

## **RECORD OF PROCEEDINGS**

DATES OF HEARING : August 29, 2007 at 11.00 hrs and  
September 7, 2007 at 11.00 hrs

CASE No. : 30 of 2007

PETITIONERS : M/s. Reliance Energy Limited (“**REL**”)

RESPONDENTS : 1. M/s. Tata Power Company Limited (“**TPC**”)  
2. The Brihan Mumbai Electric Supply and  
Transport Undertaking (“**BEST**”)

MATTER : Petition filed by REL seeking directions upon TPC  
for (i) capacity allocation of 762 MW in favour of  
REL from TPC(G), (ii) execution of power  
purchase agreement (“**PPA**”) with REL for supply  
of 762 MW, (iii) not to approve the PPA between  
TPC(G) and BEST, pending approval under Case  
No. 87 of 2006, for any quantity upwards of 655  
MW; and (iv) not to approve the PPA between  
TPC(G) and TPC(D), pending approval under Case  
No. 88 of 2006, for any quantity upwards of 360  
MW

CORAM : Chairman, Member-Technical, Member-Finance

### **Record of Proceedings held on August 29, 2007**

Shri. J.J. Bhatt appeared for REL, Shri. Suresh Mukherjee appeared for TPC, and Shri. Ramji Shrinivasan appeared for BEST.

2. Shri. J.J. Bhatt, Counsel for REL, submitted that the case of REL stands on the premise of two legal issues – firstly, as to whether REL has a *locus standi* to challenge the PPA that TPC(G) has proposed to enter into with BEST, and secondly, as to whether the Commission, in exercise of its statutory powers under the Electricity Act, 2003 (“**EA 2003**”) can alter the terms and conditions of the said PPA. Shri. Bhatt, Counsel for REL, submitted that the second issue is *res integra* and has achieved finality with the observation of the High Court, Bombay in the judgment dated March 5, 2002 in Writ Petition No. 1205 of 2001 [*Dhabol Power Company Vs. MSEB & Ors*] (“**the Dhabol judgment**”). Counsel referred to the relevant extracts of the said judgment, whereunder the import of Section 22(1)(c) of the Electricity Regulatory Commissions Act, 1998 which is identical to the provisions of Section 86(1)(b) of the EA 2003, has been explained. It was contended that as per the said judgment, the Commission has wide

regulatory powers while approving the power procurement processes between a generator and a distributor inasmuch as to alter, vary, modify any terms and conditions of a PPA, and this power is not confined only to deal with the terms and conditions which relate to financial implications of parties, and relevant procurement price. The Commission enquired whether the use of identical terminology in both the said Acts mean identical applicability of the same. To this, REL's Counsel submitted that the wording of a section in a particular statute, when similar with the wording of another section but of a different statute, should be constructed in line with the legislative intent and the external aids of statutory construction of that particular statute.

3. Counsel further submitted that the Commission is required to take a synoptic, holistic and comprehensive view on all issues connected with the power procurement initiatives of REL, BEST and TPC(D) and the availability of power from TPC(G). It was submitted that as per the submissions of TPC under paragraph 10 to the petition filed by TPC in Writ Petition No. 916 of 2001 [*TPC & Anr. Vs. State of Maharashtra & Ors*] preferred before the High Court, Bombay, it is an admitted position that "*MSEB, Tata Power, BSES and BEST are all interconnected*" with TPC. Relevant extracts from the said Writ Petition was referred to by Counsel. It was submitted that under the said Writ Petition, TPC had submitted that the existing commercial arrangement between TPC and REL maintained a 'commercial equilibrium' between TPC and REL, and the same may continue. He submitted that averments made by TPC in the said writ petition would make it clear that REL was prevented from setting up generating stations at Saphale on the premise that the existing arrangement between REL and TPC, of REL being supplied with minimum energy off-take from TPC, as per Principles of Agreement entered upon between the parties in 1998, is sufficient to show that TPC was obligated to meet the energy requirement of REL.

4. The Commission enquired of Counsel as to how the impact of the said judgment, passed in the ERC regime and based on the erstwhile set of circumstances, have an influence over issues within the ambit of the EA 2003 regime and the present scenario of acute demand-supply gap. It was submitted by Counsel that the Commission has to consider the various factors that are inter-linked with the interests of the consumers of BEST and the interests of consumers of REL, while exercising a synoptic approach over the power procurement initiatives of REL and BEST. The situation prevalent prior to the EA 2003 regime was an established power procurement 'arrangement' between TPC and REL. Under Regulation 24 of the MERC (Terms and Conditions of Tariff) Regulations, 2005 ("**Tariff Regulations**") any "arrangement" between a procurer and a supplier has been considered as sound. Thus, as such, the position of REL in the era before the EA 2003 regime and in the era during the EA 2003 regime has not undergone any loss of status as a legitimate procurer of TPC. The Commission enquired whether the term "arrangement" is applicable inter se between entities like REL(D) and REL(G) or TPC(D) and TPC (G)? It was further enquired as to whether while considering generation allocation for REL from TPC(G), a PPA needs to be in place? Counsel for REL argued that an arrangement cannot be unilateral and both parties should agree to the same.

