

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 13 of 2010

In the matter of

**Supply of Electricity from the generating stations of the Tata Power Company
Ltd. to Reliance Infrastructure Ltd. for distribution to its consumers**

Shri V.P. Raja, Chairman

Shri Vijay L. Sonavane, Member

ORDER

Dated: May 19, 2011

The Government of Maharashtra (“GOM”) issued a “Memorandum” dated 7th May 2010. The said “Memorandum” besides giving certain instructions, also contains a report of a five-member Committee (“Committee”), which was issued after considering representations made by Reliance Infrastructure Limited (“RInfra”) as well as Tata Power Company Limited (“TPC”) and Brihan-Mumbai Electricity Supply & Transport Undertaking (BEST) to the “GOM” regarding supply of electricity from the generating stations of TPC to RInfra for distribution to its consumers. In the said “Memorandum”, the GOM has taken the view that in public interest, the Commission should take suitable measures at the earliest taking into the account the said report of the Committee on certain broad principles as contained therein. The broad principles on which the Commission has been asked to take suitable measures are:-

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

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

(iii) The need to put in place a mechanism to ensure that subsidized consumers of RInfra do not have to suffer abnormal tariff rise only on account of the effect of migration of its cross-subsidizing consumers to TPC which is in a dominant position.

(iv) The need to assure that if there is any surplus power from the generation meant for Mumbai licensees at any time, it should be supplied to deficit distribution licensees in Mumbai at the average cost of purchase or any other reasonable rate to be determined by MERC."

2. Paragraph 2.1 of the Memorandum spelt out the ad-interim solution in public interest proposed by the State Government, as under:

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

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

(ii) The remaining 360 MW power should be continued to be supplied to M/s. Reliance Infra till June 30, 2010 by M/s.TPC at a regulated rate decided by the MERC.

(iii) With effect from 1.7.2010, M/s. TPC may sell 160 MW power to TPC (Distribution) at regulated rates, thereby reducing its supply to M/s. Reliance Infra from 360 MW to 200 MW.

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

(v) M/s. Reliance Infra has given in writing to Secretary, Energy that they have got bids for 315 MW of Power from next year as a mid term arrangement. They are confident of meeting the growing requirement of power for Mumbai from 2014 onwards. (M/s. Reliance Infra s letter to the State ' Government is at AnnexureII).

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

3. Pursuant to the said “Memorandum” dated 7th May 2010, this Commission initiated proceedings in Case No. 13 of 2010. Since, the Electricity Act, 2003 (“EA 2003”) mandates the Commission to protect the interests of consumers and at the same time, sub-section (3) of Section 86 requires the Commission to ensure transparency while exercising its powers and discharging its functions, in line with the said requirement, the Commission held a public hearing at Rangsharda Natya Mandir, Bandra Reclamation, Bandra (W), Mumbai 400050 on 28th June, 2010, at 11:00 hours to consider suggestions and objections on the following broad areas:-

(i) The role of the Commission to take measures in regard to the broad principles indicated in the “Memorandum” dated 7th May 2010 along with the report of the Committee;

(ii) The statutory provisions under which the Commission can take measures, if any;

(iii) The measures that the Commission can take which would be suitable in public interest.

Though the hearing went on up to 21:45 hours, several consumers did not get an opportunity to submit their say till that time. The Commission, therefore, adjourned the hearing due to shortage of time. The said adjourned hearing was resumed on Saturday, 3rd July 2010 at 10:30 hours at Rangsharada Natya Mandir, Bandra Reclamation, Bandra (West), Mumbai 400050.

4. During the aforesaid public hearings, oral and written submissions were advanced by counsels appearing for TPC, RInfra, BEST and around [120] members of the public including consumers / consumer representatives authorised under Section 94(3) of the EA 2003. A list of persons who attended the said public hearings and made submissions is provided at **Annexure 1**. Various oral and written submissions made by RInfra, TPC and BEST, as briefly stated, are as follows:-

5. Submissions of RInfra

(a) In the aforesaid proceedings in Case No. 13 of 2010, RInfra has filed its written submissions under letter of its Advocates dated June 21, 2010. The factual matrix, as presented by RInfra in the said written submissions, contain the following main averments:

(i) RInfra has, in its submissions, submitted that for over 8 decades, TPC has been a bulk licensee and had claimed monopoly of supplying power to RInfra within RInfra's area of supply. It is further submitted that TPC did not comply with its statutory obligation of laying distribution network in the suburbs of Mumbai as it did not even claim that it had a distribution licence to supply in the suburbs of Mumbai. When RInfra wanted to set up additional generation capacity, TPC had dubbed the attempt of RInfra as illegal and had strongly protested, contending that even if such a generation facility was allowed to be put up, RInfra should be directed to supply the said generated electricity outside the city and suburbs of Mumbai. It is submitted that when RInfra's generation started, TPC through W.P. No. 916 of 2001 before the Bombay High Court and letter dated September 19, 2003 claimed that RInfra was bound to purchase its electricity requirements only from TPC-G. It is further submitted that the TPC had taken advantage of the Judgment of Hon'ble Supreme Court dated May 6, 2009 in Civil Appeal Nos. 3510 - 3511 of 2008 with Civil Appeal No. 4269 OF 2008, Civil Appeal No. 3593 OF 2008, Civil Appeal No. 6098 of 2008 and Civil Appeal No. 6099 OF 2008 to reject the offer of RInfra to sign a PPA for 500 MW with TPC.

(ii) It is submitted that after the Government of Maharashtra ("GOM") gave directions to the Commission dated June 25, 2009 under Section 108 of EA 2003, the Commission had granted an *ex parte* stay on the tariff increase given to RInfra for the period 2009-10 and had directed the continuance of the tariff for FY 2008-09 and in spite of that, RInfra had allowed its distribution network in its area of supply to be used by TPC provided the Commission considered the issues of cross-subsidy and regulatory assets.

(iii) It is submitted that the issues of cross-subsidy, regulatory assets, the vacation of stay order dated July 15, 2009, the refusal of supply by TPC to RInfra, the issue of recovery of tariff if the stay is lifted particularly from the customers who have migrated to TPC in the interregnum and the impact thereon on the customers of RInfra, have not been considered, for which RInfra's low end consumers have suffered a lot, and TPC has been enjoying its dominant position to augment its revenues and increase its profits. Such action has led to allowing TPC to sell the surplus power at a very high cost to RInfra or to consumers outside Mumbai, not looking at the expenditure of Rs. 534 crore that the city of Mumbai has paid for setting up such projects.

(iv) It is further submitted that the contrary stand taken by TPC and denying RInfra a level playing field has resulted in RInfra failing to put up generation capacity.

(v) Explaining the role of the Commission in this matter, it is submitted that the Commission has a role to play, by passing appropriate order, in implementing the broad principles given in the Memorandum dated May 7, 2010, which includes TPC's obligations to use its generation capacity to supply power at regulated rates to distribution licensees of Mumbai on priority and not to take advantage of its dominant position. Further, it is submitted that the Commission should invoke its tariff fixation powers under EA 2003 to fix a tariff that will take into consideration RInfra's obligation to ensure that its consumers do not have to suffer any increase in tariff only on account of its failure to procure electricity at a reasonable cost.

(vi) It is submitted that Section 60 of EA 2003 relates to market domination and it refers to competition in electricity industry. Also, it is submitted that the provisions of Competition Act, 2002 are important while considering the issues under EA 2003, since the concept of competition and the adverse effect thereon as a result of dominant position of one of the players is provided in Competition Act, 2002. For this, the provisions of Competition Act, 2002 have been submitted to be relevant. Explaining the peculiarity of the electricity sector, RInfra has submitted that it is a peculiar type of consumer related essential commodity, which cannot be compared with any other area where free market competition is permissible, or where limited regulation operates. It is submitted that electricity is supplied to a large segment of low end consumers whose interests are mandated to be protected by the EA 2003.

(vii) It is submitted that the city of Mumbai has a long history of cross-subsidy, which is to be reduced only in a phased manner, which means that even competition has to be introduced gradually and in a phased manner and not all of a sudden so as to give a shock to the entire system. RInfra has, in this behalf, quoted paragraphs 116 and 117 of the Judgment of the Karnataka High Court dated March 26, 2010 in Writ Petition No.s 2703 & 2733 of 2009 (GM-RES) and Writ Petition No. 13338 of 2009 (GM-RES).

(viii) RInfra has submitted that TPC's generation was meant for the city of Mumbai and that the GOM is of the same view. It is thereby submitted that the Unit-8 of 250 MW set up by TPC-G is an expansion of existing capacity and not a new capacity as per Tariff Policy (TP), which has been admitted by TPC-G in its tariff petition of FY 2006-07 before the Commission and its petition before the Commission for approval of Tariff for Unit-8 in Case No. 35 of 2009. It is further submitted that Clause 5 of the TP has allowed distribution licensees to procure power for one time expansion (up to 50% of existing capacity at a power station) without following competitive bidding process at regulated rates determined by Regulatory Commissions. Also, it is submitted that the Detailed Project Report ("DPR") of Unit-8 submitted by TPC-G to the Commission on February 13, 2006 reflects clearly that the entire 250 MW capacity expansion was meant for Mumbai, and that the power from Unit 8 will be sold to licensees at a tariff arrived as per the Commission's Tariff Regulations. Also, such a representation is present in TPC-G's three Tariff Petitions to the Commission for FY 2006-07, FY 2007-08 and FY 2008-09 which reflects allocation of the 250 MW power to RInfra, BEST and TPC. Even the draft PPA agreed between TPC and RInfra on April 5, 2007 has been submitted

to be clearly showing that there was no dispute on 100 MW from Unit 8 to be given to RInfra.

(ix) It is further submitted that TPC-G has removed the first 17 pages of the original DPR submitted by it to the Commission and GOM earlier, when TPC submitted the revised DPR along with details of actual cost incurred, after the Hon'ble Supreme Court Judgment dated May 6, 2009 in Civil Appeal Nos. 3510 - 3511 of 2008 with Civil Appeal No. 4269 of 2008, Civil Appeal No. 3593 of 2008, Civil Appeal No. 6098 of 2008 and Civil Appeal No. 6099 of 2008.

(x) RInfra has submitted that the historical scenario has established TPC to be a dominant player in the Mumbai electricity market, having the advantage of a favourable tariff structure without any obligation to supply to a vast number of low end consumers and it has now the advantage of being able to supply to the high end consumers of RInfra without incurring any capital costs or laying any distribution network or subsidizing low end consumers. On the other hand, RInfra is having the disadvantage of having no tariff increase and is operating under a stay order. It is further submitted that RInfra can only meet the requirement of 500 MW (out of the total requirement of 1600 MW catered by RInfra mainly to the low end consumers) from its own generation from its Dahanu plant, and with the sudden withdrawal of supply of power by TPC, RInfra is forced to buy costly power from TPC, which RInfra was buying from TPC at regulated rates. These facts and circumstances, it has been submitted, show that TPC is in a dominant position and is abusing its dominant position by refusing to supply the power at regulated rates and by refusing to enter into PPA with RInfra. This is also shown by TPC's action of opposing RInfra's move to put up additional generation capacity and TPC's assertion that it legitimately expects RInfra to buy all the requirement of power from TPC. On these factual grounds, RInfra has submitted that TPC is now estopped from refusing to not supply 600 MW of electricity to RInfra at regulated rates on the basis of the principles of estoppel, promissory estoppel, and on the basis of the doctrine of legitimate expectations.

6. **Submissions of TPC** - TPC, in this matter, has submitted an application for rejection of the GOM Memorandum dated May 7, 2010 and the Report of the Committee submitted along with the Memorandum. The averments of TPC are as follows:

(a) TPC has referred to the Statement of Objects and Reasons of the EA 2003 to submit that there is a very limited role of the State Government, since one of the primary objectives of the EA 2003 is to divest the State Government of the regulatory powers over the licensees and vest such powers in an independent Regulatory Commission.

(b) It is submitted that the Memorandum and the Report of the GOM do not purport to emanate either under Section 11 or under Section 108 of EA 2003 and therefore, these are not binding on TPC as a generating company as also do not require cognizance of the Commission. It is further submitted that the Memorandum and the Report are an encroachment on the powers and functions of the Commission by dealing with the matters pertaining to tariff and cross subsidy and the alleged dominant position of TPC.

(c) TPC has referred to a Judgment of the Hon'ble Supreme Court in the case of *Pancham Chand vs. State of H.P.* [(2008) 7 SCC 117]. Further, TPC has referred to the decision of the Hon'ble Supreme Court in the case of *B. Rajagopala Naidu vs. State Transport Appellate Tribunal* [(1964) 7 SCR 1] on the point that the Commission is legally not obligated to take cognizance of the Memorandum since it has not been issued by the GOM in exercise of its powers under Section 11 or Section 108.

(d) It is submitted that the GOM has itself submitted before the Bombay High Court in Writ Petition No. 1224 of 2010 that the Memorandum and the Report are merely "advisory".

(e) It is submitted that the issue of ensuring that the subsidized consumers of RInfra do not suffer abnormal tariff rise only on account of the effect of migration of its cross-subsidizing consumers and the issue of the alleged surplus power with Mumbai licensees which should be supplied to the deficit Distribution Licensees at the average cost of purchase are issues which are covered by the pending Petitions filed by RInfra in Case No. 7 of 2010 and Case No. 9 of 2010, and therefore, these issues should not be considered in this case, since it will be a duplication of the same matters. Also, it is submitted that TPC has challenged the State Government's right to interfere with the right of TPC over its generation capacity before the Bombay High Court in Writ Petition No. 1224 of 2010, therefore, the issue of the alleged obligation of TPC to use its generation capacity of specified Units to supply power at regulated rates should not be looked into by the Commission.

(f) TPC has submitted that the DPR is a document meant to establish the technical and financial viability of the project and all arrangements mentioned therein are indicative in nature and therefore, the contents of the DPR cannot be read to constrain the vested rights conferred on TPC under the MoU dated April 4, 2005 with the State Government whereby TPC is obligated to supply 50% of the commissioned capacity of its Unit 8 within the city of Mumbai. It is further submitted that the supply of 160 MW to TPC-D through TPTCL is in the interest of the consumers of Mumbai since the rate for such supply is much below the short-term market rate of Rs. 7/- per unit, which has been approved for procurement by the Commission for RInfra.

(g) TPC has referred to the Judgment of the Hon'ble Supreme Court dated May 6, 2009 in the matter of *Tata Power Company Ltd. vs. Reliance Energy Limited and ors.* [2009 (7) SCALE 513] where it has been held that generating companies have the freedom to enter into contract and in particular, long-term contracts with a distribution company subject to such regulations provided in the EA 2003. TPC has also cited the issues framed by the Hon'ble Supreme Court in this Judgment, which are: (1) Whether recourse to Section 23 of the EA 2003 can be taken for issuance of any direction to the generating company?; (2) Whether the Commission while applying the provisions of Section 86(1)(b) of the EA 2003 could also take recourse to Sections 23 and 60 thereof? (3) Whether equitable allocation of power generated by a generating company is permissible? On this ground, TPC has submitted that if the Commission holds that the 160 MW that is being sold on a short-term basis to TPC-D through TPTCL should not be allowed, then TPC-G / TPTCL will be free to

dispose the 160 MW in accordance with its choice to third party according to the abovementioned Judgment of the Hon'ble Supreme Court.

