | | | | | | | | | | | | | | | | | | | 97% | 84% | | 100% | 82% | |
| C. | EHT II - Commercial | | | | | | | | | | | | | | | | | | | 107% | | | 108% | | |
| D. | EHT III - Bulk Supply Residential | | | | | | | | | | | | | | | | | | | | | | | | |
| E. | EHT IV - Railways / Metro / Monorail | | | | | | | | | | | | | | | | | | | 125% | 85% | | 126% | 84% | |
| F. | EHT V - Public Service (A) | | | | | | | | | | | | | | | | | | | | | | | | |
| G. | EHT V - Public Service (B) | | | | | | | | | | | | | | | | | | | 97% | | | 99% | | |
| H. | EHT – VI – Electric Vehicle Charging Stations | | | | | | | | | | | | | | | | | | | | | | | | |
| I. | HT I – Industry | 137% | 142% | 134% | 104% | 106% | 107% | 109% | 105% | 103% | 108% | 104% | 101% | 107% | 103% | 98% | 104% | 103% | 94% | 109% | 105% | 101% | 113% | 103% | 100% |
| J. | HT II – Commercial | 152% | 136% | 144% | 120% | 104% | 120% | 128% | 105% | 115% | 129% | 105% | 113% | 131% | 108% | 109% | 134% | 112% | 104% | 128% | 109% | 116% | 130% | 110% | 112% |
| K. | HT III - Group Housing Society | 131% | 128% | 119% | 114% | 103% | 106% | 114% | 101% | 101% | 111% | 106% | 101% | 109% | 107% | 100% | 106% | 109% | 97% | 107% | 107% | 101% | 109% | 109% | 101% |
| L. | HT V(B) - Railways Metro & Monorail | 133% | 128% | 124% | 108% | 103% | 109% | 114% | 101% | 108% | 115% | 106% | 109% | 116% | 107% | 107% | 116% | 109% | 104% | 116% | | 119% | 119% | | 120% |
| M. | HT VI - Public Services | | | | | | | | | | | | | | | | | | | | | | | | |
| N. | HT VI - Public Services (A) - Government Hospitals | 135% | 133% | 128% | 119% | 107% | 108% | 123% | 108% | 101% | 124% | 111% | 101% | 122% | 111% | 96% | 123% | 113% | 93% | 124% | 104% | 100% | 125% | 102% | 100% |
| O. | HT VI - Public Services (B) - Public Services Others | 144% | 142% | 140% | 116% | 111% | 116% | 119% | 112% | 109% | 120% | 111% | 109% | 119% | 112% | 107% | 120% | 115% | 105% | 113% | 108% | 108% | 116% | 112% | 110% |
| P. | HT VI – EV Charging Stations | | | | | | | | | | | | | | | 0% | | | | 91% | 99% | 0% | 87% | 103% | 0% |
| Q. | LT Category | | | | | | | | | | | | | | | | | | | | | | | | |
| R. | LT I - Residential (BPL) | | 87% | 42% | | 80% | 42% | | 78% | 40% | | 79% | 40% | | 79% | 39% | | 79% | 38% | | | | | | |
| S. | LT I – Residential | 81% | 99% | 98% | 73% | 87% | 97% | 80% | 88% | 93% | 81% | 88% | 93% | 82% | 88% | 91% | 84% | 88% | 89% | 81% | 91% | 86% | 87% | 91% | 86% |
| T. | LT II(A) - Commercial upto 20 kW | 123% | 138% | 133% | 95% | 111% | 119% | 102% | 110% | 115% | 101% | 108% | 112% | 101% | 110% | 110% | 102% | 109% | 107% | 105% | 108% | 110% | 113% | 106% | 109% |
| U. | LT II(B) - Commercial 20 to 50 kW | 122% | 148% | 143% | 120% | 125% | 131% | 125% | 123% | 127% | 122% | 124% | 126% | 121% | 126% | 126% | 119% | 128% | 124% | 131% | 117% | 126% | 139% | 116% | 124% |
| V. | LT II(C) - Commercial > 50 kW | 146% | 150% | 147% | 120% | 128% | 132% | 126% | 129% | 128% | 125% | 131% | 127% | 125% | 132% | 126% | 125% | 134% | 124% | 124% | 118% | 127% | 129% | 116% | 127% |
| W. | LT III (A)- Industrial upto 20 kW | 125% | 125% | 118% | 90% | 103% | 107% | 96% | 102% | 101% | 96% | 103% | 99% | 97% | 99% | 97% | 98% | 99% | 94% | 95% | 97% | 92% | 102% | 98% | 95% |
| X. | LT III (B) - Industrial > 20 kW | 122% | 139% | 128% | 111% | 116% | 122% | 116% | 116% | 117% | 115% | 117% | 117% | 115% | 118% | 116% | 115% | 120% | 113% | 113% | 109% | 120% | 120% | 109% | 117% |
| Y. | LT IX - Public Services | | | | | | | | | | | | | | | | | | | | | | | | |
| Z. | Government Hospitals & Educational Institutions | 128% | 113% | 125% | 99% | 97% | 103% | 102% | 96% | 97% | 101% | 96% | 95% | 100% | 97% | 92% | 99% | 96% | 88% | 102% | 100% | 95% | 109% | 102% | 96% |
| AA | Public Services Others | 131% | 119% | 132% | 120% | 102% | 105% | 120% | 101% | 98% | 113% | 101% | 96% | 108% | 102% | 93% | 103% | 101% | 90% | 105% | 103% | 97% | 112% | 106% | 97% |
| BB. | LT X – EV Charging Stations | | | 104% | | | 83% | | | 80% | | | 79% | | | 78% | | | 75% | 89% | 92% | 83% | 85% | 96% | 83% |

Red coloured numbers of TPC-D (except LT II-B) are above 120% but these are lower than existing cross-subsidy in MYT Order which demonstrate reduction in cross-subsidy. For LT II-B category, TPC-D in its MTR Petition has proposed 134% cross-subsidy [refer page 18 of MERC Reply], the Commission has makes it 131%. LT II-B category contributes only 2% in total sales of TPC-D [refer page 20 of MERC Reply]. (Copy of table showing reduction in cross subsidy is attached herewith and marked as **ANNEXURE-F**)

### EHV Railways (FY 2023-24):

a. Comparative Tariff:

| Particulars | Demand Charges (Rs/kVA/month) | Wheeling Charges (Rs/kWh) | Energy Charges (Rs. Cr) |
|---|---|---|---|
| TPC-D | 375 | 0.06* | 7.05 |
| AEML | 375 | 0 | 6.15 |