5. The operative part of the Dhabol judgment was referred by Counsel. He submitted that in the year 2001, REL was prevented from setting up generating stations at Saphale owing to the commercial equilibrium existing under the power procurement arrangement between REL and TPC(G). On an enquiry made by the Commission as to status of PPA, Counsel submitted that till proper power allocation is not regulated in the PPAs submitted for approval under Case No. 87 of 2006 and Case No. 88 of 2006, REL is not in a favourable position to enter into a PPA with TPC. Further, unless TPC(G) agrees to supply the quantum of power as desired by REL, there cannot be any PPA between the said parties as TPC(G) is not agreeing to the quantum desired by REL.

6. Counsel further submitted that in the EA 2003 regime, a generator has not been exempted from regulatory control, particularly concerning the aspect of which distributor it desires to sell power. Issues related to quantum of power that the generator agrees to sell to a distributor are subject to severe regulatory control. In parallel, the interests of the consumers of a distributor which has been supplied by the said generator for the past 80 years, need to be considered. On an enquiry made by the Commission, Counsel submitted that issues concerning regulatory control over a power procurement process are same under the ERC Act regime and under the EA 2003 regime. Though generation under the ERC Act 1998 was a licensed activity and under the EA 2003, the requirement of a generator to obtain a license is not mandated, it cannot be held that a generator has been given absolute freedom to sell power as per its commercial interests. Generation is a de-licensed activity under the EA 2003 regime so far as setting up of generating stations is concerned. Regulatory control subsists over the activities of a generator so far as power procurement processes are concerned in the EA 2003 regime. It was vehemently argued that while approving the PPA as submitted by TPC (PPA between TPC(G) and TPC(D)) and by BEST (PPA between TPC(G) and BEST), if the Commission comes to a finding that while approving the quantum as agreed to be supplied thereunder, if the consumer interests of another non-contracting distribution licensee are getting adversely affected, the Commission may dispense with the said PPAs in exercise of the wide powers granted under Section 86(1)(b), the scope of which power stands as provided under the Dhabol judgment. The consideration of the Commission is to arrive at an equitable balance of the interest of the consumers of all the parties involved, i.e. REL, BEST and TPC(D).

7. On the aspect of whether REL was vigilant or not so far as attempting to secure the interests of its consumers is concerned, Counsel referred to the various correspondences annexed to the present petition which disclose the intent of REL to make TPC agree to enter into a PPA with it (Annexure No.s 1, 2, 3 and 4). The Commission enquired whether the finalization of the PPAs submitted by TPC (Case No. 88 of 2006) and BEST (Case No. 87 of 2006) can be kept pending on account of the efforts made by REL to execute a PPA? Counsel submitted that a PPA cannot be presented by REL for approval of the Commission unless the exiting tri-partite dispute is resolved.

The hearing in the matter was adjourned thereafter.

## **Record of Proceedings held on September 7, 2007**

Shri. J.J. Bhatt appeared for REL, Shri. Sitesh Mukherjee appeared for TPC and Shri. Ramji Shrinivasan appeared for BEST.

