Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 10 of 2010

In the matter of
Complaint filed by Trent Ltd., against Reliance Infrastructure Ltd.

Shri V. P. Raja, Chairman
Shri S. B. Kulkarni, Member
Shri V. L. Sonavane, Member

M/s. Trent Ltd. .....Complainant

V/s

1. Reliance Infrastructure Ltd. (**RInfra**) .....Respondent No.1

and

2. Tata Power Company Ltd. (**TPC**) ...Respondent No.2

ORDER

September 08, 2010

A Petition in the nature of complaint has been filed by M/s. Trent Ltd., which is a company under the Companies Act, 1956 with its office located at Taj Building, 2nd Floor, 210, Dr. D.N. Road, Fort, Mumbai and presently occupying and carrying on business at G Block, Plot No. 60, BKC, Bandra(E), Mumbai – 400 051 ("the said premises"). It is stated in the petition / complaint that the said premises has been developed by M/s. Satnam Realtors Pvt. Ltd. (referred to as the Developer). The Complainant submits that for supply of electricity at

440/11000 volts with sanctioned load of 1280 kW at Contract Demand of 1600 kVA, the Developer had entered into a supply agreement dated (*illegible*) March, 2008 with RInfra, Respondent No.1 herein. It is stated that the Complainant is presently availing electricity supply as a HT-Commercial Consumer from the meter connected in the name of M/s. Satnam Realtors Pvt. Ltd., the Developer (who is being amalgamated with the Complainant, and thus has been referred to as the "Petitioner" in the Petition). It is also stated that currently the Developer is paying a tariff of Rs.10.50 per unit as Energy Charges to RInfra, as against similarly placed consumers, with a parallel licensee operating in the same area as that of RInfra., viz., Tata Power Co. Ltd. ("TPC"), i.e. Respondent No.2, paying Rs.6.50 per unit as Energy Charges. It is stated that due to the substantial difference in the tariff of Respondent No.1 and Respondent No. 2, the Complainant was incurring an additional cost of Rs.29,200/- per day. It is averred in the Petition that though the supply agreement dated (*illegible*) March, 2008 between the Developer and RInfra was terminable at the option of the Developer by giving 30 days notice, Clause No. 10 of the said agreement brought in substantial restrictions hindering the Complainant to switch over from RInfra to TPC as the said agreement restricted the Developer to seek the supply of electrical energy in a manner which involved use of the distribution infrastructure of any other licensee until after expiry of five years from the date of the said agreement in case the said agreement was to be terminated before the completion of five years from the date of the agreement.

2. The prayers made by the Complainant, in its Complaint filed on 15th April, 2010 are as follows:

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1. *Initiate appropriate proceedings against the Respondent No.1 under Section 142 of the Electricity Act, 2003 for contravention of the express provision of the Electricity Act, 2003 and the regulations framed thereunder by refusing to disconnect supply from the Petitioner's premises despite clear notice in writing for such purpose;*
2. *Issue appropriate directions on the Respondent No.1 to carry out disconnection of its connection to the Petitioner's premises i.e. G Block, Plot No. 60, BKC, Bandra (E), Mumbai- 400 051 forthwith, and to remove all its electrical lines, plant and equipment situated in the Petitioner's premises for carrying out supply of electricity;*

3. *Issue appropriate orders on Respondent No.2 to commence supply of electricity to the said premises i.e. G Block, Plot No. 60, BKC, Bandra (E), Mumbai- 400 051 immediately on disconnection by Respondent No.1 and removal of their meters and equipment;*

4. *Pass appropriate orders against the Respondent No.1 for awarding compensation of Rs. 29200/- per day from 4th February 2010 till the disconnection of the electric supply to the said premises towards the additional cost incurred by the Petitioner as the differential amount between Respondent No.1's tariff and the tariff charged by Respondent No.2 from HT-Commercial consumers, for availing supply of electricity from the Respondent No.1 due to the Respondent No.1's failure to carry out disconnection;*

5. *Pass appropriate orders against the Respondent No.1 for awarding interest @ 18% p.a. on the aforesaid amount from 4th February 2010 till the disconnection of the electric supply to the said premises by the Respondent No.1;*

6. *Pass such other and further orders / directions as the Hon'ble Commission may deem appropriate in the facts and circumstances of the case."*

3. The Complainant is aggrieved with the aforesaid agreement particularly Clause No. 10 appearing in the said agreement dated (*illegible)* March, 2008 between the Developer and the Respondent No.1 as extracted below:

> *"10. Termination of this agreement shall be without prejudice to the rights of REL or the consumer under the Act for recovery of any amounts due under the Agreement.*
>
> *The consumer agrees and undertakes that in case the Agreement is terminated before the completion of five years from the date of agreement, it shall not seek the supply of electrical energy in a manner which involves use of the distribution infrastructure of any other licensee until after expiry of five years from the date of this agreement."*

On the implication of this aforesaid Clause in the agreement, the Complainant has submitted that the above clause is prohibitive in nature, and the Developer thereby is prevented from availing supply of electricity to the said premises using the infrastructure of any parallel distribution licensee, and RInfra cannot enforce this stipulation contained in the agreement since RInfra being a Distribution Licensee, has the obligation to ensure that the terms and conditions contained in the agreement should not be contrary to the provisions of EA 2003. It is further submitted that this clause in the agreement is contrary to the sixth proviso to Section 14 of the EA 2003 and is adverse to the competitive and efficient distribution of electricity to consumers by parallel licensees. Also, it is submitted that the agreement is contrary to Section 43 of the EA 2003. It is submitted by the Complainant that the aforesaid Clause is illegal, void and not applicable to the Complainant.