(h) It is submitted that the limited area of enquiry, which is left open is by way of Section 60 of the EA 2003 as stated in the said Hon'ble Supreme Court Judgment.

(i) TPC has further submitted that the Commission vide its Order dated January 29, 2004 passed in Case Nos. 20 and 21 of 2003, clarified that RInfra has the discretion to purchase power from any source of its choice by entering into PPA, and further that the Hon'ble Supreme Court in the Judgment dated May 6, 2009 has clearly held that any prior arrangement for supply does not entitle RInfra to claim any entitlement of Tata Power's capacity in the absence of any PPA between the parties.

(j) TPC has submitted that the negotiated PPA with RInfra did not ultimately fructify into any binding PPA on account of the intransient stand adopted by RInfra. Further, TPC had repeatedly requested RInfra to enter into a PPA for at least 500 MW to secure its commercial interest, but RInfra had thought it fit not to enter into a PPA for 500 MW and litigated for its entire claim of about 762 MW. TPC had even notified RInfra in its APR filed in November 2007 and November 2008 that the supply of 500 MW was made to RInfra purely on *ad hoc* basis.

(k) With regard to the issue of Promissory Estoppel, TPC has submitted that the same issue had even been rejected by the Appellate Tribunal of Electricity ("APTEL") when RInfra had appealed against the Order dated November 6, 2007 passed by the Commission in Case No.s 87 and 88 of 2006 relating to BEST's petition for approval of PPA between BEST and Tata Power. It is submitted that both the Commission and the APTEL had found no merit in the argument of RInfra regarding this issue, and that it is a settled position of law that there can be no estoppel against the law, and that no estoppel can legitimize action which is ultra vires the statute.

(l) TPC has cited a number of occasions when RInfra had refrained from entering into a PPA with TPC, such as during the proceedings before the Commission relating to the approval of PPA between BEST and TPC-D, when TPC had offered to enter into a contract with RInfra for the supply of 500 MW, but RInfra had not acceded to TPC's request for the same.

(m) On the issue of profiteering, TPC has vehemently denied that it had resorted to profiteering and has submitted that such contracts entered into by TPC with BEST and TPTCL are valid and legal and in line with TPC's right under Section 10(2) of the EA 2003.

(n) With regard to the issue of Special Appropriation, TPC has submitted that it had appropriated Rs. 127 crore out of about Rs. 533 crores collected towards special appropriation project cost. Further, the amount of special appropriation project cost had been deducted from the capital base of TPC for the purpose of computation of return on capital base (fixed at a level of 16% on capital base) for determining the supply tariff. Therefore, it is submitted that, considering the

benefits derived by the consumers against the special appropriation, no equities can be claimed by the consumers since the amount of special appropriation stood covered and adjusted against the return on capital base that was otherwise payable by the consumers.

(o) On the issue of the alleged dominant position of TPC, it has referred to the Judgment in *Shah & Company, Bombay vs. State of Maharashtra [(1967) 3 SCR 466]* which says that, “Statutes are said to be *in pari materia* when they relate to the same person or thing, or to the same class of persons or things.”

(p) Some other Judgments referred by TPC are *State of Madras vs. A. Vaidyanath Ayer [AIR 1969 SC 61]*, *State of Assam vs. Deva Prasad Barua [AIR 1969 SC 831]*, *Sirsilk Ltd. vs. Textiles Committee [AIR 1989 SC 317]*, *Madanlal Sharma vs. Santosh Sharma [1980 Mah LJ 391]*.

(q) Referring to Section 4 of the Competition Act 2002, TPC has submitted that from a plain reading of the Explanation (a) to Section 4, it would be clear that ‘dominant position’ has to be established and assessed in a ‘relevant market’. TPC has referred to the Report of the High Level Committee on Competition Policy (‘Raghavan Committee’) pursuant to which the Competition Act 2002 was enacted. Also referred are the European Commission’s Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law, and the decision of the European Court of Justice in the case of *Europemballage Corpn. and Continental Can Co. Inc. vs. Commission [Case 6/72 (1973) ECR 215]*, which noted that when identifying a dominant position, the delimitation of the relevant product market was of crucial importance.

(r) It is submitted that it is imperative to determine the ‘relevant market’ before establishing whether an enterprise is dominant or not, since the dominant position has to be established in a relevant market.

(s) On the issue of the relevant geographic market for Tata Power – Generation, TPC has submitted that in order to constitute a distinct geographic market, the test to be satisfied is that the condition of competition for (a) supply of goods or provision of services; or (b) demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas. On that ground, it is submitted that since the conditions of competition for generation and wholesale supply of electricity are homogenous throughout India, no single state or a region can be distinguished from other regions based on the ‘conditions of competition’.

(t) It is submitted that the relevant geographic market for the generation and wholesale supply of electricity is the whole of India and not just Mumbai. On the issue of the relevant geographic market for Tata Power – Distribution, it is submitted that the relevant geographic market for electricity distribution is local. It is further submitted that, as compared to an overall capacity of around 1,61,000 MW of electricity, TPC-G enjoys a market share of only around 1.25% in the generation market across India, which cannot be said as a position of dominance. This applies even for short-term power markets. It is further submitted that TPC-G is not in a dominant position because it does not have a position of strength in the

electricity industry, it cannot operate independently of its competitors and is very much constrained by the competitive forces prevailing in the electricity industry, and since it is in no position to affect its competitors or consumers in the electricity industry in its favour.

(u) TPC's views are that it is unfathomable as to how an enterprise with only 3.90% of the market share (i.e. TPC) can be in a dominant position, while an enterprise which enjoys 72.60% of the market share (i.e. RInfra) is seeking protection.

(v) It is submitted by TPC that the competition law is for the protection of competition and not for the protection of the competitors, as noted by the Raghavan Committee Report. It is further submitted that the Commission should allow propagation of competition in the electricity distribution market in Mumbai in terms of duty cast upon the Commission under the EA 2003.

(w) TPC has referred to the Judgment of the Hon'ble Supreme Court in *Cellular Operators of India vs. UOI [(2003) 3 SCC 186]* where it was held that the jurisdiction conferred on a Court or a Tribunal should be construed in terms of the statute alone. TPC has also referred to the Judgment of the Hon'ble Supreme Court in *Nasiruddin vs. Sita Ram Agarwal [(2003) 2 SCC 577]* where it was observed that, "*In a case where the statutory provision is plain and unambiguous, the court shall not interpret the same in a different manner, only because of harsh consequences arising therefrom.*"

7. Submissions of BEST

BEST has submitted a presentation to the Commission in this matter. The statements put forward by BEST are as under:

(i) BEST has submitted that RInfra has failed to project their future demand and accordingly enter into a PPA to meet the demand in spite of the Commission's repeated orders. It is submitted that RInfra's increase in tariff is only on account of not making necessary long-term PPA, while BEST has taken necessary steps to project the demand and enter into necessary PPA.

(ii) Whatever revenue is received through IBSM is only reimbursement of actually paid cost of power, and therefore, it is a misnomer to call it a surplus.

(iii) RInfra is totally incorrect to state that Utilities, which are allowing RInfra to use their unutilized capacity without paying all the charges, and without an agreement for sale of unutilized capacity, are profiteering. It is submitted that RInfra is actually paying only the energy cost.

(iv) BEST has submitted that RInfra is changing their stand every time to suit their requirement and misleading the Commission. From October 2006 to March 2008, RInfra received Rs. 56.90 crore and paid Rs. 173.21 crore, whereas BEST paid Rs. 337.67 crore and received only Rs. 10.53 crore from the State imbalance pool under the Weighted Average System Marginal Cost (WASMC) mechanism when the Commission had made interim allocation. Even though better options such as banking, sale in open market, etc., are available for BEST, considering the Mumbai power situation, in the interest of the consumers of Mumbai BEST is

making available power from unutilized capacity for the Mumbai consumers by participating in IBSM mechanism.

(v) It is further submitted that, as per the Commission's Order dated May 17, 2007, the Maharashtra State Power Committee ("MSPC") is the governing body for operation of IBSM and FBSM. This Committee meets once in three months. RInfra has never raised this issue in any of the MSPC meetings and has chosen to come to the Commission directly to address this issue.

(vi) The Commission had given specific directions vide Order dated April 24, 2007 to enter into PPA within 3 months from the date of issue of this order. Further, the Commission had ruled that the energy allocation in the next two years of Control Period will be based on the approved PPA between the parties.

(vii) BEST has submitted that PPA for long-term is essential for increasing the capacity of generation of electricity, which is a purpose of the EA 2003 and therefore, must be allowed to be achieved. Also, duration of the contract in regard to supply of electricity by and between TPC-G and RInfra prior to coming into force of the contract is of no consequence particularly when no written long-term or short-term contract had been entered into by and between them. It is further submitted that the supply of electricity to different distribution companies, being outside the jurisdiction of the Commission, should not be used by the Commission lest it would bring back the License Raj, which is not contemplated by the EA 2003.

(viii) BEST has submitted that RInfra had been repeatedly saying that the Dahanu generation was established to supply the consumers in its area. However, presently, the Dahanu power is being used by all the consumers including new consumers who were connected after establishment of the Dahanu plant. Therefore, no preference or special treatment to the poor consumers has been given by RInfra, while allocating power from Dahanu. The requirement of poor consumers can be easily met from generation of Dahanu plant, which is a cheaper generation.

8. TPC submitted a presentation to the Commission for its consideration, in which they have put forward certain points and references. TPC stated that TPC had only sought from RInfra that its existing generation capacity be utilized first before any addition of new capacity by RInfra, and in that context had wanted RInfra to sign a commercial long-term agreement for a 'minimum offtake'. RInfra had enough time and opportunity to make arrangements for additional power since 2006 of at least 500 MW for taking care of its consumers, but it chose not to do such a thing. TPC has reiterated that it does not wish to do business with an entity, which does not view its partners as equals. Further, it has been mentioned that no business house would continue to do business with a litigious partner. TPC has stated that TPC's 250 MW Unit 8 has a 'declared' merchant capacity of 100 MW as the same is not recovered through tariff, and that TPC is obligated to sell 50% of the power from this Unit within Maharashtra where TPC has tied up 60% for the consumers of Mumbai.

9. RInfra also submitted its views and opinion by way of a presentation. It is stated that the tariff increase is solely on account of power purchase cost. It is further stated that, despite the consumer density of RInfra being half of BEST, the distribution cost for RInfra is 26% lower, and TPC is not comparable, since it has very few consumers. Also the power purchase cost for RInfra is higher than that of

any other distribution licensee in Mumbai. Also, RInfra has the disadvantage of having a skewed consumer mix in comparison to BEST.

10. **Submissions of the Public** - Various oral and written submissions, as briefly stated during the aforesaid hearings, are as follows:

(i) **Rationalisation of Electricity Cost**

The consumers of Mumbai have raised the issue of rising electricity tariffs, which has to be brought down to a reasonable and affordable level. In this regard, they have offered their suggestions before the Commission for its consideration such as restructuring of components of electricity costs, viz., wheeling charges, reliability charges, taxes and duty in such a way that the per unit cost of electricity of both RInfra and TPC consumers should be brought in tandem, which would bring down the migration of high end and bulk consumers from one distribution licensee to another, which would enable both the licensees to cross subsidise the low end consumers of electricity. Furthermore, to bring down the cost, the consumers have suggested that RInfra should change from a coal based generating station to gas as fuel for generation. In this context *Prayas Energy Group (PEG)*, an authorized consumer representative stated in its submission that RInfra has failed in its primary responsibility as a distribution licensee to plan and procure adequate, uninterrupted supply of power at economical cost for its consumers and this failure on the part of RInfra has resulted in escalation of electricity bills of the consumers of RInfra, the burden of which should not be allowed to fall on consumers.

(ii) **Migration of Consumers, Cross Subsidy and Surcharge**

The issue of migration of consumers and cross subsidy was a widely debated topic in the public hearings before the Commission. The basic issue was migration of the high-end consumers of RInfra to TPC, which resulted in increase in electricity bills of low end consumers to which different consumer groups offered different suggestions and objections. In this regard, authorized consumer representative, *PEG* stated in their submission that RInfra's contention was that the migration of consumers from RInfra to TPC was not happening at all levels and only the high-end Commercial and Industrial category consumers are finding it lucrative to switchover to TPC-D by reason of the Tariff Order dated 15th June 2009 and this migration of high-end consumers is adversely impacting the low-end residential consumers as the distribution licensee is not in a position to subsidise low end consumers, therefore, in view of the same their suggestion was that a cross-subsidy surcharge should be levied on high end consumers as a measure to avoid such unreasonable migration. *PEG* stated that any kind of inter-licensee cross-subsidy surcharge is untenable as it defeats the very object and purpose of EA 2003, which was privatization of electricity sector, unbundling the State Electricity Boards, creating different licensees for distribution and transmission and making these licensees accountable. Furthermore, *PEG* stated that RInfra has not given any details of their assessment about the impact that the aforesaid migration will have on their power purchase cost and the present IBSM mechanism will further aid RInfra to reduce its power purchase cost because it is settled on monthly marginal cost basis

and hence, the issues relevant to peak and off peak demand will be automatically addressed. PEG stated that if RInfrac's prayers are accepted by the Commission then in that case the consumers of Maharashtra State Electricity Distribution Company Ltd., (MSEDCL) should also be cross-subsidised.

The *Mumbai International Airport Private Limited (MIAL)*, which is one of the biggest consumers of electricity in the city of Mumbai in its submission stated that it has been a high tension bonafide consumer of RInfrac receiving supply at 11kV till November 2009 and switched over to TPC for supply of power, which was lawful as per the interim protocol dated 15th October, 2009 issued by this Commission. It stated that the issue of cross subsidy is already *subjudice* and pending before the Commission in Case No. 7 of 2010 filed by RInfrac and therefore, requested the Commission not to entertain the issue of cross subsidy in order to avoid duplication and multiplicity of proceedings and litigation, nevertheless *MIAL* set out its objections against the issue of cross subsidy as follows. Firstly, *MIAL* as a consumer of electricity has a right under the EA 2003 to procure electricity from any distribution licensee operating in its area of supply, therefore, in a situation where there is more than one distribution licensee operating in the same area of supply, the consumers are independent to receive supply from either of the licensees and can therefore, switch over from its existing licensee, which is in consonance with the objective of EA 2003 to promote competition in retail supply of electricity. Therefore, any attempt to load the switch over consumers with cross subsidy losses, which the distribution licensee may incur as a result of migration of its high end consumers will affect the right of the consumer to choose the distribution licensee, which is guaranteed by statute. In other words, *defacto* forcing them to be captive consumers of RInfrac thereby protecting the interest of RInfrac, which is legally impermissible and cannot be approved on the face of the Act. Secondly, *MIAL* is not an open access customer as envisaged under Section 42(2) of the EA 2003 because it is availing electricity from TPC using the wire network of RInfrac as per interim protocol dated 15th October, 2009 issued by this Commission and TPC's licence area includes the license area of RInfrac in which *MIAL* falls. Therefore, no cross subsidy charge can be levied on *MIAL* and similarly placed consumers.

(iii) **Regulatory Assets**

The issue of recovery of regulatory assets from RInfrac's perspective cropped up time and again in the public hearing before the Commission. The basic highlights of the aforesaid assets are as follows:

- a) Creation of regulatory assets worth Rs.554 Crore by virtue of Tariff Order dated 15th June 2009;
- b) Pending recovery of Rs 1000 Crore on account of FAC and additional FAC;
- c) Deferred recovery of Rs 178 Crore from Tariff Order for FY 2008-09;
- d) Impact of Rs.217 Crore on account of APTEL Judgment in Appeal No. 117 of 2008.