2. Shri. Sitesh Mukherjee, Counsel for TPC, submitted that the contentions raised by REL under the present petition have been supported by material documents which were in place, and judgments which were in force, at a time prior to the enactment of the EA 2003. Shri. Mukherjee submitted that prior to the EA 2003 regime, generation of electricity was an activity under strict regulatory control. Shri. Mukherjee referred to the provisions under Chapter V (Sections 28, 29, 30 and others) of the Electricity (Supply) Act, 1948, whereunder the generating licensee had to obtain the prior concurrence of the Central Electricity Authority and the State Government in order to set up generating stations. It was further pointed out that under Section 15A(3) of the said Electricity (Supply) Act, 1948, the area of operation was to be specified by the State Government and restrictions were also imposed on the aspect of sale of power from generating plants as well. Counsel further submitted that the ambit of the said regulatory control on a generating licensee was further widened under the Electricity Regulatory Commissions Act, 1998, as under Section 22(2) of the said Act, State Electricity Regulatory Commissions could be empowered by the State Government to regulate the investment proposal for generation. It was submitted that under Regulation 73 of the MERC (Conduct of Business) Regulations, 1999, any generating licensee proposing to enter into agreement for supply of energy to any procurer, was mandated to obtain the prior approval of the Commission with regard to the quantum of the power intended to be supplied, and the transfer price at which such power was intended to be supplied. Counsel further cited Regulation 72(a) whereunder no generating company, except which is under a composite scheme for inter-State generation, can sell power at such rates contrary to rates specified by the Commission. Counsel submitted that the concluding observation of the High Court of Judicature at Bombay in the Dhabol Judgment, paragraph 54 thereof, had placed substantial reliance on the said Regulations 72(a) and 73 of the MERC (Conduct of Business) Regulations, 1999. It was further argued by Counsel that the said Dhabol Judgment held that sufficient powers have been vested upon the Commission to modify the terms and conditions in the power procurement process between a generating company and a procurer. However, the said Judgment did not hold that sufficient powers vested with the Commission to direct a generating company to enter into a PPA with a particular entity. It was not held in the Dhabol Judgment that the Commission has powers to direct two private parties to enter into a contract, more so, against the will of the said parties.

3. Shri. Mukherjee submitted that REL has advanced three contentions while interpreting the powers of the Commission under Section 86(1)(b) of the EA 2003, in light of the ratio in the Dhabol judgment. The first contention is that the Commission has powers to direct the distribution licensee not to procure power. The second contention is that the Commission has powers to direct a generating company not to sell power to a

distribution licensee. The third contention is that the Commission has powers to direct as to whom a generating licensee shall sell power. It was submitted by Shri. Mukherjee that under the EA 2003 regime, the generator is empowered to set up generating stations wherever the generator desires to, subject of course with conformity to applicable regulations, and regulatory control does not subsist on the aspect as to whom the generator may sell power, and execute a PPA in accordance therewith. With reference to the judgment dated December 22, 2006 passed by the Appellate Tribunal for Electricity in Petition No. 1 of 2005 and I.A. Nos. 1 & 32 of 2006 [*Gajendra Haldea Vs. CERC & Ors.*], from which appellate proceedings are *sub judice* before the Hon'ble Supreme Court, it was submitted that while the accepted position of law is that the Commission is not vested with the power to fix the tariff/price rate at which a generator of one State may sell power to an inter-State electricity trader, the generating company comes within the ambit of the regulatory jurisdiction of a State Electricity Regulatory Commission, on its submitting a PPA for approval. The regulatory control, in this regard, lies over the aspects of tariff/transfer price and other related clauses of the PPA. The Commission has even been vested with the power to modify the terms and conditions of the said PPA, and even limit the contracted capacity of power, on a finding that supply as contracted for is in excess of the actual need of the procurer/distribution licensee. Counsel undertook to file a copy of the judgment passed by the Appellate Tribunal for Electricity in *Small Hydro Power Developers Association & Ors. Vs. Andhra Pradesh Electricity Regulatory Commission & Ors.*, wherein it was held that a generating company cannot be forced to execute a PPA, which has been substantially modified by a State Electricity Regulatory Commission in exercise of Section 86(1)(b) and applicable regulations thereof, which modifications are not agreed upon by the generating company. In this context, Counsel submitted that the relief sought by REL under the present petition seeking favourable allocation of the generating capacity of TPC(G) is misconceived and should be rejected.

4. On the aspect of the relationship that existed between REL and TPC over the past eighty years, as regards REL being a consumer of TPC, Shri. Mukherjee referred to the provisions under Section 2(c) of the Indian Electricity Act, 1910, in comparison with the corresponding provisions under Section 2(15) of the EA 2003. Counsel submitted that while during the period prior to the enforcement of the EA 2003, a "consumer" was any person *who is supplied* with energy, under the EA 2003 regime, a "consumer" is any person *who is supplied with electricity for his own use*. In respect thereof, since the EA 2003 envisages a paradigm shift in the concept of an electricity consumer, REL, not being a consumer of TPC under existing laws, cannot bind TPC with obligations in line with the obligations TPC must meet for its consumers. It was vehemently argued by Counsel that the old legal framework has no force in the present scenario to register dual obligations on TPC and REL vis-à-vis supply and purchase of power. Counsel further submitted that even under the earlier regime, i.e., prior to the enactment of the EA 2003, the incidence of sale of power by TPC to REL was never in pursuance of any registered PPA. Thus, in the present scenario of the EA 2003 regime which mandates the requirement of a PPA, the said past relationship of TPC and REL is further on a looser footing. Even further, the said past relationship, in essence, does not establish any commitment from REL to avail continuous supply from TPC. The occasions of purchase