4. It is further averred that to avail electricity supply at cheaper tariff from Respondent No.2, the Complainant requested the Developer to send a Notice of Termination to Respondent No.1 for disconnection of the electricity supply. Accordingly, the Developer sent a letter on 4th January, 2010 to Respondent No.1 for disconnection of the electricity supply within a period of 30 days.

5. The Complainant also approached Respondent No. 2 for supply of electricity. However, the Complainant was informed that as per the direction of the Commission, it will have to obtain changeover of supply by using the network of the Respondent No.1. However, the Complainant did not want to rely on Respondent No.1's network and therefore decided to set up a new connection directly with Respondent No.2 and for that purpose deposited the entire capital cost of the infrastructure that is required for obtaining supply directly from Respondent No.2.

6. Respondent No.1 vide its letter dated 14th January, 2010, refused to disconnect the supply on the ground that the Complainant should avail supply from the Respondent No. 2 by using the existing network of the Respondent No.1. Apparently, Respondent No.1 relied on the Order of the Commission dated 15th October, 2009 while taking the aforesaid stand. In response, the Complainant vide its letter dated 4th March, 2010 informed Respondent No.1 that the distribution network for availing supply of electricity directly from Respondent No.2 has been set up by the Complainant at its own cost, and therefore the procedure for changeover as laid down by the Commission in its Order dated 15th October 2009 was not applicable to the supply to be made by Respondent No.2 to the Complainant. Once again therefore, the Complainant requested Respondent No.1 to disconnect the supply by 20th March, 2010. It is also stated by the Complainant that even though the said agreement is terminable by a written notice of 30 days, Respondent No.1 i.e. RInfra has failed to disconnect the supply due to which it is becoming impossible for the Complainant to take supply from Respondent No. 2 i.e. TPC and thus Respondent No.1 is actively preventing the Complainant from taking supply from Respondent No.2.

7. Respondent No.1, vide its letter dated 10th March, 2010 replied to the Complainant reiterating its stand on disconnection. The Complainant vide its letter dated 23rd March, 2010 informed Respondent No.1 that, in spite of expiry of 30 days notice period, it had not disconnected the electricity connection and because of this, the Complainant was prevented from availing electricity supply from the Respondent No.2 at a lower tariff and is incurring commercial loss of about Rs.75,000/- per day. The Complainant also informed the Respondent No.1 that post 3rd February, 2010, the Complainant shall be liable to pay to Respondent No.1 for electricity supply at a rate chargeable by the Respondent No.2.

8. Thus, being aggrieved by the refusal of Respondent No.1 to disconnect its electricity connection to the Complainant's premises the Complainant has submitted the present complaint inter alia on the following grounds:

   (a) Regulation 6.6 of the MERC (Electricity Supply Code and other Conditions of Supply) Regulations, 2005 allows a consumer to terminate an agreement for supply of electricity by giving notice in writing of 30 days. However, Respondent No.1's failure to disconnect the supply even after giving prior notice is a clear violation of the EA 2003 and the Regulations framed thereunder. Therefore, Respondent No.1 is liable for all the consequences of such failure, including the loss that has been caused and is being caused on a daily basis to the Complainant due to the refusal to disconnect.

   (b) On the Developer's request of 4th January, 2010 for disconnection, it is submitted that, Respondent No.1 is mandated to disconnect at the premises and cannot insist on the Complainant for continuing with its connection for availing the supply from other licensees or Respondent No.2 i.e. TPC, when the Complainant is incurring expenses for setting up of the infrastructure for availing supply from other licensee i.e. Respondent No.2.

(c) The Complainant as a consumer has a right to avail supply from any licensee even at its own cost and Respondent No.1 cannot deprive the Complainant from exercising its rights to take electric supply from Respondent No.2.

(d) The Complainant is suffering a commercial loss to the extent of approximately Rs.29,200 per day on account of Respondent No.1's refusal to disconnect power supply from the Complainant's premises. Electricity being an essential input for the Complainant, its business cannot survive even a minute without the supply of electricity. Therefore, the Complainant is compelled to draw power from Respondent No.1. However, the Complainant cannot be made liable to pay Respondent No.1 for the electricity at such high tariff. Therefore, the Complainant should be compensated for the additional cost which it is forced to bear towards the difference of tariff of Respondent No.2 due to contravention by Respondent No.1 of the provisions of EA 2003 and MERC Supply Code Regulations. The Complainant has sought a direction of penalty under Section 142 of the EA 2003 upon Respondent No.1 and compensation under Section 129.

9. The Complainant also filed an interlocutory application. The prayers made thereunder are as follows:

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i. Pass appropriate ad-interim directions on the Respondent No.1 to charge the Petitioner and accordingly raise electricity bills on the Petitioner for any supply made after 4th February 2010 at the tariff applicable to similarly placed HT-Commercial consumers of Respondent No. 2 (being Rs. 6.50 per unit) till the disposal of the petition;

ii. Pass ex-parte ad-interim directions in terms of prayer (i) above;

iii. Pass such other and further orders / directions as the Hon'ble Commission may deem appropriate in the facts and circumstances of the case."

10. The Commission vide Notice dated 28th May, 2010 fixed a hearing in this matter on 29th June, 2010. Shri Darius Shroff, Advocate appeared on behalf of the Complainant. Shri J.J. Bhatt, Senior Advocate appeared on behalf of Respondent No.1 and Shri Sitesh Mukherjee, Advocate appeared on behalf of Respondent No.2.

