

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 87 of 2006, Case No. 88 of 2006 and Case No. 30 of 2007

In the matter of
BEST's Petition for Approval of Revised Power Purchase Agreement between BEST and TPC; TPC's Petition seeking approval of proposed internal capacity allocation from its generation division to its own distribution division; and dispute raised by REL for adjudication under the provisions of Section 86(1)(f) of the Electricity Act, 2003.

**Dr. Pramod Deo, Chairman
Shri. A. Velayutham, Member
Shri. S. B. Kulkarni, Member**

ORDER

Dated: 6th November, 2007

Case No. 87 of 2006:

This case has been filed by Brihan-Mumbai Electric Supply and Transport Undertaking (“BEST”) of the Municipal Corporation of Greater Mumbai, for seeking approval of a proposed Power Purchase Agreement (“PPA”) with the generation division of The Tata Power Company Limited (“TPC” or “TPC(G)”) under the provisions of Regulation 24 of the MERC (Terms and Conditions of Tariff) Regulations, 2005 (“Tariff Regulations”).

Case No. 88 of 2006:

This case has been filed by TPC, for seeking approval of proposed internal capacity allocation from the generation division of TPC to its own distribution division under the provisions of Regulation 24 of Tariff Regulations.

Case No. 30 of 2007:

This case has been filed by Reliance Energy Limited (REL”) raising a dispute as regards approval of the aforesaid PPA between BEST and TPC and as regards the aforesaid internal capacity allocation from the generation division of TPC to its own distribution division, for adjudication under the provisions of Section 86(1)(f) of the Electricity Act, 2003 (“EA 2003”).

The above cases have been clubbed together as there are certain common points, while in some cases individual points have been advanced. REL is a contesting party as an intervenor in Case No. 87 of 2006 and Case No. 88 of 2006 and has raised a dispute under Case No. 30 of 2007 qua the power purchase / allocation covered under Case No. 87 of 2006 and Case No. 88 of 2006. Since the dispute raised by REL impinges directly on the quantum of power purchase to be contracted between TPC-G and BEST and between TPC-G and its own distribution division, it would not be appropriate to deal with the three Cases separately and in isolation. Hence, the Common Order.

Factual matrix

The facts leading to the present cases are summarized as under:

I. Case No. 87 of 2006:

A. DIRECTIVES UNDER ORDER DATED JULY 07, 2006 (CASE NO. 27 OF 2005) AND BEST’S SUBMISSION IN RESPECT OF REVISED PPA:

(1) BEST vide its Petition dated December 27, 2006, submitted a Revised Power Purchase Agreement (PPA), Bulk Power Transmission Agreement (BPTA) and Connection Agreement (CA) with TPC, to the Commission for its approval. BEST in its Petition submitted that it has revised its Power Purchase Agreement in accordance with the directives given by the Commission in its Order dated July 07, 2006 in the matter of

BEST Petition for Approval of Power Purchase Agreement between BEST and TPC (Case 27 of 2005).

(2) Previously, BEST vide its Petition dated 13th July, 2005 (Case 27 of 2005) had submitted a Draft Power Purchase Agreement to be executed between TPC and BEST for approval of the Commission.

(3) The petition was disposed of by the Commission by its Order dated July 07, 2006. In the Order the Commission directed BEST to submit revised Draft Power Purchase Agreement to be executed between TPC as Generation Company and BEST as Distribution Licensee after duly incorporating the additional provisions and changes suggested in the Order.

(4) The directives issued by the Commission in its Order dated July 07, 2006 and the compliance/ correction by BEST and TPC in the revised Power Purchase Agreement are discussed below:

(a) **Nature of Agreement**

The Commission's Order dated July 07, 2006 stipulates as follows:

“23. The draft Power Purchase Agreement submitted by BEST is in the nature of Bulk Supply Agreement proposed to be executed between TPC as bulk supplier and BEST as Distribution Licensee for bulk supply of power from TPC to BEST. The Commission is of the opinion that to ensure the consistency with the Commission's Regulations including the Commission's Order on transmission pricing framework dated 27th June 2006, the Power Purchase Agreement should be executed between TPC as Generating Company and BEST as Distribution Licensee. Further, a separate transmission agreement should be executed between TPC Transmission Business and BEST for usage of TPC Transmission network. The Commission directs BEST to submit the revised draft of Power Purchase Agreement to be executed between TPC Generation business and BEST as distribution licensee for approval of the Commission.

24. Further, the draft PPA envisages the delivery points as Interconnection points at TPC receiving stations/sub-stations. As the PPA is required to be executed with the TPC Generation Business, the delivery points under the PPA needs to be modified accordingly in the revised draft of PPA.”

BEST’s submission in the revised Petition

BEST submitted revised draft PPA between BEST and TPC-G, Bulk Power Transmission Agreement between TPC-T and BEST and Connection Agreement between TPC-T and BEST.

The relevant clause from the revised PPA, submitted by BEST, regarding the delivery points are reproduced below

“4.1.3 The contracted capacity allocation to BEST shall be from overall aggregate capacity of TPC (G) without any reference specific generating units i.e. the allocation of 800 MW will be constituted through share from each generating units as shown in the table above. Subject to availability, Scheduling and Despatch Code as may be specified by SLDC under State Grid Code, TPC (G) shall operate its power plants and dispatch generation from them such that BEST load of 800 MW (at TPC’s generator terminal) is met.

4.3 Obligation to Supply and Take Energy

TPC (G) shall be obligated to supply to BEST its requirement to the extent contracted capacity of 800 MW at the generator terminals subject to Article 4.1.3. This will amount to 800 MW less the normative auxiliary consumption of the generating station at delivery points. BEST shall be obligated to take from TPC (G) its requirements to the extent of 800MW as provided in this Agreement.”

(b) **Basis of projections of sales to mill lands:**

The Commission’s Order dated July 07, 2006 stipulates as follows:

“27. Based on details provided in Draft PPA, the Commission observed that currently, the power to mill land is being supplied by TPC and from FY 2008-09 BEST has included the power requirement of mill land as part of BEST’s requirement. BEST has not submitted any reasons for including the power requirement of mill land as part of BEST’s requirement from FY 2008-09 onwards. Further, BEST has also not submitted the basis and details of year-wise load projections included in PPA. The Commission directs BEST to submit the basis and details of year-wise load projections and also submit the reasons for including the power requirement of mill land as part of BEST’s requirement.”

BEST’s submission in the revised Petition

BEST submitted that the projections are based on historical trend of data of previous five years. BEST also submitted the basis of projections of sales to mill lands with assumptions made on FSI, time frame for development, realization of loads, ratio of commercial and residential loads, existing planning norms, load factor, power factor and distribution loss.

(c) **Firm Capacity**

The Commission’s Order dated July 07, 2006 stipulates as follows:

“29. Based on the conditions in Draft PPA, the Commission observes that the commitment of TPC to supply energy to BEST is conditional as it refers to continuation of existing standby arrangement with erstwhile MSEB. Further, the draft PPA envisages that TPC shall reserve 800 MW solely for BEST and meet the incremental load from either own generation or power purchase. As observed in above sections, the PPA is to be executed between TPC as Generation Business and BEST as distribution licensee. In such case, how can TPC meet the incremental load of BEST by power purchase, as TPC Generation Business has not obtained any trading license for trading of power. Therefore, the Draft PPA should provide the firm capacity, which will be available to BEST under the PPA without stipulating any conditions of standby, etc.”

BEST's submission in the revised Petition

BEST submitted that the revised draft PPA provides firm capacity without stipulating any conditions of standby, etc.

(d) **Adherence to Bidding Process or Terms and Conditions for Tariff under Part E of Tariff Regulations**

The Commission's Order dated July 07, 2006 stipulates as follows:

"30. BEST during the hearing submitted the reasons for not adopting the competitive bidding approach for meeting its long term power requirement.

31. BEST during the hearing submitted that as the Draft PPA provides that the tariff shall be determined by the Commission, it adheres to the MERC (Terms and Conditions of Tariff) Regulations. BEST further submitted that the Commission will be the sole authority for determining tariffs and considering uncertain energy scenario worldwide and due to uncontrollable factors, it is extremely difficult to arrive at projected power purchase rate band. BEST further submitted that BEST and TPC would abide by the tariffs and power purchase rates set by the Commission from time to time. The Commission is of the opinion that the Draft PPA to be executed between TPC Generation Business and BEST should include the principles of tariff determination in accordance with the Part E of MERC (Terms and Conditions of Tariff) Regulations, 2005. Further, the Draft PPA should also include the power purchase rate band for purchase of power by BEST from TPC Generation Business."

BEST's submission in the revised Petition

BEST submitted that provisions have already been made by BEST on these aspects and the revised draft PPA provides for determination of Tariff under MERC (Terms and Conditions of Tariff) Regulations, 2005 as applicable to Generating Companies. BEST further submitted that as the tariff is to be determined and approved by the Commission, no case arises for setting a 'rate band' in the PPA.

(e) **Availability of capacity in Intra-State Transmission System**

The Commission's Order dated July 07, 2006 stipulates as below:

“32. BEST is directed to submit along with the revised Draft of PPA, the details of availability of capacity in intra-State transmission system for next 10 years considering the load projections provided in the PPA after obtaining these details from the Transmission Licensee with whom, BEST proposes to enter into a transmission agreement.”

BEST's submission in the revised Petition

Regarding availability of capacity in intra-State Transmission System, BEST submitted the copy of letter submitted by TPC to M/s Deloitte (the Commission's Consultants for determination of the transmission pricing framework), regarding information on Transmission Lines. Vide letter dated August 24, 2005, TPC has provided M/s Deloitte the detailed information regarding Transmission lines, date of commissioning, peak loading, average loading, etc.

Detailed information regarding Transmission Lines

Sl.	Voltage level (kV)	Name	Single/ Double Ckt.	Year of Comm.	Peak Line Loading in MW or %	Avg. Loading in MW or %
1	110	Ambarnath – Kalyan 1,2	D	1971	84	32
2	220	Bhira-Dharavi 7,8 *	D	1995	154	110
3	110	Bhira-Khopoli 1	D	1930	40	
4	110	Bhira-Khopoli 2	D	1958	40	
5	110	Bhivpuri-Ambarnath 1,2	D	1982	60	
6	110	Borivli-BMC	S	1976	15	5
7	110	Borivli-Kolshet	S	1972	20	15
8	110	Borivli-Malad 1,2	D	1985	102	53
9	110	Borivli –MSEB 1,2	D	1971	120	60
10	110	Chola – Kalyan 1,2	D	1929	43	19

Sl.	Voltage level (kV)	Name	Single/ Double Ckt.	Year of Comm.	Peak Line Loading in MW or %	Avg. Loading in MW or %
11	110	Dharavi-Vikhroli	D	1982	94	74
12	220	Kalwa –Salsette 3,4	D	1992	250	150
13	110	Kalwa-Kalyan	S	1960	25	15
14	110	Kalyan-Kalwa-Salsette	S	1999	25	15
15	110	Kalyan-Salsette	S	1999	25	15
16	110	Khopoli-Chembur*	S	1971	67	45
17	110	Khopoli-Bhivpuri Tie	S	2003	30	
18	110	Khopoli – Mankhurd	S	1994	75	56
19	110	Malad-Versova 1,2	D	1987	120	60
20	110	Parel-Mankhurd	S	1994	70	52
21	110	Salsette-Borivli 1,2	D	1996	250	115
22	110	Salsette-Dharavi	S	1958	68	32
23	110	Salsette-Vikhroli	S	1982	45	35
24	110	Salsette-Saki 3,4	D	1971	100	50
25	110	Salsette – BMC	S	1976	15	5
26	110	Salsette – Kolshet	S	1972	20	15
27	220	Trombay-Carnc 5,6*	D	1987	226	150
28	220	Trombay-Dharavi 5,6*	D	1992	293	200
29	220	Trombay – Salsette 1,2	D	1993	145	130
30	220	Trombay – MSEB Tie 1,2	D	1982	100	
31	110	Trombay – Dharavi 1,2	D	1957	80	62
32	110	Trombay-Parel 1,2	D	1958	85	55
33	110	Trombay-Parel 3 / Carnac 2*	D	1962	47	35
34	110	Trombay – Parel 4	D	2000	68	50
35	110	Trombay – Chembur 3	D	2000	60	44

Sl.	Voltage level (kV)	Name	Single/ Double Ckt.	Year of Comm.	Peak Line Loading in MW or %	Avg. Loading in MW or %
36	110	Trombay-Carnac 1/3	D	1962	62	0

* Partly Cable

Details of Cables

Sl.	Voltage Level (kV)	Name	Single / Double Ckt.	Year	Peak line Loading in MW or %	Avg. Loading in Mw or %
1	110	Trombay Carnac 1 & 2	D	1957		
2	110	Trombay Parel-3		1961		
3	110	Parel – Carnac		1961		
4	110	Trombay-Chembur 1& 2	D	1965		
5	110	Dharavi - Mahalaxmi		1969		
6	110	Parel-Maxalaxmi		1969		
7	110	Parel-Chembur Line 1		1969		
8	110	Dharavi – Carnac Line 3		1976		
9	110	Khopoli-Chembur Line 2		1976		
10	220	Trombay Carnac 5 & 6	D	1988		
11	110	Carnac Backbay 1 & 2	D	1988		
12	220	Trombay Dharavi 5 & 6	D	1993		
13	220	Bhira Dharavi 7 & 8	D	1992		
14	110	Parel Grant Road		1994		
15	110	Carnac Grant Road		1994		
16	220	Salsette-Borivali 1 & 2	D	1996		
17	110	Parel Mahalaxmi		1997		
18	220	Dharavi Backbay	D	2001		

(f) **Penalty Clause**

The Commission's Order dated July 07, 2006 stipulates as below:

“34. The Draft PPA stipulates that BEST will not buy its energy requirement from any other source except when TPC fails to supply the energy requirement. The reason given for non-incorporation of penalties (exploring possibilities of more economical option) is contradictory to the provisions of PPA. The Commission is of the opinion that PPA being a commercial agreement between the parties should be executed on arm's length basis and the PPA should provide for Liquidated Damages in case of non supply of committed power by TPC and the PPA should also provide for take or pay obligations in case BEST is unable to draw the committed power under the PPA. Further, the PPA should also provide for penalties in case of termination of PPA for default by either party.”