**Implementation is stayed on account of Supreme Court Order*

Tariff difference between the two licensee is Rs.0.90/kWh

b. ABR Computation:

| Particulars | Demand (MVA) | Sales (MU) | Demand Revenue (Rs. Cr) | Total Revenue (Rs. Cr) | ABR (Rs/kWh) | Contribution of Demand (Rs/kWh) |
|---|---|---|---|---|---|---|
| TPC-D | 11 | 16.32 | 4.78 | 17.28 | 10.59 | 2.93 |
| AEML | 15 | 120 | 6.75 | 87.77 | 7.31 | 0.56 |

**143.** Learned Senior Counsel for MERC would submit that, thus, TPC-D's contribution of Demand Charge in ABR is much higher than AEML; the Commission has considered Demand as submitted by licensee and applied approved Demand Charges (which are identical for all Mumbai Discom); therefore, even though tariff differential is Rs.0.90/kWh, difference in ABR is Rs. 3.28/kWh on account of higher incidence of demand charges; due to such higher ABR, cross-subsidy level is higher in TPC-D; during the course of hearing, and as required, MERC has submitted a Note explaining the rationale of Cross Subsidy and tariff determination process; it can be seen therefrom that, due to demand at very low load factor submitted by TPC-D for EHT-Railways, ABR of EHT-Railways becomes higher than HT-Railways, which is not consistent with the other three EHT Categories in TPC-D; in the normal course, ABR of EHT categories shall be lower than HT category as tariff of EHT is lower; if Load Factor of Demand submitted by TPC-D is corrected, then ABR goes below 100%; hence, higher cross-subsidy level of EHT-railways is attributable to Demand submitted by TPC-D; for ABR computation, the Commission has been using demand as submitted by the licensee; during the course of the hearing and as required, MERC has submitted a Note impact of Cross Subsidy in retail tariff; as the quantum of cross-subsidy increases, tariff for cross-subsidizing consumers goes on increasing; in the past, differential in ACoS of TPC-D and AEML-D was higher; in the MTR Order, due to increase in imported fuel cost, tariff of TPC-D was increased by around 12% year on year whereas increase in AEML-D's tariff was limited to 2% as it was not affected by imported coal cost; this has reduced ACoS differential between two distribution Licensee bringing it to almost same level i.e. Rs. 8.42/kWh of TPC-D and Rs. 8.57/kWh of AEML-D; and as Cross-subsidy structure remains the same, impact of cross-subsidy requirement makes cross-subsidizing tariff of TPC-D is more than AEML-D.

**144.** Para 8.3 of the Tariff policy, issued by the Ministry of Power, Government of India on 28.01.2016, stipulates that, for achieving the objective that the tariff progressively reflects the cost of supply of electricity, the Appropriate Commission would notify a road map that such tariffs are brought within ± 20% of the average cost of supply; and the road map would have intermediate mile stones based on the approach of a gradual reduction in cross subsidy. The obligation cast on the Commission, in terms of the Tariff policy, is for determination of cross subsidy in such a manner that the tariff does not, ordinarily, exceed 20% of the average cost of supply.

**145.** In the MYT order dated 30.03.2020, the category-wise cross subsidy proposed by the Appellant for FY 2023-24 for HT-II Commercial was 116%, for EHT V(B) -Railways/ Metro/Mono 22/33 kV it was 106%, for EHT-VI (A) Public Service - Government Hospitals and Educational Institutions it was 116%, for LT-II (B) - Commercial 20 to 50 kW it was 120%, and for LT-II (C) - Commercial above 50 kW it was 125%. Except for the category of LT-II (C) Commercial above 50 kW, for all other categories the cross subsidy prescribed in the MTR order is higher than what the Appellant had sought while filing its MYT petition. In the MYT Order dated 30.03.2020, for FY 2023-24, the prescribed retail tariff for HT-II Commercial category was 131%, for EHT IV -Railways/ Metro/Mono rail 22/33 kV it was 116%, for HT-V (A) - Public Service - Government Hospitals & Educational Institutions it was 122%, for LT II(B) - Commercial 20 to 50 kW it was 121%, and for LT-II(C) Commercial above 50 kW it was 125%.

**146.** In the impugned MTR Order, MERC has considered cross subsidy of the Appellant beyond 120% in five different categories. While the cross subsidy for HT-II Commercial was increased from 112% in FY 2022-23 to 128% in FY 2023-24, EHT II-Railways/ Metro/Mono 22/33 kV was increased from the existing 109% for FY 2022-23 to 125% for FY 2023-24. Likewise for HT V(A) - Public Service - Government Hospitals and Educational Institutions, the existing cross subsidy of 107% for FY 2022-23 has been increased to 124% for FY 2023-24. For LT II(B) - Commercial 20 to 50 kW, the existing cross subsidy for FY 2022-23 of 120% has been increased to 131% for FY 2023-24, and for LT-II(C) - Commercial more than 50 kW, the existing cross subsidy for FY 2022-23 of 116% has been increased to 124% for FY 2023-24.

**147.** Even more curious is that, while the cross subsidy for EHT railways for the Appellant for FY 2023-24 is 125% (revised upwards from 109% in FY 2022-23), the cross subsidy for the parallel licensee (ie AEML) for the same category is only 85%. The very object of providing cross subsidy is that a particular category of consumers, which has the financial wherewithal, should pay more than AcoS to subsidise another category of consumers which lacks the financial ability to pay the higher tariff determined on the basis of AcoS. Consequently, any category of consumers can either be treated as a subsidizing category or a subsidized category uniformly for all the distribution licensees. Categorization of a particular consumer category, to determine whether they are a subsidizing or a subsidized category, cannot vary from one distribution licensee and another.

**148.** While there can be a minor variation in the cross subsidy between one distribution licensee as compared to another, it defies comprehension as to how the very same category of the consumers, ie EHT IV -Railways/ Metro/Mono 22/33 kV, can be held to be a subsiding category for one distribution licensee (125% for the Appellant), and be treated as a subsidised category for another (ie AEML at 85%). In any event, no justification is discernible from the impugned order for the very same category of consumers to be treated as a subsidising category for one distribution licensee and a subsidized category for another.

**149.** Except to contend that the Appellant had itself sought a higher cross subsidy for certain categories, more than what was stipulated by the MERC earlier, no reasons are to be found in the impugned Order regarding the attempts, if any, made by MERC to bring the cross subsidy structure within the limits of ± 20%, as statutorily prescribed in the Tariff Policy or as to whether MERC has laid down a road map, in compliance with Regulation 91.4 of the MYT Regulations, to comply with the obligations cast on it under the tariff policy or, in case any such road map has been prepared, as to why it has, instead of reducing the existing cross subsidy and bringing it within the limits of ± 20%, chosen to increase the cross subsidy in the impugned Order more than what it had stipulated in its earlier MYT order.