of power by REL from TPC were in pursuance of intermittent shortfall, owing to failure in the generation of its requisite quantum from its own generating stations at Dahanu. It was commercially expedient for REL from entering into a PPA with TPC even for drawal of minimum off-take, or from streamlining its take-or-pay purchase obligations. Prior to the setting up of the said generating stations at Dahanu, REL used to draw about 4409 MU of power from TPC which drastically reduced to about 2038 MU from TPC from the year 1995, with the commencement of generation at the Dahanu generating station. The casual approach of REL which viably juxtaposed with its commercial interests, should be primarily considered by the Commission. Further, TPC catered to the intermittent energy requirements of REL based only on generation availability. Counsel referred to the Tariff Regulations and submitted that considering the casual past and continuous approach of REL vis-à-vis the applicable laws and regulations, the attempt of REL to claim a right of generation allocation, on the pretext of the adverse jeopardy that would inevitably be caused to the interests of its consumers, is a “dangerous contention” that deserves no consideration from the Commission. It was further pointed out that having not even submitted a long-term power procurement plan under Regulation 23 of the Tariff Regulations, REL has attempted to shift its onus/burden of protecting the interests of its consumers on the Commission. It was submitted that under the present petition, REL has sought the aid of the Commission to cause a PPA with TPC in order to protect the said interests of its consumers. REL has initiated such proceedings having flouted its statutory obligation to procure power and pre-plan for its consumers, as well as the repeated directions and orders of the Commission in that regard. It was also submitted that REL, as a distribution licensee, is expected to adhere to the standards of performance specified by the Commission and further under the provisions under Regulations 8.3.2 and 8.3.3 of the MERC (General Conditions of Distribution Licence) Regulations, 2006.

5. Shri. Mukherjee further submitted that under the present proceedings, REL has attempted to make out a case that as per the correspondence exchanged between REL and TPC last year, TPC has agreed upon a “sharing ratio” of its generating capacity with REL and BEST, vis-à-vis TPC(D) and provide power upwards of 500MW to REL. Counsel referred to a series of contemporaneous email correspondences that has been exchanged between REL and TPC and annexed to the present petition. Counsel referred to the contents of the email sent by REL to TPC on June 27, 2006, and the immediate response of TPC to REL vide email dated July 4, 2006, and the letter dated January 5, 2007 sent by TPC to REL, which hold that the initiative of REL to enter into a PPA with TPC was only in process at the relevant time, and no finality was reached as to the terms and conditions of the same, including inter alia the issue of allocation of generation capacity.

6. The Commission enquired of Counsel whether TPC, at the relevant time when a PPA with BEST was attaining finalization, had taken any conducive measures, in all fairness, to check the requirement of non-contracting distribution licensees to whom TPC was supplying prior to the EA 2003 regime. Counsel submitted that so far as equity and fairness is concerned, the relationship of TPC with REL and the relationship of TPC with BEST cannot be placed on the same footing. Counsel referred to relevant extracts from a

PPA that was entered into between TPC and BEST in the year 1907, whereunder reciprocal commitment of TPC to augment its generating stations in order to supply the total energy requirement of BEST (without limit to the time of demand and the quantum of requirement) vis-à-vis the commitment of BEST not to set up its own generating stations or avail power from a third party, in the event TPC was in a position to supply power to BEST, had been established. Such a corresponding contractual arrangement was never in force between TPC and REL. Thus, so far as equity and fairness is concerned, BEST genuinely should be placed in a favourable position as against REL and not the contrary. It was submitted that, in conformity with the erstwhile relationships of TPC with BEST and REL, TPC is at present willing to supply the balance power to REL, after meeting the requirement of BEST and TPC(D). As such, TPC is not pressing for any dispensation for BEST contrary to past practice and TPC is not taking any advantage of the paradigm shift of the regulated regime under the EA 2003 and dismissing the chance of REL to avail supply of power from TPC. It was vehemently contended by Counsel that even in the present scenario, TPC is willing to execute a PPA with REL for the supply of 500 MW. Counsel submitted a compilation of judgments passed by the Supreme Court and referred to one judgment which held that equity cannot supplant law but should only supplement law.

