

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 7 of 2002

In the matter of
Petition filed by TPC seeking payment of dues from REL for supply of
energy in terms of Principles of Agreement dated January 31, 1998
as entered into between the parties.

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

Dated: December 12, 2007

The Tata Power Company Ltd
Bombay House
24, Homi Modi Street
Fort, Mumbai 400 001

..... Petitioner

Versus

Reliance Energy Ltd (formerly known as BSES Ltd.)
Reliance Energy Centre
Santa Cruz (East),
Mumbai 400 055

..... Respondent

For the Petitioner:

Shri. Janak Dwarkadas along with Shri. Darius
Khambata, Shri. Srikant Dojode.

For the Respondent:

Shri. J.J. Bhatt alongwith Smt. Anjali Chandurkar,
Shri. D.J. Kakalia

ORDER

The Tata Power Company Limited (“TPC”) filed a Petition before the Commission on March 28, 2002 invoking Sections 22, 29 and 45 of the erstwhile Electricity Regulatory Commissions Act, 1998 (“ERC Act”) and Regulation Nos. 24, 68, 72, 83, 84, 95 and 96 of the MERC (Conduct of Business) Regulations, 1999. In the Petition, TPC submitted that it supplies electricity to BSES Limited (now known as Reliance Energy Limited). BSES holds a distribution license, which requires it to purchase electricity from TPC (which is a bulk licensee). From its inception upto 1995, all the power distributed by BSES in the suburbs was purchased from TPC. However, in or about 1994, BSES installed generating units at Dahanu for supply of electricity to its consumers which was commissioned by the year 1995. From September 1995, BSES started bringing the power generated by it at Dahanu to supply to its consumers in the suburbs of Mumbai city. Consequently, BSES was no more fully dependent on TPC for its entire power requirement. It is submitted by TPC that the flow of electricity at the 220 kV interconnection between TPC system and BSES system at Borivali continued. For operational and administrative convenience, TPC and BSES signed a Principles of Agreement dated January 31, 1998 (“POA”). In the present petition, TPC has sought to enforce Clauses 3 and 4 of the POA which read as under:

“(3) *BSES off-take of energy at 220kV Borivali interconnection will be billed at Rs. 2.09 per kwh plus F.C.A. (which is presently at Rs. 0.45) as applicable from time to time at other points of supply. This average energy charge is based on an estimated annual flow of 250 million units of energy through Borivali interconnection.*”

(4) *BSES agrees at take or pay to TEC in each financial year “(a) overall minimum guaranteed aggregate energy off-take and (b) minimum aggregate maximum demand at 22 KV/33 KV points”*

For the year 1997-98 “(a)” and “(b)” off-takes are set at 2875 MUs and 6900 MVA respectively. BSES will submit their realistic projection for the year 1998-99 and 1999-2000 for minimum guaranteed aggregate energy off-take and aggregate maximum demand by first week of March 1998. TEC agrees to supply minimum guaranteed energy as well as power demand.

The monthly billing will be on the basis of the existing practice between TEC and BSES and adjustment, if any, for the aggregate maximum demand and energy figures will be done at the end of the year.”

2. TPC has contended that, although, the Indian Electricity Act, 1910 requires a distribution licensee to execute an agreement with the bulk licensee to receive and pay for the supply of energy, due to non-cooperation on the part of BSES a detailed finalised power supply agreement was not executed between BSES and TPC.

3. TPC has submitted that the rate of Rs. 2.09/- per kWh plus FCA was paid by BSES upto February 2001 for the off-take of energy at the 220 kV inter-connection. However, BSES unilaterally and illegally by its letter no. TD-007/JVK/2001 dated April 11, 2007 returned Bill no. 502190 dated April 2, 2001 issued by TPC for the month of March 2001. BSES has alleged that the said bill was in violation of the Order dated December 18, 2000 passed by the Commission as also in violation of the POA. It was falsely alleged that by reason of the Order of the Hon'ble Bombay High Court dated March 19, 2001, BSES was therefore not liable to pay the rate of Rs. 2.09 per kWh for the actual drawal of energy at the 220 kV point. Together with the said letter, BSES inter alia enclosed a statement alleging that there was a reverse flow of 1,40,000 units to TPC's system. BSES purported to adjust the alleged reverse flow and paid a sum of Rs. 6,59,86,760 (Rupees Six Crore Fifty Nine Lakh Eighty Six Thousand Seven Hundred Sixty only) by applying the energy rate of Rs. 1.77/- per unit. The letter was accepted by TPC without prejudice to its rights and contentions. TPC refuted the said allegations and the wrongful deduction of Rs. 0.32/- per kWh towards energy charges for drawal at 220 kV interconnection point, as the said energy charge was neither the subject matter of BSES's Petition culminating into the aforesaid order dated December 18, 2000 nor was it the subject matter of Writ Petition No. 31 of 2001 before the Hon'ble Bombay High Court. TPC called upon BSES to pay the balance outstanding amount of Rs. 81,56,920/- (Rupees Eighty One Lakh Fifty Six Thousand Nine Hundred Twenty only) together with interest (delayed payment charges) at the rate of 24% per annum from April 16, 2001 till payment or realisation.