**150.** The Appellant's complaint in these proceedings is that MERC had arbitrarily increased its tariff by around 12% each year, as against the increase in tariff of its competitor licensees by 2%. This fact is acknowledged by the MERC, and it is submitted that consequent on such an increase, while the ACoS of the Appellant has been determined as Rs.8.42/kWh, the ACoS of AEML-D was fixed at Rs.8.57/kWh, and the difference in ACoS, between the two, has been almost brought to the same level. While the Appellant's complaint is that their ACos has been arbitrarily increased by 12% by MERC, curiously this 12% increase in the Appellant's ACoS is put against them by the MERC to hold that in view of the increase in ACoS, and as the cross-subsidy structure remains the same, the impact of cross subsidy requirement makes cross subsidizing tariff of the Appellant more than AEML-D.

**151.** As noted hereinabove, in the absence of any Appeal being preferred by the Appellant against the tariff order passed by the MERC in the case of

AEML-D, and in as much as AEML-D is not a party to the present proceedings, it would be inappropriate to make any observations on the tariff determined by the MERC for AEML-D. What can, however, be considered is whether or not the 12% increase in ACoS of the Appellant is justified for the reasons aforementioned, we are satisfied, prima-facie, that such an increase in ACoS of the Appellant is not justified. Consequently, in the light of the afore-said submissions of the MERC itself, a substantial reduction in the percentage of increase in the Appellant's ACoS, from that determined at 12%, would, by itself, result in reducing the impact of the cross-subsidy tariff of the Appellant.

### F. SALES FORECAST:

**152.** Learned Senior Counsel, appearing on behalf of the appellant, would submit that, as against the appellant's projected sales of 1686.68 MUs for LT category of Direct Sales, MERC has approved only 1538.98 MUs*;* no valid reason has been assigned by MERC for arriving at such reduced figures; the basis of **'appropriate CAGR'** is, *per se,* cryptic and non-speaking; MERC has contended that the structure of Tariff changes is based on the cost of supply and prevailing consumer sales mix, and the competitiveness of the Distribution Licensee; increased cost of power purchase for the appellant, and a substantial reduction in the approved LT sales projection of the appellant in the FY 23-24 and FY 24-25, is having a dual impact on the appellant's tariff, leading to a tariff hike of 11-12% (average) as compared to its tariff determined for FY 2022-23; despite having the lowest ACoS, the appellant has had its tariff structured, by the impugned order, in such a manner that it has been made higher in 17 out of the 24 categories amongst the parallel competing licensees; MERC has itself, in its Order dated 30.03.2020 in Case No. 326 of 2019 (approving the Truing-up of ARR for FY 2017- 18 and FY 2018-19, and Provisional Truing-up of ARR for FY 2019-20), has observed that the consumption mix of the appellant and other distribution licensees are now similar to each other, in terms of the mix of subsidising consumers, and subsidised sales and mix of residential sales to overall sales; MERC has further, in the Impugned Order itself, also noted that the consumer mix of parallel distribution licensees in Mumbai is reasonably at par; hence, such arbitrary reduction in quantum of Sales of the appellant has caused increase in the ACoS and the LT category tariff determined for FY 2023-24; such a gap in recovery of ARR will continue to persist and would have to be recovered in the future years; hence, even in case the actual ARR of future years comes down to a lower figure, the appellant will continue to be uncompetitive because of the burden of previous under recoveries, which will be a recurring issue; and it would thus become extremely difficult for the appellant to sustain its operations in the distribution market.

**153.** Learned Senior Counsel, appearing on behalf of MERC, would submit that MERC has approved lower sales than requested by TPC-D and AEML-D in its Petition, and approved higher sales for BEST; although approved sales are lower than sought in the petition, energy purchase requirement is higher than that sought in the petition in case of AEML-D as the distribution loss approved in the MYT Order has been used for grossing-up of sales as against lower distribution loss projected by AEML-D in its MTR Petition; this is consistent with the principle that trajectory for performance parameter cannot be altered in between; the approach adopted by MERC for sales projection is: (a) FY 2022-23 actual sales for Apr to Sep 2022 was available. Sales for the balance six month i.e. Oct 2022 to Mar 2023 was projected by the Licensees. Considering actuals for 6 months and projection for 6 months, MERC has approved sales as proposed by Distribution Licensees:

| Licensee | Total Sales (MU) for FY 2022-23 |
|---|---|

| | MYT Order | MTR Petition | MTR Order |
|---|---|---|---|
| TPC-D | 5031 | 5332 | 5332 |
| AEML-D | 9267 | 9976 | 9976 |
| BEST | 4727 | 4551 | 4551 |

(b) the above approved sales for FY 2022-23 becomes the base for projecting sales for FY 2023-24 and FY 2024-25. (c) Sales projection for TPC-D in the impugned MTR order & AEML-D: (d) approach used in MYT Order has been continued in MTR Order. (e) Category-wise growth rate has been computed by combining actual past years sales of AEML-D and TPC-D. This is because, consumers keeps on migrating between AEML-D and TPC-D after issuance of tariff order. So to calculate correct growth rate, sales of both licensee is combined. (f) after applying appropriate growth rate (for each category computed above) on approved sales for FY 2022-23, combined sales of AEML-D and TPC-D for FY 2023-24 and FY 2024-25 is computed. (g) TPC-D's sales is computed by applying its category wise growth rate on approved sales for FY 2022-23. (h) AEML-D's sale is computed by deducting TPC-D's sale computed at 'd' above from combined sales computed at 'c' above. (i) TPC-D in appeal has contended that the Commission in MTR Order has abruptly reduced the direct sales vis-à-vis projected by TPC-D in MTR Petition. In this regard, it is important to note the following:

a. Comparative table of sales is given below:

| Particulars | FY 2022-23 | | | FY 2023-24 | | | FY 2024-25 | | | Growth Rate FY 23-24 | | Growth Rate FY 24-25 | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | MYT Order | MTR Petition | MTR Order | MYT Order | MTR Petition | MTR Order | MYT Order | MTR Petition | MTR Order | MTR Petition | MTR Order | MTR Petition | MTR Order |
| **Direct Sales (on own wire) A** | | | | | | | | | | | | | |
| LT Sales (MU) | 1480 | 1447 | 1447 | 1631 | 1687 | 1539 | 1803 | 1941 | 1647 | 17% | 6% | 15% | 7% |
| HT Sales (MU) | 1955 | 2317 | 2317 | 2024 | 2488 | 2455 | 2106 | 2632 | 2600 | 7% | 6% | 6% | 6% |
| **Total Sales (MU)** | **3435** | **3764** | **3764** | **3655** | **4175** | **3994** | **3909** | **4573** | **4247** | **11%** | **6%** | **10%** | **6%** |
| **Change Over Sales (on AEML-D Wire) B** | | | | | | | | | | | | | |
| LT Sales (MU) | 1596 | 1568 | 1568 | 1596 | 1550 | 1570 | 1597 | 1550 | 1577 | -1% | 0% | 0% | 0% |
| HT Sales (MU) | 0.34 | 0.23 | 0.23 | 0.15 | 0.2 | 0.23 | 0.07 | 0.2 | 0.23 | -13% | 0% | 0% | 0% |
| **Total Sales (MU)** | **1597** | **1568** | **1568** | **1596** | **1550** | **1571** | **1597** | **1550** | **1577** | **-1%** | **0%** | **0%** | **0%** |
| **Total Sales C=A+B** | | | | | | | | | | | | | |
| LT Sales (MU) | 3076 | 3014 | 3014 | 3227 | 3237 | 3109 | 3400 | 3491 | 3224 | 7% | 3% | 8% | 4% |
| HT Sales (MU) | 1955 | 2317 | 2317 | 2024 | 2488 | 2455 | 2106 | 2632 | 2600 | 7% | 6% | 6% | 6% |
| **Total Sales (MU)** | **5032** | **5332** | **5332** | **5252** | **5725** | **5564** | **5506** | **6123** | **5824** | **7%** | **4%** | **7%** | **5%** |