7. The Commission observed that considering that both REL and BEST were consumers of TPC, in terms of the definition of consumer as provided under the Indian Electricity Act, 1910, TPC was required to meet the total energy requirement of BEST and REL. In view thereof, should it not have been judicious on TPC to provide balanced commitment to both BEST and REL, whether or not a PPA was in place with REL or not? The Commission further referred to the Order dated October 10, 2002 passed in Case No. 14 of 2002 (In the matter of applications dated March 5, 2002 filed by the South Indian Education Society in respect of adjudication of differences between BEST and the consumer) and the subsequent observations of the Appellate Tribunal for Electricity and enquired of Counsel as to the impact of the historical relationship of TPC with REL and BEST, in the EA 2003 regime. The Commission further referred to the shortage situation prevalent during the 1970s, and enquired of Counsel whether the manner of allocation of generation capacity employed at that relevant time may be considered in the present scenario. It was further enquired by the Commission as which party had decided the sharing ratio when the generation allocation was shared by REL and BEST to tide over the erstwhile supply shortfall in the 1970s? Counsel submitted that the scope of duty of TPC for BEST has always been on the premise of a PPA which is not the case with REL. It was submitted that even prior to the period before the enforcement of EA 2003, the obligation of energy supply contemplated the creation of PPA. The incidences of supply by TPC to REL were only on a “no-commitment basis” and therefore the position of REL and BEST, though consumers of TPC, was substantially different.

8. It was submitted by Shri. Ramji Shrinivasan, Counsel for BEST, that the sharing ratio of the allocation of generation capacity during the shortfall situation prevalent in the

1970s was determined by the Government of Maharashtra as per the directions of the Hon'ble Supreme Court. It was further submitted that irrespective of the historical arrangements between TPC and REL, post the enforcement of the EA 2003, the present issues have to be adjudged by the Commission without being bound to adopt the manner in which a similar problem was addressed in the past. It was argued that a right cannot be claimed for at a relevant point of time, based on the circumstances prevalent at a time one hundred years ago. The continuation of a right should be considered in harmony with existing *lex loci* and not otherwise. On being enquired by the Commission, it was submitted that in the year 2001, in the proceedings pending before the High Court, Bombay in Writ Petition No. 916 of 2001 [*TPC & Anr. Vs. State of Maharashtra & Ors*], there was no authoritative finding made by any judicial authority on the rights of REL. It was submitted by Counsel for BEST that whatever happened in the erstwhile scenario is a different chapter which should have no binding effect in the EA 2003 regime.

9. The Commission enquired as to whether considering the prevalent shortfall of power, can TPC independently execute a PPA with any procurer, considering the powers of the Commission under Section 23 of the EA 2003 to issue appropriate directions upon a generating company? Shri. Mukherjee submitted that the provisions under Section 23 of the EA 2003 are in essence, identical to the provisions under Section 22(2)(b) of the Indian Electricity Act, 1910. Section 23 falls under PART IV of the EA 2003 which deals with issues connected with licensing from which the generator has been exempted from regulatory mandates. Issues connected with generation are under PART III of the EA 2003. Further, Counsel submitted that the marginal note to the said Section 23 relates to directions that may be issued on licensees and not on generating companies. In this regard, Counsel submitted that the marginal note to a section is a substantial internal aid to statutory construction and submitted certain judgments passed by the Hon'ble Supreme Court highlighting the importance of marginal notes in aid of the 'drift' of a section in a statute. Counsel further referred to the contents of Section 11 of the EA 2003 whereunder the Government may specify that a generating company shall, in extraordinary circumstances operate and maintain any generating station in accordance with its directions, and the Commission may offset the adverse financial impact of such directions on any generating company in such manner as it considers appropriate. The Commission while taking into account the submission made as regards the interpretation and applicability of Section 23 enquired of Counsel on the efficacy of approving the generation allocation as per the contents of a PPA but the powers of the Commission to issue directions upon BEST or REL (being distribution licensees) under Section 23 preventing the supply or consumption of any quantum beyond a certain specified limit, considering the prevailing power shortage in Mumbai. Counsel for TPC submitted that S.23 of the EA 2003 is a carry-over from S. 22(b) of the Indian Electricity Act, 1910, which was intended to prevent someone from getting supply and not for directing licensee to give supply to anyone. Counsel submitted that, at present TPC(D) is procuring power allocated for REL, from TPC(G) at a marginal cost (i.e. the highest cost of purchase). It was further submitted that appropriate market signal should be issued to a distribution licensee, during the prevalence of shortage, for the expeditious execution of a



PPA. It was further pointed out that the show of a last-minute desperation of not having an agreeable supplier is not expected from a private distribution company that is deemed to function with more competence, man-power and skill than a distribution licensee like BEST, which is a public undertaking. REL has set up merchant plants in the past. This reveals the capability that REL may demonstrate, and should not be otherwise seeking regulatory indulgence in order to secure a quantum of about 200 MW (Quantum of power claimed by REL less the quantum of power TPC is agreeable to supply to REL).