In this context, *PEG* made a presentation stating that large part of the creation of regulatory assets is because of the power purchase practices adopted by RInfrac and that there is already an on-going investigation being undertaken by the Commission on the reasonableness of the PPA and also for capital expenditure. It added that

RInfra as a distribution licensee failed to procure power for its consumers at economical cost. Furthermore, it was emphasized that prudent cost of regulatory asset needs to be evaluated based on investigation reports and other details. Such prudent value of regulatory asset needs to be recovered from all consumers of RInfra irrespective of their switchover as they were consumers at the time of creation of this asset by levying regulatory asset surcharge and this surcharge should be proportional to ABR of particular consumer category.

(iv) **RInfra's failure to sign PPA**

In the public hearing, many of the consumers emphasized that after reading the relevant provisions under Section 42 of EA 2003 (duties of distribution licensee and open access) anyone can easily come to the conclusion that power purchase planning is the core responsibility of the distribution licensee and RInfra has failed in this primary responsibility as a distribution licensee. In this context, they quoted excerpts from various Orders passed by the Commission itself, namely Order dated 6th November 2007, Tariff Order dated 15th June 2009, and also excerpts from the Government of Maharashtra (GOM) directives to the Commission for investigation under Section 108 of the EA 2003 subsequent to the public outcry over high tariff indicating RInfra's recalcitrant and inefficient attitude towards planning and procuring adequate, uninterrupted supply of power at economical cost for its consumers inspite of repeated reminders by the Commission as well as GOM.

(v) **Competition**

Another important aspect of the aforesaid debate was that consumers of Mumbai, both high end and low end consumers, wanted competition in retail supply, which would ultimately benefit them. In their submissions, *MIAL* emphasized the fact that the EA 2003 seeks to encourage competition in the distribution sector thereby benefiting the consumer. Competition in the electricity sector is expected to yield efficiency gains and in turn result in availability of quality supply of electricity to the consumers at competitive rates for which they quoted that the sixth proviso to section 14 of the EA 2003, which envisages that two or more licensees can be granted licence for the distribution of electricity within the same area. Furthermore, the National Electricity Policy (NEP) provides that one of the key provisions of EA 2003 on competition in distribution is the concept of multiple licensees in the same area of supply. In view of the above, it is apparent that competition in the sector is provided with a view to provide benefits of competition to all sections of consumers. It further mentioned that NEP provides that once open access to distribution networks is introduced by the respective State Commissions for enabling bulk consumers to buy directly from generators, competition in the market would increase the availability of cheaper and reliable power supply. The same has been provided in the NEP to ensure that reliable power is supplied to consumer at reasonable rate. Since, RInfra has failed to procure reliable power at reasonable price for its consumers through open access route also, in this scenario *MIAL* and similarly placed consumers have migrated from RInfra to TPC where they are getting reliable power at cheaper rates. This goes to show that the consumers are no longer in a mood to tolerate the inefficiencies of the insincere licensees. The consumers who switched over as a result of the inefficiencies of RInfra cannot be now forced to bear the burden of cross subsidy losses as it would have an adverse

impact and would be against the spirit of competition as envisaged under the EA 2003.

(vi) Dominant position

Certain objections and allegations were leveled against TPC by some consumers. *Firstly*, that TPC is using its dominant position by not signing the PPA with RIntra thereby affecting low end consumers of RIntra by taking advantage of the Judgment of the Hon'ble Supreme Court dated May 6, 2009 in Civil Appeal Nos. 3510 - 3511 OF 2008 with Civil Appeal No. 4269 OF 2008, Civil Appeal No. 3593 OF 2008, Civil Appeal No. 6098 of 2008 and Civil Appeal No. 6099 OF 2008, which states that a generator cannot be forced to supply to a distribution licensee in the absence of a PPA. Furthermore, TPC did not allow additional generation capacity to be built by RIntra during the erstwhile BSES period and subsequently thwarted RIntra's effort to add generation capacity at Palghar and Saphale, claiming to be the sole bulk suppliers. *Secondly*, TPC's generation assets in Mumbai are funded by the Mumbai's consumers (Rs 533 crore collected towards Special Appropriation project cost) and hence, assets funded by them used to produce power which according to the principles of natural justice belongs to them, but is being sold outside by TPC, thereby making excessive profits for the Company. Therefore, the consumers' demand is that power produced in Mumbai should be sold here at reasonable rates and not outside. All these malpractices adopted by TPC amounts to abuse of its dominant position for which the consumers of Mumbai have requested the Commission to take appropriate measures as provided under Section 60 of the EA 2003.

(vii) Replace IBSM with FBSM

An important suggestion given by some consumer groups especially from *PEG* is to replace the existing IBSM mechanism, whereby settlement happens on monthly basis, with FSBM under which, the settlement will be done on 15-minute basis. This move is essential for encouraging proper planning and scheduling of power and thus, *PEG* requested the Commission to find out why there is inordinate delay in implementing the same. Having said that, principles cannot be flexible, and there cannot be tinkering of set mechanism to compensate for licensees failure to plan purchase of power (in the context of RIntra). It was emphasized that IBSM/FBSM should act as a rewarding and penalizing mechanism for distribution licensees, and the settlement should happen at marginal price and not at average regulated price.

11. During the hearing as well in its said written submissions, RIntra has voiced its contention that TPC has continuously attempted to perpetuate its unassailed dominant and monopolistic position in regard to bulk supply of electricity within the city and suburbs of Mumbai. RIntra has stated that it is aggrieved with TPC's unwillingness to contract the quantum of 500 MW capacity after the passage of the Judgment of the Hon. Supreme Court dated 6th May 2009 in Civil Appeal No.3510/11 of 2008. RIntra has also alleged that TPC has emerged as the sole monopoly in a completely dominant position so far as supply of electricity to Mumbai consumer was concerned particularly after the passage of the Hon.

Supreme Court's Judgment dated 8th July 2008 in Civil Appeal No.2898 of 2006 holding that TPC was a distribution licensee in the entire area of supply of BEST in South Mumbai and RInfra in the suburban area of Mumbai and also in view of the decision of the Hon. Supreme Court in the aforesaid Judgment dated 6th May 2009 holding that TPC being a generating company cannot be directed under Section 23 read with Section 86(1)(b) of the EA 2003 to supply electricity to a particular distribution licensee in the absence of a contract (power purchase agreement). RInfra's contention is that it has a legitimate expectation of being supplied with electricity by TPC to meet its consumers' demand in view of supply of electricity by TPC to RInfra for the past 80 years and in view of certain assurances made by TPC to RInfra. RInfra has also alleged that it was deprived from putting up additional generation capacity due to certain actions of TPC and was led to believe that TPC would continue to supply electricity to RInfra for the purpose of supply to consumers in Mumbai.

12. Allegations of abuse of dominant position by TPC have been made by RInfra on the basis of various grounds as stated in the said written submissions. RInfra also states that a reading of the aforesaid GOM Memorandum and the Report of the Committee brings out the role of the Commission to issue appropriate directions after considering the position of TPC, which has been found to be dominant by the said Committee as well as in the said GOM Memorandum. RInfra has sought appropriate orders directing TPC to enter into a PPA with RInfra for 600 MW including 100 MW from TPC's Unit No.8 at regulated rates. It is stated by RInfra that in the year 2000, the Maharashtra State Electricity Board (MSEB) gave consent to the Saphale power project of RInfra. Approval, however, was not granted to the Bhivpuri project of TPC. Against the said order granting approval in favour of RInfra, TPC filed a Writ Petition being No.916 of 2001 before the Bombay High Court on the premise that it had not approved TPC's proposal for the Bhivpuri power project despite it having been submitted at an earlier point of time. It was alleged in the said petition that the impugned decision of the MSEB was illegal and contrary to the Electricity (Supply) Act, 1948, which forbade it from granting sanction to any other person to generate electricity if the existing bulk licensee was able and willing to supply power. In response to the said petition MSEB withdrew its approval to RInfra's Power project on the ground that TPC being the bulk licensee was able and willing to supply power to it. On the withdrawal of the approval TPC also withdrew its petition filed before the High Court.

13. It is stated by RInfra that certain events clearly meet following conditions specified in Section 60 of the EA 2003 – (i) TPC abusing its dominant position by entering into Agreement/Arrangement with BEST and TPC-D; (ii) Denying RInfra the capacity and offering it to BEST/TPC-D on no different terms and taking over only RInfra consumers on account of huge tariff differential clearly establishes abuse of dominance; (iii) There should be level playing field for competition. It has been alleged by RInfra that TPC while seeking various statutory approvals and governmental assurances and benefits and in various applications and requests for approvals and statutory clearances and for determination of tariff for Unit 8 of 250 MW capacity of its generating plant located at Trombay, stated that the city of Mumbai would be the beneficiary of generated electricity from Unit 8 and that the entire power generated shall be used for meeting the power shortage in the city of

Mumbai. Unit 8 of 250 MW capacity of TPC's generating plant is an expansion of existing capacity and not a new capacity. TPC and the State Government of Maharashtra has executed a Memorandum of Understanding ("MOU") dated 4th April 2005 for 1500 MW in furtherance of State Government's Policy dated 28th March 2005 for investment in the power generation sector for capacity addition of 500 MW and above in terms whereof and as stated therein, the beneficiary of generation assets of TPC was to be the consumers of the city of Mumbai. It has been further alleged by RInfra that TPC has misled the State Government of Maharashtra, the Commission and consumers by undertaking in the first instance that their generating stations are meant for the city of Mumbai and later on changing its stand to divert generated electricity outside the city of Mumbai for earning super-normal profits. TPC had on 13th February, 2006 submitted to the Commission, a Detailed Project Report (DPR) of Unit 8 of its generating station for in-principle approval, wherein TPC stated in unequivocal terms that the entire 250 MW capacity expansion was meant for the city of Mumbai and it is a matter of fact that TPC supplies generated electricity to two distribution licensees (apart from its own electricity distributing arm) in order for them to supply to retail end consumers. The DPR also stated that generated electricity from Unit No. 8 would be sold to the Mumbai distribution licensees at tariff determined by the Commission in accordance with the MERC Tariff Regulations. It has also been alleged by RInfra that TPC also made similar assumptions while submitting three Tariff Petitions before the Commission for FY 2006-07, FY 2007-08 and FY 2008-09 making allocation of 250 MW of Unit 8 to RInfra, TPC(D) and BEST. However, TPC changed its stand on or after 25th March 2008 by sending a letter to the Commission indicating to the effect that 100 MW generated from Unit-8 meant for RInfra shall be given to Tata Power Trading Co. Ltd (TPTCL), since RInfra had not signed a PPA with TPC. On the other hand, the draft Power Purchase Agreement between TPC and RInfra of 5th April 2007 and as was submitted to the Commission as an annexure to the Tariff Petition submitted by RInfra for FY 2009-10 shows that there was no dispute on 100 MW from Unit-8 to be given to RInfra. It has been alleged by RInfra that TPC submitted a revised DPR along with details of actual cost incurred to MERC for approval of capital cost and tariff determination and while doing so, the TPC removed (as alleged by RInfra) the first 17 pages of its original DPR submitted to MERC and the State Government earlier, where the requirement of the city of Mumbai and Mumbai being the beneficiary was undertaken.

14. Whereas in the said proceedings in Case No.13 of 2010, during the hearing as well in its said written submissions, TPC filed representations in terms whereof, it has been inter-alia stated that post EA 2003, there were no hurdles for RInfra to set up new capacity. In the last 7 years, RInfra did not set up a single MW capacity. Every Distribution Licensee is to mandatorily have a long-term PPA for meeting the requirements of its consumers. There is no obligation on RInfra to off-take power from TPC. From the year 2003 till 2006 Tata Power pursued with RInfra to sign a long-term PPA with TPC. RInfra continued to evade the issue on one pretext or the other. Finally, as a prudent step, TPC, in order to minimise its business risk, tied up 800 MW with BEST while keeping 477 MW for its own requirements (i.e. TPC-Distribution), still keeping options of 500 MW for RInfra. RInfra instead of securing the available 500 MW chose the litigation path to insist its right on TPC's

generation capacity without any commercial PPA as required under the EA 2003. The matter was finally referred to Hon'ble Supreme Court, which settled the issue holding that TPC being a generating company cannot be directed under Section 23 read with Section 86(1)(b) of the EA 2003 to supply electricity to a particular distribution licensee in the absence of a contract (PPA).

15. TPC has contended that the "Principles of Agreement" signed between Tata Power and erstwhile BSES (now RInfra) in the year 1998 contemplated signing of long term PPA with a "Take or Pay" Obligation. RInfra reneged from the "Take or Pay" obligation in the Principles of Agreement, which is a must in any long-term PPA. TPC has questioned that despite repeated procrastination by RInfra, is TPC bound to give capacity to RInfra? RInfra does not have the statutory and contractual right to seek supply from TPC's generation capacity. There is a troublesome commercial relationship between the parties. TPC's requirement for its own retail consumers (i.e., TPC-Distribution) is growing. TPC has decided to sever the relation with RInfra. TPC had accommodated RInfra and asked them to arrange for its own power from 1st April 2010. RInfra's failure casts burden on its consumers. TPC is not responsible for the present state of affairs of RInfra. TPC had no role and authority in preventing capacity creation by RInfra. TPC had merely sought the implementation of the Kukde Committee report in Writ Petition No 916 of 2001 concerning Saphale. TPC has contended that RInfra should not pertinently rake up the issue of Palghar / Saphale in public when it was not accepted by the Hon'ble Supreme Court.(S.C. Judgement dated 6th May 2009). TPC has also stated that 100 MW (out of 500 MW power allocated to RInfra) PPA has been signed by TPC with BEST at regulated rates. The rest quantum of power is kept with Tata Power –G (through TPTCL) for increasing loads of Tata Power –D. 160 MW has been tied up in January 2010 based on estimated load of Tata Power –D in FY 2010-11 at regulated Rates. A request to TPC-G was already placed in June 2010 for additional 100 MW to meet the increased load of Tata Power –D at regulated rates. Balance capacity is kept for meeting the load arising out of TPC's suggestion to take over 4 lakh low-end consumers of RInfra where it is felt that their tariff would increase as a result of non-availability of power supply to RInfra from TPC.

16. As regards Unit 8, TPC has contended that under the MoU dated 4th April 2005 with GOM, TPC is required to supply 50% of the commissioned capacity of Unit-8 within Maharashtra. Tata Power is supplying 60% of its commissioned capacity in Unit-8 within the city of Mumbai (i.e., to BEST and TPC-D through Contracts). All issues pertaining to Unit 8, including the right of the Tata Power-Generation to sell 100 MW therefrom on the basis of bi-laterally negotiated or market determined prices has been considered and decided by the Commission in its Order dated 19th January 2010 (Capital cost and tariff determination of Unit-8). The MoU with GOM envisages outside sale after providing requisite quantum to the State. If supernormal profits was the objective, then so much capacity would not have been kept for consumers in Mumbai. The Profit after Tax for TPC with a cumulative capacity of about 3000 MW for FY 09-10 was Rs 938 Cr. TPC has questioned as to how could TPC then make a super-normal profit of Rs 1200 Cr by effecting sale of 100 MW as has been alleged?