(b) Sales approved in MTR Order is higher than that approved in MYT Order. (c) TPC-D in its Petition has projected LT direct sales at growth rate of 17% which is not consistent with past sales growth rate. Hence, the Commission has rationalised the growth rate based on past actual data and accordingly approved the sales projections. (c) other than LT direct sales, approved sales in other category is almost the same as that projected by TPC-D. (d) thus, lower sales approved for TPC-D is on account of correction in growth rate for LT direct sales which is based on past data. (e) as explained above, sales for AEML-D is derived by deducting approved sales for TPC-D from projected combined sales of AEML-D & TPC-D. As AEML-D in the past never had EHV sales, and in first half of FY 2022-23, AEML-D has shown actual EHV sale and projected additional sales in future year, the Commission has accepted the same and added it into the sales projection arrived based on methodology explained above. (f) sales for BEST is projected independently by considering category wise growth rate in the past and other relevant factors.

**154.** The impact of sales, vis-à-vis the number of consumers under a particular category, on cross subsidy can be better understood by way of an example. Let us first examine a case where there is only one category of subsidising consumers. There are two broad categories of consumers i.e. i) consumers who have subsidised tariff and ii) consumers who subsidise the tariff. In case the total cross subsidy requirement for category i) is 1000 rupees, category ii) would be required to generate cross subsidy of 1000 Rupees to compensate for i). In case number of consumers in category ii) is 100, then the total cross subsidy paid by each consumers would be Rs 1000/100= Rs.10. If the number of consumers stand reduced to 50, the cross subsidy amount per consumer would then be Rs. 1000/50= Rs.20 i.e. double of what we had in case of 100 consumers.

**155.** We shall now take, as an example, a case where there are more than one category of subsidising consumers. If the contribution made by category a) is 200 rupees and the number of consumers is say 10, the cross subsidy contribution per consumer under category a) would be 200/10=20 rupees. If the number of consumers stand reduced to 8, the cross subsidy component per consumer would then be 200/8=Rs. 25.

**156.** Therefore there is an increase in the cross subsidy component for the subsidising category if sales projection is decreased. However it will be the reverse, if sales projections for subsidised consumers is reduced i.e. the requirement of cross subsidy component reduces, the cross subsidy for the subsidising consumers reduces. The number of consumers in a particular category is proportionate to sales in MUs as Sales in MUs = no. of consumers x electricity projected for each consumer in that category.

**157.** It is thus clear that arbitrary changes in the sales approved, against the projection made by the Discom, for a particular category has a direct impact on the cross subsidy to be paid by that category.

**158.** With respect to direct sale purchase for LT Residential Category, the appellant had, in its MTR Petition, submitted that the growth in sales in this category, during the past Control Period, i.e., from FY 2015-16 to FY 2019-20 was @ 15%, as FY 2020-21 and FY 2021-22 sales had been impacted due to COVID, the sales in these years were not considered by them for CAGR calculation; sales realization of new consumers, added from FY 2021-22, was seen in H1 of FY 2022-23; the Appellant has assumed continuation of the same trend; and, accordingly, the Appellant has estimated Sales for Direct LT residential consumers based on a growth of 3% on account of natural growth of sales during FY 2022-23 as base, and balance sales from new consumer addition.

**159.** As far as LT Commercial Category was concerned, the Appellant had submitted that it had compared increase in Sales in this Category from FY 2016-17 to FY 2019-20 vis-à-vis consumer addition from FY 2019-20 to H1 of FY 2022-23; in the past 3 years, consumer addition has increased and the same is evident from the sales realization of consumers added in H1 of FY 2022-23; realization of sales of new connections, added in FY 2020-21 and FY 2021-22, is approximately 20%-25% of the estimated annual consumption; additionally, sales realization of the consumers added and identified to be added in FY 2022-23 was considered for estimating the sales for FY 2023-24 and FY 2024-25; and, based on the above analysis, the Appellant has projected the sales for FY 2023-24 and FY 2024-25 by considering 3% growth in sales, and additional due to new consumers. With respect to other LT Categories, the Appellant computed sales based on 3% Compounded Annual Growth Rate (CAGR), and had consequently arrived at a total quantum of 1631.32 MU for the LT category.

**160.** MERC has further decreased it in the Financial Year 2023-24, holding that it had considered the past sales upto FY 2021-22 for growth trend analysis, the estimated energy sales for FY 2022-23 has been considered as the base value for projecting the energy sales for FY 2023-24 and FY 2024-25; CAGR of actual consolidated sales for different periods in the past five years, i.e., FY 2016-17 to FY 2021-22, has been analyzed and an appropriate CAGR has been considered; and different CAGRs have been considered for the Appellant for the different areas overlapping with AEML-D and BEST areas.

**161.** No reasons have been assigned by MERC for not considering the Appellant's submission that, since sales were impacted due to covid in the FY 2020-21 and FY 2021-22, sales of these years ought not to be considered for CAGR calculation.

## G. SUBSEQUENT PETITION FILED FOR SHORT TERM PROCUREMENT:

**162.** Learned Senior Counsel, appearing on behalf of MERC, would submit that the Appellant had filed a Petition for short term power procurement, for the period April to June 2023, at a higher rate; the appellant has contended that the quantum of short term power is small and limited to the peak period of April to June 2023; however, in that proceeding before the MERC, the appellant has clearly stated that they are utilizing full capacity of TPC-G units during April to June 2023 and, after exhausting the same, will opt for costly short term power.