4. On the other hand, as averred in TPC's Petition, BSES contended that it agreed to the charges of Rs. 2.09/- per unit only because it was liable to pay a sum of Rs. 3.5 crore per month towards standby charges and was not liable to pay the said rate if it was made liable to pay any other amount towards standby charges. BSES alleged that if TPC was desirous of charging the said rate, it would be required to submit a tariff revision proposal before the Commission. Per contra, TPC pointed out that BSES has been making payment to TPC at the rate of Rs. 2.09/- per unit for energy drawn at 220 kV point of interconnection since February 1998. TPC conveyed to BSES that the payment of Rs. 2.09/- per unit could not be linked with tariff revision.

5. TPC has annexed to its Petition a statement of claim (Exhibit "N") showing BSES's 220 kV bill details and interest amount on outstanding from March 2001 as on end of February 2002.

6. As regards Clause 4 of the POA, TPC has contended that although BSES, vide its letter dated March 10, 1998, gave its estimates for the years 1998-1999 and 1999-2000 for minimum guaranteed energy off-take and minimum aggregate maximum demand, BSES unilaterally sought to make the said projections subject to the condition that TPC shall not supply energy to BSES' existing consumers. As per TPC, the POA did not contain any such condition. For the period 1998-1999 there was a shortfall of 103 MU of actual energy off-take vis-à-vis guaranteed off-take. BSES was therefore bound and liable

to pay TPC a sum of Rs. 18,31,00,000/-. For the year ended 1999-2000, there was a similar shortfall of 428 MU. BSES was bound and liable to pay TPC a sum of Rs. 76,08,50,000/-. TPC further contended that supplementary bills as sent by TPC were returned by BSES on the basis that BSES had not committed to take or pay in respect of the energy off-take for the years 1998-1999 and 1999-2000. It was also wrongly alleged that the said guaranteed off-take included the drawal at 220 kV point. TPC has contended that the said guaranteed off-take was at 22kV/33kV points and not at 220 kV interconnection point.

7. The Petition contains the following main prayers:

- “(a) BSES be ordered and directed to pay to Tata Power for energy supplied at 220 kV interconnection at the rate of Rs. 2.09 per kwh in accordance with the Principles of Agreement dated 31st January, 1998 (Exhibit “C” hereto);*
- (b) BSES be ordered and directed to pay to Tata Power a sum of Rs. 8,95,18,160 (Rupees Eight Crore Ninety Five Lakh Eighteen Thousand One Hundred Sixty Only) as per the particulars of claim (Exhibit “N” hereto) together with further interest at the rate of 24% per annum.*
- (c) BSES be ordered and directed to pay to Tata Power a sum of Rs. 116,10,69,201 (Rupees One Hundred and Sixteen Crore Ten Lakh Sixty Nine Thousand Two Hundred One Only) as per the Particulars of Claim (Exhibit “X”, hereto) together with further interest at the rate of 24% per annum on the principal sum of Rs. 94,39,50,000 (Rupees Ninety Four Crore Thirty Nine Lakh Fifty Thousand Only) till payment or realisation.”*

8. The above shows that TPC has prayed to the Commission to direct BSES to pay for energy supply at Borivli 220 kV interconnection at the rate of 2.09/- per unit as per the POA, which, as alleged, BSES has unilaterally been paying at the rate of 1.77/- per unit from the billing month of March 2001. TPC has also prayed to the Commission to direct BSES to honour its committed off-take at 22 kV/33 kV points of supply on a “take or pay” basis from the year 1998-1999 onwards.