BEST submission in the revised Petition

BEST submitted that Clause 4.4 under Article 4 of PPA on 'Under Obligation to supply and take energy' provides for surcharge for non-supply of contracted capacity. Also Article 13 on 'Termination on Event of Default' has provision for payment of compensation. The provisions under Article 4.4 and Article 13 are reproduced below:

“Article 4.4: Surcharge for non supply of contracted capacity

2.4.1 *Till the time MERC specify billing and settlement code for intra-State transmission, or ABT on intra-State Transmission System, the following provisions shall govern the payment of surcharge by TPC(G) for not generating and supplying contracted capacity:*

2.4.2 *Availability for recovery of full fixed cost in case of TPC's thermal and hydro generating stations shall be as per MERC (Terms and Conditions of Tariff) Regulations, 2005*

2.4.3 *In case the availability of generating stations of TPC(G) falls below 85% on annual basis, the TPC(G) shall compensate BEST at the rate of 10 paise per kWh for computed as under.*

*Annual Surcharge in Rs = (85%- Actual Availability) **

*8760*800*1000*0.1)*

The surcharge for non-supply of contracted capacity shall be independent of any recovery of annual fixed charges based on target availability.

Article 13: Termination on event of default

13.1 This agreement may be terminated by BEST as provided hereunder in the event of following defaults by TPC (G)

13.1.1 TPC is adjudicated bankrupt or dissolved or a receiver is appointed for its assets or proceedings for TPC's liquidation (except for the purpose of amalgamation or restructuring on terms not detrimental to BEST) are continuing more than six (6) months after they were commenced

13.1.2 Failure for a continuous period of 90 days relating to obligations to supply under Article 4.2

13.1.3 Failure relating to obligations for contracted capacity under Article 4.1 without taking remedial action within a period of 30 days

13.2 This agreement may be terminated by TPC(G) as provided hereunder in the event of defaults by BEST

13.2.1 BEST is adjudicated bankrupt or dissolved or a receiver is appointed of the whole or any part of its assets or proceedings for its liquidation (other than for the purpose of amalgamation or restructuring on terms not detrimental to TPC(G)), which are continuing more than six (6) months after they were commenced

13.2.2 Failure of the BEST to make due and admissible payment of TPC(G) for consecutive two months under Article 10”

B. TECHNICAL VALIDATION SESSION IN CASE NO. 87 OF 2006:

(5) The Technical Validation session in the matter was held on April 18, 2007. The list of participants who attended the Technical Validation Session is given at **Annexure I**.

During the Technical Validation Session, BEST made a presentation on the following aspects:

- a) The requirement for Long Term PPA with TPC for a period of 10 years
- b) Compliance of various directives issued in the Commission's Order dated July 17, 2006, regarding Nature of Agreement, Delivery Points, Tariff Regulation compliance, Transmission capacity, etc.
- c) Yearly load profile, load curve and long term demand forecast in relation to the contracted capacity of 800MW
- d) Assumptions made for load due to Mill land development

(6) Subsequent to Technical Validation Sessions, the Commission vide letter dated April 20, 2007 directed BEST to submit some additional information and data gaps. BEST responded to the queries raised by the Commission through its submission on Affidavit dated May 14, 2007. The queries raised by the Commission and BEST's response to the queries are given below:

- a. **Justification for entering into a long term contract for 10 years taking into account demand forecast during peak and off-peak hours, and analysis of other sources of power and availability of transmission capacity in future.**
- b. **The demand forecast for the next 10 years with the basis and assumptions along with the financial model used for demand forecasting.**

BEST's Response

BEST submitted that they had carried out evaluation of all possible options, regarding availability of alternate sources of power, power availability in western region, situation in the State of Maharashtra and infrastructure constraints for procuring power from various places.

Considering these factors, BEST has entered into PPA for 10 years instead of 17/20 years as per the previous agreements. BEST submitted that the demand forecast is made on the basis of analysis of past trends. BEST divided its licence area into 10 areas on

lines of geographical boundaries of Municipal Wards and projections were made for each area taking into account the load growth for each area for the past 5 years.

Regarding the forecast for development of textile mill land area, BEST submitted that the sales are based on details of land utilization as obtained from Development Planning department of Municipal Corporation of Greater Mumbai. BEST submitted that the load forecasting is based on certain norms existing in BEST for last several decades depending on usage of premises such as residential, commercial, industrial, etc., and these forecasts tally with the actual load developed, proving the reliability of BEST norms. BEST has considered the usage of built-up areas as 50:50 for residential and commercial purpose based on the applications received for development of 13 existing mill premises and BEST further submitted that it is assumed that the load will develop over a period of 8 years depending on socio-economic factors and government policies. BEST submitted that considering the possibility of development of Dharavi into a self-sufficient township with different public amenities, residential and commercial towers, etc., the estimated load requirement for the Dharavi mega makeover comes to approximately 197 MW, which is included in the load projections. BEST has also included the transmission loss of 4.85% and normative auxiliary consumption of 4.5% of the generating station in its demand forecast while estimated the power required at the generator bus bar.

BEST further submitted that as per the recorded demand for FY 2006-07, the capacity allocation required at the generating station bus bar comes to 870 MW, as shown in the Table below, and in the context of development of textile mill land and Dharavi makeover, the contracted capacity of 800 MW is the bare minimum.

Table: Month-wise MD statement for FY 2006-07 and Generation Capacity required

Month	MD in MW	Ex-Bus generation required *	Generation capacity required at Generation Terminal **
April-06	743	781	818
May-06	777	817	855
June-06	784	824	863
July-06	745	783	820
Aug-06	722	759	795
Sept-06	749	787	824
Oct-06	791	831	870
Nov-06	751	789	826
Dec-06	708	744	779
Jan-07	702	738	773
Feb-07	702	738	773
March-07	776	816	854
Average	746	784	821

* Transmission loss of 4.85%

** Normative Auxiliary Consumption of 4.5%

BEST submitted that any capacity rendered surplus during off-peak periods will be traded and the revenue thus obtained will be ploughed back to the consumers.

Regarding power procurement for quantities beyond contracted capacity, BEST submitted that it has already appointed a consultant for formulating its long term power purchase plan (LTPPP) for the next 10 years for quantities above 800 MW.

Regarding transmission capacity, BEST submitted that being a Transmission System User of the Intra-State Transmission System (InSTS), it is presently using 800 MW transmission capacity of TPC-T's transmission network and has also entered into a Bulk Power Transmission Agreement with TPC-T, which has been submitted to the

Commission. As for transmission capacity above 800 MW, BEST submitted that the matter would be taken up with STU.

c. The basis for arriving at 10 paise/kWh surcharge payable by TPC-G to BEST in case the availability of generating stations of TPC-G falls below 85% alongwith supporting computations.

BEST's response

BEST observed that TPC-G's generating stations availability has been more than 88% for the past several years. BEST submitted that the penalty for fall in availability below 85% is linked to the RoE obtained by TPC on their thermal units and generation from TPC's Thermal Station at 85% PLF and requested the Commission to approve the same.

d. The mechanism for assessing the compensation amount in case of termination due to events of default may be incorporated in the PPA.

BEST's Response

Best submitted that as stipulated in clause 13.4.2 of the draft PPA, the referee after hearing both parties and on examination of such witnesses, evidences and documents, shall give award for determination of compensation payable by the defaulting party. BEST submitted that any assessment of compensation under such eventualities at this stage, would be fraught with error of judgement. Hence, both the parties decided to leave the determination of compensation at termination to the independent referee who will award the compensation after hearing both the parties.

e. The list of delivery points, i.e., physical point or point(s) at which the transfer of electrical power occurs between the TPC-G and intra-State transmission system for utilization by BEST to be attached as Annexure to the PPA.

BEST's response

BEST submitted that the delivery points are mentioned in Table-1 of Article 4.1 of PPA and are subject to change. The List of Delivery Points of TPC-G Generating Stations with Intra-State Transmission System submitted by BEST is given below:

Sl.	Unit	Installed Capacity in MW
1	Khopoli Hydro Station	72
2	Bhivpuri Hydro Station	75
3	Bhira Hydro Station	300
4	Trombay- Unit-4- Thermal Station	150
5	Trombay- Unit-5- Thermal Station	500
6	Trombay- Unit-6- Thermal Station	500
7	Trombay- Unit-7- Thermal Station	180

f. The reasons for deviation from Regulations pertaining to Rebate and Late Payment Surcharge.

BEST's response

BEST submitted that the both TPC and BEST for the past many years have been following a billing and payment mechanism suitable to their cash flow requirements. As per MERC (Terms and Conditions of Tariff) Regulations, 2005, there is a provision of late payment surcharge and payment security mechanism through letter of credit for billing and payment for the same. BEST submitted that since TPC has agreed to existing payment mechanism, i.e., payment to be made in three instalments, TPC has waived the payment security mechanism, i.e., payment through Letter of Credit as the same will cost BEST approximately Rs. 9.60 crore per annum and BEST's cash flow will not permit such huge payment of bill in one stroke. BEST further submitted that TPC has agreed to allow 1.25% rebate on total bill amount inspite of three instalments, which again benefits BEST. Hence, BEST and TPC-G have agreed to continue the existing payment arrangement in the draft PPA.

(7) After receipt of replies to queries raised during the Technical Validation Session, the Commission admitted the Petition for further public process and Commission vide its

letter dated June 12, 2007 directed BEST to publish Public Notice(s) for inviting objections/comments from stakeholders including the general public. BEST published a public notice in the Times of India, Indian Express, Hindustan Times, Maharashtra Times, Loksatta and Sakal dated June 16, 2007. The Executive Summary and draft PPA were also made available in downloadable format on the website of the Commission.

C. PUBLIC HEARING IN CASE NO. 87 OF 2006:

(8) A Public Hearing in the matter was held on July 17, 2007, at Vista Hall, Centre No.1, 30th Floor, World Trade Centre, Cuffe Parade, Mumbai 400 005. The list of participants who attended the Public Hearing is given at **Annexure II**. At the Public Hearing held on July 17, 2007, Shri. Shripad Anand Puranik, DGM (Electric Supply) alongwith Shri. Harinder Toor, Advocate, appeared for BEST. Shri. J.D. Kulkarni, DGM appeared for TPC. Shri. J.J. Bhatt, Senior Advocate appeared for Reliance Energy Limited, interveners in the matter. Several consumers also appeared and made representations. No one was present on behalf of consumer representative organizations authorized on a standing basis under Section 94(3) of the Electricity Act, 2003 (“EA 2003”). The various contentions raised in the said Public Hearing by REL and responses and submissions made thereto by BEST and several consumers, are aspects that have been dealt together with similar contentions that were raised in Case No. 88 of 2006 and Case No. 30 of 2007 in the later part of this Order under the head “Submissions made by REL”. Issues other than that connected with submissions made by REL raised during the Public Hearing and submissions made in connection thereto are summarized as follows:

(a) Quantum of power

Shri Sailesh D. Doctor from Electrical Contractor Association of Maharashtra (ECAM) sought clarification on the quantum of power purchase under the existing and proposed agreement between BEST and TPC.

Shri. N. Ponrathnam, Shri K. Sampath, Shri K.A. Salim and Shri A.R Bapat submitted that BEST should get the required power of 800 MW as first priority from TPC and not on pro-rata basis. Shri. N. Ponrathnam further submitted that BEST should measure the

actual energy, demand, PF, load factor, voltage, frequency and other parameters as per the regulations of MERC.

BEST's response

BEST responded that the existing agreement for power between BEST and TPC stipulates that TPC would meet the total power requirement of BEST. The proposed PPA is for 800 MW, which is before the Commission for approval. BEST added that it agrees with the suggestion of Shri Ponrathnam that BEST should be given first priority to get supply from TPC.

(b) Future Planning

Shri. N. Ponrathnam, Shri K.Sampath and Shri K.A.Salim submitted that BEST must find other suppliers apart from TPC. They suggested that competition in the area of BEST will provide an option for obtaining cheaper power in the city of Mumbai.

BEST's Response

BEST submitted that it had appointed a consultant before renewing the agreement with TPC to evaluate options for procuring cheaper power from various other sources. After the detailed study by the consultant it was found prudent to continue to purchase electricity from TPC. Regarding the power procurement for energy beyond the contracted capacity, BEST would need to procure the same from outside sources. In this respect, under the directions of the Commission, BEST has appointed a consultant for preparation of Long Term Power Purchase Plan (LTPPP).

(c) Tariff

Shri Sailesh D. Doctor from ECAM asked for information on prevailing rates for the fixed charges.

BEST Response

BEST submitted that as per the Commission's Order dated April 04, 2007 in the matter of TPC (G)'s MYT petition, the fixed charge per annum is Rs.690 Crore, which works out to Rs.0.388 Cr./MW.

(d) Demand Forecast and Load Factor

Shri. Navin Shetty submitted that BEST in its MYT presentation had projected a conservative sales growth for the MYT period in all its consumer segments. The growth projected was 3.54 % and 3.5% in the residential and commercial segments for FY 2007-08 whereas only 1.05% growth was projected for the industrial segment. He further stated that the projections made by BEST are not in line with the demographic changes taking place in its licence area. He submitted that it would be difficult for BEST to maintain and improve on its current load factor of 58% with the assumption of the growing residential segment. He further said that BEST needs to strategize imaginatively to retain their depleting industrial consumers by incentivising their consumption.

BEST's response

BEST submitted that it has improved its load factor to 60% and is also initiating suitable Demand Side Management measures, which are likely to further improve the load factor. BEST also submitted that the Commission has introduced partial Time of day (ToD) tariff and incentives for better load factor. BEST has installed a number of ToD meters for high consumption consumers and proposes to widen this base as per the directives of the Commission. BEST submitted that the incentives provided as per the Commission's Order will result in improvement of load factor to some extent. BEST stated that shifting of consumer base from industrial category to residential and commercial category is totally dependent on changing land use and the Government policies for providing incentives to industries in various parts of the country.

(e) Basis of arriving at 800 MW

Shri Sailesh D. Doctor from ECAM sought the basis of entering into a PPA for 800 MW with TPC.

BEST Response

BEST responded that the quantum of power for the agreement has been arrived by considering past trends and anticipating load growth and allocation made by TPC.