**163.** The relevant portion of the MERC Order dated 25.05.2023 reads thus:

*" ………6.1.* ***Generally, in the month of April, May and June the demand of power is at its peak being the summer season****. Accordingly, TPC-D has to plan its power procurement to meet the increased demand. The estimated average peak demand for TPC-D for April 2023, May 2023 & June 2023 is 839 MW, 875 MW and 835 MW respectively.* ***While arriving at the power requirement which was an exercise done in December, 2022, TPC-D had to consider the entire tied up capacity from TPC-G and other long term tied up sources so as to meet the high demand.*** *However, there was still a shortage of around 50 to 150 MW expected for the period April to June, 2023. In view of this, to meet the demand and ensure uninterrupted power availability for its consumers, TPC-D had issued the RfP (Request for proposal) for short term power purchase for April 2023 to June 2023, on 23 December, 2022. It may be pertinent to note here that the actual average demand for April, 2023 was 858 MW.*

*6.2. In justification to the utilisation of power from TPC-G, TPC-D submitted that the* ***requirement of short-term power was arrived at after considering the entire tied up capacity and the procurement was carried out following the MoD principles****. In addition, due to the* *prevailing weather conditions in the month of April, 2023 leading to lower temperatures, the power exchange rates did not go up as was expected. In view of the same, TPC-D optimised its power procurement by maximising its procurement from exchanges at lower rates and has procured 95.21 MU during the month of April through exchange at an average rate of Rs. 4.78 per unit. Further, the off take from this short term capacity was reduced to 27.7 MU at actual rate of Rs. 7.53 per unit based on MoD & revisions as against the purchase of around 35 MU with 85% availability which the successful bidder was committed to provide to TPC-D.*"

**164.** According to the Learned Senior Counsel for MERC, the above quoted paras demonstrate that TPC-G units are utilized to the full capacity (and not to the technical minimum) during peak demand season of April to June 2023; and this justifies MERC approving TPC-G's energy above technical minimum based on the average of past actual consumption.

**165.** With regards the contention of MERC that the appellant has submitted a petition seeking approval for short term purchase for April 2023 to June 2023 at Rs. 7.60 per Unit, which is at variance with the objection raised by the appellant for the determined tariff of Rs. 5.13 per Unit, Learned Senior Counsel appearing on behalf of the appellant, would submit that MERC has erroneously sought to equate a small quantum of 50 MW of Non-Renewable short-term power purchase, required for one quarter, with the annual short term power requirement of the appellant; undisputedly, the short-term power purchase rates are higher during peak seasons, and significantly lower in off-peak periods; the weighted average of all such power purchase quantum is the short-term rate on annual basis; as per Regulation 22 of MYT Regulations 2019, the Distribution Licensee may undertake additional power procurement during the year, over and above the power procurement plan for the control period approved by MERC; the rate of Rs. 7.60/kWh for short term power purchase is in line with the above said regulation, and the MERC has erred in comparing the high rate, during the peak season for a small quantum for one quarter of the year, with the approved bilateral rate for the entire year; further, MERC has recently adopted tariff of the other distribution licensees in Maharashtra in the similar range; MERC itself has already approved and adopted the said short term power procurement proposal of the appellant, *vide* its order dated 25.05.2023 in Case No. 53 of 2023, under Section 63 of the Act.

**166.** It does not stand to reason that MERC should seek to justify the power purchase cost determined in the impugned MTR Order dated 31.03.2023, relying on a petition filed by the Appellant subsequent thereto on which the MERC had passed an order on 25.05.2023. As against the total procurement of power of 5781.40 MUs approved in the impugned MTR order, the subsequent petition filed by the Appellant was for a meagre quantum of just 50 MW, that too for the peak demand season of April to June. It is evidently because the short term power procurement cost, for which the subsequent petition was filed by the Appellant, was around Rs.7.60/Kwh, that they had informed MERC that they would procure the entire prescribed quantum from TPC-G as the cost of procurement from TPC-G is Rs.7.38/Kwh. Reliance placed by MERC, on the subsequent petition filed by the Appellant and its subsequent order dated 25.05.2023 is therefore misplaced.

## H. ADJUSTMENT THROUGH FAC MECHANISM:

**167.** Learned Senior Counsel, appearing on behalf of MERC, would submit that the impact of the change in the quantum, even if it resulted in a variation in the cost of power purchase, can be passed through by the Appellant as a gain under the fuel adjustment charge mechanism, adjusting its retail supply tariff to the consumer on a monthly basis; the Appellant can provide necessary data and details for the MERC to review the FAC Fund, created under the impugned order, so that the Appellant can invoke the provisions of Regulations 9 and 10 of the MYT Regulations, 2019 to pass on the gain from the variation in power purchase cost on a monthly basis to the consumers.

**168.** With regards the contention of MERC that, in case the appellant can procure power from cheaper sources, the benefit can be passed by it to its consumers using the FAC Mechanism, Learned Senior Counsel for the appellant, would submit that, for the current month of April 2023, the appellant has incurred the average cost of Rs. 7.39/kWh (variable +fixed charges) towards procurement from TPC-G Trombay Thermal Generating units, as compared to the approved average rate of Rs. 8.58/kWh (variable and fixed charges); even if the appellant can source power from cheaper sources, it is bound to charge the tariff as determined/revised by the MERC, and the differential rate being Rs.-0.44/kWh (Difference between average power purchase rate approved (Rs. 5.97/kWh) and actual average power purchase rate for April 2023(Rs. 5.53/kWh)) cannot be utilized to provide the benefit of such reduced cost to its consumers through the FAC mechanism; (a) passing through of benefits of lower tariff through FAC mechanism, as contended by the MERC, is of no avail to the appellant as, by the Impugned Order, the same has been deferred till the next tariff determination process, and it is unlikely that the consumers would wait to avail the benefit, accruing under FAC, till the next tariff determination, more particularly when there is a wide gap between the determined tariff of the parallel distribution licensee; in any case, passing through of benefits of lower tariff through FAC mechanism (which varies depending on the power purchase cost) on monthly basis does not make the tariff of the appellant competitive to the other parallel distribution licensee; consumers take the decision to migrate on the basis of the tariff schedule approved by the

MERC and do not consider the possible benefit of FAC; (b) TPC-G raises the invoice to its beneficiaries, for the power purchased, based on the actual landed fuel cost; hence TPC-G is not affected due to the tariff approved by the MERC in the Impugned Order; the tariff determined therefrom is only for determination of tariff to be charged by the distribution licensee from its consumers; however, the appellant is bound to charge the tariff determined for it by the MERC, *vide* the Impugned Order, without being able to pass on the benefit to its consumers till the next tariff determination; and (c) inspite of the ACoS of the appellant being the lowest, the tariff determined is so skewed that, even if negative FAC is allowed to be passed to the consumers as suggested by MERC, it would still render the appellant uncompetitive because of the huge difference in tariff among different licensees to begin with.

**169.** Regulation 10 of the Maharashtra Electricity Regulatory Commission (Multi Year Tariff) Regulations, 2019, relates to the mechanism for pass-through of gains or losses on account of uncontrollable factors, and Regulation 10.2 stipulates that the aggregate gain or loss to a Distribution Licensee, on account of variation in cost of fuel, power purchase, shall be passed through under the Fuel Adjustment Charge (FAC) component, as an adjustment in its Tariff on a monthly basis, as specified in the Regulations and as may be determined in the orders of the Commission passed under these Regulations, and shall be subject to ex-post facto approval by the Commission on a quarterly basis.

