

**Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal Nos. 87 & 107 of 2010

Dated: 26th August, 2011

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam,
Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member**

Appeal No. 87 of 2010

In the matter of:

**Tata Power Trading Company Limited,
Tata Power Mahalaxmi Receiving Station
Senapati Bapat Marg, Lower Parel,
MUMBAI-400 013.**

... Appellant

Versus

- 1. Maharashtra Electricity Regulatory Commission,
World Trade Centre No. 1, 13th floor,
Cuffe Parade, Colaba, Mumbai 400 001
(Through Secretary)**
- 2. The Tata Power Company Limited,
Bombay House,
24, Homi Mody Street,
Mumbai-400 001
(Through Company Secretary)**
- 3. BEST Undertaking,
Electricity House,
Colaba Causeway,
Mumbai-400 020
(Through Chairman)**

... Respondents

Counsel for the Appellant(s): Mr. Meet Malhotra, Sr. Advocate
Mr. Sitesh Mukherjee, Ms.M.Ghosh
Mr. Avijeet Lala,
Mr. Vishal Anand,
Ms. Sakya Chaudhari

Counsel for the Respondent(s): Mr. Buddy A. Ranganadhan for R-1
Mr. Amit Kapoor, Mr. Mansoor Ali Shoket,
Ms. Sakie Jakharia and
Ms. Sugandha Somani for R-2
Mr. Harinder Toor &
Mr. Mukesh Kumar for R-3

Appeal No. 107 of 2010

In the matter of:

**The Tata Power Company Limited,
Bombay House,
24, Homi Mody Street, Fort,
Mumbai-400 001**

... Appellant

Versus

**Maharashtra Electricity Regulatory Commission,
World Trade Centre No. 1, 13th floor,
Cuffe Parade, Colaba, Mumbai 400 001
(Through Secretary)**

... Respondent

Counsel for the Appellant(s): Mr. Amit Kapur, Ms. Sakie Jakharia
Mr. Mansoor Ali Shoket,
Ms. Sugandha Somani

Counsel for the Respondent(s): Mr. Jayant Bhushan, Sr. Advocate &
Mr. Buddy A. Ranganadhan for R-1

JUDGMENT

HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

Appeal No. 87 of 2010 has been filed by Tata Power Trading Company Ltd. against the direction made in the order dated 19.1.2010 passed by Maharashtra Electricity Regulatory Commission for approval of capital cost and determination of tariff for Trombay Unit No. 8. Appeal No. 107 of 2010 has been filed by the Tata Power Company Limited against the same order challenging the same direction and disallowance of some costs.

2. Tata Power Company is in the business of generation and distribution. It has a licence for distribution of power in some parts of Mumbai. Tata Power Trading Company Ltd. is an inter-state trading licensee.

3. The Maharashtra State Commission is the first Respondent in both the Appeals. In Appeal No. 87 of 2010, Tata Power Co. Ltd. and BEST Undertaking are second and third Respondents respectively. BEST is a distribution licensee in Mumbai.

4. The brief facts of the case are as under:

4.1. On 28.3.2005 the Government of Maharashtra issued a policy with the objective to promote investment in power generation in the State of Maharashtra with a view to mitigate power shortages. The Policy, *inter alia* provided for 100% exemption from Octroi for machinery and other equipments required for initial setting up of the Project.

4.2. In view of above policy, the Tata Power Company, Appellant herein, entered into an MOU on 4.4.2005 with the Government of Maharashtra for setting up

power plants in Maharashtra. The MOU provided for 100% exemption from Octroi, in terms of the policy.

4.3. On 21.12.2006 Tata Power Company signed Power Purchase Agreement with BEST, Respondent No. 3 herein, for sale of 100 MW from Trombay Unit No. 8 with the installed capacity of 250 MW. On 23.12.2006, in an internal meeting of Tata Power Company, 50 MW power out of Trombay Unit No. 8 was allocated for distribution business of Tata Power Company, hereinafter referred to as TPC-D. Thus 150 MW power out of the installed capacity of 250 MW of Trombay Unit No. 8 was tied up with the distribution licensees in Mumbai.

4.4. The minutes of meeting dated 23.12.2006 and Power Purchase Agreement between Tata Power Company and BEST were submitted to the State

Commission in Case No. 88 of 2006 and No. 87 of 2006 respectively which were subsequently approved by the State Commission on 6.11.2007.

4.5. Tata Power Company entered into PPA with Tata Power Trading Company Ltd. for sale of 92 MW ex-bus surplus power from Unit No. 8 as well as any additional power available from the said Unit.

4.6. On 29.3.2009, the Trombay Unit No. 8 was put to commercial operation.

4.7. The Tata Power Company on several occasions took the matter with Govt. of Maharashtra regarding issuance of exemption certificate for Octroi for the equipment and material for Trombay Unit No. 8 in terms of its MOU with the State Government but the same was not provided. Consequently Tata Power

Company had to pay Octroi on the equipment installed at Unit No. 8.

4.8. On 8.7.2009 the Tata Power Company submitted a Petition before the State Commission for approval of the capital cost and tariff for Trombay Unit No. 8.

4.9. The State Commission after seeking additional information from the Tata Power Company and holding public hearing, passed the impugned order dated 19.1.2010, disallowing certain claims of the Tata Power Company and giving some direction regarding ensuring supplies of power corresponding to the capacity contracted by Mumbai licensees before power is supplied to other entities.

4.10. Aggrieved by the above order of the State Commission dated 19.1.2010 the Appellants have filed these Appeals. As the order under challenge and the

issue raised in both the Appeals is common, a common judgment is being rendered.