9. The rival contentions of BSES are that TPC cannot seek specific performance of certain clauses of the POA whilst seeking to give a go-by to other clauses embodied therein. The POA was a complete arrangement entered into primarily to resolve the question of standby charges payable by BSES to TPC. Although, the Government of Maharashtra by its order dated January 19, 1998 had directed payment of Rs. 3.5 crore per month by BSES to TPC as and by way of standby charges, nevertheless in order to maintain good relationship with TPC, BSES had agreed to clauses 3 and 4 of the POA as part of a “package deal” pertaining to payment of standby charges, and as a “sweetener” in addition to the said Rs. 3.5 crore. BSES has also contended that it cannot be expected

to guarantee any off-take from TPC in view of the fact that TPC has made concrete attempts, and have in fact, lured away large consumers of BSES. Such guaranteed off-take cannot be given since the energy purchased from TPC is inextricably linked with the capacity of BSES to sell the power to its consumers. It has been contended that any shortfall in actual off-take vis-à-vis guaranteed off-take is largely due to the decrease in REL's consumer demand as an effect of TPC directly supplying to the existing consumers of REL. Consequently, by its letter dated March 10, 1998, BSES while furnishing its estimates for the years 1998-1999 and 1999-2000 of off-take and demand expressly recorded that the same would be subject to TPC not supplying energy to the existing consumers of BSES. It has been contended by BSES that TPC cannot reprobate and approbate at the same time and have to stand by and affirm the said POA in its entirety. TPC cannot selectively seek specific performance of certain clauses while repudiating their obligations and rights under other clauses.

10. BSES also raised an objection that the contentions raised by TPC under the present petition were the subject matter of appeals pending before the Bombay High Court in MERC Appeal Nos. 1 and 2 of 2002 and hence, sub judice.

11. BSES has contended, without prejudice to its other contentions, that even assuming without admitting that the rate of Rs. 2.09/- per unit as stipulated under clause 3 of the POA is completely independent of the question of standby charges as averred by TPC, then in that event, such charge levied by TPC can only be part of energy charges. In such an event, it is clear that TPC cannot seek to claim the said amount over and above the tariff being levied for energy charges and any such levy without the sanction of the Commission as provided by the ERC Act and the regulations made thereunder, would clearly be untenable. No such sanction has been sought for by TPC as per the said regulations. BSES has further contended that TPC is not entitled to levy charges on BSES at a rate different from that which is levied on other bulk consumers such as the BEST, as has been sought to be done. Without prejudice to the said contentions, BSES has further contended that TPC has by its letters dated May 21, 2001 and June 2, 2001, inter alia, sought directions from the Commission that BSES pay for energy drawn at 220 kV Borivli interconnection at the rate of Rs. 2.09/- per unit as per the POA. TPC has also sought that BSES be directed to honour its alleged commitment for off-take on a "take or pay" basis.

12. This case was heard for admission on September 12, 2002 and by an order dated October 17, 2002, the Commission rejected the present case in view of the pendency of the appeals filed by both TPC and BSES before the Bombay High Court against the Commission's Order dated December 7, 2001 passed in Case No. 7 of 2000.

13. By an order dated November 7, 2003 in MERC Appeal No. 1 of 2003 in MERC Case No. 7 of 2002, the Hon'ble Bombay High Court, on the representation made by both TPC and BSES that the appeals referred to in the Commission's order dated October 17, 2002, stand disposed of, passed the following order:

“Case No. 7 of 2002 is restored to file of Maharashtra Electricity Regulatory Commission. All contentions of the respective parties are kept open to be agitated before the Commission...”

14. On receipt of TPC’s letter dated October 5, 2005 for a hearing in the present case, in view of Hon’ble High Court’s order of remand dated November 7, 2003, the Commission fixed a hearing for December 6, 2005. The hearing in the matter was adjourned several times on the request made by Counsels for both the parties from time to time. In the meanwhile, Reliance Energy Limited (“REL”) (earlier known as BSES) filed its affidavit-in-reply and TPC filed its rejoinder.