(f) Penalty Clause

Shri. N. Ponrathnam, Shri K.Sampath and Shri K.A. Salim, submitted that a provision of surcharge of 10 paise per kWh for non supply of contracted capacity in case the availability of TPC (G)'s generation falls below 85% on an annual basis is a very low compensation from TPC to BEST for non-performance. They suggested that, TPC should be charged 100% of the cost incurred for the purchase of electricity by BEST because of default on part of TPC.

BEST Response

BEST submitted that the generator gets penalized in terms of reduction in fixed cost payment as per the MERC (Terms and Conditions of Tariff) Regulations if the availability falls below 80%. Moreover, the Regulations do not specify any additional penalties.

(g) Considering Dharavi and Mill land load in PPA

Shri N. Ponrathnam, Shri Sampath and Shri K.A. Salim submitted that in the present PPA, demand and future supply requirement in case of Dharavi or development of mill lands must not be considered and should be addressed separately.

BEST Response

BEST responded that the contracted capacity of 800 MW is less than its present requirement and that its energy requirement would be much more after the development of Dharavi and Mill land.

(h) Status of Agreement

Shri Sailesh D. Doctor from (ECAM) sought information on the present status of the agreement.

Shri Rakshpal Abrol, Shri Jude G. Tandon and Shri K.F. Paul submitted that the earlier PPA between the BEST and TPC was valid upto 2004 and the said PPA was entered into under the provisions of erstwhile Indian Electricity Act, 1910 and erstwhile Electricity Supply Act, 1948, which had been superseded by the Electricity Act, 2003 and by MERC (Terms & Conditions of Tariff) Regulations, 2005.

BEST Response

BEST submitted that the previous PPA between BEST and TPC signed in 1987 was valid upto 2004. However, as per Clause 4 of the agreement, the said agreement is still operative. BEST submitted the revised PPA on July 13, 2005 to the Commission for its approval. Further, as per MERC (Terms and Conditions of Tariff) Regulations, the PPA existing as on the date of issue of Regulations continue to remain operative until approval or rejection of such PPA. BEST further submitted that as per the directives of the Commission, BEST has entered into an agreement with TPC (G) for 800 MW capacity in December 2006 and is awaiting the Commission's approval for the same.

(h) Auxiliary Consumption

Shri. N. Ponrathnam, Shri K.Sampath and Shri K.A. Salim, submitted that the auxiliary consumption consumed by a power plant is a factor in control of the power plant operators and in this case TPC should be responsible to optimize the auxiliary consumption and increase the efficiency of the plant and hence, the contracted power should be exclusive of auxiliary consumption.

BEST Response

BEST submitted that the factor of auxiliary consumption has already been dealt with by the Commission in the Tariff Order for TPC-G.

II. Case No. 88 of 2006:

A. TPC's SUBMISSION IN RESPECT OF INTERNAL CAPACITY ALLOCATION FROM THE GENERATION DIVISION OF TPC TO ITS OWN DISTRIBUTION DIVISION

(9) TPC, vide their letter dated March 16, 2007, submitted for the Commission's approval, the following Agreements proposed to be entered into between its Generation, Transmission and Distribution functions: (a) Power Purchase Agreement between distribution business and generation business; (b) Bulk Power Transmission Agreement between transmission business and distribution business; and (c) Connection Agreement

between transmission business and distribution business. The Commission's approval has been sought under Regulation 24 of the Tariff Regulations. Vide letter dated April 16, 2007, on scrutiny of the said Petition, TPC were asked by the Commission's registry to remit balance fees as per Regulation 12 of the MERC (Fees and Charges) Regulations, 2004 as TPC had only remitted Rs. 10,000/- towards the fees for approval of the aforesaid PPA. Vide letter dated April 24, 2007, TPC contended that the said Regulation 12 was not applicable and requested for deferment of the payment of additional fees, if any, till the issue as to whether a PPA should be executed between the generation and distribution division, is decided by the Commission based on legal opinion to be furnished by TPC.

(10) Vide letter dated April 16, 2007, REL filed an intervention application seeking permission of the Commission to allow REL to make submissions during the Technical Validation Session in Case No. 88 of 2006 contending that if the internal capacity allocation from the generation division of TPC to its own distribution division, is allowed as proposed, then this would seriously impinge on REL's rights and requirements of their customers leading to drastic consequences. REL also prayed vide the said letter and the Intervention Application for a copy of the papers and proceedings in Case No. 88 of 2007.

B. TECHNICAL VALIDATION SESSION IN CASE NO. 88 OF 2006:

(11) A Technical Validation Session in Case No. 88 of 2006 was held on April 18, 2007, wherein TPC were directed to obtain legal opinion as whether a PPA could be executed for internal capacity allocation from the generation division of TPC to its own distribution division. The list of participants who attended the Technical Validation Session is given at **Annexure III**. During the Technical Validation Session, the Commission also directed TPC to submit the long-term demand projects for the next ten years. REL's Intervention Application was also taken up and REL agreed to reserve its comments, objections and views for submission during the public hearing as other persons and general public would also be allowed to make submissions during the public hearing.

(12) Vide letter dated May 7, 2007, TPC submitted a legal opinion stating that a PPA is not permissible to be entered into between the generation division and distribution division for internal capacity allocation from the generation division of TPC to its own distribution division, as a Company cannot enter into a contract as envisaged under the Indian Contract Act, 1872, which includes a PPA, with itself, and therefore, such capacity allocation could be documented by way of an internal memo or manual or minutes of meeting. In furtherance thereto, TPC submitted minutes of meeting between TPC-Generation and TPC- Distribution held on December 22, 2006 at its Carnac Bunder office. It was agreed between the TPC officials present therein that “as PPA discussions with REL have not progressed any further, TPC Gen may consider allocating 477 MW of capacity to TPC-D. Accordingly, TPC-Gen can then allocate 500 MW of capacity to REL”.

(13) TPC vide its letter dated May 7, 2007 submitted its load projections for the next ten years.

(14) The Commission vide its letter dated July 18, 2007 directed TPC to publish Notice(s) in leading newspaper for the submission of objections/comments from stakeholders including the general public, by August 24, 2007. TPC were directed to make available copies of the Petition towards arrangement of power including Minutes of Meeting and submission made on May 7, 2007 on payment of Rs. 50/- (Rupees Fifty only) at the Head Office and Zonal offices of TPC. The Public Notice, Executive Summary and draft PPA were also made available in downloadable format on the website of the Commission.

C. PUBLIC HEARING IN CASE NO. 88 OF 2006:

(15) A public hearing was held on August 29, 2007. Written views, submissions, comments and objections were received by the Commission from (a) REL vide their letter dated August 24, 2007; (b) Shri. Sandeep Ohri vide his letter dated August 16, 2007; (c) Bombay Small Scale Industries Association (“BSSIA”) vide letter dated August 16, 2007 (though it is mentioned therein that it is for Case No. 87 of 2006); (d)

M/s. Rashtriya Chemicals & Fertilizers Limited (“RCFL”) vide letter dated August 28, 2007. The list of participants who attended the public hearing is given at **Annexure IV**.

(16) At the said public hearing, Shri. V.H. Wagle, Manager-TPC, submitted that pursuant to publication of their application in various newspapers, written responses have been received from BSSIA and RCFL. Shri. Wagle and Shri. J.D. Kulkarni, DGM-TPC, made a power-point presentation in support of the projections circulated by TPC earlier. Copies of the power-point presentation were submitted for records. During the course of the power-point presentation, the Commission enquired of TPC regarding the basis for calculating the growth rate in daily load curve, as the scope of having new consumers is very minimal in the case of TPC (D). Shri. J.D. Kulkarni submitted that TPC has calculated the said growth rate at 4% on the present daily load curve. The Commission directed TPC to perform a scientific analysis of its expected peak load for the ensuing ten years, and submit the same before the Commission. Shri. Wagle submitted that the loads for HPCL and BPCL are expected to increase in the near future by 40 MW and 35 MW, respectively. The load for Railways is further expected to increase by 31.8%. The Commission observed that TPC needs to obtain required load projections from the Railways. On an enquiry made by the Commission, Shri. Wagle submitted that hydro-power would be available to TPC during day-time. At the end of the power-point presentation, the Commission enquired of TPC as to whether the bulk consumers of TPC (e.g., the Railways) have provided any assurance to TPC for availing supply continuously for the forthcoming 10 years, considering the possibilities of such bulk consumers creating their own generation systems. Shri. J.D. Kulkarni submitted that as per the information available to TPC, the Railways have not occupied any land to set up generation systems. It was further submitted by Shri. S. Ramakrishnan, Executive Director-TPC, that in the present scenario, which provides for the facility of open access, it would be difficult to establish a strong commitment from existing consumers for the future. However, the present arrangement needs to be executed considering the existing demand and anticipated increase in demand for the ensuing ten years. It was submitted by Shri. J.D. Kulkarni and Shri. Ashok Sethi, Senior GM-TPC, that at present a few consumers have approached TPC for supply of power through open-access.

(17) At the said public hearing, the Commission observed that TPC has various bulk consumers and it should be in a position to assess its load profile on an annual basis. The Commission directed TPC to undertake a detailed category-wise load analysis of its existing consumers and submit the same to the Commission.

(18) As regards the submissions made by consumers and REL during the said hearing, Shri. Rakshpal Abrol, President-BSSIA, submitted that various member-industries of BSSIA have conjointly entered into an agreement with TPC(D) for supply of power for a tenure of five years. Shri. J.J. Bhatt, Counsel for REL submitted that REL objects to the allocation of quantum as provided for in the PPA and that he would like to make his submissions in relation thereto at the time of adjudication of dispute by the Commission in the proceedings under Case No. 30 of 2007. Shri. R.B. Patil, DGM(Finance)-RCFL, referred to their written submission dated August 28, 2007 as submitted before the Commission. It was submitted by RCFL that right from their inception, power has been procured from TPC, which helps them in controlling their cost of production, which eventually benefits the last mile consumer, i.e., the farmers. Since May 2007, the tariff payable to TPC has increased by around 45% for the same power consumption as earlier. This is due to categorization under “HT Industrial & Textile” instead of “HT Public & CPP”. It was further submitted that RCFL has set up a CPP of 18 MW capacity, which shall be put into operation on the availability of Re-gasified Liquefied Natural Gas (RLNG). It was submitted that due to the existing quantum of allocated power for TPC(D), TPC(D) has to source power from expensive sources in order to meet its demand. This has resulted in the introduction of additional charges in the tariff for TPC-D’s consumers. Thus, the existing quantum of power allocated in favour of TPC(D) should be increased. The Commission enquired of RCFL as to whether it can provide any commitment to continue to avail supply of power from TPC. Shri. R.K. Nagraj, RCFL, submitted that while RCFL has set up its CPP of 18 MW capacity, the actual demand of RCFL is in the vicinity of 28 MW. This ensures that RCFL shall be requiring supply from TPC for the ensuing years, even if it commences the operation of its CPP.

III. Case No. 30 of 2007

A. SUBMISSIONS MADE BY REL:

(19) REL filed a Petition under their letter dated July 11, 2007 under the provisions of Section 86 of EA 2003, inter alia contending that there is a dispute that has arisen between REL and TPC (1st Respondent therein) for refusal to supply to REL eligible and required quantity of energy/electricity and in showing undue favour to BEST (2nd Respondent therein). Hearings were held on August 29, 2007 and September 7, 2007. The list of participants who attended these hearings are given at **Annexure V** and **Annexure VI** respectively. Shri. J.J. Bhatt appeared for REL, Shri. Sitiesh Mukherjee appeared for TPC. Shri. Harinder Toor and Shri. Ramji Shrinivasan appeared for BEST. Dr. Ashok Pendse, Mumbai Grahak Panchayat was present as an authorised Consumer Representative. It has been averred by REL that as the grievance raised in the present petition has occurred due to the proceedings in Case No. 87 of 2006 and Case No. 88 of 2006, REL would rely on their contentions which should be taken together for adjudication of Case No.'s 87 of 2006, 88 of 2006 and 30 of 2007. REL has contended that currently as well as in the past, TPC has been supplying electricity to REL in bulk. It has been averred that until February 1995, when REL's own generation capacity was able to commence operations, the entire requirement of REL and BEST was met by TPC. The grievance is that while during FY 2005-06, monthly peak demand of REL met by TPC was 836 MW (April 2005 to March 2006) and monthly average coincident peak demand was 745 MW (November 2005 to October 2006), however, pursuant to several discussions with TPC the quantum agreed by TPC for supply to REL is only 500 MW. It has also been averred that it is REL's case that during a meeting held on April 24, 2006, it was agreed between REL and TPC that the existing generation capacity of TPC would be allocated in the ratio of maximum demands of BEST, REL and TPC's direct consumers during FY 2005-06 in the proposed PPA. REL has disputed TPC's stand that in view of TPC's commitment to BEST, the quantity originally agreed to be supplied to REL is required to be reduced directly as a consequence of the proposed PPA between TPC and BEST. It is averred that during FY 2005-06 REL's offtake from TPC has been higher than that of BEST and also in the said year the annual purchase of energy of REL from TPC is also higher than BEST's purchase of energy from TPC and the same has

also been acknowledged by the Commission while allocating the energy generation from TPC-G for FY 2007-08. The tariff rates of REL, TPC, BEST were determined on this basis. It has been averred that in the circumstances, any reduction in the capacity allocation of REL and any increase in capacity allocation in favour of BEST, will adversely affect REL's consumers. It has also been submitted that the consumers of Mumbai and suburban Mumbai are predominantly dependent upon the power generated by TPC(G) as prior to 1995 the entire requirement of REL and BEST were met by TPC(G) and thereafter after the commencement of REL's Dahanu station, the remaining part of REL's requirement is met by TPC(G). REL has provided a schedule of its drawal other than from its Dahanu station for FY 2006-07 (April 2006 to March 2007) and on that basis has sought that the present generation capacity of TPC of 1777 MW be allocated in the ratio of coincident peak demand, i.e., in the proportion of 762 MW to REL (42.85%), 655 MW to BEST (36.88%), and 360 MW to TPC (D) (20.27%).