10. Shri. Ramji Shrinivasan, Counsel for BEST, submitted that the present petition is not maintainable and is an abuse of the process of law. It was contended that the reliefs sought for under the present petition have already been disallowed by the Commission under several past proceedings and thus, REL should be put to costs for initiating the present petition. Counsel submitted that secondly, the present petition suffers from severe laches and delay at the instance of REL. The present petition may have been preferred by REL two years ago and at the present juncture, when Case No. 87 of 2006 (in the matter of approval of PPA between TPC(G) and BEST) has already been finally heard, a further opportunity of being heard should not be allowed to REL to forestall the said power procurement process between TPC(G) and BEST. The present petition is a belated petition and cannot be allowed to obstruct the disposal of proceedings initiated without any such laches. The affidavit submitted by REL establishes nil vigilance in the aspect of complying with the EA 2003, the regulations framed thereunder and the subsequent orders of the Commission. It was submitted that under the present proceedings, REL has shown 'crocodile tears' to initiate a PPA with TPC with the aid of regulatory indulgence. It was vehemently contended that the said approach of REL in not taking appropriate measures to procure power and putting spokes in the wheel of BEST's initiative to execute a PPA with TPC, is a fit case for revocation of license.

11. It was submitted that a cautious interpretation of the first prayer sought by REL, under the present petition is that the Commission should exercise regulatory indulgence and 'work out a contract' for REL. The second prayer as sought for, is absolutely vexatious as considering the pending disputes of REL and TPC, how can REL seek to vitiate the PPA that BEST has desired to execute with TPC(G)? REL is not a party to the said PPA. Further, considering that BEST has complied with the Tariff Regulations framed under the EA 2003 regime and REL being the defaulter, the said prayer should be totally rejected. It was vehemently argued that even if the first prayer is granted in entirety in favour of REL, there is sufficient balance power available from TPC(G) to meet the requirement of BEST, for which BEST has proposed to enter into a PPA with TPC(G). The Commission should take note of the fact that under the proceedings under Case No. 87 of 2006, BEST has submitted that the actual requirement of BEST is upwards of 800 MW and BEST has initiated to execute a PPA with TPC(G) on the quantum agreed to be supplied by TPC(G). BEST has to further procure power from other sources to meet its total requirement. It was argued that while BEST has agreed to execute a PPA with TPC(G) for a quantum of power less than its actual requirement, what prevents REL to execute a PPA with TPC(G) for a quantum which is less than the

actual requirement of REL? The Commission needs to consider whether the conduct of REL is justifiable enough to seek such reliefs and whether any justification has been provided by REL to excuse the non-compliances of the specific directions and mandates issued by the Commission.

12. Counsel Shri. Shrinivasan submitted that primarily BEST should not have been impleaded in the present proceedings considering that a dispute on the supply of power of upwards 500 MW is between TPC(G) and REL, and BEST has no role to play in this dispute. Further, REL has not adduced any evidence to contend that the requirement of BEST for 800 MW from TPC(G) is 'malafide' or 'fanciful' or a 'figment of an imagination'. Without such a foundation being laid in the present proceedings or under the proceedings in Case No. 87 of 2006, it may be reasonably concluded that the second prayer has been sought to procrastinate the finalization of the PPA between TPC(G) and BEST. It was submitted that the present petition has been filed by REL on being denied any intervention to procrastinate the Technical Validation Session of the PPA between TPC(G) and BEST under Case No. 87 of 2006. Counsel submitted that the attempt of REL to forestall the PPA that is awaiting finalization between TPC(G) and BEST, is based on an "entitlement" that REL has over the generating capacity of TPC(G). The said term requires REL to sufficiently establish beyond reasonable doubt, the existence of such a right. It is well settled in legal jurisprudence that every right presupposes a corresponding duty. Had REL exercised its duty to establish a commitment from TPC(G) to be supplied with a certain quantum of power (whether entire requirement or not) vide a PPA, it could be understood to be possessed with a right of entitlement on the generating capacity of TPC, should TPC fail to supply REL as per contract. It was argued further that the demand projections submitted by TPC under its MYT Petition reveal that the consumption of BEST from TPC(G) is more than REL, which in all fairness establish a greater right of BEST towards a larger share of generation allocation.