11. During the hearing, the Complainant submitted that Respondent No.1 wants the Complainant to either continue to receive electricity from Respondent No.1 or receive the power supply from Respondent No.2 using the network of Respondent No.1. The Complainant is not agreeable to Respondent No. 1's stand in view of the fact that Respondent No.2 has its own network in the area and also in view of the fact that the Complainant has also paid for a dedicated network and which the Complainant wants to use for receiving power supply directly from Respondent No.2. The Complainant having created its own infrastructure for receiving electrical energy directly from Respondent No.2 and since the consumers have a choice to choose their supplier, Respondent No.1 cannot hinder that choice. Further, because of the Respondent No.1's

stand, the Complainant is incurring commercial losses and in view thereof the Complainant requested for ad-interim reliefs to receive power supply directly from Respondent No.2. Complainant also offered to furnish a Bank Guarantee to the Respondent No.1, for the loss of Wheeling Charges to the Respondent No.1, in case the final decision goes in favour of Respondent No.1.

12. Per contra, Respondent No.1 argued that the question of grant of any ad-interim relief or acceptance of contentions on merits does not arise as the admissibility of the complaint would need to be decided first. Time was sought to file a reply to the Complaint / Petition. It was submitted that the question of the Commission's jurisdiction in the matter may also be kept open for consideration at an appropriate time.

13. The Respondent No.2 submitted that it was not contesting the matter and that Respondent No.2 has the right to supply electricity directly to a consumer and the consumer has a right to choose the supplier.

14. After hearing all the concerned parties, the complaint was admitted and pleadings were directed to be completed.

15. Subsequently, the Complainant filed another application for ad-interim relief on 6th July, 2010 praying as follows:

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1. *Pass ad-interim orders allowing the Petitioner to receive power supply from the Respondent No.2 by utilizing the distribution infrastructure created by the Respondent No.2 and already paid for by the Petitioner, upon providing a bank guarantee of Rs. 6,30,696/- in terms of Para 9 read with Annexure A of this application.*
2. *Pass such other further orders / directions as the Hon'ble Commission may deem appropriate in the facts and circumstances of the case."*

16. Further submissions have been made as follows -

(i) The Complainant submits that its premises are situated within the common area of supply of Respondent No.1 and Respondent No.2, where both the licensees are operating as parallel Distribution Licensees. Therefore, under the EA 2003, the Complainant has a right to choose the Distribution Licensee for the purpose of receiving electricity supply. Hence, Respondent No.1, who is currently serving the Complainant, cannot prevent the Complainant from discontinuing its electricity supply , and, the Respondent No.2 cannot refuse to give supply of electricity upon receiving such request, which includes the obligation of the Respondent No.2 to lay down the necessary distribution infrastructure, based on the provisions under Sec. 43(1) to 43(3) of EA 2003, Regulations 6.1 and 6.6 of MERC Electricity Supply Code Regulations, along with Regulation 9.4 of MERC (Standards Of Performance of Distribution Licenses, Period for Giving Supply and Determination of Compensation) Regulations, 2005 (" MERC SOP Regulations").

(ii) The Complainant submits that reliance placed by the Respondent No.1 on the previous orders of the Commission namely orders dated 15th June 2009 and 15th October 2009 are misconceived, and the question of avoidable expenditure by Respondent No.2 as a parallel licensee is not an issue in this case since the Complainant has agreed to erect the required lines / network to get the supply from Respondent No.2, due to which no capital expenditure will be incurred by Respondent No.2, and there is nothing in the Order dated 15th October, 2009 which prevents the Complainant from directly availing supply from Respondent No.2. With reference to the paragraph 21(3) of the Commission's order dated 22nd February, 2010 in Case Nos. 60, 81, 83, 84, 85 and 86 of 2009 in the matter of Petitions seeking changeover from BEST Undertaking to Respondent No.2 (TPC), the Complainant submits that reliance on Commission's order dated 15th June 2009, must be placed in correct perspective. According to the Complainant, in the order dated 22nd February, 2010, the Commission has permitted the consumers to avail supply from TPC directly without using the wires of BEST for wheeling and that in light of the above submission, it is *prima facie* established that there is no merit in the contention of Respondent No.1 that the Complainant can avail supply from Respondent No.2 only by using its distribution network and not otherwise.

(iii) The Complainant submits that, if the argument of Respondent No.1 is accepted, then at the most, its claim would be limited to receiving the wheeling charges of 46 paise / unit from the Complainant. The Complainant requests to be permitted to utilize the distribution infrastructure created by Respondent No.2 already paid for by the Complainant, for receiving power supply from the Respondent No.2. The Complainant also submits that it is prepared to provide a Bank Guarantee to cover the entire amount on account of wheeling charges that would be payable to Respondent No.1, if ultimately the Commission decides in favour of Respondent No.1. The amount of Bank Guarantee shall be enhanced and the period of validity thereof shall be extended from time to time till the matter is finally decided by the Commission. With this, the interests of Respondent No.1 will be fully protected during the pendency of these proceedings.