(20) Similar submissions have been made under Intervention Applications in Case No. 87 of 2006 and Case No. 88 of 2007. The submissions made during the hearings in Case No. 87 of 2006 and Case No. 30 of 2007 are summarized as under:

(a) 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 EA 2003 can alter the terms and conditions of the said PPA. Learned Senior Counsel, 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. 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 construed in line with the legislative intent and the external aids of statutory construction of that particular statute. 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 of 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.

Shri. J.J. Bhatt, Learned Senior Counsel for REL referred to the submissions of REL filed under affidavit on July 12, 2007. Counsel submitted that the import of the words “*regulate the electricity purchase and procurement process of distribution licensees*” as referred to in Section 86(1)(b) of the EA 2003, grants sufficient authority and jurisdiction to the Commission to “*regulate*”. The term “*regulate*” is an all encompassing term which gives power to regulate each and every facet of the procurement process and consequently allow, or disallow, or modify, the very quantum of power agreed to be sold by a generator /supplier to an energy procurer.

(b) He also submitted that in terms of Section 23 of the EA 2003, which is applicable to generating companies apart from distribution licensees, issues concerning the extent of power that a generating company may commit under contract, is a definite area for

regulatory oversight of the Commission. If such was not the intention of the Parliament while enacting the EA 2003, especially Sections 23 and 86 thereof, any amount of energy that a generating company would agree to sell/allocate in favour of a distribution licensee, would have to be 'blindly accepted' by a State Electricity Regulatory Commission. Counsel argued that had TPC(G) agreed to sell its entire generating capacity in favour of BEST or any distribution licensee outside Maharashtra, such would, obviously, not have been approved by the Commission. Counsel, in support of his contention, referred to various case laws on the scope and ambit of the term "regulate".

(c) Counsel for REL further submitted that, while approving a power procurement process, it is not only incumbent on the Commission to judge whether the terms and conditions contained in the draft PPA conforms with law. The Commission is primarily required to judge whether the said terms and conditions are reasonable from all parameters and the test of reasonability is of wide import. On a harmonious construction of Sections 23, 60 and 86(1)(b) of the EA 2003, the genuine requirement of non-contracting distribution licensees (especially on issues connected with interest of consumers, quantum of power contracted for supply, tenure of supply, procurement price) should be considered within the test of reasonability. It was specifically submitted by Counsel that directions may well be passed to generating companies under Section 23 of the EA 2003, though the marginal note/heading to the said Section suggests that the said provision applies only to distribution licensees. It was submitted that it is well settled that marginal notes do not supersede the import of the main provisions contained in a Section.

(d) Shri. Harinder Toor, Counsel for BEST, submitted that under Section 10(2) of the EA 2003, it is provided that a generating company may supply electricity "*to any licensee*" in accordance with the EA 2003 and the rules and regulations made thereunder. This is a substantive provision of law which grants exemption to generating company from regulatory control over the aspect of which licensee a generating company may agree to sell energy. Counsel further submitted that, on contradistinction, there is no provision of law under the EA 2003 that provides for generation allocation in respect of a PPA being entered into between a generating company and a licensee. Further, the

provisions of Section 23 of the EA 2003 do not attract the issues raised under the present proceedings. As regards REL referring to Section 60 of the EA 2003, the provisions of the said Section relates to a particular set of circumstances which is not in issue in the present proceedings. As regards the submissions of Shri. Bhatt, Counsel for REL, as to the import of Section 86(1)(b), Shri. Toor submitted that the MERC (Terms and Conditions of Tariff) Regulations, 2005 (hereinafter referred to as “Tariff Regulations”) should be read in context with the said cited statutory provisions. As regards the submissions of Shri. J.J. Bhatt, on the import of Section 86(1)(f), Counsel submitted that there is no existing dispute between BEST and TPC. The prevailing disputes between REL and TPC(G) are separate issues, outside the scope of present proceedings.

(e) Shri. Toor referred to the provisions contained under the First Proviso to Regulation 7.1.2 of the Tariff Regulations, and submitted that even after the expiry of the mandated three months, from the date of notification of the said Regulations (being August 23, 2005), REL has not taken any steps towards execution of PPA. This failure continued even after the issuance of specific directions by the Commission to that effect under its Order dated December 9, 2005 in Case No. 4 of 2003 (in the matter of additional outlets for drawal of power by REL from TPC). These acts of wilful non-compliance establish the absence of bonafides in the case of REL. In this perspective, Counsel questioned the locus standi of a negligent licensee like REL to intervene and obstruct the validation process of a PPA between BEST (a bona fide licensee) and TPC(G). BEST and TPC(G) are independent contracting parties and REL is not privy to the PPA. Shri. Toor submitted that the scope of jurisdiction of the Commission on the issue of granting approval under the power procurement process is circumscribed within the parameters under PART D (“Electricity Purchase and Procurement”) and PART E (“Generation”) of the Tariff Regulations. The said scope is limited in contradistinction to the powers vested on the Commission under PART A (“General”) under which the Commission shall issue tariff orders (under Regulation 10). The said regulations do not authorise the Commission to provide for generation allocation, and the contentions of Counsel of REL should be rejected by the Commission.

Under Section 86(1)(b) of the EA 2003, it is required of all licensees to execute “*agreements for purchase of power*”. Under the specific provisions of the Tariff and under various orders passed by the Commission, distribution licensees within Maharashtra have been directed to initiate the process of executing power purchase/procurement agreements. It is unfortunate that even after the expiry of three years from the enforcement of the EA 2003, REL has made no effort towards entering into a PPA with a generating company to tide over the anticipated situation of power shortage. The stand taken by REL that TPC(G) has not agreed to execute a PPA with REL, does not disentitle REL from procuring power from any other generating company outside Maharashtra. It is the duty of all distribution licensees to ensure the availability of power and REL has dismally failed as a utility in this regard. It cannot be the case for REL, at this present juncture, to obstruct the PPA of BEST.

(f) Counsel for REL argued that should REL procure power from outside Maharashtra, the same would result in hike in REL’s retail tariff. BEST should not be given any preference for allocation of capacity of TPC(G) keeping in view that REL has been procuring power from TPC(G) for the last 80 years. It was argued by REL that it would not be a judicious conclusion that solely because REL has failed to make TPC(G) agree to execute a PPA with REL, the consumers of BEST shall enjoy the benefit of reasonable tariff and the consumers of REL shall be subjected to tariff hike. It was submitted that REL has made several written requests to TPC(G) for the execution of a PPA which have not been considered by TPC(G). In fact, the Commission is duty bound to protect the interests of BEST’s consumers and the interests of REL’s consumers, as a fair share of the saleable generating potential of TPC(G) is a legitimate expectation of REL than it is a contractual commitment to BEST.

(g) Counsel for REL submitted that TPC(G) being the largest energy generator in Maharashtra, quite evidently enjoys the status of market domination. Counsel for REL submitted that it is essential for the Commission to place prime consideration on the existing power shortage situation prevailing in Maharashtra, especially in Mumbai, and the energy demand prevailing in each distribution licensee’s area, prior to according any permission on allocation of 800 MW power from TPC (G) to BEST for the forthcoming

ten years. Counsel submitted that though no written agreement/ documented arrangement for power procurement have existed between REL and TPC(G), REL has been procuring power from TPC(G) for the last 80 years. Such a long-standing and existing arrangement between REL and TPC(G), albeit without any written contract or power purchase agreement, has the force of a valid contract, which creates a right of REL for procuring energy from the generating stations of TPC(G).

(h) Counsel submitted that the Commission may either approve the supply of 800 MW PPA for ten years but restrict the actual drawal beyond a specified allocated limit, or in the alternative, approve the present PPA for a certain tenure, e.g., for five years. Shri. J.J. Bhatt further contended that the Commission is well within the scope of regulatory jurisdiction under the EA 2003, to approve 'open-ended' PPAs between distribution licensees of Maharashtra and TPC(G), wherein no quantum of power shall be specified and drawal shall be as per actual requirement. Counsel submitted that considering the exigency of power crisis in Mumbai, and the presence of two distribution licensees and one generating company in Mumbai, the Commission has powers under Section 23 of the EA 2003 to direct TPC(G) (i) to reserve its balance generation availability/stock in favour of both BEST and REL, vis-à-vis its future open access consumers; (ii) to reserve its balance generation availability/stock in favour of REL (the non-contracting distribution licensee) while approving the present PPA with BEST (the contracting distribution licensee).

(i) Counsel for REL further submitted that, as such, the EA 2003 has no independent mandatory provision requiring the execution of PPAs for procurement of energy though Section 86(1)(b) provides for the regulatory role of the State Electricity Regulatory Commission to approve "*agreements for purchase of power*". Counsel for REL argued that, the Commission, while keeping in view the "legitimate expectation" of REL (which is a long-standing consumer of TPC(G)), should therefore regulate the present power procurement process between BEST and TPC(G) over the generating plants of TPC(G). The doctrine of legitimate expectation applies in favour of REL owing to the fact that as aforesaid, REL has been procuring power from TPC(G) for the last 80 years. REL submitted that from 1929 to 1995, REL has been procuring energy from the generating

plants of TPC(G) for 66 years and BEST has been another distribution licensee. It would be justified if the Commission equitably allocates the generating potential of TPC(G) between REL and BEST, not only considering the demand of the consumers of BEST but also considering the demand of the consumers of REL, as the said generating potential of TPC(G), in effect, is the energy for the public. He further submitted that BEST should not be given preferential favour on the sole count that it has approached the Commission with a signed PPA. If allocation of supply of generated energy is to be made on a first-come-first-serve basis, there would be no requirement to vest a regulatory body with the power to regulate power procurement processes. In this regard, Counsel further submitted that various letters/correspondences of REL requesting TPC(G) for effecting a written arrangement/PPA vis-à-vis reply of TPC(G) not agreeing to supply the desired quantum, has been filed by REL to show the bona fide attempts of REL towards executing a PPA with TPC(G). REL submitted that during a meeting held on April 24, 2006, TPC has committed to allocate the existing generating capacity in the ratio of respective maximum demands of BEST, REL and TPC during the year FY 05-06 in the proposed PPA. REL also submitted that the Commission by its Order dated July 7, 2007 directed that the question of capacity to be renegotiated and reconsidered by the parties. REL has contended that vide their letter dated January 5, 2007, TPC was required to consider a PPA in terms of the directions of the Commission under Order dated October 3, 2006 in Case No. 12 & 56 of 2005 (in the matter of the ARR Petition of TPC for FY 2005-06 and ARR & Tariff Petition for FY 2006-07).

(j) Per Contra, BEST_submitted that REL has misrepresented and made blatantly false statements inasmuch as contending that under the Order dated July 7, 2006, TPC and BEST was directed to renegotiate and reconsider capacity allocation and submit a draft PPA that “*should provide the firm capacity which will be available to BEST under the PPA without stipulating any conditions of standby, etc.*” Under the said Order, the Commission has directed TPC and BEST only to quantify the energy allocation. No direction was issued to TPC and BEST to renegotiate and reconsider capacity allocation. REL has contended that vide their letter dated January 5, 2007, TPC was required to consider a PPA in terms of the directions of the Commission under Order dated October 3, 2006 in Case No. 12 & 56 of 2005 (in the matter of the ARR Petition of TPC for FY

2005-06 and ARR & Tariff Petition for FY 2006-07). BEST submitted that under the said Order dated October 3, 2006 it is provided that the ideal basis of allocation could only be by way of a PPA. An interim arrangement was considered only in the absence of PPA, and such arrangement can never be considered as basis for determination of quantum for PPA. The justified demand of BEST, under the present PPA should not be disapproved. With regard to the contention of REL that energy being a public resource, should be equitably distributed and equitably allocated, and legitimate expectation of REL should be protected, it was submitted that considering that energy is indeed a public resource, and requires to be equitably distributed and equitably allocated, BEST expects to share the much cheaper generation of REL(G), which is solely used by REL(D).

(k) REL submitted that while BEST, unlike REL, has effectively executed PPAs with TPC(G), the latter has deposed in various court proceedings that it is committed to a long standing power procurement arrangement in favour of REL. REL further submitted that in a given situation where the generating potential of TPC(G) that is available for sale being 1777 MW, and in a given situation that both BEST and REL separately execute long-term PPAs with TPC(G) for procurement of 1000 MW each, the Commission on envisaging continual power shortage in Mumbai for the ensuing two years vis-à-vis the generation availability of only 1777 MW from TPC(G), in all prudence, may approve both the PPAs only for a period of two years, with a common direction that both REL and BEST shall be allowed to draw not more than any specified allocated quantum (less than the agreed 1000 MW for each BEST and REL). Thus, both the aspects of quantum and tenure are left to the Commission's judgment.

(l) Shri. J.J. Bhatt submitted that, allocation of power would be interlinked with approval for quantum for power procurement. An energy procurer should not be allowed to procure more than its approved allocation and neither should a generator be allowed to provide an energy procurer more than the said approved allocation. The creation of the institution of a State Electricity Regulatory Commission with the power of regulating power procurement processes, stands on the premise of this interlink. Should this interlink not be recognised, the regulatory power of the Commission over power procurement processes will become otiose. So far as regulation of the quantum for

procurement is concerned, it was stressed that the Commission should, at first, reasonably determine generation allocation amongst the distribution licensees of a particular State, and thereafter approve the quantum of power desired to be procured by one distribution licensee of that State. It would alternately be justified for the Commission to approve the quantum of power desired to be procured under PPA, but in effect, allow the actual generation within a specified allocation limit, that is determined considering the demand-supply situation and other prevailing factors. From a different perspective, it was submitted by Counsel that the approval of the quantum of power desired to be procured by a distribution licensee, without the prior generation allocation, or without ceiling actual generation within an allocated limit, shall entail the procurer/distribution licensee to sue the supplier/generating company for specific performance, in a situation when generation availability is less than contracted power. However, if the Commission approves the present PPA between BEST and TPC(G) for the supply of 800 MW for ten years with a direction that actual generation shall not exceed the lesser allocated limit, TPC(G) not supplying beyond that certain limit will be protected under the said direction of the Commission. Considering the generating potential of TPC(G), if commitment of 800 MW from TPC(G) is approved in favour of BEST for a long-term duration of ten years, REL at least for the next ten years, would be left in a disadvantageous position as regards procurement from TPC(G) of power upwards of 500 MW (considering the energy requirement of TPC(D)). This would be contrary to the practice of the last 80 years when REL has in many occasions procured power in the vicinity of 800 MW from TPC(G). If only 500 MW is the surplus power left for supply to REL, in a given scenario when REL finally executes a PPA with TPC(G) for procurement of 500 MW, and its actual requirement exceeds 500 MW, the Commission would be incapacitated to direct TPC(G) to supply power upwards of the contracted 500 MW to REL, owing to the non-availability of power from TPC(G). Thus, the consumers of REL would be unjustly deprived of the legitimate share of power that TPC(G) generates (which is public property) and which will be contrary to the continuing practice for the last 80 years. On the other hand benefits will accrue to the consumers of BEST at the cost of consumers of REL. The terms and conditions appearing in the present draft PPA between BEST and TPC(G) should be seriously

considered by the Commission on these core issues that reflect the well being of the power sector in Mumbai.