15. REL, in its affidavit-in-reply, has averred that, as required pursuant to its amended license, REL was required to execute a suitable interconnection with the system of TPC after the commissioning of the Thermal Power plant at Dahanu. The said interconnection was delayed by TPC in view of their displeasure with the standby charges that had been fixed by the Government of Maharashtra vide order dated January 19, 1998. In the course of further negotiations that followed, REL to obtain the necessary interconnection, agreed to pay for energy purchased at the interconnection at the rate of Rs. 2.09 per unit as against the prevailing rate in order to “placate” TPC and compensate them for what they perceived to be a lower rate for standby charges. This was in fact a departure from the agreement earlier reached between the parties, and recorded in a letter dated April 15, 1996 addressed by TPC, that existing tariff (which was Rs. 1.77/- unit) would apply to the interconnection. Accordingly, the parties signed the POA. Clause 2 of the said POA recorded that REL would pay to TPC an amount of Rs. 3.5 crore per month as standby charges for 275 MVA as per Government orders. Clause 3 recorded that REL would pay for energy off-take at the 220 kV interconnection at the rate of Rs. 2.09/- per unit, the average energy charges being fixed on the basis of an estimated annual flow of 250 million units of energy through the interconnection. Taking into account the said estimated annual flow of 250 million units and the enhanced rate of Rs. 0.32/- paise per unit agreed to be paid by REL, TPC was to receive by virtue of this Agreement a further amount of Rs. 8 crore annually over and above the standby charges of Rs. 3.5 crore per month fixed by the said order dated January 19, 1998, that is, an aggregate of Rs. 50 crore per annum.

16. REL has submitted that the matter relating to standby charges was challenged by both REL and TPC through Special Leave Petition Nos. 10877-10878 of 2003 and 11461-11462 of 2003, as filed respectively. The Supreme Court had remanded the matter back to the Commission. The Commission passed an Order dated May 31, 2004 on the dispute in the matter of payment of standby charges, which was challenged by REL and TPC before the Bombay High Court by filing Writ Petition Nos. 1471 of 2004 and 2248 of 2004, respectively. The interim order dated July 1, 2004 in Writ Petition No. 1471 of 2004 passed by the High Court was challenged by REL before the Supreme Court under Civil Appeal No. 1773 of 2005. The High Court’s judgment in Writ Petition No. 1471 of

2004 dated December 24, 2004 was challenged by REL before Supreme Court in Civil Appeal No. 1774 of 2005. TPC also challenged High Court's judgment in Writ Petition No. 1471 of 2004 dated December 24, 2004 under Civil Appeal No. 2915 of 2005.

17. REL has submitted that all the three appeals filed under Civil Appeal No. 1773 of 2005, Civil Appeal No. 1774 of 2005 and Civil Appeal No. 2915 of 2005, are pending for final hearing before the Supreme Court. All these three appeals pertain to the dispute relating to standby charges. REL also challenged the Commission's Order dated May 31, 2004 relating to the dispute on standby charges, before the Appellate Tribunal for Electricity under Appeal No. 29 of 2005.

18. REL's contention is that the rate agreed under the POA for energy purchased at 220 kV interconnection, was superseded, in view of the fact that REL has been making payment of standby charges as directed by the Commission's Order dated May 31, 2004.

19. REL has also contended that TPC has refused to augment their system for supply of energy to REL, and is therefore disentitled by its conduct from claiming any amount from REL on "take or pay" basis as TPC has thereby effectively prevented REL from drawing energy. Without prejudice to the foregoing contention, REL has further contended that TPC has failed to take into account, in calculating the alleged shortfall in guaranteed off-take by REL, the energy drawn at the 220 kV interconnection for the years 1998-1999 and 1999-2000.

20. REL has denied that the issues of standby charges, energy charges for actual drawal and guaranteed off-take are completely independent or distinct from each other as the energy charges payable by REL and any alleged guaranteed off-take were relevant facts in determining the issue of standby charges. REL has also contended that the observations of the Commission under its Order dated December 7, 2001 that the rate of Rs. 2.09/- per unit for energy drawn at 220 kV point was binding on REL does not survive as the Bombay High Court by its order dated June 3, 2003 has set aside the Commission's Order dated December 7, 2001.