17. Respondent No.1 filed its Affidavit in Reply on 13th July, 2010 wherein the following submissions have been made:

(i) Respondent No.1 submits that the present complaint is misconceived and is not maintainable for lack of jurisdiction of the Commission on various reliefs claimed by the Complainant. The Complainant is a consumer and has to approach the Consumer Grievance Redressal Forum and thereafter to the Electricity Ombudsman, if required, for the purpose of seeking relief against any grievances. In support, the Respondent No.1 has referred to various judgments and orders of the Hon'ble Supreme Court and the Hon'ble Appellate Tribunal passed on the issue of jurisdiction of the State Commissions from time to time, conveying that the State Commission has no jurisdiction to decide disputes raised by consumers. In support of its argument, Respondent No.1 has quoted the following judgments:

(a) Supreme Court's judgment in the case of *MSEDCL vs. Lloyd Steel Industries Ltd.*, [AIR 2008 SC 1042]

(b) The following judgments and orders of the Appellate Tribunal for Electricity were quoted:
- *Dakshin Haryana Bijli Vitaran Nigam Ltd. Vs DLF Services Ltd.*, [2007 Aptel 356]
- *Dakshin Haryana Bijli Vitaran Nigam Ltd. Vs Princeton Park Condominium,* [2007 Aptel 764]
- Order dated 30th March 2009 passed in Appeal No. 180 of 2008,
- Order dated 30th March 2009 passed in Appeal No. 181 of 2008,

(ii) The Respondent No.1 submits that the reliefs claimed for in the prayers made by the Complainant cannot be granted by this Commission. Respondent No.1 submits the following arguments for the same. It submits that the Complainant has filed the complaint on two principal grounds as follows:

(a) that Clause 10 of the agreement between the Complainant and the Respondent No.1 is illegal, void and not applicable to the Complainant and,

(b) that the tariff offered by Respondent No.2 is much lower than the tariff offered by Respondent No.1.

(iii) In addition, the Respondent No.1 submits that the Complainant has claimed that under the MERC Electricity Supply Code, it has a right to lay a parallel distribution network from the nearest point of Respondent No.2, by reimbursing the cost of laying the network whereupon the distribution network will belong to Respondent No.2. This, the Respondent No.1 terms as claiming a selective right of having a distribution network laid for its benefit, at its cost by a parallel distribution licensee enjoined with a universal service obligation.

(iv) With the Complainant and the Respondent No.2 being group companies, the Respondent No.1 sees this exercise as a test case for the Respondent No.2 for selectively laying distribution lines and thereby an attempt to circumvent the order dated 15th October, 2009.

(v) According to Respondent No.1, the Commission should not take a decision in the present case before the following pending issues are resolved as Respondent No. 1 is not in position to apply its full and reasonable tariff to its consumers due to the pendency of the following cases and matters:-

(a) In pursuance of the Government of Maharashtra (GoM), letter ref: REL2009/CR 227/NRG-1, dated June 25, 2009, the Commission by its order dated 15th July, 2009 has stayed the tariff increase for certain consumer categories and sub-categories till further orders which the Commission had earlier approved under its Tariff order dated 15th June 2009.

(b) Because of the above stay order, Respondent No.1 has not been able to file its ARR petition for year 2010-11.

(c) The Commission's order of 15th October, 2009 is itself an interim order, and a final order is awaited.

(vi) Respondent No.1 further submits that because of the tariff structures of Respondent No.1 and Respondent No.2, the high end (subsidising) consumers are migrating to Respondent No.2, which is adding to the Respondent No.1's problem of cross subsidy and regulatory assets. It is stated that Respondent No.1 had submitted earlier that the issue of liability of migrating consumers, for past dues also needed to be decided before finalization of the issue of migration.

(vii) According to Respondent No.1, if the present case is decided in favour of the Complainant, it would give an undue and unfair advantage to Respondent No.2, as without deciding various preceding issues, Respondent No.2 would be able to start supplying selectively to consumers directly by laying duplicate distribution network, enhancing its already monopolistic position in Respondent No.1's area of supply. Respondent No.1 submits that the attempt of filing the present complaint is to enhance Respondent No.2's monopoly and to deny level playing field to Respondent No.1, contrary to consumers' interest. The entire complaint, according to Respondent No.1, is with malafide intent.

(viii) According to Respondent No.1, the present complaint is one more attempt by Respondent No.2 to put up a *fait accompli* to this Commission of having laid a network selectively, to wriggle out of the fundamental premise which has guided this Commission in refusing selective laying of network by Respondent No.2 and in directing wheeling in respect of Respondent No.1's area of supply presumably to ensure that the consumers are not saddled with costs of stranded assets.

(ix) With the caveat of making submissions without prejudice to other submissions, Respondent No.1 has submitted its reply to the Complaint, as below:

(a) Respondent No.1 has denied that it has knowledge regarding whether the Complainant deposited the entire capital cost of the infrastructure that is required to be set up for a new connection. Respondent No.1 further denies that the Complainant is incurring an additional cost of Rs.29,200/- per day.

(b) Respondent No.1 has denied that it has refused to disconnect supply as alleged or otherwise. It submits that it informed the Complainant that the Commission has in its tariff order dated 15th June, 2009 while dealing with the distribution roll-out of Respondent No.2, suggested that the Respondent No.2 should explore the option of providing supply to Consumer in its licence area by using the existing distribution network of Respondent No.1 for the purpose of optimising on the Capital Expenditure requirement for development of distribution network by Respondent No.2.

(c) It had suggested to the Complainant that instead of wasteful and expensive duplication of distribution infrastructure, it may avail the supply from Respondent No.2 by using the existing network of Respondent No.1. Approximately 46,000 consumers of Respondent No.1 have already taken the advantage of lower tariff of Respondent No.2.

(d) Respondent No.1 denied that it has failed to disconnect the supply even after the notice period. It has also denied that consequential losses accrue to the Complainant.

(e) To release HT electric supply to the Complainant's premises on May 7, 2008 required Respondent No.1 to erect the HT switchgear and other necessary equipments, erected solely to serve the Complainant's premises. However, no other consumer would take power from such connection.