**170.** Using its power for removal of difficulties under Regulation 106 of the MYT Regulations, 2019, MERC made changes in the FAC mechanism, stipulated under Regulation 10 of the MYT Regulation 2019, requiring the distribution licensee to undertake computation of monthly FAC as per Regulation 10 of the MYT Regulations, 2019 except for treatment to be given to the negative FAC as follows- (1) Negative FAC amount shall be carried forward to the next FAC billing cycle with holding cost. (2) Such carried forward negative FAC shall be adjusted against FAC amount for the next month and balance negative amount shall be carried forward to the subsequent month with holding cost. (3) Such carry forward of negative FAC shall be continued till the next tariff determination process. (4) In case such FAC Fund is yet to be generated or such generated fund is not sufficient to adjust against FAC computed for a given month, then the Distribution Licensee can levy such amount to the consumers through FAC mechanism, upon seeking prior approval from the Commission.

**171.** The impugned Order, passed by MERC, records that, in order to maintain transparency in management and use of such FAC fund, the Distribution Licensee shall maintain monthly accounts of such FAC fund and upload it on its website for information of stakeholders.

**172.** The fuel adjustment charge fund is maintained to suitably adjust changes in the fuel cost to be paid by the distribution licensees. In case there is cost saving, the appropriate amount is transferred to the FAC fund and in case there is an increase, the differential amount is paid to the distribution licensee from the FAC fund to compensate for such a change, thereby avoiding any pass through to the consumers. Therefore, even in case there is a reduction in the cost of power procurement from TPC-G, the benefit accrued to the Appellant thereby is not made pass through, and instead the proportionate amount is banked in the FAC fund for future adjustments, and the consumer is not immediately benefitted by any such reduction. In the present case, it does appear that the FAC fund has NIL amount. Consequently, in case of increase in the cost of procurement of power, the same would be made a pass through whereas, in case of reduction in the cost of power procurement, the same will be transferred to the FAC fund, and the benefit of reduction in cost is not passed on to the consumers immediately. This methodology does not result in a reduction in tariff, till much later ie at the true-up stage, and no benefit enures to the consumers as a result.

### I. NO GRIEVANCE EXPRESSED BY THE APPELLANT EARLIER WHEN ITS TARIFF WAS LOWER THAN ITS COMPETITOR:

**173.** Learned Senior Counsel, appearing on behalf of MERC, would submit that, both in the MTR Order dated 12.09.2018 as well as in the MYT Order dated 30.3.2020, the tariffs of the Appellant were lower than its competitor except for 3 categories in the MTR Order dated 12.09.2018; as the tariff was lower, compared to its competitors, the Appellant was in an advantageous position, and it did not complain about the cross subsidy levels after issuance of the MYT Order; now, as the difference in ACoS of both licensees has reduced due to 12% tariff increase in TPC-D and 2% increase in AEML-D, for the given cross-subsidy structure (TPC-D has higher cross-subsidy percentages than AEML-D, which is having same trend for past period), tariff of subsidizing consumers of TPC-D becomes more than AEML-D; since its tariffs are more compared to the tariffs determined for its competitors, it is agitated; and the main reason for increased tariff is increased power purchase expenses of the appellant.

**174.** With regards the submission urged, on behalf of MERC, that the Appellant had no grievance regarding the cross-subsidy earlier when its tariff was lower, it goes without saying that the Appellant would, obviously, not have any grievance with respect to the cross subsidy of the previous years, since its tariff was far lower than that of its competitors. The Appellant, therefore, had no cause to complain against determination of cross subsidy by MERC. Unlike the Appellant or AEML-D, both of whom are distributing electricity as a business venture, in which profit motive is inherent, the obligation cast by the Electricity Act on the MERC is to ensure that distribution of electricity is conducted on commercial principles [Section 61(b)], competition, efficiency, economical use of resources, good performance and optimum investments is encouraged [Section 61(c)], and consumers' interest are safeguarded, and the distribution licensees are enabled to recover cost of electricity in a reasonable manner [Section 61(d)].

**175.** The very object of the Electricity Act, as is evident from its preamble, is for conducive measures to be taken for development of the electricity industry, promoting competition therein, protecting the interest of consumers, and ensuring transparent policies regarding subsidies. It is the duty of MERC, as a regulator, to take necessary steps to achieve the objects of the Act, and to ensure a level playing field among the competing distribution licensees in Mumbai. Unreasonable increase of 12% in ACoS from the previous years may, as contended by the Appellant, well result in their being rendered uncompetitive. What, however, is of far greater concern is that such an exorbitant increase would adversely affect consumers' interest.

**176.** Arbitrary increase in ACOs for FY 2023-24, as high as 12%, would automatically result in an unreasonably high recovery of the cost of electricity from, and a tariff shock being given to, the consumers. The substantial difference in the cross subsidy, between one distribution licensee and another would discourage competition both of which would violate the objects of, and the guiding principles under Section 61 of the Electricity Act.

## J. REBATE UNDER REGULATION 81.5 OF MYT REGULATIONS:

**177.** Learned Senior Counsel appearing on behalf of MERC, would submit that Regulation 81.5 of the MYT Regulations, 2019 allows distribution licensees to give a rebate on the tariff determined under Section 62(1)(d) i.e. tariff for retail sale of electricity; the Supreme Court has also held that "rebate" is a "discount", to allow as the deduction from a gross amount; it is a discount repaid to the payer." **(State of Uttar Pradesh Vs. Jayprakash Associates (2014) 4 SCC 720**); further, Clause 8.1 (4) of the Tariff Policy also provides that Licensees may have the flexibility of charging lower tariffs than approved by the State Commission if competitive conditions require so without having a claim on additional revenue requirement on this account in accordance with Section 62 of the Act; the concept of rebate is akin to concessional/reduced rate of tariff; "Rebate" means abatement, discount, credit, refund, or any other account of repayment; though the word "tariff" is not defined in the Act, it is used in various Sections of the Act to connote as what is determined by the Appropriate Commission (as distinguished from what is charged by the licensee); tariff is determined by the Commission in terms of provisions for various verticals of the electricity sector /industry in terms envisaged in Part VII of the Electricity Act, 2003; in **PTC India Ltd. Vs. CERC & Ors: (2010) 4 SCC 603;** the Supreme Court held that the term "tariff" is not defined in the 2003 Act, and the term "tariff" includes within its ambit not only the fixation of rates but also the rules and regulations relating to it; therefore, tariff also includes the above regulations that contemplate existence of tariffs to be considered as maximum ceilings; the discounting policy in fact promotes competition – (a) a factor stated in the preamble of the 2003 Act i.e. "promoting competition"; (b) Section 23 – "promoting competition"; (c) Section 61(c) "factors which would encourage competition"; and Section 62(d) proviso "for promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail supply of electricity".