13. Counsel argued that it is well settled that the historical position prior to the EA 2003 regime has no implication in the adjudication of the present proceedings and that under the EA 2003 regime REL and BEST should be treated on equal footing. The test for allocation of generating capacity shall only be on the basis of compliance with the requirements of EA 2003 and the regulations framed thereunder. Even for argument's sake, if the Commission desires to consider the historical aspect concerned with regard to whether REL or BEST had equal rights of entitlement to the generating capacity of TPC, the Commission shall consider that it is BEST which deserves dispensation and not REL. As pointed by Shri. Suresh Mukherjee, TPC was bound to supply the entire requirement of BEST vide a PPA executed in the year 1907 and no such agreement was executed by TPC(G) with REL. Supply of power to REL by TPC(G) over the past 80 years was that of incidental demand and this demand was based on the 'whims and fancies of REL'. Merely due to the fact that TPC(G) could meet the incidental demand of REL, as and when demanded for by REL, does not equate the position of REL with that of BEST. If at all REL has a right of any nature, REL may be said to have a right over the surplus power that is left over after TPC(G) meets the demand of BEST. It was further argued that the

‘agreement’ which BEST had with TPC(G) has more force of law than the ‘arrangement’ which REL had with TPC(G).

14. It was further contended by Shri. Shrinivasan that while the Tariff Regulations required submission of PPA within three months from the date of its enforcement, BEST had presented its PPA for approval prior to the said date of enforcement, considering the impact of the said regulations. Whereas, on the other hand, REL has not submitted any PPA for approval flouting the Tariff Regulations which, being subordinate legislation, has the force of a law. Counsel referred to Order dated December 9, 2005 passed by the Commission in Case No. 4 of 2003 (in the matter of additional outlets for drawl of power by REL from TPC) whereunder reliefs sought by REL for directions upon TPC to release additional outlets were rejected and a grace period of additional three months was provided to REL for submission of a PPA for approval. REL has not complied with the specific Order of the Commission. That was the occasion for initiating the present proceedings, if at all, and not two years later. At present, on the basis of negotiations that REL had initiated with TPC, REL has attempted to procrastinate the PPA of BEST and TPC(G). REL has throughout these negotiations adamantly maintained the stand that it will execute a PPA with TPC(G) only when TPC(G) promises to supply what is warranted by REL and not otherwise. This attitude has caused a reduction of surplus availability from 600 MW to 500 MW over the last two years. This amounts to total disrespect to the regulatory process and the duty to protect the interests of its consumers and a violation and breach of the licence that has been granted to REL. If at all REL had any substantial right of allocation of generation capacity, what prevented REL to prefer a substantive petition seeking to establish/determine such a right. While on the contrary, REL has only been diligent enough to prefer intervention applications in the proceedings filed either by TPC or BEST. Referring to the Order passed by the Commission on October 3, 2006 in Case No.s 25 and 53 of 2005 (In the matter of ARR Petition of REL for FY 2005-06 and ARR & Tariff Petition for FY 2006-07) and the Order dated April 24, 2007 in Case No. 75 of 2006 (Approval of REL's Distribution Business ARR for Control Period FY 2007-08 to FY 2009-10 & Retail Tariff For FY 2007-08) it was alleged that REL had conveniently adopted the policy of drawing power from its generating plants at Dahanu and pressing for supply from TPC only to meet peak demand. Under the present petition, REL has attempted to convert the said interim arrangement into a perpetual arrangement. An interim arrangement sets forth the manner for tiding over the interim demand while the Tariff Regulations required the creation of a PPA for long-term duration. REL cannot be put at par with BEST which has complied with the law to protect the long-term interests of its consumers.

15. On the import of the Dhabol judgment vis-à-vis the contentions of REL that the Commission has powers to modify the terms and conditions of a PPA under Section 86(1)(b) of the EA 2003, it was submitted by Shri. Shrinivasan that if such an unacceptable construction was indeed applicable, the same should be operative at the instance of REL on a PPA that REL has submitted for approval and not a PPA which BEST has submitted for approval. Referring to the provisions under Section 22(1)(c) of

the Electricity Regulatory Commissions Act, 1998, vis-à-vis the provisions under Section 86(1)(b) of the EA 2003, Counsel submitted that the significant inclusion of the words “through agreements for purchase of power” in the said Section 86(1)(b) makes the incidence of a PPA a legislative mandate. REL should not be allowed to escape the meshes of applicable law under the shelter of the Dhabol judgment which was held in a regime not requiring mandatory execution of a PPA.