(m) Counsel for REL submitted that considering the exigency of power shortage and various other ancillary factors in Mumbai, the Commission, after employing its expertise and judicious foresight, may envisage a steep rise in the demand-supply gap over the ensuing years, or even an increase in the number of generating units in the State. Based on its judicious foresight, the Commission has the jurisdiction to regulate all aspects of power procurement processes, whether quantum or tenure, in terms of Section 86(1)(b) of the EA 2003. Counsel for REL submitted that the stand of REL is not that it does not need to execute a PPA with its supplier/generating company. The stand of REL is that the EA 2003 does not *mandate* a distribution licensee to execute PPA for availing supply of energy. In fact, REL has submitted a draft PPA (which was for the consideration of TPC) appended to their intervention application dated April 2, 2007 seeking intervention in the Technical Validating Session of the present PPA between BEST and TPC(G). The role of the Commission is to oversee, as in the present case, whether the requisitioned 800 MW is the actual requirement of BEST or not and while assessing the actual requirement of BEST, the Commission is to exercise its judicious decision over the requirement of other licensee/s serviced by TPC(G).

(n) Shri. Shripad Anand Puranik, DGM (Electric Supply)-BEST, made a power-point presentation (“PPT”) while submitting on the various aspects of the draft PPA submitted for approval. Shri. Puranik submitted at the outset, that REL has not contended, or adduced any evidence to hold that, the actual energy requirement of BEST is less than 800 MW. Taking into account auxiliary consumption and transmission losses, the present PPA is for the supply of 764 MW at G<>T interface and 727 MW at T<>D interface. The actual requirement of BEST is upwards of 800 MW (though during certain off-peak hours, load is comparatively less) which would require BEST to enter into separate short-term power procurement arrangements. Reduction in load during off-peak hours will enable TPC to back down on generation and stop costly generation through its Unit No.4. This will have beneficiary impact on reducing the overall generation cost of TPC, which in turn will be beneficial to BEST. Surplus power may be traded by BEST with

other distribution licensees. As regards the contention of REL that TPC should be directed to allocate a quantity 762 MW to REL and further, to enter into a PPA with REL on that count, it was submitted by BEST that the term 'agreement' implies mutual understanding between two or more participating parties, which cannot be dictated by a third party. It is not the duty of the Commission to decide the party with whom the generator has to enter into a PPA. As regards the contention of REL that the Commission should not approve the present PPA for any quantum exceeding 655 MW and further, the PPA between TPC(G) and TPC(D) for a quantity not exceeding 360 MW, it was submitted by BEST that under the Commission's Order dated April 24, 2007 in Case No. 75 of 2006 [in the matter of Approval of REL(D)'s ARR for Control Period FY 2007-08 to FY 2009-10 & Retail Tariff For FY 2007-08] it has been provided 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, Commission can not advise the Licensee on any issue on which the Licensee has to enter into PPA. The Commission after taking the due notice of the matter, hereby directs all Licensees i.e. BEST, TPC and REL- D to enter into respective PPA's."*

(o) BEST submitted that as regards the contention of REL that REL is entitled to a proportionately higher quantity of energy from TPC as compared to that being supplied to BEST, TPC has met the energy requirement of REL from time to time, only after meeting the total energy requirement of BEST, as per the existing agreement between BEST and TPC. Further, post the enactment of the EA 2003, the existence of PPA is essential for drawal from a generator. That apart, it is the prerogative of a generation company to decide with whom it may enter into an agreement for power supply and for what quantum of power. As regards the allegation of REL that TPC has not only refused to supply a proportionately higher quantity to REL but has in fact threatened to supply a much lesser quantity to REL than what has been earlier supplied or what ought to be supplied on any legal, equitable, rationale and historical basis, it was submitted that REL has been negligent to execute a PPA with TPC(G) as the result of which any surplus quantum is probably not available with TPC(G) for supply to REL.

(p) BEST submitted that the interests of the consumers of a distributing licensee, which is prepared to execute a PPA, should be considered by the Commission 'overlooking the unjustified demand' of any other distribution licensee. On the issue of the importance of maintaining reliable supply in the area of supply of BEST, it was submitted that vital installations and institutions of national importance like the Reserve Bank of India, the Bombay Stock Exchange, Consulates of various Nations, Naval Dockyard, Head Offices of Commercial Institutes, Sachivalaya, the Council Hall, the Governor's Bungalow, the Head Office Mumbai Municipal Corporation, the Defence Installations, amongst others, are located in the area of BEST. BEST has provided uninterrupted supply to its consumers. BEST has utilized efficient in-house load-forecasting arrangements to undertake load forecasting over last many decades. The loads at various points (from 415 V to 110 kV) are regularly recorded and analyzed by BEST. Further, BEST carries out systematic planning of equipments, establishments of substation to ensure redundancy. The efforts of BEST should result in the benefit of its own consumers. It would not be judicious for BEST to expose its consumers to 'the era of uncertainty and power cuts' for the sake of the consumers of REL. Reduction in the proposed contracted capacity of BEST, to protect the interests of the consumers of REL, will not only put additional financial burden on the consumers of BEST; such would amount to subsidizing REL's consumers. This is against the basic principles of EA 2003 which advocates elimination of subsidies even among different classes and categories. Disapproval of the desired 800 MW in favour of BEST will render the systematically planned arrangements of BEST, infructuous. BEST submitted that if the present PPA for 800 MW is allowed, BEST would not be required to purchase any additional requirement, which is currently in the vicinity of 231 MU. The present procurement costs being Rs. 500 crore, approval of the PPA would reduce the procurement cost to Rs. 477 crore, which will benefit its consumers to the tune of Rs.23 crore.

(q) As the present cases involve interest of consumers, persons representing consumers or consumer bodies or even individual consumers were allowed to make submissions. The submissions so made are summarized below:

(r) Shri. Sandeep Ohri, Member-BSSIA, submitted that the Commission should interpret the provisions of the EA 2003 in terms of its preamble, which reveals the legislative intent. It was argued that interpretation of the provisions of the EA 2003 cannot be stretched to grant more powers to State Electricity Regulatory Commissions 'under the garb' of exercising the powers specifically provided. Such would amount to transgression of statutory provisions and all directions, orders, notifications, rules or regulations, if passed by a State Electricity Regulatory Commission thereunder, shall be void. Refuting the submissions made by Shri. J.J. Bhatt, Counsel of REL, Shri. Ohri submitted that the wordings of Section 86(1)(b) of the EA 2003 are clear and they do not encompass any authority on the Commission to determine the generation allocation of TPC(G) in favour of any non-contracting distribution licensee. Section 60 of the EA 2003 is not attracted in the present proceedings and the present PPA between BEST and TPC(G) does not have any terms and conditions that may attribute a dominant position either on BEST or on TPC. This is because BEST and REL are not bound to procure energy from TPC only, and neither is TPC(G) bound to sell energy only to BEST or REL only. Shri. Ohri submitted that under Section 86(1)(b) of the EA 2003, the role of the Commission is limited to ensure that BEST, while committing to its customers that long-term power supply shall be available, ties up with a source (power generator or a trader) so that the consumers of BEST are not 'left stranded'. The Commission's function is only to ensure that an agreement is in place with any generator. Any additional regulatory supervision would amount to 'over-regulation'. Shri. Ohri submitted that at the most, the Commission may fix the minimum and maximum ceiling of the procurement tariff in case of any shortage of supply, as per the Proviso to Section 62(1)(a). Shri. Sandeep Ohri submitted that TPC(G) may out-source power and supply to REL and in this context it may not be true to suggest that TPC's ability of providing energy is limited to 1777 MW only. With reference to the contentions of REL that the Commission should invoke Section 23 on TPC(G), considering the exigency of power crisis in Mumbai vis-à-vis the presence of two distribution licensees and one generating licensee in Mumbai, Shri. Ohri argued that it is BEST that has taken the ready initiative of executing a PPA and not REL. Preference should therefore, be in favour of BEST. Further, the contentions of the Counsel that TPC(G)

has not agreed to execute a PPA with REL for supply of energy upwards of 500 MW, does not bar REL to proceed with the execution of a PPA with TPC(G) for the supply of 500 MW only and approach the Commission for additional power from TPC, whether from its generating division or from any other out-sourced plant. Advancing further contentions, Shri. Ohri submitted that Section 23 of the EA 2003 can be invoked only in an emergency situation which is not the issue in the present case. Moreover, TPC(G) is not the only generator within the reach of REL. Shri. Ohri submitted that the actual peak demand of BEST is upwards of the desired 800 MW (reference may be placed to the report prepared by M/s. CRISIL, consultants to BEST, and filed by BEST). The contentions raised by Shri. J.J. Bhatt, so far as they relate to REL being deprived of their legitimate expectation/share of the generating potential of TPC(G), are not tenable as the quantum of power desired to be procured by REL is less than the legitimate requirement of BEST. REL has not produced any evidence to adduce that 800 MW exceeds the actual requirement of BEST. Shri. Ohri further submitted that both BEST and REL procure energy from TPC at almost similar rates. However, the tariff of BEST is much lower than the tariff of REL. The Commission should note that BEST, in effect, ensures 'cost-effective usage' of energy despite making a fair profit from its business (which is over Rs. 150 crore and, at some occasions, has been in the vicinity of Rs. 175 crore). BEST is undoubtedly making a far better use of the available supply of power, as compared to REL. This entails that the BEST should not be deprived from their genuine requirement of 800 MW which will cause unwarranted tariff hike on their consumers. Shri. Ohri further submitted that BEST is a local authority and owned by representatives of the Public. The functions of BEST are governed by strict rules and regulations. Limited freedom vests on the administration of BEST and their operational procedures are rigid. Quite to the contrary, REL is a private company and is free to set up generating plants, having own generating facilities, own electricity trading company and electricity transmission company – which ensures sufficient flexibility for procuring any quantum of power from any other generating company apart from TPC(G).

(s) Shri. Ajit Venkatesh Shenoy, of Rastriya Matodata Manch submitted that consumers of BEST shall be adversely affected comparatively much more than the consumers of REL, should the present PPA between BEST and TPC(G) not be approved. Further, the Commission should consider that BEST being owned by a public undertaking, the utility ensures greater contractual commitment for TPC(G) than REL, which is a private body. REL may withdraw/ revoke their commitments based on cheaper power availability in the market. Furthermore, it needs to be examined by the Commission that should the present PPA be disapproved, BEST may not be in a position to procure power from any other generator and guarantee reliable supply.

(t) Shri. Rakshpal Abrol, President-BSSIA, made a power-point presentation and submitted that under Schedule IX (b) to the Indian Electricity Act, 1910 read with relevant provisions under the Electricity (Supply) Act, 1948, all 'distributing licensees' which did not have a generating division, were mandated to enter into a written agreement for power purchase with the 'bulk-licensee' from whom drawal is desired, which agreement shall be for a minimum duration of seven years. Shri. Abrol submitted that REL has not complied with the mandate of executing PPAs prevalent under the regime of the Indian Electricity Act, 1910. While on the contrary, BEST had executed such power procurement agreements with TPC(G) in terms with Schedule IX (b) to the Indian Electricity Act, 1910. Further, the present approach of REL is in the nature of blocking the lawful initiatives that BEST has taken under the Tariff Regulations. He submitted that it should be noted that, as per historical records, BEST has always conformed with applicable laws on power procurement prevalent prior to the enforcement of the EA 2003, whereas REL has not. Shri. Abrol submitted that the actual energy requirement of BEST is 800 MW. Further, vide Maharashtra Gazette Notification No. LTT.6778-CR-937-(IV)-NRG-4 dated December 7, 1978, all the four existing licenses of TPC had been amended inasmuch as, inter alia, to require TPC to meet the actual energy requirement of BEST. Thus, the present PPA between BEST and TPC(G) should be approved by the Commission.

(u) Shri. N. Ponrathnam, submitted that approval of the present PPA between BEST and TPC(G) should be granted considering the prevailing demand-supply gap in the distribution license area of BEST. However, the Commission may not approve issues connected to supply of 72.47 MW in the future, post the commissioning of plants at Trombay and decommissioning of Unit No. 4 as that would, in effect, ascertain a monopolistic status in favour of TPC(G) and defeat competition. Shri. Ponrathnam further submitted that TPC(G) should be allowed to terminate the PPA, by issuance of a six-month prior written notice to BEST, subject only to approval by the Commission of the reasons that TPC(G) may furnish for termination.

(v) Rejoining on issues, REL submitted that the situation prevalent prior to the EA 2003 regime was an established power procurement ‘arrangement’ between TPC and REL. Under Regulation 24 of the Tariff Regulations any “arrangement” between a procurer and a supplier has to be 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. It was contended that, although, an arrangement / agreement needs to be in place, such arrangement cannot be unilateral and both parties should agree to the same. 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. 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). Counsel argued 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. Counsel submitted that issues concerning regulatory control over a power procurement process are same under the Electricity Regulatory Commission’s Act, 1998 (“ERC Act”) regime and under the EA 2003 regime. Though generation under the ERC Act 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).

(w) On the aspect of whether REL was vigilant or not so far as attempting to secure the interests of its consumers is concerned, Counsel for REL 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). Counsel submitted that a PPA cannot be presented by REL for approval of the Commission unless the exiting tri-partite dispute is resolved and therefore the approval of the PPAs submitted by TPC (Case No. 88 of 2006) and BEST (Case No. 87 of 2006) have to be kept pending till final disposal of the present dispute.