17. As regards the allegation of sale of surplus power to Mumbai Distribution Licensees, TPC has submitted that each Licensee getting their supply from Tata Power –Generation, has share in the individual Unit rather than in the total generation capacity. While scheduling power the distribution licensees follow Merit Order Despatch principle and schedule the costlier generating Units last. Thus, the unused generation capacity of distribution licensees really comes out from the top of Merit Order stack that is being passed onto the power deficit distribution licensee through the Interim Balancing Settlement Mechanism (“IBSM”) pool. The consumers will be penalised, as they will be forced to pay for generation from the high cost unit, which should have ideally been backed down by the distribution licensee. TPC has stated that its total Generation Capacity is 2027 MW (Including Unit-4 , which is mothballed). Supply to BEST for consumers of Mumbai is 1000 MW (932 MW plus Unit-4, which is mothballed). Supply to Tata Power – Distribution for the consumers of Mumbai is 687 MW (647 MW plus Unit-4, which is mothballed). More power would be used to meet future load growth of consumers of Tata Power Distribution. TPC's 250 MW Unit 8 has a ‘declared’ merchant capacity of 100 MW (i.e., only 150 MW is contracted to Distribution Licensees of Mumbai). TPC is obliged to sell 50% of the power from this Unit within Maharashtra, whereas, TPC has tied up 60% for the consumers of Mumbai. TPC assumes the risk of the ‘Fixed Cost’ for this 100 MW as the same is not recovered through tariff. TPC gained less than Rs 70 Cr in the last year on account of this merchant capacity as against Rs.1200 Cr alleged by RInfra. TPC has been supplying to all consumers changing over from RInfra without earning any business return for the increased effort.

18. It is stated by TPC, that TPC as a ‘generator’ is not obliged to supply to a ‘non-contracting’ distribution licensee. RInfra has enjoyed TPC's generation capacity without any commercial agreement all these years. Despite repeated directives by the Commission, RInfra did not bother to arrange medium-term/long-term power for its consumers forcing them to bear the burden of expensive short term power purchase. Despite TPC being willing to sign for 500 MW as late as in April 2009, RInfra could not really ‘bring’ itself on the signing table till the Hon’ble Supreme Court’s Judgment in TPC's favour. By using ‘consumer’ pressure through the GOM, RInfra is trying to question the Hon’ble Supreme Court’s verdict dated 6th May 2009 in Civil Appeal No.3510/11 of 2008. RInfra through its electricity billing system has repeatedly used ‘false’ communication to malign TPC because it has a wide reach amongst consumers. By preventing TPC from expanding its ‘retail’ business and network expansion, RInfra has actually ‘abused’ its dominance as a distribution licensee. By seeking to apply cross subsidy surcharge, RInfra is seeking to prevent consumer ‘choice’ being exercised. TPC has submitted that out of the entire installed generation capacity in India of 1, 63,000MW, its share is only a minuscule of 3000 MW; TPC is an insignificant player in the merchant power market as it trades 1.8 billion units out of 60 billion units traded in India in the short term market, and in distribution segment TPC is facing competition for the first time, and that dominant position is necessarily required to be assessed in relation to the country as a whole.

19. From the contents of the GOM's "Memorandum" dated 7th May 2010, and the report of the five-member Committee as well as in the course of proceedings in Case No. 13 of 2010 before the Commission, and various issues that arose before it, particularly as is apparent from an account of submissions made as in paragraphs 10 and 11 above, the Commission felt that there may be such issues, which prima facie appear to be contrary to Sections 3 and 4 of the Competition Act, 2002. Therefore, the Commission submitted a statutory reference to the Competition Commission of India under the provisions of Section 21 of the Competition Act, 2002 under letter dated 2nd August 2010, wherein the Commission sought the opinion of the Competition Commission on certain issues, which arose in the course of proceedings in Case No. 13 of 2010. The issues on which the opinion of the Competition Commission were sought were as under:

- (a) *"What would be the "relevant market" in the facts and circumstances of the present case? Whether "relevant market" would be in the generation segment or distribution segment or in both? Whether the "relevant geographic market" is the "Mumbai market" or the "Pan-India market"?"*
- (b) *Whether TPC is in a dominant position in regard to its generation business? If so, whether it is in the "Mumbai market" or in the "Pan-India market"?"*
- (c) *Whether TPC is in a dominant position in regard to its distribution business?*
- (d) *Whether RInfra is in a dominant position either in the generation business or the distribution and supply business? Which is the relevant market in this case? Is RInfra to be accused of any practice that would have an adverse effect on competition?*
- (e) *Who, in the facts and circumstances of the present case, is abusing its dominant position, TPC or RInfra? If so, in which relevant market?*
- (f) *Whether TPC is in a dominant position in regard to its generation business? If so, whether it is in the "Mumbai market" or in the "Pan-India market"?"*
- (g) *Whether TPC is in a dominant position in regard to its distribution business?*
- (h) *Whether RInfra is in a dominant position either in the generation business or the distribution and supply business? Which is the relevant market in this case? Is RInfra to be accused of any practice that would have an adverse effect on competition?*
- (i) *Who, in the facts and circumstances of the present case, is abusing its dominant position, TPC or RInfra? If so, in which relevant market?*
- (j) *Would it be relevant to consider that TPC has submitted that out of the entire installed generation capacity in India of 1,63,000MW, its share is only a minuscule of 3000MW; Tata Power is an insignificant player in the merchant power market as it trades 1.8 billion units out of 60 billion units traded in India in the short term market, and in distribution segment TPC is facing competition for the first time, and that dominant position is necessarily required to be assessed in relation to the country as a whole?*
- (k) *If there is diversion of electricity by TPC-Generation to TPC (Distribution) or a case of offering electricity to RInfra at higher rates, would this constitute as an anti- competitive act?*

- (l) *Was there an “exclusive supply agreement” between TPC and RInfrac at any point in time? If yes, would TPC require to continue to supply electricity from its generating stations at regulated / reasonable rates to distribution licensees of Mumbai on priority especially in view of the Judgment of the Hon'ble Supreme Court dated May 6, 2009? Does such a long-standing and existing arrangement between RInfrac and TPC, without any written contract or power purchase agreement, have the force of a valid contract, which creates a right of RInfrac for procuring energy from the generating stations of TPC? If so, would refusal of TPC to supply to RInfrac constitute as an anti- competitive act or even abuse of dominant position?*
- (m) *Is the agreement between TPC and BEST to supply 100MW of electricity an “exclusive supply agreement”? If so, whether such an agreement causes or is likely to cause an appreciable adverse effect on competition keeping in view claims made by RInfrac?*
- (n) *Is it that BEST, despite having valid contract for procurement of power from TPC for several decades, ought not to have been given any preference for allocation of capacity of the generating stations of TPC keeping in view that RInfrac has been procuring power from TPC for the last several decades? Would this constitute “refusal to deal”, causing or is likely to cause an appreciable adverse effect on competition?*
- (o) *Whether TPC’s refusal to supply electricity to RInfrac in the absence of a PPA with RInfrac constitutes “refusal to deal”? If so, whether such an agreement causes or is likely to cause an appreciable adverse effect on competition?*
- (p) *Is RInfrac’s failure to procure electricity at reasonable costs, a result of any practice or practices by TPC resulting in denial of market access to RInfrac at any point in time?*
- (q) *Did TPC ever make the conclusion of contract for sale of electricity to RInfrac (“Power Purchase Agreement”) subject to acceptance by RInfrac of supplementary obligations which, by their nature or according to commercial usage, had no connection with the subject of such contract?*
- (r) *Is the conduct of withdrawal of electricity by TPC putting RInfrac in a competitive disadvantage vis-a-vis TPC and BEST wherein due to the conduct of TPC the retail tariffs of RInfrac may shoot up while at the same time the retail tariffs of TPC and BEST would remain lower due to cheaper cost of generation of TPC?*
- (s) *Is this an anti-competitive conduct, that the consumers of TPC and BEST would enjoy the benefit of reasonable tariff and the consumers of RInfrac would be subjected to tariff hike, due to “refusal to deal” by TPC?*
- (t) *Whether there has been any denial of market access in generation and supply to RInfrac?*
- (u) *If there has been any denial of market access in generation and supply to RInfrac, has TPC abused its dominant position and indulged in practices resulting in denial of market access in generation and supply to RInfrac which is its competitor being a distribution licensee in the common area of supply, attempted in various forms to drive RInfrac out of the electricity market, created various barriers on RInfrac, foreclosed competition by*

- hindering entry and continued operation of business in the market and has thereby contravened various provisions of the Competition Act, 2002?*
- (v) *Did TPC use its dominant position in one relevant market to enter into, or protect, other relevant market?*
 - (w) *Keeping in view Hon'ble Supreme Court's Judgment dated 6th May, 2009, while at the same time the need to curb anti-competitive practices and abuse of dominant position, if any, can and should there be a direction that the entire power generated by TPC in Mumbai including from its Unit-8 should remain available to Mumbai consumers at tariff determined by the MERC under the EA 2003? Would this be acceptable under common law principle of "reasonable restriction"? Can such a direction be given particularly when MERC is also required to ensure freedom of trade carried on by TPC?*
 - (x) *Is it a case where TPC resisted competition for supply of electricity in Mumbai, at one time and continued to meet RInfra consumers demand and now does not wish to supply electricity to RInfra anymore? Do these alleged actions come within the purview of anti-competitive practice or abuse of dominant position under the Competition Act, 2002?*
 - (y) *Despite several directions from the MERC, RInfra did not plan its power procurement in the long and medium term, and has admittedly failed to secure reliable power supply by failing to execute power purchase agreements with cheaper sources of generation for the benefit of its consumers. Is this fact to be taken into account for investigating whether TPC has indulged in anti-competitive practices or has abused its dominant position in the facts and circumstances of the present case?*
 - (z) *Does TPC's offer to take over all such consumers belonging to weaker sections of society who were being cross-subsidized by the cross subsidizing consumers of RInfra who have switched over to TPC to give them the benefit of low cost power generated by TPC generating stations, negate the allegations of abuse of dominant position and anti-competitive agreements?"*

20. Vide letter dated 5th October 2010, the Offg. Secretary of the Competition Commission of India forwarded an Order dated 28th September, 2010 in Reference No. 01/2010 passed by the said Commission in terms whereof the Competition Commission considered the entire material placed before it by the Commission and examined the provisions contained under Section 21 of the Competition Act, 2002. On examining the essential requirements of the said Section 21 and the materials available on record, the Competition Commission came to the finding that there is no specific mention about any decision taken or proposed to be taken by MERC in the referred Case No. 13/2010 with reference to which an opinion was required to be rendered by the Competition Commission. In view of the above, the Competition Commission passed the following order:

“....

7. *There is no indication that such decision or proposed decision if arrived at is or would be contrary to the provisions of the Act along with the reasons, logic, underlined principles of arriving at such decision or*

proposed decision and likely contraventions of the Act for forming the opinion further on the matter. As such, the Commission is of the opinion that the reference received from MERC is not in accordance with the provisions of Section 21 of the Act and therefore, cannot be treated as a reference by Statutory Authority in terms of the provisions of the Act.”

21. Subsequently, the Hon'ble High Court of Bombay, in its Judgment dated January 18, 2011, on Writ Petition No. 71 of 2011 filed by TPC vs. Government of Maharashtra and others, ruled as under:

*"5. The Supreme Court, observed that generating companies were not absolutely free from regulations... **If a generating company is in a dominant position, Section 60 empowers the Commission to issue such directions as it considers appropriate if an agreement is entered into in abuse of the dominant position or if a combination is entered into which is likely to cause or causes an adverse effect on competition in the electricity industry...** The view of the Supreme Court was that save and except for the exercise of regulatory power which is specifically recognized by the Act, it is not open to government or the Commission to exercise a power which is not incorporated in the statute or in the regulations. Hence, the Court held that the “requirements of a licensee and/or sheer number of its consumers, would be wholly irrelevant for the purpose of construction of a statute”. Among the conclusions that were recorded in the judgment of the Supreme Court, those which are relevant to the present case are as follows:*

“1) Activities of a generating company are beyond the purview of the licensing provisions.

2) The Parliament therefore did not think it necessary to provide for any regulation or issuance of directions except that which have expressly been stated in the Act.

...

7) If regulatory clause is sought to be applied in relation to allocation of power, the same would defeat the delicensing provisions. Generating companies have the freedom to enter into contract and in particular long term contracts with a distribution company subject to the regulatory provisions contained in the 2003 Act.

...

9) Duration of the contract in regard to supply of electricity by and between TPC (G) and RInfra prior to coming into force of the contract is of no consequence, particularly when no written long term or short term contract had been entered into by and between them.

10) Fairness or otherwise of the supply of electricity to different distribution companies being outside the jurisdiction of the Commission, the same by itself

cannot be a ground for bringing back the licence raj, which is not contemplated by the Act.”

...

The object of the Legislation :

16. In evaluating the rival submissions which have been urged before the Court, this Court must at the outset advert to the rationale underlying the enactment of the Electricity Act of 2003. The Statement of Objects accompanying the introduction of the bill in Parliament noted that the electricity supply industry in India was governed by the Electricity Act of 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commission Act of 1998. Over a period of time, the functioning of the State Electricity Boards set up under the Act of 1948 deteriorated. The SEBs were unable to take decisions on tariff in a professional and independent manner and tariff determination was in practice done by the State Governments. To address this problem, the Act of 1998 was enacted to provide for distancing of government from the determination of tariffs. The Act of 2003 was enacted with the policy of encouraging private sector participation in generation, transmission and distribution of electric power and in furtherance of the objective of distancing regulatory responsibilities from government to the regulatory commissions. The Act inter alia provided for a regime of open access.

...

The Affidavit of Government :

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

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

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

(iii) The second part of the memorandum merely suggested a protem interim arrangement, described as a reasonable ad interim solution in public interest and the memorandum merely records that the government expected the parties concerned to abide by it.

The position which the government has adopted before the Court is that the memorandum dated 7 May 2010 was not a statutory directive but constitutes only a request to MERC. When the Petition was admitted by this Court by a Division Bench of this Court on 11 June 2010 a statement was made, on the basis of the affidavit, by the Advocate General that the State Government has at that stage not exercised its powers under Section 11. The statement of the

Advocate General also makes it clear that no statutory directive was issued by the State Government.

...

The nature of the power :

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

20. The power that is conferred upon the state government to issue directions is statutorily conditioned upon the existence of circumstances which warrant the exercise of statutory power. The validity of a statutory directive when issued would have to be decided with reference to the existence of those circumstances which condition the exercise of power. In the present case, no statutory directive has been issued. The difficulty in accepting the argument which has been urged on behalf of the state government that its memorandum is valid because it is only a request is that though the government, when it exercises a statutory directive is bound by the discipline of the Act, a government which makes a mere request in the terms which have been adverted to in the memorandum in question would be virtually bereft of the discipline of the Act. Such a position cannot possibly be countenanced. The government, in the garb of exercising what is termed as a mere request or advice cannot either confer jurisdiction upon a State Electricity Commission, which it lacks, nor can it persuade the Commission to assume jurisdiction on an area which it is not empowered to enter. Undoubtedly, the State Electricity Commission has wide powers but even those powers are structured by the Act as was observed by the Supreme Court in its decision in Tata Power Company. Even in the context of Section 86(1)(b) the Supreme Court observed that these provisions do not empower the State Electricity Commission to issue a direction to a generating company to supply electricity to a licensee who has not entered into a power

purchase agreement. State governments are bound by the discipline and rigor of the legislation that has been enacted by Parliament in the Electricity Act of 2003. Accepting a submission which permits the state government to issue requests to regulatory authorities, contrary to the specific statutory scheme enacted in the legislation, would have disruptive consequences. This would result in the reintroduction of a fresh regime of licensing which in the first place the Electricity Act of 2003 was intended to disband.