(f) That the Complainant may avail supply from Respondent No.2 after following the procedure laid down for changeover of supply from one Licensee to other on the network of existing Licensee. It has also been submitted that the issue as to whether the Complainant can be allowed to disconnect from RInfra's network so as to enable receiving connection to the network of Respondent No.2 i.e., TPC, is a subject matter before the Commission and the Regulations in this regard are expected soon. Till such time of finalization of the Regulations, the Commission's order dated 15th October, 2009, in respect of changeover of the consumer, governs.

(g) According to Respondent No.1, an optimal solution means ensuring optimality of distribution network development as a whole and not separately of any one Distribution Licensee. For optimal development of distribution network, the networks of both the Licensees should be seen as one network. Network development will be optimal in case there is a monopoly. If in case of a consumer connected to one Distribution Licensee, a network erected to connect the consumer to the other Distribution Licensee, makes the existing connection assets stranded, this ought not to be entertained by the Commission. In light of the above it is irrelevant as who pays for the entire capital cost for connection, as this would result in stranded cost, and the cost of unused assets will get passed on to the consumers of the other licensee. In a multiple distribution licensee situation, if the choice of network is left to the discretion of the consumers, the distribution licensee will not be able to fulfill its statutory obligation under the EA 2003. Choice of network to the discretion of the consumers is not in the spirit of the optimal, efficient coordinated and economical development of the distribution network, as envisaged in the Section 42(1) of the EA 2003. Till the time the comprehensive Regulations are finalized by the Commission w.r.t. the changeover, the only Order governing and facilitating supply choice to retail consumers is the Order dated 15th October 2009.

(h) Respondent No.1 further submits that for the purpose of releasing electricity supply to the Complainants premises, it has incurred expenses of approx Rs. 8 lakh and in accordance with the Commission's Order containing the approved Schedule of Charges, the Complainant has contributed only the normative amount of Rs.3,00,150/-. Whereas the Respondent No.1 has spent additional Rs.5,00,000/- (approx) as capital expenditure, which has been added to the

Gross Fixed Assets of Respondent No.1, the associated cost being recovered from all the Consumers of Respondent No.1 through its tariffs. It is further submitted that it is irrelevant as to whether the consumer himself pays for entire capital expenditure for connection, or the Licensee pays and includes the said component in the ARR (with only normative contribution from the consumer). It is immaterial as in either case, the existing connection assets will get stranded and the costs of those stranded or un-used assets will get passed on to the consumers of the other Licensee.

(i) Respondent No.1 has denied allegations in regard to its contravention of the provisions of EA, 2003 and the MERC Supply Code or failure to carry out disconnection or that it has prevented the Complainant from availing the supply of electricity from another licensee. According to Respondent No.1, the main complaint should be heard along with several other pending issues and application for ad-interim reliefs cannot be heard in isolation on a standalone basis, and, the case would depend upon the outcome of those issues. Respondent No.1 has also denied that its interest will be fully protected during the proceedings in case the Complainant furnishes a bank guarantee as offered by the Complainant. It has been alleged that the present complaint is filed by Respondent No.2 through its group and front company, as a test case.

(j) With the above, Respondent No.1 denies that the Complainant has a strong case on merits or that the balance of convenience is in favour of the Complainant, or that the complaint is bonafide or in the interest of justice or that refusal to grant interim reliefs would cause grave financial loss to the Complainant. In view of the above, Respondent No.1 submitted that the complaint and the application for interim / ad-interim reliefs are liable to be dismissed and / or rejected. Respondent No.1 also urged the Commission to direct the Complainant to apply for changeover under the approved protocol.

18. The Respondent No.2 i.e. TPC filed its reply in the matter on 20th July 2010 wherein it has contended as follows:
    (i) That in the present case, the Complainant has not alleged that the Respondent No.2 has contravened the provisions of the EA 2003 and the MERC Supply Code Regulations by refusing to connect electricity supply to it. Therefore Respondent No.2 is not opposing the reliefs sought by the Complainant and merely has sought to limit its submissions to the legal and regulatory issues involved in the present case.
    (ii) That the area of enquiry in the present matter remains limited to the issue as to whether a consumer can be prevented from availing supply from a licensee of its own choice on the ground of losses which its existing licensee may suffer due to such changeover, and does such a prevention amount to contravention of the provisions of the EA 2003.
    (iii) According to Respondent No.2, the EA 2003 has ushered in reforms in the electricity sector on two fundamental objectives: Promotion of competition and protection of consumers' interest. Section 43 thereof preserves the right of a consumer to choose a supplier from among the competing parallel licensees. And

therefore Respondent No.1 cannot prevent or hinder the Complainant from receiving supply from Respondent No.2 by refusing to disconnect and remove its electrical lines and equipments from the Complainant's premises, and the Commission needs to determine under Section 142 as to whether the Respondent No.1 is in any manner impeding such right to receive supply by the Complainant by refusing to disconnect supply to the Complainant.

(iv) According to Respondent No.2 the core issue arising in the present proceedings is that, if an already connected consumer to the distribution network of one distribution licensee wants to migrate to the distribution system and infrastructure of another distribution licensee, then on what terms such migration should be permitted and what charges should be payable by the migrating consumer to his erstwhile distribution licensee, whose distribution asset may be stranded due to his migration to the other licensee. Similarly, what charges, if any, should be paid by the migrating consumer to his new licensee.