**178.** Learned Senior Counsel for MERC would further submit that, if the Distribution Licensee is willing to absorb some expenses without passing it on to consumers, it can do so under Regulation 81.5 of the MERC MYT Regulations, 2019 by allowing rebate in the tariff determined by the Commission; but seeking reduction in tariff, by considering lower generation tariff, would be against the regulatory mandate of the Commission.

**179.** Regulation 81.5 of the MYT Regulations, 2019 inter alia , provides:-

> *"81.5* ***The Distribution Licensee may offer a rebate to the consumers on the Tariff and charges determined by the Commission****:*
>
> *Provided that the Distribution Licensee shall submit details of such rebates to the Commission every quarter, in the manner and format, as stipulated by the Commission:*
>
> *Provided further that the impact of such rebates on the Distribution Licensee shall be borne entirely by the Distribution Licensee and the impact of such rebate shall not be passed on to the consumers, in any form:*
>
> *Provided also that such rebates shall not be offered selectively to any consumer/s, and shall have to be offered to the entire consumer category/sub-category/consumption slab in a non-discriminatory manner."*

**180.** Regulation 81.5 of MERC MYT Regulations 2019 enables the Distribution Licensee to offer a rebate to the consumers on the Tariff and charges determined by the Commission. The first proviso thereto requires the Distribution Licensee to submit details of such rebates to the Commission every quarter, in the manner and format, as stipulated by the Commission. The second Proviso stipulates that the impact of such rebates on the Distribution Licensee shall be borne entirely by the Distribution Licensee, and the impact of such rebate shall not be passed on to the consumers, in any form. The third Proviso stipulates that such rebates shall not be offered selectively to any consumer/s, and shall have to be offered to the entire consumer category/sub-category/consumption slab in a non-discriminatory manner.

**181.** Regulation 81.5 is a provision which enables the distribution licensee to absorb certain expenses, without passing it on to its consumers, through rebate in tariff determined by the Commission. The said Regulation provides that any discom may charge a category of consumers by offering discounts on the tariff determined by MERC. In case such a benefit is made pass through, the discount offered shall continue to be applicable, even if the tariff of such a consumer gets reduced at the time of true up. This can be explained by way of an illustration. For example, if the tariff of a consumer is, say Rs. 5.00. The discom offers 10% discount to such category. The tariff payable shall be Rs. 5 minus 10% i.e. 4.50. In case after true up, the tariff is reduced to Rs. 4.00, the discount will still be applicable, and the tariff would be Rs. 4.00 minus 10% i.e. Rs.3.60. The Appellant could not have, therefore, applied Regulation 81.5 to levy tariff for a reduced amount, as against the determined tariff, on the expectation that the tariff determined by the Commission is on the higher side, and would certainly get reduced after true up. Charging a lower tariff, than the determined tariff, will only result in proportionate reduction in case the tariff gets reduced after true up. The submission, urged on behalf of MERC, that the Appellant can always avail the benefits of Regulation 81.5 of the MYT Regulations, is of no assistance to the Appellant.

### K. WILL THE APPELLANT BE OUT OF BUSINESS AS A RESULT OF THE IMPUGNED ORDER?

**182.** Learned Senior Counsel, appearing on behalf of MERC, would submit that this type of competition amongst distribution licensees is one of its kind and unique in India. With each revision in tariff, consumers migrate from one licensee to another. The energy purchase requirement of AEML-D started reducing from FY 2010-11 and, at the same time, TPC-D's power purchase requirement kept on increasing. This indicates migration of consumers from AEML-D to TPC-D. Similarly from FY 2016-17 & FY 2017-18, reduction is witnessed in energy requirement of TPC-D and increased for AEML-D. All these indicate that consumers keep on migrating from one licensee to another.

**183.** At the interlocutory stage of these appellate proceedings, we see no reason to examine whether or not the increase in the ACoS would result in the Appellant being required to shut down its business, as that is not the test to determine whether or not the appellant would suffer irreparable injury if the interim relief sought by them is not granted.

### L. GRANT OF INTERIM RELIEF FOR FY 2024-25 NEED NOT BE CONSIDERED AT THIS STAGE:

**184.** Learned Senior Counsel, appearing on behalf of MERC, would submit that MERC is cognizant of increased tariff on account of transmission constraint and increased power purchase expenses and hence, in the MTR Order dated 31.03.2023, it has enabled Mumbai Distribution Licensees to file a petition for revision in tariff for FY 2024-25 by November 2023; in the normal course, as per MYT Regulations 2019, the next tariff revision would have been made only in FY 2025-26, but considering the peculiar facts mentioned above, the Commission has allowed Distribution Licensees to seek tariff revision for FY 2024-25; and using this option, the appellant can approach the Commission for revision in tariff for FY 2024-25 with supporting details.

**185.** Para-8.2 of the impugned order relates to the tariff filing petition option. It is stated therein that MERC was of the view that, if there is any substantial improvement/reduction in the costs considered by the Commission in the present Order, the Licensee may file a revised tariff Petition for the 5th year of the Control Period, i.e., FY 2024-25, in accordance with Regulation 5 of the MYT Regulations, 2019. Since the Appellant is entitled to approach the Commission by filing a revised tariff petition for FY 2024-25 by November of this year, the present interim order is confined only to FY 2023-24.

**186.** The various discrepancies and infirmities in the impugned MTR Order dated 31.03.2023, as analysed hereinabove, clearly show that the Appellant has made out a prima facie case. Consequently, if even one of the other two tests are satisfied, the Appellant would be entitled to the grant of interim relief.

### IV. BALANCE OF CONVENIENCE AND IRREPARABLE INJURY:

**187.** Learned Senior Counsel appearing on behalf of the appellant, would submit that the balance of convenience lies in the favour of the appellant, and irreparable loss would be caused to it if the interim relief sought for is not granted; no prejudice would be caused to MERC, should the interim relief be granted to the appellant; should the Impugned Order not be stayed, it would then consequentially erode the fair competition and level playing field in the distribution business between the parallel competing licensees in Mumbai; the tariff determined for the appellant is substantially higher in various categories (17 out of 24 categories) than the distribution licensee parallelly operating in Mumbai; further the impact of the increase in the appellant's ACoS is Rs. 1.39/kWh; as a logical corollary, the appellant's consumers would be constrained to avail of the 'Changeover and Switchover Protocols' and mass migrate to other parallel licensees in the respective areas; the contentions of MERC are misconceived and misleading; should the interim relief, sought by the appellant, not be granted by this Tribunal, then mass migration of the appellant's consumers shall occur which shall inevitably lead to driving the appellant out of the electricity distribution business; hence irreparable harm and injury shall be caused to the appellant if the interim relief, as sought, is not granted; the huge under recovery of ARR, due to migration, will not only impact the current year, but also make the appellant uncompetitive in future years due to creation of regulatory assets; and, therefore, the reliefs as prayed for by the Applicant/Appellant may kindly be granted.