21. Primarily, REL has contended with respect to the two issues raised in the present petition, as under:

- (i) that the rate of Rs. 2.09/- per unit for purchase of energy at the 220 kV point was arrived at in view of the amount payable for standby charges being perceived by TPC to be low and the said rate ceased to operate as the said amount was altered by the Commission's order dated May 31, 2004;
- (ii) that it was an implied term in the POA that TPC would not sell power directly to REL's consumers and on the said condition being breached by TPC, REL was not required under the POA or otherwise, to furnish any guarantee as to off-take to TPC.

22. Whereas, TPC in its rejoinder denied that TPC has made or is making any attempt to “lure away” the consumers of REL, as alleged or otherwise. TPC submitted that it is supplying power to consumers as per its license conditions and the Orders of the Commission. The said allegation, including the allegation that TPC has deprived REL of potential revenue on that account, was a subject matter of Case No. 14 of 2002 in which proceedings the Commission by an Order dated July 3, 2003 has rejected the said allegations of REL. Further, TPC has denied REL’s contention that the energy rate of Rs. 2.09/- per kWh for energy supplied at 220 kV interconnection was part of a “package deal” for standby charges. TPC has also refuted the contentions of REL that TPC has refused to augment their system for supply of energy to REL. On the issue of TPC refusing to provide additional outlets to REL, it has been contended by TPC that the Order dated December 9, 2005 passed by the Commission in Case No. 4 of 2003 settles the said refusal, and the said refusal does not negate or vitiate the operation of the take or pay obligation agreed upon by REL under the POA. TPC has further refuted the contention of REL that while calculating the alleged shortfall in guaranteed off-take by REL, TPC has failed to take into account the energy drawn from the 220 kV interconnection for the years 1998-1999 and 1999-2000. TPC has contended that the energy drawn from the 220 kV interconnection at Borivli is only for standby purpose and not for normal drawal, as has been observed by the Commission vide Order dated December 9, 2005 in Case No. 3 of 2003. It has been contended by TPC that the guaranteed off-take at 22 kV/33 kV points of supply are separate and distinct from the off-take at 220 kV point of supply.

23. Thereafter, the matter was heard in part on April 4, 2007 and June 20, 2007 before the Commission, and on the request of parties, was finally heard on July 25, 2007. At the hearing held on July 25, 2007, Shri. Janak Dwarkadas, Counsel for TPC submitted that allowing REL not to pay as per contractual agreement on the pretext that the profits of TPC are in excess of reasonable return, amounts to cross subsidy in favour of REL’s consumers by TPC’s consumers. Counsel clarified that the monthly payment of Rs. 3.5 crores, which BSES was required to deposit with TPC under the POA was for TPC creating adequate provision for BSES to avail standby power through the 220 kV interconnection at Borivali. The energy rate of Rs. 2.09/- per unit relates to the rate at which BSES is to pay for actual off-take of standby power, and thus the two rates are mutually exclusive. Counsel further apprised of the glaring disparity on the stand of REL so far as the take or pay obligation is concerned. It was submitted that the letter of REL dated April 9, 2001 records the refusal of the take or pay obligation and on the other hand, the affidavit of REL dated December 2, 2005 contends that the take or pay obligation though shall be binding on REL provided that TPC accedes not to “poach” in the license area of REL. Shri. Darius Khambatta, Counsel for TPC, submitted that the contention of REL to link the present proceedings with issues connected with standby does not merit consideration. It was submitted that REL cannot on one hand contend that each and every aspect of the POA are interconnected and inseparable and on the other hand initiate separate and distinct proceedings on various issues arising out of the POA. Counsel referred to the last sentence in the letter dated May 21, 2001 (written by the

advocates of REL to the advocates of TPC, and copy forwarded to the Commission) which provides that interlinked issues should be comprehensively resolved. Counsel further referred to the observation of the Commission under Order dated December 7, 2001 in Case No. 7 of 2000 (paragraph 51 thereof) which reads as under:

“..... Since the two parties had agreed upon the rate of Rs. 2.09 per kWh, BSES cannot make a grievance of it before the Commission”

24. On July 31, 2007, REL submitted written notes of their arguments as delivered on April 25, 2007. On August 14, 2007, TPC submitted written notes of their arguments as delivered on April 25, 2007.