(v) That the Commission may be pleased to lay down the guidelines as to what assets including costs, if any, would actually get stranded in particular situations and to what extent the distribution assets can be re-deployed in other parts of the erstwhile licensees network and also consider as to what extent the stranded assets have to be depreciated and how is the depreciation to be computed. It is also submitted that the issue of stranded assets of Respondent No.1 cannot be considered in the present proceedings and has to be determined by the Commission in a separate proceedings for which the Respondent No.1 is open to file a separate petition.

(vi) That the Respondent No.1 is wrong in suggesting, at the time of hearing on 29th June, 2010 that the present complaint by the Complainant is a "test case" which should be decided along with all other issues pending before the Commission, because the said issues are already subjudice before this Commission and the Bombay High Court and have no bearing or relevance to the present proceedings. Further, the MERC Supply Code does not bar the Complainant from getting electricity supply from a licensee through a dedicated distribution system laid at its own cost.

(vii) Respondent No.2 is statutorily obligated to give electric supply to the Complainant upon receiving a request for the same and this also includes the obligation to lay down the required distribution infrastructure if required. The Interim protocol under Order dated 15th October, 2009 does not prohibit a consumer from bearing the infrastructure costs for laying down a dedicated distribution line to receive supply from a licensee of its choice.

(viii) Respondent No.2 also submitted that the Commission may pass appropriate directions upon Respondent No.1.

19. Shri N. Ponrathnam, a Consumer Representative, made the following submissions:

(i) Respondent No.1 has forced consumers to pay for the cost of cable from substation to their premises. Hence, the consumer paying for dedicated line is nothing new in the State of Maharashtra.

(ii) The Complainant and Respondent No.1 have entered into an agreement which is inconsistent with Regulation 6 of Electricity Supply Code.

(iii) Whether it is optional or mandatory for any new consumer of suburban Mumbai to use the network of RInfra. Consumers should have a choice to opt for any combination to suit his economics.

(iv) It is the duty of Commission under Sections 45(5), 55(2), 57, 62, 86, 128, 129, 181 of EA 2003 and other provisions of the EA 2003 to ensure that the consumer is not harassed. Violation of statutory provisions by Respondent No.1 should be stopped.

(v) Respondent No.1 has violated Regulations 6.6, 5.5, 6.8 of the MERC Supply Code; Regulation 5.4 of the Maharashtra Electricity Regulatory Commission (General Conditions of Distribution Licence) Regulations, 2006 as Respondent No.1 has not made available copies of its licence, maps delineating the area of supply, for public inspection; and Regulation 6.2 of MERC Electricity Supply Code as the agreement format is not found on Respondent No.1's website.

(vi) Shri Ponrathnam has urged that the Commission ought to issue a blanket order in favour of consumers and forcing the licensees to comply with the statute.

20. Shri Rakshpal Abrol, another Consumer Representative, made the following submissions:
    (i) That the agreement between the Distribution Licensee and the consumer, is not as per the approved agreement of MERC.
    (ii) That the Commission may pass Orders/directions, after going through the detailed submissions made by the Complainant and Respondent No.1.

21. The Complainant vide its rejoinder (submitted on 21st July 2010) to the reply filed by Respondent No.1, submitted as follows:

    (i) The Complainant submits that the reply affidavit by the Respondent No.1 is a vile attempt at obfuscating the issue involved in the present situation with issues which are extraneous and unrelated to the present proceedings. Respondent No.1 is seeking to re-agitate the issues which are subject matter of separate proceedings already pending before the Bombay High Court and before the Commission too, thereby deliberately trying to dissuade the Commission from looking into the complaint made against it by the Complainant. Moreover, Respondent No.1 in its reply submissions has raised the issues such as the PPA between him and the Respondent No.2, recovery of Cross Subsidy surcharge and past revenue gap, and others, which are immaterial and diverse to the present complaint.

    (ii) The Complainant denies as baseless allegation made by the Respondent No.1 that the Complainant and Respondent No.2 are group companies, sharing the same address, as Respondent No.1 has led no evidence in support for the same. The Complainant and Respondent No.2 are independently managed companies, whose operations are closely supervised by their respective boards. Hence, the allegation of Respondent No.1 is vexatious. The Complainant takes strong objection to the

allegation made by the Respondent No.1 that the Complaint is put up by the Respondent No.2 and that the present complaint is malafide.

(iii) The Complainant denies Respondent No.1's contention that the complaint is not maintainable, and that the Complainant in the guise of relying on Section 142, is seeking reliefs which are beyond the jurisdiction of the Commission. Further, the Complainant states that it is wrong to suggest that the present complaint relates to a grievance between an individual consumer and its licensee and is to be agitated before the Consumer Grievance Redressal Forum (CGRF). It is a case based on Sections 142 and 129 of EA 2003 complaining against contraventions made by the Respondent No.1 of the specific provisions of the EA 2003 and the MERC Supply Code Regulations. Under the scheme of EA 2003, such a complaint against contravention of the provisions the EA 2003 and the Regulations framed thereunder, and for securing the compliance thereof cannot lie before the CGRF, which does not have the requisite powers to determine and adjudicate issues relating to contravention of the EA 2003. Therefore, this complaint has to necessarily be made before the Commission.

(iv) The Complainant has referred to the Supreme Court's decision in the case of *Maharashtra Electricity Regulatory Commission (MERC) Vs Reliance Energy Ltd.* [(2007) 8 SSC 381] where it has held that the Commission has full power to pull up any of its Licensees to see that the Rules and Regulations are properly complied with, and pass such orders so that the public is not harassed by invoking the powers under Sections 45(5), 52, 55(2), 57, 62, 86, 128, 129 and 181 of the EA 2003. Extracts from the order of The Appellate Tribunal for Electricity in Appeal No. 180 of 2009 also have been quoted by the Complainant in this regard, and it is stated that the reliefs prayed for in the present complaint can only be granted by this Commission.