(x) 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. TPC submitted that prior to the EA 2003 regime, generation of electricity was an activity under strict regulatory control. TPC referred to the provisions under Chapter V (Sections 28, 29, 30 and others) of the Electricity (Supply) Act, 1948, whereunder the generator 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. TPC further submitted that the ambit of the said regulatory control on a generator was further widened under the ERC Act, 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 generator 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 for TPC 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. TPC 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.

(y) TPC 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 TPC 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 said judgment passed by the Appellate Tribunal for Electricity. TPC also referred to the Judgement dated June 2, 2006 passed by the Appellate Tribunal in the case of *Small Hydro Power Developers Association & Ors. Vs. Andhra Pradesh Electricity Regulatory Commission & Ors*, in Appeal Nos.1, 2, 5, 6, 7, 8, 9, 10, 12, 15, 16, 17, 18, 19, 20, 21, 22, 34, 46, 47, 48, 49, 50, 52, 58, 67 and 80 of 2005, 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, TPC 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. 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, Counsel for TPC 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. TPC 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 loose 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.

(z) TPC argued 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 500 MW to REL. TPC referred to a series of contemporaneous email correspondences that has been exchanged between REL and TPC and annexed to the present petition. TPC 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. Counsel for TPC 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 in dismissing the chance of REL to avail supply of power from TPC. It was stressed by TPC that even in the present scenario, TPC is willing to execute a PPA with REL for the supply of 500 MW. Counsel for TPC submitted that equity cannot supplant law but should only supplement law.

(z i) TPC submitted that the obligation of TPC towards 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. 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.

21. TPC 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 construction 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. Counsel for TPC submitted that Section 23 of the EA 2003 is pari materia with Section 22(b) of the Indian Electricity Act, 1910. TPC 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 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).

22. 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 for BEST submitted that secondly, the present petition suffers from severe latches and delay at the instance of REL. The present petition in Case No. 30 of 2007 raising a dispute could have been preferred by REL two years ago but at the present

junction, 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 latches. 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, nothing prevents REL to execute a PPA with TPC(G) for a quantum which is less than the actual requirement of REL.

23. 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. 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. Sitiesh 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).

24. 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 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. It was argued 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.

25. 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 ERC Act, 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 delivered in a regime not requiring mandatory execution of a PPA. 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.

26. BEST 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.

27. Shri. J.J. Bhatt, Counsel for REL, submitted that as per the arguments advanced by Shri. Suresh 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. 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.

IV. DECISION WITH REASONS:

(A) A large number of contentions on facts as well as law were urged and quite a number of decisions had been cited before the Commission by the counsel appearing for the parties. These contentions have been raised by REL, BEST, TPC and consumers during the hearings as well under respective written objections filed by REL, reply thereto filed by BEST and TPC. Having heard the parties and after having considered the materials placed on record, and the applicable provisions of law, the Commission is of the finding as under:

(1) SCOPE AND AMBIT OF SECTION 86(1)(b):

As regards the scope of powers of the Commission under Section 86(1)(b) of the EA 2003, it is essential to set out the said provision. Section 86(1)(b) reads as under:

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

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

The above provision requires to be read with Regulation 7 and Regulation 24 of the MERC (Terms and Conditions of Tariff) Regulation, 2005, which read as under:

“7 Determination of generation tariff

7.1 Existing generating station

7.1.1 Where the Commission has, at any time prior to the notification of these Regulations, approved a power purchase agreement or arrangement between a Generating Company and a Distribution Licensee or has adopted the tariff contained therein for supply of electricity from an existing generating station then the tariff for supply of electricity by the Generating Company to the

Distribution Licensee shall be in accordance with such power purchase agreement or arrangement for such period as may be so approved or adopted by the Commission.

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

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

Provided further that the supply of electricity shall be allowed to continue under the present agreement or arrangement, as the case may be, until such time as the Commission approves of such power purchase agreement and shall be discontinued forthwith if the Commission rejects, for reasons recorded in writing, such power purchase agreement.

7.2 New generating stations

*7.2.1 The tariff for the supply of electricity by a Generating Company to a Distribution Licensee from a new generating station shall be in accordance with a power purchase agreement approved by the Commission, except if such power purchase agreement has been exempted from requiring such approval in accordance with **Part D** of these Regulations.*

7.3 Own generating stations

7.3.1 Where the Distribution Licensee also undertakes the business of generation of electricity, the transfer price at which electricity is supplied by the Generation

Business of the Distribution Licensee to his Retail Supply Business shall be determined by the Commission:

*Provided that the Commission shall have regard to the terms and conditions specified in **Part E** of these Regulations in determining the transfer price for such supply.*

7.3.2 The Distribution Licensee shall maintain separate records for the Generation Business and shall maintain an Allocation Statement so as to enable the Commission to clearly identify the direct and indirect costs relating to such business and return on equity accruing to such business.

7.3.3 The Distribution Licensee shall submit, along with the application for determination of tariff for retail sale of electricity, the information required under Part E of these Regulations relating to the Generation Business, so as to enable the Commission determine the transfer price for supply of electricity to the Retail Supply Business in accordance with the terms and conditions contained in the said Part.

7.4 Notwithstanding anything contained in this Regulation 7, the Commission shall adopt the tariff for supply of electricity by a Generating Company to a Distribution Licensee if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government:

Provided that the applicant shall provide such information as the Commission may require to satisfy itself that the guidelines issued by the Central Government have been duly followed.”

“24 Approval of power purchase agreement / arrangement

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

Provided that the prior approval of the Commission shall be required in accordance with this Regulation 24 in respect of any agreement or arrangement

for procurement of electricity by the Distribution Licensee from a Generating Company or Licensee or from any other source of supply on a standby basis:

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

24.2 The Commission shall review an application for approval of power purchase agreement/ arrangement having regard to the approved long-term power procurement plan of the Distribution Licensee and the following factors:

(a) Requirement for power procurement under the approved long-term power procurement plan;

(b) Adherence to a transparent process of bidding in accordance with guidelines issued by the Central Government;

(c) Adherence to the terms and conditions for determination of tariff specified under Part E of these Regulations where the process specified in (b) above has not been adopted;

(d) Availability (or expected availability) of capacity in the intra-State transmission system for evacuation and supply of power procured under the agreement/ arrangement;

(e) Need to promote cogeneration and generation of electricity from renewable sources of energy.

24.3 Where the terms and conditions specified under Part E of these Regulations are proposed to be adopted, the approval of the power purchase agreement between a Generating Company and a Distribution Licensee for supply of electricity from a new generating station may comprise of two steps, at the discretion of the applicant:

(a) Approval of a provisional tariff, on the basis of an application made to the Commission at any time prior to the application made under clause (b) below; and

(b) Approval of the final tariff, on the basis of an application made not later than three (3) months from the cut-off date.”

(a) During the public hearing, counsel for BEST submitted that the first Proviso to Regulation 7.1.2 of the MERC (Terms and Conditions of Tariff) Regulations, 2005 required the submission of an application for approval of power purchase agreement or arrangement within a period of three months of notification of the said Regulations. However, even after the expiry of the mandated three months from the date of notification of the said Regulations (August 23, 2005), REL has not taken any steps towards execution of PPA. This failure continued even after the issuance of specific directions by the Commission under its Order dated December 9, 2005 in Case No. 4 of 2003. These acts of wilful non-compliance establish the absence of bonafides in the case of REL. In this perspective, Counsel questioned the locus standi of a negligent licensee like REL to intervene and obstruct the validation process of a PPA between BEST and TPC(G). It has been argued that BEST and TPC(G) are independent contracting parties and REL is not privy to the PPA. Per Contra, Counsel for REL has vehemently contended that the EA 2003, particularly Section 86(1)(b) does not make it mandatory for the execution of a power purchase agreement for the purchase of power by a distribution licensee from a generating company. Whereas, it is noticed from Regulation 7.1.2 as above that “***..the supply of electricity by such Generating Company to such Distribution Licensee after the date of notification of these Regulations shall be in accordance with a power purchase agreement approved by the Commission in accordance with Part D of these Regulations***”. Accordingly, the Commission has issued several directives to the distribution licensees to this effect in its various Orders. The Regulations as pointed out, make the submission of power purchase agreements, mandatory. The objective is also to remove any uncertainty that may be faced by consumers of a distribution licensee that does not have any written terms and conditions through a power purchase agreement in place for purchase of contracted power. In the present instance, as is borne out on the face of it from the materials placed before the

Commission, there have indeed been written correspondences exchanged between REL and TPC(G) under email dated May 4, 2006 containing the draft of the proposed PPA between REL and TPC(G), REL's letter dated May 4, 2006, TPC's letter dated May 5, 2006 regarding issues to be incorporated in the proposed PPA, REL's letter dated June 5, 2006, TPC's letter dated June 12, 2006. Amongst other issues, the issue that is relevant in the present proceedings and on which the parties were not *ad idem*, was the exact quantum to be sold by TPC(G) and purchased by REL under the PPA. Whereas, under Schedule II (a) of the draft PPA (titled "Projections of REL loads (MVA) and quantum of electricity (MU) for the next 5 years"), REL projected its total peak requirement, TPC's comment as is borne out from the draft was that "REL to provide projected yearly peak drawal schedule (MW) and energy from TPC and not total peak requirement of REL". Under REL's email dated June 27, 2006 and TPC's reply email dated July 4, 2006, the issue relating to allocation of existing generation capacity in the ratio of respective maximum demands of BEST, REL and TPC(D), was raised between the senior management of REL and TPC. The records show that REL wrote a letter dated January 5, 2007 to the Managing Director of TPC contending that as REL's consumers have contributed towards fixed cost of TPC's existing generation since its inception, they would have a lien on appropriate capacity allocation in existing generation capacity of TPC. As is clear on the face of it from the correspondences referred to above, REL could have submitted an application under the aforesaid Regulation only if there was any power purchase agreement or an agreed arrangement with TPC(G). However, REL-D has also not submitted for the approval of the Commission any power purchase agreement for long-term power procurement with any other generator/supplier, and in fact, has not even submitted for approval any written arrangement for procurement of power from its own generation division (REL-G) as well. REL's recalcitrant attitude in seeking approval of the terms and conditions of its power procurement, deserves to be deprecated and the Commission administers a warning on REL. REL being a distribution licensee and a generator, it is for REL to file the power purchase agreements for purchase of power from generating companies early, and written arrangements for procurement from its own generation division immediately, for approval of the Commission as prescribed by the provisions of The Electricity Act 2003 and in terms of the Regulations framed by the

Commission. The Commission may take stern action in the event of such failure on the part of REL, in future.

(b) BEST have contended that the ambit of approval process under Section 86(1)(b) is required to be restricted to the price and the Commission has no powers to reduce the quantum agreed by distribution licensee and generating company under the power purchase agreement submitted for approval. This argument is not sustainable as a plain reading of the aforesaid section leaves no manner of doubt that the Commission is authorised to issue such orders, instructions, directions as it may deem fit to a distribution licensee in connection with electricity purchase and procurement. The power to approve electricity purchase includes the power to disapprove. By inserting the word “including” before the words “the price” in the aforesaid section, the legislature has made the scope of the power to regulate, extensive. The word “including” enlarges the meaning of the words occurring in the aforesaid section. It is obvious that the word “including” as used is inclusive and denotes extension and cannot be treated as restricted in any sense and it would be inappropriate to put a restrictive interpretation upon terms of wider denotation.

In AIR 1972 SUPREME COURT 168 "Commissioner of Income-tax, A.P. v. M/s. Taj Mahal Hotel, Secunderabad", it was held that:

“6. The word "includes" is often used in interpretation clauses in order to enlarge the meaning of the words or phrases occurring in the body of the statute. When it is so used, these words and phrases must be construed as comprehending not only such things as they signify according to their nature and import but also those things which the interpretation clause declares that they shall include.”

So, therefore, when the word “including” is so used, the words “regulate electricity purchase and procurement process of distribution licensees” must be comprehending, not only to regulate “the price”, as they signify according to their natural import, but also those things that are part and parcel of the purchase and procurement which includes the quantum of electricity to be purchased or procured. It would be thus, reasonable to hold

that the Commission has unfettered jurisdiction to regulate on all aspects in connection with electricity purchase and procurement as well as to decide the legality of electricity purchase and procurement process of distribution licensees. Therefore, the Commission under the EA 2003 has all the powers conferred expressly by the statute and also it has all the incidental and ancillary powers, which are necessary to make fully effective the express grant of statutory powers. Within the bounds of its jurisdiction it has all the powers expressly and impliedly granted under the statute. The Commission, thus, is entitled to make pragmatic adjustments, which may be called for by particular circumstances. If, on a consideration of the facts and circumstances of a particular case, a conclusion could be arrived at to the effect that the “agreements for purchase of power” which have been submitted for approval under Section 86(1)(b) require to be regulated in terms of Section 23 keeping in view the prevailing demand shortage situation or is restricting competition, or not protecting interest of consumers or is not ensuring supply of electricity to all areas, and if the Commission is of the opinion that it is necessary or expedient so to do, the scope of approval under Section 86(1)(b) would include the powers to reject, modify, alter and / or vary the terms of the agreements for purchase of power and to further direct the distribution licensee to re-write the terms found reasonable. The scope and ambit of the word “regulate” has found conclusive interpretations by the Apex Court. In the case of *Cellular Operators Association of India and others, Appellants v. Union of India and others* (AIR 2003 SC 899] the Supreme Court held as under:

“33. The regulatory bodies exercise wide jurisdiction. They lay down the law. They may prosecute. They may punish. Intrinsicly, they act like an internal audit. They may fix the price, they may fix the area of operation and so on and so forth. While doing so, they may, as in the present case, interfere with the existing rights of the licensees.”