21. The manner in which the State Government construed its own memorandum dated 7 May 2010 is apparent from the subsequent memorandum that it issued on 19 May 2010. Government by its subsequent memorandum noted that the Petitioner had, contrary to the advice of government in the memorandum dated 7 May 2010 applied to the State Load Despatch Center to schedule 160 MW of power to its distribution arm. The subsequent memorandum therefore left it beyond a pale of doubt that the State Government was directing the Chief Engineer at the State Load Despatch Center to maintain the status quo in respect of scheduling 360 MW of power till further directives are received or obtained from the MERC or till further orders or directions in this behalf are issued by the State Government. If the State Government believed that circumstances justified the exercise of statutory powers, it ought to have taken the responsibility to issue a statutory directive. Government would then accept responsibility for its action and commit itself to a scrutiny of its action in judicial review. But once it came to the conclusion that the exercise of a statutory directive was not warranted at that stage, it would be impermissible for the State Government to issue what it termed as a request but which it treated as a binding advice by issuing a directive in its subsequent memorandum of 19 May 2010. The Memorandum of 19 May 2010 is consequential to the Memorandum of 7 May 2010.

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

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

23. Based on the response given by the CCI on the reference made by the Commission to the CCI, the Commission decided to make a reference to the CCI for its opinion the proposed decisions with respect to the identified issues of relevant market and dominant position in the relevant market, in accordance with the requirements of Section 21 of the Competition Act, 2002. The issues and the decisions proposed by the Commission in the Reference dated February 1, 2011 before the CCI were:

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

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

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

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

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

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

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

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

24. The CCI, vide its Opinion dated March 14, 2011 under Section 21 of the Competition Act, 2002, opined as under on the above reference made by the Commission:

"2. INQUIRY INTO THE REFERENCE

In order to form an opinion on each of the decisions proposed by MERC, the issues placed before the Commission need to be examined in light of the facts and figures provided by MERC in the Reference, the relevant provisions of the Competition Act, 2002 and in the context of the evolving market dynamics in the electricity sector in India.

2.1. Relevant Market for Electricity Generation Business

...

*2.1.3 In the Reference, the Generation Business has been described separately. For reasons discussed below, the relevant product market for generation business will encompass generation as well as wholesale supply of electricity. The supply side in the wholesale electricity market comprises the Central Generating Stations, State Generating Stations, Independent Private Producer and Surplus Captive Power producers; while the demand side is represented by licensed distributors, traders, SEBs and bulk consumers... Demand for bulk power is thus met out by all the supply side participants in the wholesale supply market. Therefore, "**Generation and Wholesale supply of electricity**" constitutes one separate relevant product market.*

2.1.4 The scope of the geographic market for generation and wholesale supply of electricity has to be defined keeping in view the extant legal and regulatory framework for generation and the actual trends and patterns in wholesale transaction of electricity in the country...

...

2.1.6 The energy generated from a generating station can be sold anywhere in the country, using open access provisions in the transmission grid. The generator's supply domain is not restricted to the state in which it is located; it can cater to distribution companies/traders/retail consumers (>1 MW) across the country. Several private sector

generating stations are selling their power on merchant basis and through the power exchange, to various entities even outside the state in which they are located. There is no compulsion on the procurers also to meet their demand from the generating stations situated in their respective states or regions.

2.1.7 The Central Government has notified Competitive Bidding Guidelines (CBG) for Case I type (independent of location and fuel) and Case II type (location and fuel specific). Under Case I type bidding process, the generating station can be located anywhere in the country and power can be supplied at the interconnection point specified by the procurer. As per the Reference, in the State of Maharashtra, MSEDCL has tied up around 5025 MW of capacity through long term PPA, based on Case I type bidding process. RInfra has also undertaken the process to procure power on medium term (up to 7 years) and long term basis under Case I type competitive bidding process.

...

2.1.10 It is therefore observed that due to the enabling legislations, improvement in inter-State transmission infrastructure and organized power trading, the wholesale market for electricity in India is in the process of evolving into an integrated, multi buyer, multi-seller framework from state specific single buyer model. Nevertheless, the wholesale/bulk electricity market in India is still dominated by long term contracts, more than 90% of the power generated in the country being transacted through long term power purchase agreements (PPAs) between generators and purchasers...However, the long term PPAs are not geographically bound...

2.2 Relevant Market for Electricity Distribution Business

2.2.1 Under the current legislative structure, Distribution of Electricity is a licensed business. There is no separate mention of license for retail supply in the Electricity Act, 2003. The accepted practice is that the incumbent distribution licensee supplies to retail consumers as part of the distribution license to form a combined Distribution and Retail Supply Licence. Thus, the relevant product market for distribution business is 'Distribution and Retail Supply of Electricity'.

...

2.2.6 The market for 'distribution and retail supply of electricity' comprises of end users/retail consumers on the demand side and supply side is represented by distributing companies, generators and traders. The EA 2003 enables the retail consumers (>1 MW) to buy electricity from any of these three groups of suppliers. Distribution companies obtain distribution license for a particular territory, develop, operate and maintain distribution networks in the licensed territory. Any supplier

of electricity, be it a generating company, trading company or another distributing company, can cater to retail consumer using the distribution networks, paying appropriate wheeling charges to the respective distribution licensee. Retail tariffs for distribution licensee are fixed by regulatory commissions on basis of Annual Revenue Requirements (ARRs) of distribution licensees.

...

2.2.11 The three distribution areas within the Mumbai region therefore cannot be clubbed into a homogeneous relevant geographical market for distribution of electricity. Rather, each licensed distribution areas should be looked at as a distinct relevant geographic market, the boundaries of the markets being co-terminus with the territory specified in the respective licenses.

2.3 Dominance of TPC or RInfra in the Generation Business

...

2.3.2 Dominance of an enterprise is essentially to be assessed within the defined relevant market. The relevant market in the present context is 'Generation and Wholesale supply of electricity in India'.

2.3.3 The total electricity generating capacity in the country stood at 170,228.86 MW as on 31st January 2011. As per the Reference, TPC's total installed generation capacity is 2027 MW in Mumbai and around 950 MW in other parts. RInfra's total installed generation capacity is 500 MW near Mumbai and around 1033 MW in other parts. Therefore, each firm enjoys an insignificant market share in the relevant market.

2.3.4 Further, in the rapidly evolving structure of the wholesale market post EA, 2003, demand for wholesale electricity of a distribution company/trader/retail bulk consumer can be met by multiple sellers, i.e., generators/surplus captive producers/traders, not only from the respective state or region but from across the country. The integrated transmission network has enabled inter-state exchange of electricity as elucidated earlier. Even the spikes in peak demand can be met from the short term power market. In such a scenario and in an all India wholesale market, neither of the enterprises can be said to be in a position where they enjoy or exercise market power.

2.4 Dominance of TPC or RInfra in Distribution Business

2.4.1 Dominance of an enterprise in a relevant market needs to be assessed in totality, taking into account all possible factors that may enable or constrain it to operate independently of the competitive forces or affect its consumers, competitors or the relevant market in its favour.

The relevant market here is 'Distribution and Retail Supply of Electricity in Mumbai Suburbs (excluding areas served by MSEDCL).

- 2.4.2 *Let us first examine the question of dominance of RInfra, which is the incumbent in the relevant market. As has been brought out in the Reference, in terms of consumer base, RInfra is way ahead of TPC-D, which so far is the only competing firm in the relevant market. RInfra caters to a consumer base of 30.30 lakh, as compared to 1.63 lakh consumers served by TPC-D (this includes consumers in the BEST area). If the consumer base is taken as the measure of market share, RInfra enjoys a majority share. Moreover, the exiting peak demand at Generation-Transmission interface for RInfra is 1575 MW whereas the corresponding figure for TPC-D stands at 602 MW. In terms of both the parameters, RInfra enjoys significant market share.*
- 2.4.3 *Further, being the distribution licensee, RInfra owns the majority of low transmission network of distribution infrastructure in the relevant geographic market. The size of their distribution network and consumer base has enabled them to leverage economies of scale.*
- 2.4.4 *However, the large distribution network owned by RInfra has to be seen against the open access provisions extended to any and all including even consumers with even less than 1 MW load by MERC. Under the current regulatory framework specified by MERC under its order dated October 15, 2009, any and all consumers in the areas of supply of RInfra are permitted to changeover to TPC, as TPC is also a distribution licensee in the same area of supply. TPC enjoys the benefit of lower input cost of power which gets reflected in lower retail tariffs in comparison to RInfra. About 60,000 consumers as per the Reference have already changed over to TPC and are receiving retail supply of electricity from TPC by using the distribution system of wires of RInfra on payment of wheeling charges, etc. Large number of high load subsidising consumers have switched from RInfra to TPC-D to gain from the tariff differential between the two.*
- 2.4.5 *When looked in conjunction with RInfra's disproportionately large number of low usage subsidised consumers, high power purchase cost and consequent high tariff, it cannot be said that RInfra enjoys significant market power in the relevant market. The very fact that owing to its high tariff, consumers are shifting to TPC-D corroborates the inability of RInfra to affect its consumers, competitors or the relevant market in its favour.*
- 2.4.6 *Therefore, in terms of the parameters of consumer base, TPC's market share is less than 5% and in terms of peak demand, TPC's market share is less than 30%, which is significantly less than RInfra.*
- 2.4.7 *Owing to its vertically integrated structure, the distribution arm of TPC, i.e., TPC-D has access to low cost of power generated by its own generating stations. Further, the distribution losses of TPC are*

substantially lower at 0.6% against more than 10% of RInfrac, due to its High Tension Network in distribution infrastructure. These factors, coupled with the customer base predominantly of the high power consuming subscribers with negligible consumers off subsidised class enable TPC to offer power to the retail customers at tariff rates lower than that offered in the relevant market by its competitor RInfrac, which in absence of long term power purchase agreements, has been procuring power at higher cost through short term arrangements...

2.4.8 However, whether TPC is in a dominant position in the relevant market which enables it to operate independently of competitive forces, need to be examined not in isolation but concurrently with the evolving market structures for wholesale and retail supply of electricity in the country. The recent levelised tariffs discovered in Case I and Case II bidding in the states and in the Ultra Mega Power Projects are lower than the power generation cost of TPC in most of the cases. In the reference, it has been mentioned by the MERC that the prices discovered by RInfrac for medium term power purchase through competitive bidding process for future supplies are lower than the power generation cost of TPC under the present regulated structure. The durability of relative commercial advantage of TPC on account of lower power input cost need to be assessed in the light of price discoveries in the wholesale electricity market and specifically the price discovered by RInfrac for medium term power purchase.

...

2.4.10 Therefore, the alleged commercial advantage enjoyed by TPC on account of comparatively lower power input cost cannot be seen as durable in the context of the developments in the wholesale/generation electricity markets...

3 OPINION OF THE COMMISSION

The Commission, based on an examination of the facts referred to in the Reference and the developments in the market structures in electricity in light of the provisions of the Competition Act, 2002, offers the following opinion on the decisions proposed by MERC with respect to the issues that arose during the course of proceedings in Case No. 13 of 2010 as below:

3.1 Issue - Whether the following decision is contrary to the Competition Act, 2002 for determining the relevant market for Generation Business?

...

The Commission, taking into consideration the current organisation structure of electricity markets and the extant regulatory framework, defines the relevant product market as 'generation and wholesale supply of electricity market'. Further, with the advent of power trading, robust inter-state transmission system and statistics corroborating actual inter-state transactions in the wholesale market for electricity, the Commission concludes that the geographic scope for 'Electricity generation/wholesale electricity market' is national or Pan India.

The Commission opines that the decision proposed by the MERC that the relevant geographic market for electricity generation (and wholesale supply) is the entire country is in accordance with the Competition Act, 2002.

- 3.2 *Issue - Whether the following decision is contrary to the Competition Act, 2002 for determining the relevant market for Distribution Business?*

...

In view of the facts and circumstances mentioned in the Reference, the Commission defines the relevant product market as 'distribution and retail supply of electricity'. Further, the three distribution areas within the Mumbai region are characterized by different competitive conditions and hence, cannot be unified into a homogeneous relevant geographic market for distribution of electricity. Rather, each licensed distribution area should be looked at as a distinct relevant geographic market, with the boundaries co-terminus with the territories specified in the respective licenses. In the context of the present case, the relevant market is the Mumbai suburbs (excluding areas served by MSEDCL).

The Commission opines that the decision proposed by the MERC on the relevant geographic market for distribution business is not in accordance with the Competition Act, 2002.

- 3.3 *Issue - Whether the following decision is contrary to the Competition Act, 2002 for determining whether TPC or RInfra can be said to be a dominant position in the Generation Business?*

...

Upon evaluation of the current structure of the electricity generation and wholesale supply in the country, taking a holistic view of the factors laid down in Section 19(4) of the Competition Act, 2002 and in view of the definition of dominant position in the explanation to

Section 4 of the Act, the Commission is of the opinion that neither TPC nor RInfra is in a dominant position in the relevant market for "Generation and wholesale supply of electricity in India".

The Commission opines that the decision proposed by the MERC regarding the dominance of RInfra or TPC in the relevant market of generation and wholesale supply is not contrary to the Competition Act, 2002.

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

...

Dominance has to be assessed within the meaning of Section 4 and Section 19(4) of the Competition Act, 2002. Upon consideration of the facts and circumstances in totality in the relevant market of distribution and retail supply in Mumbai suburb (excluding areas served by MSEDCL) and evolving structural changes leading to competition in the electricity markets, the Commission is of the opinion that neither of the enterprises, i.e., TPC and RInfra is in a dominant position in the relevant market.

The Commission opines that the decision proposed by MERC on dominance of TPC and RInfra in the relevant market for distribution and retail supply of electricity is not in conformity with the provisions of the Competition Act, 2002."

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

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

27. The 'broad principles' laid out in the GoM Memorandum essentially state that TPC should not take advantage of its dominant position in the absence of a PPA with RIntra, and should use its generation capacity to supply power to distribution licensees of Mumbai at regulated rates. During the regulatory process, the Parties have submitted that both, TPC and RIntra are abusing their dominant position in respective Businesses. Hence, the three key issues to be addressed here are:

- a. Whether TPC or RIntra can be said to in a dominant position in the Generation or Distribution Business?
- b. Whether TPC or RIntra are abusing their dominant position in the Generation or Distribution Business?
- c. What statutory powers need to be exercised by the Commission in case TPC or RIntra are found to be abusing their dominant position in the Generation or Distribution Business?

The Commission now proceeds to address each of these key issues one by one.

28. Section 175 provides that “*The provisions of this Act are in addition to and not in derogation of any other law for the time being in force.*” Therefore, since the definition of market, dominant position and abuse of dominant position have been laid out in great detail in the Competition Act, 2002, the Commission has relied on the same, to determine whether the Commission is required to intervene in the present matter under Section 60 of the EA 2003.