25. As per the written submissions of REL, payment for supply at the 220 kV interconnection at the rate of Rs. 2.09/- per unit was stopped by REL on the basis that the Bombay High Court, vide order dated March 19, 2001 in Writ Petition No. 31 of 2000 in Case No. 7 of 2000, directed REL to pay TPC an amount of Rs. 8.25 crore per month towards standby. On the operation of the said order, REL started paying for energy drawal from the 220 kV interconnection at the rate of Rs. 1.77/- per unit. It was reiterated by REL that increase in the normal energy rate of Rs. 1.77/- per unit by Rs.0.32/- paise was agreed by REL as a whole in the POA, considering the monthly standby payment of Rs. 3.5 crore. Any increase in the said monthly standby payment (as directed under the said order of the High Court) would disentitle TPC to claim any differential amount. It has been further contended in this regard that the standby fixation exercise was undertaken by the Commission with effect from April 1, 1999 which, in effect, annulled and refixed the standby rate as fixed under the POA. It has been further contended by REL that the issues in question under the present proceedings are inextricably linked with the dispute pending before the Supreme Court on standby charges. The present petition of TPC should therefore be rejected on that count.

26. REL has further contended that for the years 1998-1999 and 1999-2000, TPC has received a reasonable return, as stipulated in the Sixth Schedule of the Electricity (Supply) Act, 1948 as per the Commission's Order dated May 31, 2004 through restatement of accounts.

27. As per the written submissions of TPC, the aggregate dues of REL as on July 31, 2007 amounts to Rs. 310,92,54,596/- (Rupees Three Hundred Ten Crore Ninety Two Lakh Fifty Four Thousand Five Hundred and Ninety Six only), which REL is liable to pay together with interest at the rate of 24% per annum. TPC contended that issues connected with the energy charge of Rs. 2.09/- per unit are absolutely different from issues connected with standby charges. TPC placed reliance on the judgment of the Hon'ble Supreme Court dated October 17, 2003, which upheld the Bombay High Court's order dated June 3, 2003, inasmuch as observing that standby charges are for the guarantee and availability of power and is to be paid in addition to payments for actual drawal of energy. It was submitted that energy rate of Rs. 2.09/- per unit was fixed as

agreed upon under the POA for “actual drawals” at the 220 kV interconnection, whereas standby charges are fixed charges, payable irrespective of drawal. The contention as built up by REL that the present matter should not be heard and disposed of due to the pendency of Appeal No. 1 of 2007 before the Appellate Tribunal for Electricity and Civil Appeal No. 2898 of 2006 and Civil Appeal No. 415 of 2007 before the Hon’ble Supreme Court, was refuted by TPC. TPC has contended that under none of the said pending proceedings, REL has submitted that the energy charge of Rs. 2.09/- per unit as per the POA have been agreed by REL in terms of a “package deal”, which stand REL has continually preferred under the present proceedings. In fact, under various proceedings before the Commission on various occasions, REL has never contended that the POA as agreed upon between TPC and REL has ceased to exist. The contentions of REL that the POA is operational on the condition of TPC not supplying to the consumers of REL, should be considered on this premise.

28. TPC has further contended that it is a settled principle of law that if clauses of a contract are separate and severable, each of them is enforceable separately and the validity and enforceability of one clause is not dependent on, or limited by, the invalidity or unenforceability of the other clause(s). In this light, it was submitted that the issues connected with standby are patently distinct from issues connected with energy charge at Rs. 2.09/- per unit.

29. TPC has further submitted that the obligation of take or pay, as contained under the POA, has invoked the *doctrine of minimum guarantee*, whereby a supplier is assured of minimum consumption of the supplied product, or payment of the same whether it is consumed or not. Reliance has been placed on the observation of His Lordships in AIR 1975 SC 2235 [*Amalgamated Electricity Company Limited Vs. Jalgaon Borough Municipality*] in this regard.

30. TPC has refuted the contention of REL that since for the years 1998-1999 and 1999-2000, TPC has received a reasonable return, as stipulated in the Sixth Schedule of the Electricity (Supply) Act, 1948 as per the Commission’s Order dated May 31, 2004 through restatement of accounts, REL need not be required to pay its outstanding dues. It was contended by TPC that Clear Profit Excess is liable for proportionate refund to consumers only on its exceeding Reasonable Return. REL (and its consumers) as a debtor of TPC, cannot be allowed to benefit at the expense of other consumers of TPC, apart from REL. No consumer (as a debtor) can be permitted to avoid the payment of outstanding amounts to the supplier on the ground that the supplier has earned reasonable return. TPC has further stated that the unilateral contentions/conditions with which REL had sought to extend the POA, through its letter dated March 10, 1998 and March 13, 2001, were never, either expressly or through implication, agreed by TPC. That apart, unilateral imposition of any condition on previously agreed terms and conditions cannot be permitted under law. It is settled law that a party cannot unilaterally alter the terms of a contract. In this regard, reliance has been placed on the observation of His Lordships in [1966] 2 Lloyds Rep 45 – *Cowey Vs. Liberiall Operation Ltd.*, where it was held that a