In the case of *K Ramanathan vs State of Tamil Nadu* (1985) 2SCC 116, the Supreme Court held as under:

“19. ..The power to regulate implies the power to check and may imply the power to prohibit under certain circumstances, as where the best or only efficacious regulation consists of suppression. It would therefore appear that the word regulation cannot have any inflexible meaning as to exclude prohibition. It has different shades of meaning and must take its colour from the contest in which it is used having regard to the purpose and object of the legislation and the court must necessarily keep in view the mischief which the legislature seeks to remedy”

The Commission needs to examine the statement of objects and reasons of the Act, the preamble of the Act and various Sections thereof as they will portray what the statute needs to accomplish and therefore, how it should be construed. The EA 2003 and the very Statement of Objects and Reasons as well as the preamble to the statute would indicate that to take measures conducive to development of electricity industry, promoting competition, protecting interest of consumers and supply of electricity to all areas, the EA 2003 was enacted and the independent electricity regulatory commissions were constituted. That being the object for which the present independent Commission was constituted, the power of the Commission has to be adjudged from the language conferring that power and it would not be appropriate to restrict the same on the ground that the provisions of the EA 2003 cannot be stretched to grant more powers to State Electricity Regulatory Commissions ‘under the garb’ of exercising the powers specifically provided. In conclusion, the Commission is of the view that Section 86(1)(b) is wide enough to vest jurisdiction and power on the Commission to regulate the quantum of electricity to be procured by a distribution licensee besides other aspects of electricity purchase and procurement process.

(c) TPC has contended that under Section 86(1)(b) the generator cannot be regulated in terms of the quantum to be supplied to a distribution licensee. The Commission is of the view that the power to regulate quantum to be procured by a distribution licensee under Section 86(1)(b) is a part and parcel of the power to regulate the quantum to be supplied by a generator to a distribution licensee.

(d) One another point was highlighted by Shri. J.J. Bhatt, learned counsel for REL with respect to the requirement to read the provisions of Section 86(1)(b) harmoniously with Section 60. The learned counsel for REL has advanced detailed argument in this respect and has relied on one Writ Petition No. 916 of 2001 [*TPC & Anr. Vs. State of Maharashtra & Ors*] preferred before the High Court, Bombay, by 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. In the Commission’s view, the lispendence between REL and TPC, if at all, it was for the Hon’ble High Court to decide, which subsequently was allowed by the High Court, to be withdrawn pursuant to Hon’ble Court’s Order dated 18th June 2001 in view of CEA’s assurance that it would not give its consent to any project till the project is justified from demand angle and till all statutory clearances and tariff aspects are considered including considering objections raised by Tata Power. Although Counsel for REL submitted that the said writ petition needs consideration for deciding whether any direction is required to be given under Section 60 of EA 2003, the Commission feels no need to express any opinion in this respect nor is it within its jurisdiction.

As regards Section 60, which would be relevant to be referred at this stage, it reads as under:

“60. 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.”

For invoking the aforesaid provision, either of the following three situations must conclusively be shown to exist:

- (i) any agreement has been entered into which is likely to cause or causes an adverse effect on competition in electricity industry; or
- (ii) dominant position has been abused which is likely to cause or causes an adverse effect on competition in electricity industry; or
- (iii) a combination has been entered into which is likely to cause or causes an adverse effect on competition in electricity industry.

Based on the analysis of data submitted by both TPC-D (for internal capacity allocation from its generation division) and BEST (for PPA with TPC-G), and as explained in the subsequent paragraph, the Commission is satisfied with the compliance with Regulation 24 of the MERC (Terms and Conditions of tariff) Regulations, 2005 and the demand of TPC-D and BEST. Once the demand of TPC-D and BEST is justified in terms of the data that has been submitted in terms of the proposed capacity to be purchased, in the present case, it has not been shown to the Commission as how the proposed PPA between TPC(G) and BEST is likely to cause or causes an adverse effect on competition in electricity industry or that it is proposed to be entered into with a view to reduce competition or eliminate the competitors. Hence, in view of the demand that stands justified for TPC-D and BEST, the Commission, considering the material placed on record, does not deem fit to issue any directions under Section 60 in the present case.

(2) COMPLIANCE OF THE PPA BETWEEN TPC-D AND BEST AND THE TERMS AND CONDITIONS OF THE INTERNAL CAPACITY ALLOCATION BETWEEN TPC-G AND TPC-D, WITH THE MERC (TERMS AND CONDITIONS OF TARIFF) REGULATIONS, 2005

(a) Future Planning by BEST

The Commission has taken note of suggestions made by stakeholders and the submissions made by BEST in this regard. During the Technical Validation session, BEST gave a presentation on future requirements and its study of Long Term Power Purchase Plan. In response to the Commission's query raised during the Technical

Validation Session as regards schedule for the above study, BEST submitted that it will take around 3-4 months to complete the study on future requirements and long term Power Procurement Plan. The Commission directs BEST to submit the future power requirements in excess of 800 MW and Long Term Power Procurement Plan for the same within six months from the date of issue of this Order.

(b) Tariff of TPC Generating Stations and Auxiliary Consumption

As regards the objection that the auxiliary consumption and tariff of TPC-G's stations should be reduced, the Commission has approved the Unit-wise Tariff for TPC's Generating Stations vide its Order dated April 2, 2007 on Multi Year Tariff Petition of TPC-Generation Business. The Commission in its Order has also approved the trajectory of Auxiliary Consumption for TPC's Generating Units. Moreover, this issue cannot be raised during this proceeding, which is related to the approval of the PPA between two parties, rather than the tariff approval of TPC-G.

(c) BEST Demand Forecast and Load Factor

The issue raised here is on the demand projected by BEST in its MYT Petition. The Commission has already issued the Order on BEST's MYT Petition for FY 2007-08 to FY 2009-10 and also approved the sales forecast. In case of any variation between actual sales during FY 2007-08 and sales estimated in the Order, the same will be considered at the time of truing up based on actual sales.

(d) Penalty Clause

Some stakeholders have submitted that the penalty provision in the PPA between TPC-G and BEST of 10 paise/kWh for non supply of contracted capacity in case the availability of TPC (G)'s generation falls below 85% on an annual basis is on lower side, and should be increased. In this regard, the Commission's Tariff Regulation No. 33.1.1 (a) stipulates that the annual fixed charges of the Generating Company/Business will be recovered in full, subject to achieving 80% availability on an annual basis, and there is an incentive of 25 paise/kWh for every unit of generation above 80%. In the PPA between TPC-G and BEST, TPC-G has agreed to ensure annual availability of 85%, and has also agreed to pay a penalty of 10 paise/kWh for every unit of shortfall, if the availability falls below

85%. The Commission is of the view that this is a fair approach and actually guarantees additional availability over and above the availability levels stipulated under the Commission's Tariff Regulations. The generator cannot be penalised twice for achieving availability less than 85% or 80%, since the fixed cost recovery is linked to the same. This is also the standard practice for PPAs being entered into between the generating Company and the purchaser.

The Commission hence, approves this clause as proposed by BEST in its PPA. Accordingly, BEST will have to ensure that it contracts for adequate generation capacity for its requirement, assuming the availability of TPC-G generation capacity as 80%.

(e) Status of Agreement

BEST had initially submitted the Petition for approval of Power Purchase Agreement on July 13, 2005. The Commission issued its Order on the said Petition on July 7, 2006 directing BEST to modify the PPA and submit the revised PPA between TPC's generating business and BEST for the Commission's approval, as the Agreement submitted by BEST was not a Power Purchase Agreement, but a Bulk Supply Agreement which was not in line with the provisions of EA, 2003 and Commission's Regulations. For complying with the directions of the Commission, BEST submitted its Revised PPA for approval of the Commission on December 27, 2006. The Commission, after issuing the MYT Orders for all the licensees and Generating Companies/Businesses, has taken up the PPA for approval, and is now ruling on the same.

(f) Compliance with MERC (Terms and Conditions of Tariff) Regulations, 2005

Regulation 24.2 of MERC (Terms and Conditions of Tariff) Regulations, 2005 specifies as under:

"The Commission shall review an application for approval of power purchase agreement / arrangement having regard to the approved long-term power procurement plan of the Distribution Licensee and the following factors:

- (a) Requirement for Power Procurement under approved long-term power procurement plan;*
- (b) Adherence to transparent process of bidding in accordance with guidelines issued by the Central Government;*
- (c) Adherence to the terms and conditions for determination of tariff specified under part (E) of these regulations where the process specified in part(b) above has not been adopted;*
- (d) Availability (or expected availability) of capacity in intra-state transmission system for evacuation and supply of power procured under the agreement/arrangement;*
- (e) Need to promote cogeneration and generation of electricity from renewable sources of energy.”*

The Commission has analysed both the Petitions, i.e., BEST Petition for approval of Power Purchase Agreement between TPC-G and BEST and TPC's Petition for approval of Power Purchase Arrangement between TPC-G and TPC-D in accordance with the provisions of Regulation 24.2 of MERC (Terms and Conditions of Tariff) Regulations, 2005. The Commission's views on the compliance of the PPA between TPC-D and BEST as well as internal capacity allocation between TPC-G and TPC-D with the provisions of Regulations and other techno-commercial issues are discussed below.

(g) Compliance of BEST's Power Purchase Agreement with the Regulations

(i) Demand Forecast and Long Term Power Procurement Plan

Based on the month-wise Maximum Demand (MD) details submitted by the BEST for FY 2006-07, the Commission observes that the maximum demand of BEST during FY 2006-07 was in the range of 702 MW to 791 MW which does not include the requirement of textile mill land. Considering the transmission loss of 4.85% and weighted average auxiliary consumption, the total contracted generation capacity required by BEST to meet the maximum demand recorded in FY 2006-07 works out to be 773 MW to 870 MW.

Regarding Long Term Power Procurement Plan, BEST has submitted that it has already appointed a consultant for long term power purchase plan (LTPPP) for next 10 years for quantities above 800 MW. BEST further submitted that BEST has entered into PPA for the capacity of 800 MW to meet the maximum demand and in case any surplus capacity is available during off peak periods, the same will be traded and revenue earned from such trading will be passed on to consumers.

Considering the actual Maximum Demand of BEST recorded during FY 2006-07 and other submissions made by BEST, the Commission is of the view that the PPA entered by BEST with TPC for 800 MW is justified to meet BEST's requirement.

(ii) Adherence to Terms and Conditions for Tariff under Part E of Tariff Regulations

The Power Purchase Agreement submitted by BEST provides for determination of tariff as per MERC (Terms and Conditions of Tariff) Regulations, 2005 as applicable to Generating Companies and hence, the PPA complies with this Regulation.

(iii) Availability of capacity in Intra-State Transmission System

BEST, being a Transmission System User (TSU) of the Intra-State Transmission System (InSTS)), is presently using 800 MW transmission capacity of TPC-T's transmission network. Further BEST has also executed a Bulk Power Transmission Agreement with TPC-T. Hence, there is transmission capacity available to meet BEST's requirement of 800 MW. For additional power procurement contracted from other sources, BEST would have to co-ordinate with the State Transmission Utility (STU) for assessment of available capacity.

(iv) Need to promote cogeneration and generation of electricity from renewable sources of energy

Regarding purchase of energy from renewable sources, the Commission directs BEST to comply with the Commission's Order on Renewable Purchase Specification (RPS) dated August 16, 2006 in Case 6 of 2006.

(h) Compliance of TPC-D's Power Purchase Arrangement with the Regulations

(i) Demand Forecast and Long Term Power Procurement Plan

TPC, in its presentation on Load Projections, submitted that actual peak demand during FY 2006-07 was 475 MW and estimated peak demand during FY 2007-08 and FY 2008-09 is 484 MW and 517 MW, respectively. TPC, during the public hearing, submitted that during FY 2005-06, TPC's average power requirement at G<>T interface was 458 MW and by grossing up this requirement with average auxiliary consumption, TPC's requirement at Generator Terminal during FY 2005-06 was 477 MW.

TPC in its submissions further submitted that the peak demand of TPC-D can be met by TPC-G upto FY 2009-10 from Trombay and further allocation from Unit 9 at appropriate time will meet the peak demand till FY 2013-14.

Considering the actual Demand of TPC during FY 2005-06 and FY 2006-07 and other submissions made by BEST, the Commission is of the view that the Power Purchase Arrangement proposed by TPC-D for availing 477 MW power from TPC-G for next 10 years is justified to meet TPC-D's requirement.

(ii) Adherence to Terms and Conditions for Tariff under Part E of Tariff

Regulations

The terms and conditions for internal capacity allocation between TPC-G and TPC-D as submitted by TPC-D provides for determination of tariff as per MERC (Terms and Conditions of Tariff) Regulations, 2005 as applicable to Generating Companies and hence, the PPA complies with this Regulation.

(iii) Availability of capacity in Intra-State Transmission System

TPC-D, being a Transmission System User on the Intra-State Transmission System (InSTS), is presently using transmission capacity of TPC-T's transmission network to meet its entire requirement. Hence, there is transmission capacity available to meet TPC-D's current requirement of 477 MW. For additional power procurement contracted from other sources, TPC-D would have to co-ordinate with the State Transmission Utility (STU) for assessment of available capacity.

(iv) Need to promote cogeneration and generation of electricity from renewable sources of energy

Regarding purchase of energy from renewable sources, the Commission directs TPC-D to comply with the Commission's Order on Renewable Purchase Specification (RPS) dated August 16, 2006 in Case 6 of 2006.

Based on the above analysis, the Commission is satisfied with the data and information submitted by BEST and TPC substantiating the requirements of Regulation 24 of the MERC (Terms and Conditions of tariff) Regulations, 2005.

(B) In view of the above, the Commission hereby approves the PPA between BEST and TPC and the internal capacity allocation from the generation division of TPC to its own distribution division, as proposed, with effect from April 1, 2008. Hence, the Commission approves the Power Purchase Agreement between TPC-G and BEST for 800 MW and the Power Purchase Arrangement between TPC-G and TPC-D for 477 MW, as sought by BEST and TPC-D, respectively.

(C) REL-D is directed to file long-term Power Purchase Agreements for procurement of power from generating Companies and other sources at the earliest. Also, REL-D should submit Power Purchase Arrangement for procurement of power from its own generating unit REL-G, for the Commission's approval, within one month of the issue of this Order.

(D) In the past, in view of the prevailing supply shortage situation, the Commission has invoked its powers under Section 23 of the EA 2003, and has directed the distribution licensees to share the available generation capacity in a particular ratio, based on the share of non-coincident peak demand for FY 2006-07, and subsequently based on the share of the coincident peak demand for FY 2007-08, since the coincident peak demand data was available by then. The situation in the previous years was compounded by the fact that there were no approved PPAs between the parties, and an important aspect like power procurement cannot operate in a vacuum. However, the Commission's powers to issue directions under Section 23 of the EA 2003 are wide and if necessary and found expedient, the Commission may issue such directions in future also, despite the existence of any or all the approved PPAs, in case of any shortfall in contracted capacity, in order to protect interests of consumers. During the transition period, in case of shortage of supply of electricity in the city of Mumbai, the Commission will assess the situation at the time of conduct by the Commission of Annual Performance Review in terms of Regulation 17 of the MERC (Terms and Conditions of Tariff) Regulations, 2005 and assess whether any specific direction to the distribution licensees is required to be issued, to ensure that the consumers of all three distribution licensees in Mumbai city are treated equitably and for equitable distribution of electricity. It is clarified that the supply in the form of generation capacity does not necessarily have to be located within Mumbai or even within Maharashtra, and the supply availability referred to here is in the context of firm long-term power purchase agreements between the distribution licensees and power suppliers.