29. Section 60 of the EA 2003 reads as follows –

*“60. **Market Domination** – The Appropriate Commission may issue such directions as it considers appropriate to a licensee or a generating company if such licensee or generating company enters into any agreement or abuses its dominant position or enters into a combination which is likely to cause or causes an adverse effect on competition in electricity industry.”*

30. The operative parts of the above-quoted Section 60 are:

- The Commission may issue directions to a Licensee or a Generating Company.
- For issuing any such directions under Section 60 of the EA 2003, the following needs to be ascertained:
 - Whether any Licensee or Generating Company has entered into any Agreement, which causes or is likely to cause an adverse effect on competition in the electricity industry?
 - Whether any Licensee or Generating Company has abused its dominant position?
 - Whether any Licensee or Generating Company has entered into a combination, which causes or is likely to cause an adverse effect on competition in the electricity industry?

31. The relevant provisions of the Competition Act, 2002 are reproduced below:

"Definitions

2. In this Act, unless the context otherwise requires,—

...

(r) "relevant market" means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets;

(s) "relevant geographic market" means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas;

(t) "relevant product market" means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use;..."

"CHAPTER II

PROHIBITION OF CERTAIN AGREEMENTS, ABUSE OF DOMINANT POSITION AND REGULATION OF COMBINATIONS

Prohibition of agreements

Anti-competitive agreements

3. (1) **No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.**

(2) Any agreement entered into in contravention of the provisions contained in subsection (1) shall be void.

(3) **Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which—**

(a) directly or indirectly determines purchase or sale prices;

(b) limits or controls production, supply, markets, technical development, investment or provision of services;

(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;

(d) directly or indirectly results in bid rigging or collusive bidding,

shall be presumed to have an appreciable adverse effect on competition:

Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in

production, supply, distribution, storage, acquisition or control of goods or provision of services.

Explanation.—For the purposes of this sub-section, "bid rigging" means any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding

(4) Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including—

- (a) tie-in arrangement;*
- (b) exclusive supply agreement;*
- (c) exclusive distribution agreement;*
- (d) refusal to deal;*
- (e) resale price maintenance,*

shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

Explanation.—For the purposes of this sub-section,—

- (a) "tie-in arrangement" includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;*
- (b) "exclusive supply agreement" includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person;*
- (c) "exclusive distribution agreement" includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods;*
- (d) "refusal to deal" includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought;*
- (e) "resale price maintenance" includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.*

(5) Nothing contained in this section shall restrict—

- (i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under—*
 - (a) the Copyright Act, 1957 (14 of 1957);*
 - (b) the Patents Act, 1970 (39 of 1970);*
 - (c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999);*
 - (d) the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999);*

- (e) the Designs Act, 2000 (16 of 2000);*
- (f) the Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000);*
- (ii) the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.*

Prohibition of abuse of dominant position

Abuse of dominant position

- 4. (1) No enterprise or group shall abuse its dominant position.***
- (2) There shall be an abuse of dominant position under sub-section (1), if an enterprise or a group—***
- (a) directly or indirectly, imposes unfair or discriminatory—***
 - (i) condition in purchase or sale of goods or service; or***
 - (ii) price in purchase or sale (including predatory price) of goods or service.***

Explanation.— For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory condition or price which may be adopted to meet the competition; or

- (b) limits or restricts—***
 - (i) production of goods or provision of services or market therefor; or***
 - (ii) technical or scientific development relating to goods or services to the prejudice of consumers; or***
- (c) indulges in practice or practices resulting in denial of market access in any manner; or***
- (d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or***
- (e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.***

Explanation.—For the purposes of this section, the expression—

- (a) "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to—***
 - (i) operate independently of competitive forces prevailing in the relevant market; or***
 - (ii) affect its competitors or consumers or the relevant market in its favour.***
- (b) "predatory price" means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the***

goods or provision of services, with a view to reduce competition or eliminate the competitors.

(c) "group" shall have the same meaning as assigned to it in clause (b) of the Explanation to section 5.

Regulation of combinations

Combination

5. The acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be a combination of such enterprises and persons or enterprises,..." (**emphasis added**)

"19.(1) The Commission may inquire into any alleged contravention of the provisions contained in subsection (1) of section 3 or sub-section (1) of section 4 either on its own motion or on—

...

(5) For determining whether a market constitutes a "relevant market" for the purposes of this Act, the Commission shall have due regard to the "relevant geographic market" and "relevant product market".

(6) The Commission shall, while determining the "relevant geographic market", have due regard to all or any of the following factors, namely:—

- (a) regulatory trade barriers;
- (b) local specification requirements;
- (c) national procurement policies;
- (d) adequate distribution facilities;
- (e) transport costs;
- (f) language;
- (g) consumer preferences;
- (h) need for secure or regular supplies or rapid after-sales services.

(7) The Commission shall, while determining the "relevant product market", have due regard to all or any of the following factors, namely:—

- (a) physical characteristics or end-use of goods;
- (b) price of goods or service;
- (c) consumer preferences;
- (d) exclusion of in-house production;
- (e) existence of specialised producers;
- (f) classification of industrial products..."(**emphasis added**)

32. Thus, the issue of abuse of dominant market position that has been raised by RInfra against TPC as regards the generation and distribution business and by TPC against RInfra for the distribution business, needs to be assessed against the following parameters:

- Firstly, what is the relevant market for Generation Business and Distribution Business?

- Secondly, have either TPC or RInfra entered into any Agreement or a combination, which is likely to cause an adverse effect on competition in electricity industry?
- Thirdly, is either TPC or RInfra in a dominant position in the above-identified relevant markets for Generation Business and Distribution Business?
- Fourthly, if either of TPC or RInfra is in a dominant position in the above-identified relevant markets for Generation Business and Distribution Business, then, can either of them to be said to be abusing their dominant position in the relevant markets?

33. The Commission now proceeds to determine whether there has been any abuse of dominant position by either TPC or RInfra vis-a-vis the above-quoted relevant Sections of the EA 2003 and the Competition Act, 2002.

Relevant Market for Generation Business and Distribution Business

34. The Generation Business and Distribution Business have been discussed separately. The relevant market for both, Generation Business and Distribution Business, can either be the Geographical Market or the Product Market. However, as per the Competition Act, 2002, the 'Relevant Product Market' means a market comprising all those products, which are regarded as interchangeable or substitutable by the consumer. However, the product in this case is 'electricity', which is not practically interchangeable with any other product, for the volumes being discussed. Hence, consideration of the Product Market is of no relevance for both, Generation Business as well as Distribution Business.

35. As per the Competition Act, 2002, the 'Relevant Geographical Market' means a market comprising the area in which the conditions of competition for supply of goods or demand of goods are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas. The Competition Act, 2002 also states that while determining the relevant geographic market, due regard shall be given to regulatory trade barriers, local specification requirements, national procurement policies, transport costs, consumer preferences, etc.

Source of Supply in Mumbai

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

a. RInfra

- 1) Till the year January 1995, the entire requirement of RInfra to supply electricity to its consumers was supplied by TPC from the generating stations of TPC at Trombay, Thermal Power Station and Hydro Power Stations at Khopoli, Bhivpuri and Bhira. Subsequently, RInfra in February 1995 installed and commissioned its 500 MW power generating station in Dahanu. However, supply from Dahanu generating

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

"7.4.3 Power Purchase from Tata Power Company

...

The total generation from TPC Generation Business is not sufficient to meet the total demand and energy input requirement of three Distribution Licensees in Mumbai i.e., TPC-D, REL-D and BEST, and hence additional energy needs to be procured for meeting the overall energy requirement of Mumbai system. TPC, in its ARR and Tariff Petition for FY 2006-07, has proposed that TPC-D will procure the additional energy requirement of Mumbai System for meeting the requirement of its own distribution network as well as for supplying power to other two Distribution Licensees, i.e., REL-D and BEST to meet their overall energy requirement.

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

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

"

12. POWER PURCHASE AND SALES

12.1. Objections Received

TPC in its submission stated that in light of the recent PPAs between TPC-G & BEST and TPC-G & TPC-D, the Company will be able to supply only 500 MW of power to REL-D, subject to signing of a power purchase agreement between the parties and the power purchase cost as projected by REL-D needs to be revised accordingly....

TPC further highlighted that the Electricity Act 2003 as well as the MERC (Terms and Conditions of Tariff) Regulation, 2005 envisage that every distribution licensee should make its own arrangement to procure the required power. Thus the assumption by REL-D in its MYT petition that the balance requirement of 787 MUs to 1000 MUs will be procured by TPC-D for REL-D is not correct. TPC clearly stated that it will not take any responsibility for procuring power on behalf of REL-D...

12.2. REL-D's Response

...

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

Further, REL-D also requested the Commission to allow them some time to respond on the short term purchase.

12.3. Commission's Ruling

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

The Commission also rules that in the first year of the control period, the Commission will allocate the capacity of TPC-G based on ratio of coincident peak demand but from the second year of the control period onwards the Commission will allocate the capacity of TPC-G based on the available approved PPAs.

...

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

"2.5 Power Purchase Expenses Power Purchase from REL-G

...

Power Purchase from TPC-D & Short term Power purchase

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

The Commission opines that as per universal service obligation, every licensee is responsible to procure power to serve its own consumers and a licensee cannot absolve of its statutory responsibility, by its mere authorizing other licensee to procure short term power on its behalf. The Commission hence does not recognize the arrangement wherein TPC-D would procure short term power for REL-D & BEST. The Commission directs REL-D to ensure procurement of its full requirement of power on its own.

The Commission has considered the short term power purchase requirement at 14 MUs for FY 2007-08 and since the sources of short term power purchase have not been specified by REL-D, the Commission has considered the rate of Rs 4.41 per unit as proposed by REL-D for procurement of short term power in its petition."

- 3) For FY 2008-09 and FY 2009-10, TPC continued to supply 500 MW of electricity to RInfra, for the RInfra to supply to its consumers, though there was no PPA between RInfra and TPC. By letter dated June 25, 2009, TPC communicated its refusal to supply 500 MW to RInfra with effect from April 1, 2010, on the grounds that:
 - i. TPC has committed 800 MW to BEST and 477 MW to its own distribution system;
 - ii. Hon'ble Supreme Court vide its Judgment dated 8th July 2008 vindicated the position of TPC to supply all consumers in Mumbai and accordingly the power requirement of their own distribution business is expected to grow significantly for which they have to make arrangement in near future, and
 - iii. RInfra has not entered into and signed a Power Purchase Agreement with TPC.

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

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

b. TPC

TPC was sourcing its entire power requirement from its own thermal generating Stations at Trombay and hydro generating stations at Khopoli, Bhivpuri, and Bhira. There was no problem till around FY 2005-06, when the power generated by TPC and RInfra was sufficient to meet the combined power requirements of RInfra, TPC and BEST. For FY 2006-07, due to the increase in demand, there was a demand-supply gap, and TPC procured the additional power requirement from outside the State to meet the overall gap in Mumbai, as elaborated for REL above.

In November 2007, the Commission approved the Power Purchase Arrangement between TPC-G and TPC-D for 487 MW, vide its Order dated November 6, 2007 in Case 87 and 88 of 2006 and Case 30 of 2007. For its balance requirement, TPC has been purchasing power through the Power Management Group formed by the Mumbai distribution licensees, and from the IBSM pool.

Presently, TPC sources 647 MW from its own generating stations (487 MW through long-term Power Purchase Arrangement with TPC-G and 160 MW through short-term PPA with TPC-G/TPTCL), viz., Trombay Thermal Power Station and Hydro Power Stations at Khopoli, Bhivpuri and Bhira, as against its demand of around 750 MW.

c. BEST

BEST was sourcing its entire power requirement from TPC's thermal generating Stations at Trombay and hydro generating stations at Khopoli, Bhivpuri, and Bhira. There was no problem till around FY 2005-06, when the power generated by TPC and RInfra was sufficient to meet the combined power requirements of RInfra, TPC and BEST. For FY 2006-07, due to the increase in demand, there was a demand-supply gap, and TPC procured the additional power requirement from outside the State to meet the overall gap in Mumbai, as elaborated for REL above.

In November 2007, the Commission approved the Power Purchase Arrangement between TPC-G and BEST for 832 MW, vide its Order dated November 6, 2007 in Case 87 and 88 of 2006 and Case 30 of 2007. For its balance requirement, BEST has been purchasing power through the Power

Management Group formed by the Mumbai distribution licensees, and from the IBSM pool.

Presently, BEST sources 932 MW (including additional 100 MW approved by the Commission in its Order dated September 1, 2010 in Case 1 of 2010) as against the peak demand of around 925 MW of BEST.

37. The **Generation Business** is not a licensed business under the EA 2003, and anyone can set up a generating station anywhere in the country. The energy generated from any generating station can be sold anywhere in the country, using the open access provisions under the EA 2003. Thus, the consumers, who comprise the market for generation, are spread all over the country. Earlier, the Central Generating Stations were selling to more than one State through PPAs and Central Sector allocations, while the State Generating Stations were selling power only within the State. Subsequent to the enactment of the EA 2003, several private sector generating stations are selling their power on merchant basis and through the Power Exchanges, outside the State in which they are located. The Central Government has also notified the Competitive Bidding Guidelines (CBG) for Case I type (location and fuel independent) and Case II type (location and fuel specific). The Central Government has also formulated the concept of Ultra Mega Power Plants (UMPPs) under the Case II type of competitive bidding, wherein generating Stations with capacity of around 4000 MW have to be set up at the specified location with the specified fuel, by the winning bidder, at the rate discovered through competitive bidding. The power generated by these UMPPs is to be sold to selected States (typically 5-6 States) through PPAs in the agreed proportion. The status of the UMPPs is given in the following Table:

Sr No	Name of the Project	Name of the State	Project awarded to	PPAs with states	Capacity (MW)	Fuel	Levelised Tariff (Rs/KWh)	LOI Issued
1	Mundra UMPP Anticipated COD - 27.06.2012	Gujarat	Tata Power Company Ltd	Gujarat (1805 MW), Maharashtra (760 MW), Punjab (475 MW), Haryana (380 MW) and Rajasthan (380 MW)	3800	Imported Coal	2.26	Dec. 2006

Table: Procurement of Electricity through Competitive Bidding Under Case II (UMPPs)								
Sr No	Name of the Project	Name of the State	Project awarded to	PPAs with states	Capacity (MW)	Fuel	Levelised Tariff (Rs/KWh)	LOI Issued
2	Sasan UMPP Anticipated COD - 27.11.2012	Madhya Pradesh	Reliance Power Ltd	Madhya Pradesh (1500 MW), Punjab (600 MW), Uttar Pradesh (500 MW), Haryana (450 MW), Delhi (450 MW), Rajasthan (400 MW) and Uttarakhand (100 MW)	4000	Domestic Coal	1.20	Aug 2007
3	Krishnapatnam UMPP Anticipated COD - First Unit 30.09.2013	Andhra Pradesh	Reliance Power Ltd	Andhra Pradesh (1600 MW), Karnataka (800 MW), Tamilnadu (800 MW) and Maharashtra (800 MW).	4000	Imported Coal	2.33	Nov 2007
4	Tilaiya UMPP Anticipated COD - First Unit 24.11.2014	Jharkhand	Reliance Power Ltd	Jharkhand (1000 MW), Uttar Pradesh (650 MW), Bihar (500 MW), Punjab (450 MW), Gujarat (300 MW), Maharashtra (300 MW), Rajasthan (250 MW), Madhya Pradesh (200 MW), Haryana (200 MW) and Delhi (150 MW).	4000	Domestic Coal	1.77	Feb-09