unilateral declaration by one party to another in the absence of agreement cannot constitute a variation. Further reliance has been placed on the observation of His Lordships in (2004) 1 SCC 12 – *Citibank N.A. Vs. Standard Chartered Bank & Ors.*, which decided that novation, rescission or alteration of a contract under Section 62 of the Indian Contract Act, 1872 can only be done with the agreement of both parties to contract. So far as REL has contended that REL has stopped paying TPC at Rs. 2.09/- per unit, consequent to the Bombay High Court's order dated March 19, 2001 directing REL to pay TPC an amount of Rs. 8.25 crore per month towards standby, TPC has contended that the said misconceived contention has not been supported or corroborated by any documents or through correspondence. Refuting the said contention, TPC has contended that even after the order issued by the Government of Maharashtra on March 4, 1999, which directed REL to pay additional standby of Rs. 9 crore to TPC from December 1998 to March 1999, REL had paid TPC at 2.09/- per unit, for the drawal of power through the 220 kV point. This said contention of REL does not further stand in view of the Commission's Order dated December 9, 2005 in Case No. 3 of 2003.

31. Having heard the parties at length and after considering the voluminous material placed on record, the Commission is of the view as under:

- (i) In the written submissions, REL has admittedly paid a sum of Rs. 2.09 per kWh plus FAC for the period upto March 2001, pursuant to clause 3 of the said POA. Thereafter, REL admittedly paid a sum of Rs. 1.77 per kWh, which was the rate which TPC was charging all its other consumers including REL for off-take at 22/33kV level. REL has however, contended that the rate of Rs. 2.09 per kWh instead of Rs. 1.77 per kWh, was clearly linked to standby. REL had agreed to pay Rs. 2.09 per kWh as a part of the package of standby inasmuch as the standby charges payable were Rs. 3.5 crore per month. In the written submissions, it is averred that REL was paying TPC for energy purchased at 220 kV interconnection at the rate of Rs. 2.09 per kWh from February 1998 till February 2001. However, the Hon'ble Bombay High Court in Writ Petition No. 31 of 2001 in Case No. 7 of 2000, by an Order dated 19th March 2001, directed REL to pay to TPC an amount of Rs. 8.25 crore per month towards standby charges. Accordingly, REL started to pay at the rate of Rs. 1.77 per kWh and ceased to pay Rs. 2.09 per kWh. The Commission is of the view that this argument is not sustainable. Firstly, High Court's Order dated 19th March 2001 in Writ Petition No. 31 of 2001 was an "ad hoc arrangement" as per the Minutes of the Order. Secondly, the said High Court's Order related to standby interconnection and facility for BSES' Dahanu Generating Station and did not adjudicate on the issue of rate to be applied for actual off-take, neither is there any finding in relation thereto. Thirdly, all contentions were kept open for consideration by the Commission when referred. From the records available, there is nothing to show that there is any order passed by any court holding that there is a linkage between standby charges and actual drawal charges. There is also no material to show that

Rs. 2.09/- per kWh was paid as a comprehensive arrangement relating to standby and *de hors* actual off-take at 220 kV point.