(v) The issues addressed by Respondent No.1 like the non-signing of the PPA between the RInfra and TPC, recovery of cross-subsidy surcharge and past revenue gap, the Memorandum issued by the Government of Maharashtra dated May 7, 2010 and the dominant position of TPC, etc are not even remotely connected with the adjudication of the present complaint specially under Sections 129 and 142 of the EA 2003. The Complainant submitted that it is not a party to such proceedings and therefore no specific reply is required. Further, the Complainant stated that Respondent No.1 has raised such irrelevant and unrelated issues in the present proceedings with malafide intentions to make the Commission digress from the complaint / Petition filed by the Complainant.

(vi) That the allegation of selective network rollout by the Respondent No.2, the reliance placed by Respondent No.1 upon the order dated October 15, 2009 passed by the Commission is misconceived, out of context and based upon deliberate misreading of the Order. The observation made by the Commission in its ARR Order of TPC dated June 15, 2009 was in context of checking avoidable Capital Expenditure by TPC as a parallel Distribution Licensee. However, the same is not an issue in this case as the Complainant has agreed to erect the required lines/network to avail the supply from Respondent No.2 and therefore no capital

expenditure shall be incurred by Respondent No.2. And that the Complainant has already deposited the entire capital cost of the infrastructure required to be set up for a new connection with the Respondent No.2.

(vii) That under the Supply Code Regulations, a consumer is permitted to get dedicated distribution facilities installed for it upon paying the distribution licensee all the expenses reasonably incurred on such works. The contention of the Respondent No.1 is legally incorrect as it suggests that the Complainant is claiming a selective right of having a distribution network for its benefit by a parallel distribution licensee.

(viii) Regarding the cost of Stranded Assets, the Complainant submits that cost of the stranded assets is valued at Rs.5 lacs by the Respondent No.1. Hence, if the claim of Respondent No.1 is accepted, then its claim would be limited to receiving an amount of Rs.5 lacs at the highest, towards the cost of the distribution assets purportedly rendered redundant upon the Complainant availing supply from Respondent No. 2 without using Respondent No.1's wires. The Complainant further submits that if it is willing to bear the cost of Rs.5 lacs towards the stranded assets subject to the final decision of the Commission, then it should not be prevented from enjoying its statutory right to connect to the distribution system of Respondent No.2.

(ix) That the interim protocol in the Commission's order dated October 15, 2009 is not meant to prevent or prohibit a consumer from availing supply directly from Respondent No.2 without necessarily using the wires of Respondent No.1. The network laying or augmentation was not a point in issue in the said order. Whereas in its order dated February 22, 2010, the Commission has ruled that the consumers can avail supply from TPC directly without using the wires of BEST for wheeling.

(x) That the purported defence of the Respondent No.1 is entirely based on the interpretation of the Order dated 15th October 2009, and the same in the Complainant's opinion is being based on a deliberate misreading of the said order. The Complainant submits that said order cannot be read to mean that consumers like the Complainant have to compulsorily use the wires of their existing distribution licensee.

(xi) Denying and disputing the contents of Para 19 of the Respondent No.1's reply, the Complainant submits that despite written notice, Respondent No.1 has refused to disconnect supply . Further, it is submitted that the order dated 15th June 2009 read with order dated 22nd February 2010 makes it clear that there is no embargo on a consumer to avail supply from a parallel licensee only through the wires of existing distribution licensee, and, it is also provided under the MERC Supply Code Regulations that a consumer may get dedicated distribution facilities installed at its own cost for receiving supply from the distribution licensee.

(xii) The Complainant submits that Respondent No.1 is liable to pay compensation as per the law to the Complainant for the losses suffered by the Complainant on continuing basis, due to Respondent No.1's failure to disconnect the electricity supply and thus compelling the Complainant to avail supply at significantly higher tariff.

(xiii) The Complainant reiterates that in light of the submissions made, the stated position of law and in the facts and circumstances of the present case, the Respondent No.1 is liable to be proceeded against under Sections 142 and 129 of the Act, due to contravention of the provisions of the Act and the MERC Supply Code Regulations.

22. The matter was heard on 4th August, 2010 and 25th August, 2010. The Complainant has urged that in view of its continuing losses due to higher Tariff of Respondent No.1, as per its Interim Relief Application it may be allowed to immediately take power supply directly from Respondent No.2 and also it is ready to give a bank guarantee to cover the Wheeling Charges payable to Respondent No.1 for the interim period in case the final order goes in favour of Respondent No.1. The Complainant has also offered to pay to Respondent No.1, the balance cost of his stranded assets used for supplying power to the Complainant, which works out to Rs.5 lacs, as claimed by Respondent No.1. The Complainant also submitted that Respondent No.1 may have recovered the cost of infrastructure fully, if the Complainant had continued with it for the contracted period of 5 years, but the Complainant is ready to pay the balance of cost incurred by the licensee. According to the Complainant, paying the said cost would remove burden, if any, on the remaining consumers of Respondent No.1. It was submitted that the Complainant has incurred expenses of Rs.20 Lacs for building the new infrastructure for receiving the electricity supply directly from the nearest substation of Respondent No. 2 (about 50M away). This would become part of the Respondent No.2's assets.