38. Distribution Utilities in several States have also undertaken the competitive bidding exercise to procure power, and most of these have been the Case II type of power procurement. In the State of Maharashtra, MSEDCL has tied up around 5025

MW of capacity through long-term PPA, based on Case II type competitive bidding process. RInfra has also undertaken the process to procure power on medium-term (upto 7 years) and long-term basis under Case I type competitive bidding process. As stated earlier, under Case I type bidding process, the generating Station can be located anywhere in the country, and power can be supplied at the interconnection point specified by the procurer, which is typically the interconnection point at the State boundary (in case of State Utilities). The status of Case I and Case II bidding in different States is given in the Table below:

Table: Status of Case-I and Case-II Bidding in States (adopted tariff)

Sl. No	State	Type	Seller/Project Name	Procurer	Capacity (MW)	Fuel Type	Levelised Tariff (Rs/kWh)*	Anticipated COD
1	Assam	Case-II	Bordikarai Small Hydro Electric Project	Assam Power Distribution Company Ltd.	4.7	Hydro Electric Project	2.73	Jan 2014
			Municipal Solid Waste Based Power Project	Assam Power Distribution Company Ltd.	6	Municipal Solid Waste	4.38	-
2	Chhattisgarh	Case-II	Indiabulls CSEB Bhayathan Power Ltd.	Chhattisgarh State Electricity Board	858	Coal	0.81	Unit I - 2012
3	Delhi	Case-II	Sasan Power Ltd. (UMPP)	BSES Rajdhani Power Ltd.	196.11	Coal	1.196	27.11. 2012
		Case-II	Tilaiya Power Ltd. (UMPP)	BSES Rajdhani Power Ltd.	64	Coal	1.77	U-I 24.11. 2014
		Case-II	Sasan Power Ltd. (UMPP)	North Delhi Power Ltd.	130.50	Coal	1.196	27.11. 2012
		Case-II	Tilaiya Power Ltd. (UMPP)	North Delhi Power Ltd.	44	Coal	1.77	U-I 24.11. 2014
		Case-II	Sasan Power Ltd. (UMPP)	BSES Yamuna Power Ltd.	121.50	Coal	1.196	27.11. 2012
		Case-II	Tilaiya Power Ltd. (UMPP)	BSES Yamuna Power Ltd.	42	Coal	1.77	U-I 24.11. 2014
4	Gujarat	Case-I	Adani Enterprises Ltd.	Gujarat Urja Vikas Nigam Ltd.	1000	Coal / Lignite	2.89	U-I Dec 2010
			Aryan Coal Beneficiaries Pvt. Ltd.	Gujarat Urja Vikas Nigam Ltd.	200	Unspecified	2.25	Nov 2010
			Adani Power Pvt. Ltd.	Gujarat Urja Vikas	1000		2.35	U-I Dec

Sl. No	State	Type	Seller/Project Name	Procurer	Capacity (MW)	Fuel Type	Levelised Tariff (Rs/kWh)*	Anticipated COD
				Nigam Ltd.				2010
			Essar Power Ltd.	Gujarat Urja Vikas Nigam Ltd.	1000	Imported Coal	2.401	U-I Mar 2011
5	Haryana	Case-I	Mundra TPS, Phase-IV, Gujarat (for Adani Power Ltd.)	Haryana Power Purchase Centre	1424	Coal	2.94	U-I Dec 2010
			Kamalang Thermal Power Project, Orissa (for PTC India Ltd. - GMR Project)	Haryana Power Purchase Centre	300	Coal	2.86	Mar 2012
		Case-II	Mahatma Gandhi Super Thermal Power Plant, Jhajjar	Haryana Power Purchase Centre	1320	Coal	2.996	Dec 2011
6	Madhya Pradesh	Case-II	Sasan UMPP	MP Power Trading Company Ltd	1500	Coal	1.196	27.11. 2012
			Jharkhand Integrated Power Ltd. Tilaiya (UMPP) Jharkhand	MP Power Trading Company Ltd	200	Coal	1.77	U-I 24.11. 2014
7	Punjab	Case-II	Talwandi Sabo Power Limited	Erstwhile, PSEB	1800 \pm 10%	Coal	2.864	Jan 2013
8	# Maharashtra	Case-I	Adani	MSEDCL- Maharashtra State Electricity Distribution Company Ltd	1320	Coal	2.642	Aug 2012
	Lanco		680		Coal	2.70	Sept 2012	
	JSW		300		Coal	2.716	Sept 2010	
	EMCO		200		Coal	2.879	Mar 2014	
	Indiabulls		450		Coal	3.260	Apr 2014	

Sl. No	State	Type	Seller/Project Name	Procurer	Capacity (MW)	Fuel Type	Levelised Tariff (Rs/kWh)*	Anticipated COD
			Indiabulls		750	Coal	3.260	Apr 2014
			Adani		1200	Coal	3.280	Mar 2014
			Adani		125	Coal	3.280	Mar 2014

*Rounded off up to three decimal points.

Source: Forum of Regulators.

39. As is obvious from the above Tables, the Generation Business is a pan-India business, and power generated in one State can and is being sold in other States, and there is no bar on the power being sold in the same State, nor is there any bar on the procurer (concerned distribution licensee) to procure power from a generator located in the same State.

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

41. The **Distribution Business** is a licensed business under the EA 2003, and only persons who have been issued a distribution licence under the EA 2003 are authorised to distribute electricity in the area specified in their Licence. In the present case, the distribution licence areas of RInfra and TPC, as approved by the Commission, are as under:

42. RInfra's area of supply is from Bandra to Dahisar, Mira, Bhayander and Chunabhatti to Mankhurd and Vikhroli, in the city of Mumbai. TPC's area of supply is entire Mumbai city and suburbs (excluding areas served by MSEDCL) thereby entitling TPC to effect retail supply in BEST's area of supply, i.e., South Mumbai area (Island city, approx. from Colaba to Sion and Mahim) and RInfra's area. The Judgment delivered by Hon'ble Supreme Court of India on 8-7-2008 in Appeal (civil) No. 2898 of 2006 in Tata Power Company Limited vs. Reliance Energy Limited & Ors, read with the Specific Conditions of Distribution Licence notified by the Commission for RInfra and TPC, and Interim Order dated 15-10-2009 passed by the Commission in Case No. 50 of 2009, makes the situation in Mumbai unique, as the consumers of RInfra and BEST have the option to seek supply from TPC by making an application under Section 43 of the EA 2003 to TPC.

43. Thus, there are two Distribution Licensees in each of the following licence areas:

- a. Bandra to Dahisar, Mira, Bhayander and Chunabhatti to Mankhurd and Vikhroli - RInfra and TPC
- b. South Mumbai area (Island city, approx. from Colaba to Sion and Mahim) - BEST and TPC

44. However, there is one distinct difference between the above two licence areas, as discussed below. In the licence area served by RInfra and TPC, Open Access is permissible on the distribution network of RInfra as well as TPC, and eligible consumers located in this licence area can seek supply from any source other than the distribution licensee/s, and supply has to be given through Open Access using the wires of the licensee to whom the consumer is connected. Further, based on the protocol laid down in the Commission's Order dated October 15, 2009 in Case No. 50 of 2009, consumers connected to RInfra's distribution network are receiving supply from TPC-D (the other distribution licensee in the same area of supply) using the network of RInfra-D. However, such Open Access is not possible on BEST's distribution network under Section 42(3) of the EA 2003, by virtue of its special status as a Local Authority.

45. Other than the area of Mumbai Island City and Mumbai Suburbs, one other distribution licensee distributes electricity in the State of Maharashtra, viz., MSEDCL. Unlike, in the Island City of Mumbai and Mumbai Suburbs, there is only one distribution licensee in the area served by MSEDCL. MSEDCL distributes electricity in the following areas- part of Mumbai Suburban, i.e., Kanjur, Bhandup & Mulund and rest of Maharashtra.

46. From the above, it is clear that the relevant market for Distribution Business is restricted to the area of supply specified in the Licence of the Distribution Licensee.

47. Thus, **as per the criteria laid down for identification of the relevant geographic market, the market for Distribution Business is the respective licence area, and for the case in question, the relevant market is the Mumbai suburban distribution licence area excluding areas served by MSEDCL**, considering the regulatory trade barriers and specific licence conditions.

Is any Agreement or Combination anti-competitive?

48. In the present matter, the following Agreements have to be considered:

- a) PPA for 832 MW between BEST and TPC-G
- b) PPA for 100 MW between BEST and TPC-G
- c) Power Purchase Arrangement for 477 MW between TPC-G and TPC-D
- d) Power Purchase Arrangement for 500 MW between RInfra-G and RInfra-D

49. Section 3 of the Competition Act, 2002, defines the parameters to assess whether any Agreement is anti-competitive. None of the above Agreements can be said to be anti-competitive, since they do not restrict the available supply in any

way, and the distribution licensees have the capacity and ability to contract with other sources of supply to meet their energy requirement, as summarised above, with reference to Case I and Case II type of competitive bidding. In fact, the prices discovered by RInfracore in its competitive bidding process are lower than that payable for power purchase from TPC. Further, **all the above PPAs and Power Purchase Arrangements have been approved by the Commission through separate Orders, under the rationale that the same are justified to meet the projected power requirement of the respective distribution licensees, and the prices are regulated by the Commission. Hence, the Commission rules that none of the relevant Agreements can be considered to be anti-competitive.**

50. The term 'Combination' relates to the acquisition of one or more persons or merger or amalgamation of enterprises, which is not the case in the present matter, and is hence, not relevant for the present matter.

Dominant Position in the Relevant Market

51. TPC has a total installed generation capacity of 2027 MW in Mumbai, and around 950 MW in other parts of the country, while RInfracore has a total installed generation capacity of 500 MW near Mumbai, and around 1033 MW in other parts of the country, as compared to the total installed generation capacity of around 1,73,626 MW in the country (as on March 31, 2011), which is the relevant market for the Generation Business. It is obvious that neither TPC nor RInfracore can be said to have a dominant position in the Generation Business in the relevant market.

52. As regards the Distribution Business, in the relevant market, i.e., Mumbai licence area, RInfracore has around 27 lakh consumers, whereas TPC has around 1 lakh consumers. Further, RInfracore owns most of the distribution network that supplies electricity to consumers within the licence area common to RInfracore and TPC, whereas TPC's distribution network in these areas is miniscule and restricted primarily to HT consumers. For supplying electricity to consumers who have migrated from RInfracore, TPC has been utilising RInfracore's distribution network. In other words, in terms of consumer reach and connectivity, RInfracore has significantly higher market share as compared to TPC. However, one of the biggest cost elements of the distribution licensee is the power purchase cost, which impacts the retail tariff to a large extent. On this parameter, TPC has an advantage over RInfracore, since, TPC has access to sufficient quantity of own generation at the present moment, and the average cost of power procurement of TPC is lower than that of RInfracore. Also, due to historical reasons, TPC's consumer mix is skewed towards large HT consumers, and only recently, has there been an addition to the consumer numbers in large numbers due to migration from RInfracore. As a result, TPC's tariff for most consumer categories/consumption slabs is significantly lower than that of RInfracore for the same category/consumption slab, making RInfracore uncompetitive for the respective category/consumption slab. Thus, on the parameter of cost and tariff, TPC has a significant advantage over RInfracore in the relevant market for the Distribution Business.

53. As given in CCI's Opinion, the dominance of an entity in any market has to be seen in totality and cannot be seen in isolation either from the point of access to cheaper power or ownership of the distribution network. Moreover, the distribution licence issued to RInfra and TPC is an integrated licence comprising the Wires as well as Supply business. Since, both RInfra and TPC have different relative strengths and weaknesses in the Mumbai suburban licence area (excluding areas served by MSEDCL), the Commission is of the view that neither RInfra nor TPC is in a position of dominance in the relevant Market for Distribution Business.

Abuse of Dominant Position

54. Having discussed the relevant markets for the Generation Business and Distribution Business, it is now required to assess whether either TPC or RInfra have abused their dominant position in either of these markets.

55. For the Generation Business as well as the Distribution Business, the question of possible abuse of dominant position does not arise, since the Commission has concluded above that neither TPC nor RInfra can be said to be in a dominant position in the relevant market for the Generation Business and/or the Distribution Business.

CONCLUSION

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

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

As concluded earlier in the Order, there is no evidence to show that TPC is in a dominant position either in the Generation Business or in the Distribution Business. Moreover, supply to TPC-D cannot be termed as diversion of power intended for RInfra-D, since, RInfra also supplies the entire quantum generated by RInfra-G to its distribution division. Both these transactions are intended to benefit the consumers in Mumbai, and hence, cannot and should not be disturbed.

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

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

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

Further, as elaborated earlier, the Hon'ble High Court as well as Hon'ble Supreme Court have clearly ruled in the same matter that the generator cannot be forced to sell power to any specific entity, especially in the absence of a PPA, and the hardship caused to consumers of any licensee or the fairness or otherwise of the supply of electricity to different distribution licensees is outside the purview of the Commission.

Accordingly, the Commission rules that TPC-G cannot and should not be compelled to supply electricity to RInfra, in the absence of any PPA between TPC and RInfra for the same.

However, the fact of the matter is that for FY 2010-11, the generation capacity of TPC-G of 460 MW, which was being supplied to RInfra till FY 2009-10, has been scheduled in favour of the respective Parties in accordance with the ad-interim solution proposed by the GoM vide its Memorandum dated May 7, 2010. Out of the 460 MW of TPC-G capacity under consideration, TPC has supplied 100 MW to BEST as per the approved PPA, and 360 MW to RInfra from April 1, 2010 to June 30, 2010. From July 1, 2010 to March 31, 2011, 200 MW has been supplied to RInfra, with the remaining 160 MW being utilised to meet TPC-D's requirement.

Also, apart from the present Case No. 13 of 2010, the issue of despatch of power by the Maharashtra State Load Despatch Centre (MSLDC) in the favour of RInfra rather than in favour of TPC, in accordance with the GoM Memorandum and letters written by the GoM to the MSLDC, was agitated by TPC before the Hon'ble Bombay High Court. The Hon'ble High Court vide its Order dated August 9, 2010, in Writ Petition No. 1224 of 2010 granted liberty to TPC to approach this Commission in respect of the dispute arising out of the impugned letters. Subsequently, TPC filed a Petition numbered as Case No. 37 of 2010, praying for relief in terms of despatch of power in favour of TPC, and compensation for the difference in power purchase rate incurred by TPC, etc. The Commission has issued its Order dated September 29, 2010 in Case No. 37 of 2010, ruling as under:

"35. In hindsight, the Commission is of the view that the administrative action of MSLDC was reasonable as there was a state of flux in view of the Government of Maharashtra Memorandum dated 7th May 2010 asking this Commission to look into the matter in public interest, and in view of Government of Maharashtra Memorandum dated 19th May 2010 issued in an extraordinary situation of public exigency and issuing directions to MSLDC to maintain status quo in respect of scheduling 360 MW of power till further directives from this Commission or till further orders / directions from the Government of Maharashtra. In this situation, the Commission is of the view that the MSLDC took a reasonable decision as the MSLDC was entitled to act as per the Government of Maharashtra

Memorandums dated 7th May 2010 and 19th May 2010 issued in an extraordinary situation of public exigency... The Commission is of the view that the entitlement of the MSLDC to act on the basis of the Govt. Memorandums does not get diluted even on the submission made by the Learned Advocate General that the said Memorandum only records the State Govt''s expectations for the parties to abide by it and the efforts of the State Govt. to seek cooperation of the parties including TPC. In light of this, the Commission is of the view that the SLDC was entitled to act on the Govt. Memorandums that were stated to be issued in public interest even though they were later clarified to be not in the form of a direction under Section 37 of the EA 2003.