With the above observations, the Commission disposes of **Case No. 87 of 2006, Case No. 88 of 2006 and Case No. 30 of 2007.**

Sd/-
(S.B. Kulkarni)
Member

Sd/-
(A. Velayutham)
Member

Sd/-
(Dr. Pramod Deo)
Chairman

(P.B. Patil)
Secretary, MERC

List of Participants present at the Technical Validation Session held April 18, 2007 in Case No. 87 of 2006 regarding admissibility of REL's Intervention Application and Approval of PPA between BEST and TPC

1. Shri R.L. Chechani, Principal Consultant, PwC
2. Shri. Kapil Sharma, REL.
3. Shri Amitabh Shah, Concultant, PwC
4. Shri. J.J. Bhatt, Counsel for REL.
5. Shri. Surendra Khot, REL.
6. Shri. P.S. Pandya, REL.
7. Shri. Satheesh Lal, Advocate for BEST.
8. Shri. K.N. Rajagopal, DCE, BEST.
9. Shri. S.M. Sakpal, SSGM, BEST.
10. Shri. C.H. Shinde, DCEPL BEST.
11. Shri. A.V. Kane, AGM (ES) BEST.
12. Shri. S.A. Puranik, DGM, BEST
13. Shri A.G. Patil, DCE (Ele).
14. Shri. M.T. Nair, Chief Legal Advisor, BEST.
15. Shri. K.R.A. Shetty, Legal Advisor, BEST.
16. Shri. P.D. Pawal, DIA, BEST.
17. Shri. S.B. Dhole, ACA, BEST.
18. Shri. M.R. Dharaskar, BEST.
19. Shri. S.R. Khedkar, Div. Engineer, BEST.
20. Shri. A.R. Talyanik, AE, BEST.
21. Shri. A.G. Patil, BEST.
22. Shri. Harinder Toor, Counsel for BEST.
23. Shri. J.D. Kulkarni, DGM, TPC.
24. Shri. V.H. Wagle, Manager, TPC.
25. Shri. P.K. Anvekar, Asst Manager, TPC.
26. Shri. S.R. Mehendale, Asst Manager, TPC.
27. Shri. M.K. Gupta. AM, TPC.
28. Shri. A. Sethi, GM, TPC.
29. Shri. T.P. Mohan, AGM, TPC.

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List of Participants present at the Public Hearing held 17th July, 2007 in Case No. 87 of 2006 regarding Approval of PPA between BEST and TPC

1. Shri Surendra Khot, Sr. Manager, REL
2. Shri Rakshpal Abrol, President, Bombay Small Scale Industries Association,
3. Shri N. Ponrathnam, Vel Induction Hardenings
4. Shri Jude G. Tandon, Jani Industrial Estate
5. Shri K.F. Paul,
6. Shri Navin M. Shetty, BSSIA
7. Shri Sandeep N. Ohri
8. Shri K.Sampath, Fluidyne
9. Shri K.A. Salim, Polysteel India Ltd.
10. Shri S.M. Sakpal, BEST
11. Shri U.Y. Vajandar, BEST
12. Shri Uttam Khobragade, GM,, BEST
13. Shri A.V. Kane, AGM (ES), BEST
14. Shri S.J. Tandon, CE (MERC), BEST
15. Shri S.A. Puranik, BEST
16. Shri K.N. Rajagopal, BEST
17. Shri C.H. Shinde, BEST
18. Shri S.N. Pawar, BEST
19. Shri N.M. Herlekar, BEST
20. Shri S.V. Varadkar, BEST
21. Shri R.B. Bharadwaz, BEST
22. Shri M.R. Dharangkar, BEST
23. Shri P.E. Jagtap, BEST
24. Shri M.Z.MA. Sayed, BEST,
25. Shri A.A. Mule, BEST
26. Shri K.P.S. Kutty, BEST
27. Shri S.R. Khedkar, BEST
28. Shri K.R.A. Shetty, BEST
29. Shri S.B. Dhole, BEST
30. Shri R.Y. Harkulkar, BEST
31. Shri P.S. Kirtikar, BEST
32. Shri R.D. Pawar, BEST,
33. Shri A.G. Patil, BEST
34. Shri R.S. Kadam, BEST
35. Shri M.T. Nair, BEST
36. Shri M.B. Nikkam, BEST
37. Shri P.A. Jadhav, BEST
38. Shri V.V. Dabholkar, BEST
39. Shri P.V. Sawant, BEST
40. Shri S.B. Thorat, AFF
41. Shri Ganesh Balasubramanian, REL
42. Shri V.H. Wagle, Sr. Manager, TPC
43. Ms. S.R. Mehendale, Asst. Manager, TPC
44. Shri P.K. Anvekar, Asst. Manager, TPC
45. Shri J.D.Kulkarni, Dy. General Manager, TPC

46. Ms Sukanya Khar, REL
47. Ms Anjali M. Chandurkar, Advocate, REL
48. Shri J.J. Bhatt, Sr. Advocate, REL
49. Shri P.M. Hundiwale, REL
50. Shri Kapil Sharma, Head-Regulatory Affairs, REL
51. Shri P.S. Pandya, Sr Consultant, REL
52. Shri A.V. Shenoy, Rashtriya Matadata Manch
53. Shri Dilip M. K.

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List of Participants present at the Technical Validation Session on 18.04.2007 at 12.00 hours in Case No. 88 of 2007 in the matter of Admissibility of REL's Intervention Application and Approval of Power Purchase Agreement between TPC-D and TPC-G

1. Mr M.K. Gupta, Asst. Manager, TPC
2. Mr S.R. Mehendele, Asst. Manager, TPC
3. Mr V.H. Wagle, Sr. Manager, TPC
4. Mr J.D. Kulkarni, Dy. General Manager, TPC
5. Mr P.K. Anvekar, Sr. EE, TPC
6. Mr S.B. Thorat, Sr. Manager, A.F. Ferguson & Co.
7. Mr Vikas B. Nair, Manager, A.F. Ferguson & Co.
8. Mr T.P. Mohan, TPC
9. Mr Ashok Sethi, Sr. General Manager, TPC
10. Mr S.R. Khedkar, BEST
11. Mr M.R. Dharaskar, Suptd., BEST
12. Mr A.R. Talegaonkar, AE, BEST

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List of Participants present at the Public Hearing on 29.08.2007 at 11.00 hours in Case No. 88 of 2007 - In the matter of Comments/ Suggestions for approval of long term power purchase arrangement between the TPC Distribution Business and TPC Generation business

1. Mr. Ashok Sethi, Sr.GM, TPC
2. Mr V.H. Thakurani, Dy. GM, TPC
3. Mr P.N. Sankaragupta
4. Mr R.B Patil, D.G.M. (Fin.), Rashtriya Chemical Fertilizers
5. Mr N.R. Kamat, CE, Rashtriya Chemical Fertilizers
6. Mr V.H. Wagle, Sr. Manager, TPC
7. Mr S.R. Mehandele, Asst. Manager, TPC
8. Mr P.K. Anvekar, Sr. EE, TPC
9. Mr A.V. Kane, Asst. GM (ES), BEST
10. Mr C.H. Shinde, Dy. CE, BEST
11. Mr J.D. Kulkarni, Dy. GM, TPC
12. Mr Sitiesh Mukherjee, Advocate
13. Mr Ganesh Balasubramanian, REL
14. Mr P.A. Pandya, REL
15. Mr S Ramakrishna, TPC
16. Ms Sukanya Khan, REL
17. Mr J.J. Bhatt, Counsel, REL
18. Ms Anjali M. Chandurkar, Counsel, REL
19. Mr Prakash K. Sr. Manager, M/s Associated Capsules Pvt. Ltd.
20. Mr Sailesh Kothari, Manager, M/s New Haven Steel Ball Corpn.
21. Mr S.R. Khedkar, BEST
22. Mr M.R. Dharaskar, Suptd, BEST
23. Mr R.R. Mehta, Sr. Vice President, REL
24. Mr P.M. Hundiware, Associated Vice President, REL
25. Mr Kapil Sharma, Head-Regulatory Affairs, REL
26. Mr A.A. Mule, BEST
27. Mr Mahesh D. Mahale, Mulla & Mulla, REL

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List of Participants present at the hearing on 29.08.2007 at 12.00 hours in Case No. 30 of 2007 in the matter of Petition filed by M/s Reliance Energy Ltd. determining the quantity of energy/ electricity in respect of entering of Power Purchase Agreement of REL, TPC and BEST.

1. Mr Sitesh Mukherjee, Advocate, TPC
2. Mr Ashok Sethi, Sr. GM, TPC
3. Mr J.D. Kulkarni, Dy. GM, TPC
4. Mr V.H. Wagle, Sr. Manager, TPC
5. Mr Prakash K., Sr. Manager, Associated Capsules Pvt. Ltd.
6. Mr Sailesh Kothari, M/s New Haven Steel Ball Corpn.
7. Mr V.H. Thakurani, Dy. GM, TPC
8. Mr S.A. Puranik, Dy. GM, BEST
9. Mr R.R. Mehta, Sr. V.P., REL
10. Mr Kapil Sharma, Head-Regulatory Affairs, REL
11. Mr P.M. Hundiware, Associate V.P. REL
12. Ms. Bhavna Singh, Mulla & Mulla, REL
13. Mr Mahesh D. Mahale, Mulla & Mulla, REL
14. Mr Rakshpal D. Abrol, President, Bombay Small Scale Industries Association
15. Mr N.R. Kamat, CE, Rashtriya Chemical Fertilizers
16. Mr R.B. Patil, Dy. GM (Finance), Rashtriya Chemical Fertilizers
17. Mr K.R.A. Shetty, Legal Assistant, BEST
18. Mr A.V. Kane, Asst. GM (ES), BEST
19. Mr C.H. Shinde, Dy. Chief, BEST
20. Mr A.G. Patil, CERC, BEST
21. Mr S.N. Pawar, AERC, BEST
22. Mr S.M. Sakpal, BEST
23. Mr M.B. Nikam, BEST
24. Mr L.K. Nagraj, Dy. GM, Rashtriya Chemical Fertilizers
25. Mr P.N.S. Gupta, CE (Electrical), Rashtriya Chemical Fertilizers
26. Mr Murali Nair, Chief Legal Adviser, BEST
27. Mr Ramji Shrinivas, Advocate, BEST
28. Mr K.N. Rajagopal Dy. Chief, BEST
29. Mr S.J. Tandon, CE, BEST
30. Mr A.P. Bodhe, BEST
31. Mr P.S. Kirtikar, BEST
32. Mr K. Vinodraj, Dy. CE, BEST
33. Ms. Santrupta, Consultant, PwC
34. Mr J.J. Bhatt, Counsel, REL
35. Ms. Anjali Chandurkar, Counsel, REL
36. Mr Ganesh Balasubramanian, REL
37. Mr Pankaj Pandya, REL
38. Mr N.V. Bhandari, Suptd., BEST
39. Dr Ashok Pendse, Mumbai Grahak Panchayat
40. Mr R.M. Pradhan, BEST
41. Mr A.B. Ketkar
42. Mr. Dhamre

List of Participants present at the hearing on 7.09.2007 at 11.00 hours in Case No. 30 of 2007 in the matter of Petition filed by M/s Reliance Energy Ltd. determining the quantity of energy/ electricity in respect of entering of Power Purchase Agreement of REL, TPC and BEST.

1. Dr Ashok Pendse, Mumbai Grahak Panchayat
2. Mr Sitesh Mukherjee, Advocate, TPC
3. Mr Ganesh Balasubramanian, REL
4. Mr Kapil Sharma, Head-Regulatory Affairs, REL
5. Mr Rakshpal Abrol, President, Bombay Small Scale Industries Association
6. Mr M. Palaniappan, ABPS Infra
7. Mr R.B. Patil, Rashtriya Chemical Fertilizers Ltd.
8. Mr P.S. Pandya, Consultant, REL
9. Mr Ramji Shrinivasan, Advocate, BEST
10. Mr S.A. Puranik, BEST
11. Mr C.H. Shinde, BEST
12. Mr K.R.A. Shetty, BEST Legal Adviser
13. Mr P.E. Jagtap, BEST
14. Mr K.N. Rajagopal, BEST
15. Mr K. Vinodraj, BEST
16. Mr E.G. Jeevan, BEST
17. Mr Ashok Sethi, TPC
18. Mr S.M. Sakpal, BEST
19. Mr A.V. Kane, BEST
20. Mr J.D. Kulkarni, Dy. GM, TPC
21. Mr S.S. Joshi, BEST
22. Mr N.V. Bhandari, BEST
23. Mr K. Pavithran, BEST
24. Mr R.M. Pradhan, BEST
25. Mr S.R. Mehendele, Asst. Manager, TPC
26. Mr V.H. Wagle, Sr. Manager, TPC
27. Mr S.J. Tandon, BEST
28. Mr S.N. Pawar, Asst. Engineer, BEST
29. Mr A.G. Patil, CE, BEST
30. Mr S.R. Surve
31. Mr S.V. Varadhan
32. Mr A.B. Ketkar
33. Mr M.T. Nair, BEST
34. Mr S.R. Khedkar, BEST
35. Mr M.R. Dharaskar, BEST
36. Mr R.D. Waikar, BEST
37. Mr S.R. Karkhanis, ABPS Infra
38. Mr S.A. Radke
39. Mr N.K. Sanghi, Sanghi Oxygen Bombay Pvt. Ltd.
40. Mr C.A. Colaco, Consultant, TPC
41. Mr P.P. Kulkarni, BEST
42. Mr R.R. Mehta, REL
43. Mr S.R. Khot, Sr. Manager, REL