16. Counsel further referred to the Order passed on December 9, 2005 in Case No. 4 of 2003, as referred above, whereunder an observation has been made by the Commission that the “..... prior to implementation of the Electricity Act 2003, open access to transmission network was neither available to distribution licensees nor to consumers. Therefore, it was incumbent on the distribution licensee, in this case REL, to procure power from the bulk licensee, i.e., TPC. However, now licensees are permitted to procure power from any source subject to availability of transmission capacity. The EA 2003 provides flexibility to REL to procure from any other source, as well as to TPC to sell power to any consumer or to any licensee other than REL” and further “Though the Commission has addressed this issue in its Order on licences, this situation is bound to create uncertainty about availability of power to Mumbai consumers. Therefore, the Commission hereby directs both the parties to enter into an agreement within three months of this Order to ensure long-term availability of power to Mumbai consumers.” The Commission passed an Order on July 7, 2006 in Case No. 27 of 2005 and held that the parameters for approval of a PPA are in the nature of financial implications of the PPA and not on all the terms and conditions of any PPA. A further reference was made to the MYT order dated April 25, 2007 in Case No. 75 of 2006, where the specific request of REL to establish a capacity allocation was rejected by the Commission.

17. Counsel Shri. Shrinivasan submitted on the import of the doctrine of legitimate expectation vis-à-vis promissory estoppel. It was submitted that REL has attempted to claim rights in the nature of promissory estoppel, while contending the existence of rights in the nature of legitimate expectation. Further, it was argued that the conduct of REL has been in the nature of a ‘casual buyer’ against which no legitimate expectation vests. Counsel added that generation from REL-G is cheaper, and if there has to be any allocation of generation capacity, then REL-G’s generation capacity should also be pooled and allocated.

18. Counsel concluded his arguments requesting an expeditious disposal of the present proceedings as on account of the procrastination caused to the finalisation of the PPA between TPC(G) and BEST, BEST has suffered undue financial losses.

19. Dr. Ashok Pendse, Mumbai Grahak Panchayat, submitted that while each distribution licensee in the State of Maharashtra seeks to protect the interests of its own consumers, the Commission should note that such does not necessitate one set of consumers to subsidize another set of consumers. Further, it was submitted that unlike the situation in other States, the State of Maharashtra is being serviced by two private

distribution companies. Both TPC and REL should ensure a solution to the present dispute and supply power to their consumers. Dr. Ashok Pendse added that REL has not proved that adequate efforts have been made to source power from outside.

20. Shri. J.J. Bhatt, Counsel for REL, submitted that as per the arguments advanced by Shri. Sitiesh Mukherjee, it has been admitted that the Commission has the jurisdiction to restrict a distribution licensee from procuring a quantum of power over the actual demand of the said licensee. Further, as per the arguments advanced by Shri. Shrinivasan that REL should have entered into a PPA with TPC(G) for supply of 500 MW and thereafter sought regulatory indulgence for increase in quantum, it has been conceded that the Commission has jurisdiction to direct a generator to supply power to a distribution licensee over the quantum agreed upon by the generator. It was submitted by Shri. J.J. Bhatt that Section 86(1)(b) by using the word “including” does not mandate the execution of PPA by the distribution licensee and the Commission is well authorized to regulate the “electricity purchase and procurement process”. The said Section 86(1)(b) has refrained from the usage of the word “shall”, and therefore a distribution licensee is not under any mandate to execute PPA with a generator. In this regard, Counsel submitted that REL is not relying on the Interim Order dated December 9, 2005 passed in Case 4 of 2003. It was pointed out by the Commission that the contention made by Shri. Shrinivasan was that REL should have found it expedient to enter into a PPA reserving the surplus power available at TPC’s end. It was observed by the Commission that REL should employ its best measures and take appropriate steps in order to safeguard the interests of its own consumers. Counsel for REL referred to the allegations made by Shri. Shrinivasan with respect to negligence and laches on the part of REL to initiate a PPA, and submitted that the activity of BEST, REL and TPC should be compositely assessed by the Commission. The initiative of REL to enter into a PPA with TPC has a relation with the initiative of BEST to enter into a PPA with TPC. Since TPC had already agreed to provide a larger capacity allocation in favour of BEST, REL was left with a quantum that does not meet the actual need of REL. The consensus between a generator and a distributor on the aspect of quantum of supply is primary, based on which a PPA can be entered upon. Unless that is fixed, REL is incapacitated to present a PPA for approval of the Commission. It was submitted that the regulatory powers of the Commission cannot be used to compel REL to enter into a PPA with TPC whether or not the actual demand of REL may be met or not. The Commission observed that there was no bar on REL from entering into a long-term power purchase agreement with other sources, in case TPC was unable to supply the requisite quantity, and enquired from REL, whether the Commission was expected to find a generation Company for REL to enter into a PPA? It was contended that if this regulatory approach is adopted then it shall not be able to meet a commercial equilibrium within the licensees and generators in Mumbai.

21. Shri. Sitiesh Mukherjee submitted that TPC shall file rejoinder to the reply filed by REL in Case No. 88 of 2006 on September 11, 2007.

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