**188.** The "balance of convenience" must be in favour of granting interim relief. The Court/Tribunal, while granting or refusing to grant interlocutory relief, should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if interim relief is refused, and compare it with that which is likely to be caused to the other side if the interim relief is granted. If, on weighing competing possibilities or probabilities of likelihood of injury and if the Court considers that pending the Appeal, status quo should be maintained, interim relief would be granted. (***Dalpat Kumar v/s Prahlad Singh – AIR 1993 SC 276).*** The Court/Tribunal must satisfy itself that the comparative hardship or mischief or inconvenience which is likely to occur from withholding grant of interim relief will be greater than that would be likely to arise from granting it (***Dalpat Kumar v/s Prahlad Singh – AIR 1993 SC 276)***.

**189.** The prayer for grant of interlocutory relief is at a stage when the existence of the legal right asserted by the Appellant, and its alleged violation, are both contested and uncertain and remains uncertain till they are examined during the final hearing of the main appeal . The court/tribunal, at this stage, acts on certain well-settled principles of administration of this form of interlocutory remedy which is both temporary and discretionary. (**Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd., (1999) 7 SCC 1; Gujarat Bottling Co. Ltd v Coca Cola Co: (1995) 5 SCC 545**).

**190.** The interlocutory remedy is intended to protect the Appellant, being the initiator of the action, against incursion of its rights. The basic principle of the grant of an interlocutory order is to assess the right and need of the Appellant, as against that of the Respondent, and it is a duty incumbent on to the law courts/tribunals to determine as to where the balance lies. (**Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd., (1999) 7 SCC 1**). The court/tribunal also, in restraining the Respondent from exercising what it considers to be its legal right but what the Appellant would like to be prevented, puts into the scales, as a relevant consideration, where the balance of convenience lies. (**Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd., (1999) 7 SCC 1**).

**191.** Interlocutory relief is granted to mitigate the risk of injustice to the Appellant during the period before the uncertainty is resolved. (**Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd., (1999) 7 SCC 1**; **Gujarat Bottling Co. Ltd v Coca Cola Co: (1995) 5 SCC 545;** ***Wander Ltd.* v. *Antox India (P) Ltdl:* 1990 Supp SCC 727**).

**IRREPAIRABLE INJURY:**

**192.** As the grant of interim relief is discretionary, exercise thereof is subject to the court/tribunal satisfying itself that its interference is necessary to protect the party from the species of injury. In other words, irreparable injury would ensue before the legal right would be established at the trial (***Dalpat Kumar v/s Prahlad Singh – AIR 1993 SC 276)***.

**193.** Besides satisfying itself that a prima facie case, for the grant interim relief, is made out, the Court/Tribunal further has to satisfy itself that non-interference would result in "irreparable injury" to the party seeking relief and that he needs protection from the consequences of apprehended injury. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely one that cannot be adequately compensated by way of damages (***Dalpat Kumar v. Prahlad Singh MANU/SC/0715/1991 : AIR 1993 SC 276; Mahadeo Savlaram Shelke and Ors. Vs. Puna Municipal Corporation and Ors. : MANU/SC/0673/1995***).

**194.** As noted hereinabove, the increase in the Appellant's ACos, as well as its tariff, by around 12% p.a. is, prima facie, unjustified. While we find force in the submission, urged on behalf of the Appellant, that such an abnormal tariff hike would render them uncompetitive, and in the flight of their consumers to their competitor licensees, we are more concerned with the effect of, what appears to us prima facie, an unjustified and abnormal tariff hike on the consumers in Mumbai. Not only is this hike in violation of Section 61(d) of the Electricity Act, it is also against larger public interest, which is among the factors to be taken into consideration in deciding whether or not to grant interim relief (**"Injunctions and Security for Judgment in a Framework of Interlocutory Remedies": A.A.S. Zuckerman in "The Law Quarterly Review" Vol 109, at page 432 (at p.**

**446);** ***Mahadeo Savlaram Shelke and Ors. Vs. Puna Municipal Corporation and Ors. : MANU/SC/0673/1995).***

**195.** We are satisfied that the balance of convenience is in the Appellant's favour, and they would suffer irreparable injury if the interim relief sought for by them is not granted in their favour. The MERC would, on the other hand, not suffer substantial prejudice, if an interim order is passed staying operation of the impugned MTR Order dated 31.03.2023 for FY 2023-24, since, by its MYT Order dated 30.03.2020, MERC had fixed the tariff for each of the five year control period from 01.04.2020 till 31.03.2025 ie separately for FY 2020-21, FY 2021-22, FY 2022-23, FY 2023-24 and FY 2024-25. Regulation 15.3 of the MYT Regulations, 2019 stipulates that the Tariff so published shall be in force from the date stipulated in the Order and shall, unless amended or revised, continue to be in force for such period as may be stipulated therein. But for the MTR Order dated 31.03.2023, the MYT Order dated 30.03.2020 would have continued to govern FY 2023-24 also. Granting interim stay would only result in the Appellant's tariff, for FY 2023-24, being governed by the MYT order dated 30.3.2020, till the disposal of this Appeal. Needless to state that, in case the Appellant were not to succeed in the main appeal, when it is finally heard later, it would be open to MERC to proceed against them in accordance with law.

## V. CONCLUSION:

**196.** In the light of the several discrepancies and infirmities in the impugned MTR Order dated 31.03.2023, as detailed hereinabove, we would have preferred to set aside the said order and remand the matter to the MERC for its consideration afresh, and in accordance with law. Learned Senior Counsel, appearing both on behalf of the Appellant and the MERC, however stated that the submissions made by them were confined only to the I.A, and they reserved their right to put forth additional submissions when the main appeal is taken up for hearing later.

**197.** In view thereof, we consider it appropriate to grant interim stay of the tariff schedule for FY 2023-24, approved in the judgment of the MERC in Case No. 225 of 2022 dated 31.03.2023, pending disposal of Appeal No. 369 of 2023. The examination undertaken by us in this order is confined only to the MTR Order passed by the MERC on 31.03.2023. The observations made in this Order do not relate to the SLDC or the STU, and these statutory authorities (i.e. SLDC and STU) shall exercise their functions under the Act uninfluenced by any observations made in this Order. IA No. 732 of 2023, in Appeal No. 369 OF 2023, shall stand disposed of accordingly.

List the main appeal on ***16.10.2023***.

Pronounced in the open court on this the 13th day of July, 2023.

**(Sandesh Kumar Sharma)**
Technical Member

**(Justice Ramesh Ranganathan)**
Chairperson

**REPORTABLE / ~~NON-REPORTABLE~~**

*tpd/*