23. Having heard the parties and after considering the materials placed on record, the Commission is of the view that the following issues arise for consideration in the present case:-

(1) What is the recourse available to M/s. Trent Ltd., the Complainant herein under the electricity supply agreement dated (*illegible*) March, 2008 executed between M/s. Satnam Realtors Pvt. Ltd., the Developer and Respondent No.1?

Although, the Complainant is aggrieved with the aforesaid Clause No. 10 appearing in the said agreement dated (*illegible*) March, 2008 between the Developer and the Respondent No.1, the fact is that the Complainant is not a party to the said Agreement. In that sense, on first principles, the Complainant does not have *locus standi* to challenge the said Clause No. 10 appearing in the said agreement dated (*illegible*) March, 2008. However, even if it is to be considered that the said agreement defacto binds the Complainant, Clause No. 11 of the said agreement makes it compulsory on the consumer to refer any disputes or differences arising between the parties as to the

rights and obligations, to the forum for redressal of consumer grievances. Clause No. 11 reads as follows -

> *"11.In the event of any disputes or differences between the parties hereto as to the rights and obligations under this agreement, the consumer agrees to refer such disputes to the Forum for Redressal of Consumer Grievances set up by REL, for redressal of their grievance. ..."*

Thus, the recourse available to the present Complainant is to refer its disputes to the forum for redressal of consumer grievances set up by Respondent No.1 and not this Commission. Having said that, even if the Commission wishes to examine the validity of Clause 10 of the aforesaid agreement, the Commission would be *defacto* adjudicating on a dispute referred to it by a consumer which it has with a distribution licensee, viz., Respondent No.1. The Hon'ble Supreme Court in Appeal (civil) 2846 of 2006 in the case of Maharashtra Electricity Regulatory Commission vs. Reliance Energy Ltd. & Ors., held *inter alia* in its judgement dated 14-8-2007 as under:-

> *"12. It may be noted from a perusal of Section 86(1)(f) of the Act that the State Government** has only power to adjudicate upon disputes between licensees and generating companies.* ***It follows that the Commission cannot adjudicate disputes relating to grievances of individual consumers.*** *The adjudicatory function of the Commission is thus limited to the matter prescribed in Section 86(1)(f)." {Emphasis supplied}*
>
> ** "*State Government"* to be read as "*State Commission".*

The above legal position has also been held in the following judgements:-

(a) Supreme Court's judgment in the case of *MSEDCL vs. Lloyd Steel Industries Ltd* AIR 2008 SC 1042

(b) The following judgments of the Appellate Tribunal for Electricity:

(1) 2007 Aptel 356, Dakshin Haryana Bijli Vitaran Nigam Ltd. Vs DLF Services Ltd.,

(2) 2007 Aptel 764, Dakshin Haryana Bijli Vitaran Nigam Ltd. Vs Princeton Park condominium,

(3) 2009 Appeal No. 180 of 2008, order dated 30th March 2009,

(4) 2009 Appeal No. 181 of 2008, order dated 30th March 2009.

Even under the MERC Electricity Supply Code Regulations 3.3.3 onwards where the provision of supply to an applicant entails works of installation of Dedicated distribution facilities, the said Regulation provides that any dispute with regard to the need for and extent of augmentation of the distribution system under Regulation 3.3.4 shall be determined in accordance with the procedure set out in the Consumer Grievance Redressal Regulations.

Thus, looking at it from any angle, the appropriate forum to entertain the present controversy would be the consumer grievance redressal forum which is the appropriate forum constituted under Section 42(5) of the EA 2003 and, if still not satisfied, with the

order passed by the appropriate forum, the Complainant consumer can approach the Electricity Ombudsman under Section 42(6) of the Act.

(ii)**Has the present Complaint been made with *malafide* intent?**

In view of the above decision in this case, allegations made by Respondent No.1 that the Complainant and Respondent No.2 being group companies have filed the present complaint with malafide intent, is not relevant.

(iii) **What would be the role of consumer grievance redressal forums ?**

Following the Commission's Order dated 15th October, 2009 in Case No. 50 of 2009, there is a strong possibility that there would be many more of such cases and instances where consumers would be aggrieved with the demand of a distribution licensee that their distribution system must be used in order to receive supply from another distribution licensee in the same area even if the consumer is ready to bear the cost of dedicated distribution line to receive supply from the distribution licensee of its choice, as well as the consumer is willing to bear the cost towards the stranded assets of their existing distribution licensee. The CGRFs should ensure that then such consumers should not be prevented from enjoying their statutory right to connect to the distribution system of a distribution licensee of its choice. While deciding these matters, the CGRFs should ensure that consumers of both distribution licensees are not prejudicially affected on account of the stranding of distribution assets, if any, due to changeover / switching over of some consumers of one distribution licensee to another distribution licensee and also that the distribution system of the existing distribution licensee remains economical due to such changeover / switching over.

While deciding these types of cases, CGRFs would also need to bear in mind that "*promoting competition"* is one of the stated objectives in the preamble to the Electricity Act, 2003. Similarly, "*taking measures conducive to development of electricity industry" and "protecting interest of consumers"* are also the stated objectives in the preamble to the said enactment.

The above is a direction to CGRFs under Regulation 26 of the "Maharashtra Electricity Regulatory Commission (Consumer Grievance Redressal Forum & Electricity Ombudsman) Regulations, 2006".

Accordingly, the present Complaint and the IA's are disposed of.

Sd/-	Sd/-	Sd/-
(V. L. Sonavane)	(S. B. Kulkarni)	(V.P. Raja)
Member	Member	Chairman

(K. N. Khawarey)
Secretary, MERC