36. In view of the above, the Commission, at this stage, is not inclined to interfere with, quash or set aside the impugned letters dated 16th May 2010, 18th May 2010, 12th June 2010 and letter dated 30th June 2010. In the background of the matter, the Commission does not find any merit in the contention of TPC that MSLDC involved itself in determining as to on which party the title of electricity is vested. 37. In light of the above decision, prayers seeking compensation for the power bought by the petitioner from spot/UI/short term market, as contained in prayer clauses (c) and (d) are not granted. As regards the prayer to order and impose penalty on SLDC under Section 142 of the EA 2003, the Commission is of the view that it would not be justifiable to impose penalty on MSLDC as MSLDC has acted not in usual circumstance but in an extraordinary circumstance mentioned in the Govt. Memorandum stated to be issued in public interest and to protect the interest of consumers of suburban Mumbai. As stated above, the MSLDC was entitled to act as per the said Government of Maharashtra Memorandums."

TPC has challenged the above-said Order in Case No. 37 of 2010 before the Hon'ble Appellate Tribunal and the matter is presently sub-judice before the Hon'ble Appellate Tribunal, and no interim relief has been granted by the Hon'ble Appellate Tribunal.

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

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

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

(3) The need to put in place a mechanism to ensure that subsidized consumers of RInfra do not have to suffer abnormal tariff rise only on account of the effect of migration of its cross-subsidizing consumers to TPC which is in a dominant position

RInfra had submitted a Petition before the Commission on April 27, 2010 inter alia seeking that Commission specify an appropriate mechanism for recovery of loss of cross subsidy from consumers who choose to migrate to the other distribution licensee, to avoid tariff shock on balance subsidised consumers left with RInfra-D. This case was numbered as Case No. 7 of 2010 "*In the matter of Petition of RInfra seeking relief on account of certain critical issues affecting the petitioner's consumers and its financial viability*". The Commission has issued an Order dated September 10, 2010 disposing of the said case with certain observations as to how the Commission would deal with the issues raised in the said Case No. 7 of 2010. Para 9(b) of the said Order is extracted below –

"While a certain consumer mix and consumption mix is estimated at the time of the determination of retail tariffs, the mechanism of true-up is expected to take care of changes in consumer mix and consumption mix of the licensee from the level estimated at the time of the determination of revised tariffs. The distribution licensee will have to submit the detailed computations of the impact of the change in consumer mix, as well as propose the methodology for mitigating the financial impact, in its Tariff Petition. It may also be kept in mind that the averments made by some consumers, and estimation of reduction in high cost of power purchase due to migration of high end consumers who also generally have high consumption, should also be taken into account while doing the computation. Accordingly, the Commission will address the financial impact on RInfra-D resulting from change in consumer mix and consumption mix pursuant to the migration of consumers, at the time of determining ARR/true-up for the respective years, based on RInfra-D's Petition in this regard."

Para 9(d) of the said Order is extracted below –

"As far as the issue of loss of cross-subsidy and its impact on low-end consumers due to migration (being predominantly from the

subsidizing category of consumers) is concerned, the Commission agrees with the view of consumer representatives and stakeholders that to a large extent this is a tariff design related issue. Accordingly, at the time of the issuance of the Tariff Order for RInfra-D, the Commission will suitably design a tariff structure, duly taking into account the proposals submitted by RInfra-D, the eligible costs of the utility, the ability to pass on increase in costs to various categories of consumers, and other related aspects.”

Subsequently, RInfra-D has submitted its proposal for levying a surcharge on migrating consumers to recover the loss of cross-subsidy due to the migration from RInfra-D to TPC-D, in its APR Petition in Case No. 72 of 2010. RInfra-D's proposal in this regard is under the consideration of the Commission, and will be addressed appropriately in the Commission's Order in Case No. 72 of 2010.

Therefore, the Commission is not going into these issues in this present matter.

(4) The need to assure that if there is any surplus power from the generation meant for Mumbai licensees at any time, it should be supplied to deficit distribution licensees in Mumbai at the average cost of purchase or any other reasonable rate to be determined by MERC

RInfra had submitted a petition before the Commission on April 28, 2010 inter alia seeking that Commission may modify the existing Interim Balancing and Settlement Mechanism by directing that all inter-discom exchange of power from surplus available out of TPC-G capacity should happen at the weighted average regulated price of all units of TPC-G put together, pending implementation of Intra-State ABT and FBSM. This case was numbered as Case No. 9 of 2010 “*In the matter of Petition seeking modification of present Interim Balancing and Settlement Mechanism (IBSM) with Final Balancing and Settlement Mechanism (FBSM)*”. The Commission has issued an Order dated August 23, 2010 disposing of the said case. Relevant extracts of the said Order are given below –

"42. As regards the issue regarding RInfra-D's contention that the present approach of settlement of inter-DISCOM trade at marginal rate is leading to exploitation of the situation, and amounts to consumers of the decrementing licensee cross-subsidising the consumers of the incrementing licensee, the Commission is of the view that on the contrary, if the IBSM/FBSM pool settlement is done at the average pooled rate rather than the marginal rate, it would amount to consumers of the incrementing licensee cross-subsidising the consumers of the decrementing licensee, which clearly does not make any economic sense. The surplus licensee cannot be expected to supply costlier power to its consumers and pass on the cheaper power to the deficit licensee, and will amount to penalising the consumers of the surplus licensee. Each distribution licensee is required to contract for the required quantum of power so that the quantum of decrement into the pool is minimal. For any system, merit order despatch has to be followed, to minimise the cost, and as a result, the unutilised power will always lie at the top of the merit

order stack and will be despatched at the end, though the fixed cost liabilities will have to be serviced by the licensee that has contracted for the power. This unutilised power, which is at the top of the merit order stack, is rightly being passed on to the deficit licensee, through the IBSM pool.

43. It is clear that RInfra-D would not have had to source power from the IBSM pool, had it entered into the requisite power purchase contracts, since there is no compulsion to do so. Unless any licensee decrements into the pool, the surplus licensees will not be able to increment into the pool, and would have to either back down the contracted generators or sell the surplus to others, depending on the contractual arrangements.

...

45. Further, RInfra-D's contentions in this regard are contradictory, since, in its Petition, RInfra-D has also admitted that the approach of permitting the surplus licensees to transfer their highest priced power to the deficit licensee was conceptually correct, given that under merit order operation, lower priced generation/purchase is first consumed and surplus, if any, exists only from the marginal stations. RInfra-D's contention that the above economical approach should not be adopted in a supply-deficit situation has no merit, since, by that reasoning, most economic principles will have to be done away with, given that the country as a whole has been experiencing supply deficit for quite some time now, which is likely to continue for some time.

46. As regards the issue of modification of IBSM till such time the FBSM becomes operational, the Commission is of the view that there is no need to modify the pool settlement mechanism, on account of the following reasons:

a. The imbalance settlement mechanism outlined under the IBSM and FBSM are based on sound economic principles, which have been accepted by the Petitioner, RInfra-D also, in the past as well as in this Petition itself.

b. As discussed in earlier paragraphs, unless RInfra-D enters into long-term/medium-term power purchase contracts for procurement of power at reasonable rates, the issue of high power purchase cost is unlikely to be resolved even after the implementation of the FBSM.

c. RInfra-D's first prayer is conceptually incorrect, as it has prayed for settlement of the imbalance quantum at the weighted average rate of TPC-G's Units. Also, RInfra-D's submission that due to different load curves of the three Distribution Licensees in Mumbai and for historical reasons of sharing of common generation facility, the Distribution Licensees having surplus in any part during the day, schedule it in favour of other decrementing Distribution Licensees in the city, such that the load generation is balanced for the city, is factually incorrect. The imbalance

pool is not a 'Mumbai' pool and is a State-wide pool, with MSEDCL also being a participant of the pool, which has been decrementing in the recent past, though it has been incrementing in the last two years on an average. As highlighted by MSEDCL, there cannot be two rates of settlement for energy within the State, with surplus from TPC-G capacity being settled at weighted average TPC-G rate and surplus from other licensees being settled at another rate. The pool is a self-balancing pool and increment by surplus licensees has to match with the decrement by the deficit licensees, both in terms of quantum as well as cost.
..."

Therefore, the Commission is not going into these issues in this present matter.

57. RInfra has also raised several other submissions during the course of hearings in the present matter. However, the Commission is of the view that such submissions made by RInfra, as summarised in paragraphs 5(i) and 11 and 12 of this Order, have already been considered and settled by the Hon'ble Supreme Court in its Judgment dated May 6, 2009, and hence, there is no justification for raising the same issues again. The Commission has hence, not gone into these issues.

With the above, Case No. 13 of 2010 stands disposed of.

Sd/-
Vijay L Sonavane
(Member)

Sd/-
V P Raja
(Chairman)

Annexure 1

List of persons who attended and made submissions during the hearings held on 28th June, 2010 and 3rd July 2010 in Mumbai.

MAHARASHTRA ELECTRICITY REGULATORY COMMISSION**PUBLIC HEARING**

**Scheduled on 28.06.2010 (Monday) at 11.00 hrs and 3rd July 2011 at 10.00 hrs at
Rangsharda Natya Mandir, Bandra Reclamation, Bandra (W),
Mumbai 400 050**

ATTENDANCE SHEET

No.	Name & Address of the Objector
1.	Tata Power Company Ltd.
2.	Reliance Infrastructure Ltd.
3.	BES&T Undertaking.
4.	State Load Despatch Centre, Kalwa, Maharashtra State Electricity Transmission Co. Ltd. [MSETCL]
5.	Government of Maharashtra, Industries, Energy & Labour Dept;
[B]	Consumer Representative u/s. 94 (3) of the EA Act, 2003
6.	Prayas, Energy Group.
7.	Mumbai Grahak Panchayat.
8.	Thane Belapur Industries Association
9.	Vidarbha Industries Association.
[C]	Consumer Representative u/s. 94 (3) of the EA, 2003 for Case No. 13 of 2010
10.	Shri Sandeep N. Ohri.
11.	Shri N. Ponarathanam.
12.	Shri Rakshpal Abrol.
13.	Adv. Mahesh Vaswani
14.	Smt. Ajanta R. Yadav
15.	Shri Tarak Oza
16.	Shri Shrikant V. Soman
	Objections / Suggestions by Consumers
[D]	
17.	Shri Vikas Agwekar
18.	Shri Vinod Sharma
19.	Shri Jayprakash M. Godamble
20.	Shri Mohmed Eesa
21.	Shri Sharad Kamble
22.	Shri James John
23.	Dr. L.B. Tiwari
24.	Shri Prasad Sane

No.	Name & Address of the Objector
25.	Shri Ashutosh Gupte
26.	Adv. Mohit Jadhav
27.	Shri Mahesh Temkar
28.	Shri Prashant Gawankar
29.	Shri Ashok D. Doshi
30.	Shri Sanjay Jadhav
31.	Smt. Gayatri Gupta
32.	Shri Manohar Shinde
33.	Shri Raju Shah
34.	Shri Dilip Pawar
35.	Shri Chandrakant Mudras
36.	Shri Balwant Patil
37.	Shri Amit Bhosale
38.	Smt. Neelam Dhavan
39.	Shri Mahesh Nene
40.	Shri Amol Jadhav
41.	Shri Ajit A. Potkar
42.	Shri M.S. Ramani
43.	Shri Sunil V. Patankar
44.	Shri Ganesh Khankar
45.	Shri Sandesh S. Narkar
46.	Shri Ravi Bhanushali
47.	Shri Vijay Vaidya
48.	Shri Sanjay Rawul
49.	Shri Prakash Chavan
50.	Smt. Amruta Pradhan
51.	Shri Satish Kulkarni
52.	Smt. Sujata Gokhale
53.	Shri Rajesh Prakash
54.	Adv. Parag M. Alavani
55.	Shri Sandeep Borkar
56.	Shri Nitin Madhukar
57.	Shri Sunil Deodhar
58.	Siddhivinayak Sah. Grih Sanstha Ltd.
59.	Shri Ramchandra Narayan Patkar
60.	Adv. Pallavi P. Arolkar
61.	Shri Jesu J. Avroor
62.	Shri Mohd. Sikandar Azam
63.	Shri T.R. Vishwamani
64.	Shri Pradeep Patne
65.	Shri Ganesh Subramaniam
66.	Adv. Uma Agarwal
67.	Shri Yashdev D. Bahl
68.	Dr. Dilip J. Raichura
69.	Shri Rajkumar R. Yadav
70.	Shri K. Parameshwaran

No.	Name & Address of the Objector
71.	Shri Sunil L. Yadav
72.	Shri Ved Vyas Sharma
73.	Shri Anil Vasant Tharthare
74.	Shri Paresh Mehta
75.	Shri Jagdish Chhagan Choudhari
76.	Smt. Greta Tauro
77.	Shree Rameshwar Swayam Sahayata Bachat Gat
78.	Smt. Sudha Ratan Borkar
79.	Shri Jayantilal Shah
80.	Adv. Umesh M. Patil
81.	Adv. Arun Patel
82.	Shri Chandraudan S. Goritiyal
83.	Adv. Keshav Shinde
84.	Adv. Rajesh Dabholkar
85.	Shri S.V. Pai
86.	Shri Sunil C. Mone
87.	Dr. Mumtaz Khoja
88.	Shri Hemal Mehta
89.	Shri Pankaj Muni
90.	Shri Suresh Gawade
91.	Nagari Nivara Parishad
92.	Shri Sanjeev R. Nayak
93.	Shri Dilip Chalil
94.	Advanced Locality Management & Networking Action Committee
95.	Shri Dinkar H. Tawde
96.	Adv. Ashish B. Shelar
97.	Adv. Arun Jagtap
98.	Swargesth Vidhyagouri Sumanlal Shah Trust Mumbai
99.	OKAY Industries
100.	Chemvalve Industries Pvt. Ltd.
101.	Shri Pratap G. Hogade
102.	Shri Anil Shidore
103.	Society for promotion of Area Resource Centres (SPARC)
104.	National Slum Dwellers Federation (NSDF)
105.	Mumbai International Airport Ltd.
106.	Wire Rings
107.	Shri S.H. Parab
108.	Shri Parvin Shaikh
109.	Shri Roshan Khan
110.	Smt. Malti Ambre
111.	Shri Mohmed Afzal
112.	Shri Ulhas Chaudhari
113.	Shri Reliph F. Vilad
114.	Shri Kalam Siddiqui
115.	Shri Vishal Mirande
116.	Shri K.N.Rajagopal

No.	Name & Address of the Objector
117.	Shri P.N. Shridharan
118.	Dr. V. Tahnumoorthy
119.	Shri Ravindra Bhanushali
120.	Shri Manubhai Tanna
121.	Shri S.L. Kazi
122.	Shri K.S. Ramaswami
123.	Shri Vijay Malankar
124.	Shri Jude G. Tandon
125.	Shri Balasaheb S. Patil