- (ii) Most importantly, it is nobody's case that the POA is not in existence. The POA specifically provided the rate for standby charges and energy charges separately. REL's contention that the rate of Rs. 2.09/- per kWh for energy off-take was part of the package for standby charges is not sustainable in view of there being neither any document corroborating the same nor any order of any judicial authority confirming the same. Clause 3 of the POA which provides for the energy off-take rate for Rs. 2.09/- per kWh is not subject to the standby charges rate mentioned in Clause 2 of the POA. The contention of REL that the agreed rate of Rs. 2.09/- per unit was agreed to placate TPC on the latter's grievance with the monthly standby compensation of Rs. 3.5 crore that REL was directed to pay TPC under the order of the Government of Maharashtra, or consented to as a "sweetener" in the POA, is also not tenable in the absence of any documentary evidence. The law on severability of contract is that if any provision of an agreement, or the application thereof to any person or circumstance, is invalid or unenforceable to any extent for any reason including by reason of any law or government policy, the remainder of the agreement, and the application of such provision to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby, and each provision of the agreement shall be valid and enforceable to the fullest extent permitted by law. Any invalid or unenforceable provision of any agreement may be replaced with a provision, which is valid and enforceable which most nearly reflects the original intent of the invalid and unenforceable provision. Thus, the unenforceability/applicability of one invalid clause does not negate the enforceability/applicability of another valid clause.
- (iii) The Commission holds that Clause 3 of the POA is a contractual obligation of REL and REL ought to pay for the same. The off-take obligations for supply at 22 kV/33 kV points are separate and distinct from the supply at 220 kV interconnection. Also, standby charges is for the guarantee and availability of power and such charges are in addition to the charges which have been contractually agreed to be paid for actual drawal of electrical energy. The rate of Rs. 2.09/- per kWh for REL's actual drawal at 220 kV interconnection is separate than the standby charges, which are fixed charges payable irrespective of drawal. The dispute relating to the standby charges is subject matter of Civil Appeal No. 415 of 2007 pending before the Hon'ble Supreme Court. Since, the history relating to the standby arrangement and fixation of standby charges is a part of several proceedings, which have been adumbrated upon by the Commission, it is not necessary to recapitulate the entire history.

- (iv) With regard to the issue concerning take or pay obligation, it is REL's case that the said obligation was subject to TPC not supplying to REL's existing consumers. As regards clause 4 of the POA, REL has contended that the projections for 1998-99 given by REL contained an inbuilt stipulation that the projections were subject to TPC not taking away its existing consumers. REL has also brought to the notice of the Commission that, subsequently, the Hon'ble Appellate Tribunal for Electricity has held that TPC had no licence to supply to consumers of REL directly, which judgment is sub judice before the Hon'ble Supreme Court. Even, another judgement of the Hon'ble Appellate Tribunal for Electricity, inextricably linked to the issue of weaning away of REL's consumers, that is the giving of rebates by REL, is sub judice before the Hon'ble Supreme Court. Whereas TPC contends that REL unilaterally and without justification, sought to make the projections for the years 1998-1999 and 1999-2000 subject to TPC not supplying energy to REL's existing consumers. This condition was never accepted by TPC. TPC contends that such unilateral condition was unlawful and not binding on TPC. However, nobody has pointed out to the Commission that the foregoing contentions are *sub judice* before the Supreme Court in Civil Appeal No. 2898 of 2006 relating to TPC's license to supply electricity. That being the case, the Commission has been called upon to decide this issue. At this stage therefore, the Commission would be required to hold whether Clause 4 of the POA was subject to TPC not supplying electricity to REL's consumers or whether Clause 4 was subject to any other condition or whether any extraneous condition can be read into Clause 4 of the POA. The Commission is of the view that in the absence of any document or correspondence, it cannot be presumed that the POA has been amended. From a plain reading of the POA, no such condition can be read into Clause 4 that Clause 4 would stop operating once TPC supplies to REL's consumers. The issue whether TPC did supply to REL's consumers or whether TPC supplied to its own consumers, is admittedly *sub judice* before the Supreme Court and the Commission need not go into this issue. As observed above, Clause 4 of the POA does not attach with itself any express condition, which negates the obligation to take or pay by REL. In view thereof, the Commission holds that the take or pay obligation survives in favour of TPC and consequently REL is bound to honour the same.
- (v) REL has not disputed the quantum that has been off-taken by them at the 220kV point. Hence, as the dispute solely relates to the rate to be applied and which stand decided as above, the particulars of claim of TPC at Exhibit N of their Petition stands in favour of TPC. The particulars of claim at Exhibit X of TPC's petition also stands as the Commission has held that the take or pay obligation ought to have been honoured by REL as the same was not conditional. REL is directed in terms of the above.

With the above, the Commission disposes of Case No. 7 of 2002.

Sd/-
(S.B. Kulkarni)
Member

Sd/-
(A. Velayutham)
Member

Sd/-
(Dr. Pramod Deo)
Chairman

(P.B. Patil)
Secretary, MERC