4.11. Tata Power Company is in the business of generation and distribution. For the sake of brevity, the generation business will be referred to hereinafter as TPC-G and the distribution business as TPC-D.

5. The Tata Power Company in Appeal No. 107 of 2010 has made the following submissions:

5.1. Commission's direction regarding contracted capacity of Trombay Unit No. 8: The State Commission in the impugned order has directed the Tata Power Company to ensure that it should supply power corresponding to the capacity contracted by Mumbai Licensees viz. TPC-D and BEST, before it supplies power to other entities, subject to the schedule provided by the two distribution licensees.

These directions amount to giving preference to BEST and TPC-D, directing TPC-G to renege from its contracted obligation as enunciated in the PPA with Tata Power Trading Company Ltd., hereinafter referred to as Tata Trading. Thus the State Commission has brought in new terms and conditions which tantamount to arbitrarily revisiting and reopening the PPAs which were earlier approved by the State Commission. The direction of the State Commission is without jurisdiction and contrary to the judgments of Hon'ble Supreme Court and the Tribunal.

5.2. Non-consideration of Octroi payment to determine capital cost: The State Commission has approved capital cost of Rs. 1047 crores excluding Rs. 27.2 Crores, which was paid by the Appellant towards Octroi payment, on the plea that Government of Maharashtra was required to grant 100% exemption

on Octroi in terms of the MOU signed by the Appellant with the State Government. The Appellant had specifically submitted before the State Commission that it had been following up with the Government of Maharashtra for exemption of Octroi but there was no response. Subsequently, the State Government by its communication dated 4.8.2010 refused to grant any exemption on Octroi duty. The State Commission should have allowed the Octroi actually paid by the Appellant generating company for determination of capital cost of the Unit No. 8 in terms of its Tariff Regulations, 2005. Further, the actual capital cost even after including Octroi duty is less than the capital cost of other similar projects elsewhere in India, which were considered by the State Commission while approving the capital cost.

5.3. Treatment of Tax: Minimum Alternate Tax is payable by the TPC-G: The State Commission has not allowed grossing up of the Return on Equity to account for the MAT payable by TPC-G. This is against the judgment of the Tribunal dated 23.3.2010 in Appeal No. 68 of 2009 read with order dated 5.11.2009 passed in Review Petition No. 9 of 2010 and judgment dated 10.9.2010 in Appeal No. 49 of 2010.

5.4. Disallowance of actual rate of interest paid by TPC-G: The State Commission has not allowed interest rate of 14% at which TPC-G took IDBI Tranche 3 loan in October, 2008. At that time, the funds in the market had dried up and the interest cost had risen substantially. SBI PLR at that time was also 13.75%. The actual rate of interest paid by TPC-G can not be denied and has to be reimbursed through tariff.

6. Tata Trading, the Appellant in Appeal No. 87 of 2010, has made the following submissions:

6.1. Tata Trading is only aggrieved by the direction of the State Commission in the impugned order regarding supply to Mumbai Licensees before TPC-G supplies power to other entities as it has contracted 92 MW ex-bus power (100 MW less auxiliary consumption @ 8%) and is entitled to sell the same to any licensee or consumer in Maharashtra as well as outside the state.

6.2. The impugned directions given by the State Commission directly and substantially impacts the rights of the Appellant Trading Company. In terms of the directions of the State Commission, reduction in generation of power below the rated capacity of Trombay Unit No. 8 will reduce the entitlement of Tata Trading. Apart from the loss incurred by the Tata

Trading in terms of reduction in power supply from Unit No. 8, the impugned directions also interferes with the ability of the Appellant to do onward sale of a firm determinable capacity from Unit No. 8 to any licensee or consumer.

6.3. The impugned direction has been passed in a totally unconnected proceeding for determination of generation tariff of Unit No. 8 at Trombay for sale of power from TPC-G to the distributable licensees, viz; BEST and TPC-D; and without hearing the Appellant Trading Company.

7. On the above issues Shri Amit Kapur and Shri Sitesh Mukherjee, learned counsel for the Appellants argued against the above findings of State Commission in the impugned order. Shri Jayant Bhushan, Sr. Advocate assisted by Shri Buddy

Ranganadhan representing the State Commission and Shri Harinder Toor, learned counsel for the BEST argued forcefully supporting the findings of the State Commission.

8. After examining the material on record and hearing the arguments of the learned counsel for the parties, the following questions would arise for our consideration:

- i) Is the impugned direction given by the State Commission regarding supply of power from Trombay Unit No. 8 to the distribution licensees of Mumbai beyond its jurisdiction and contrary to the judgment of Hon'ble Supreme Court?
- ii) Was the State Commission right in disallowing the expenses on account of Octroi

paid by the TPC-G on the equipment installed at Trombay Unit No. 8?

iii) Has the State Commission erred in not allowing grossed up Return on Equity to account for the Minimum Alternate Tax payable by TPC-G?

iv) Was the State Commission right in not allowing the actual rate of interest paid by TPC-G to IDBI for the loan taken in October, 2008?

9. The first issue is regarding the impugned direction to TPC-G to supply of power from Trombay Unit No. 8 to Mumbai distribution licensees corresponding to their contracted capacity before it supplies power to other entities.

9.1. According to the learned counsel for the Appellants, the impugned direction of the State Commission would amount to:

- i) Giving preference to Mumbai distribution licensees over Tata Trading which also has a contract for firm power in Unit No. 8.
- ii) Bringing new terms and conditions and arbitrarily revisiting and reopening the PPAs which had earlier been approved by the State Commission by its order dated 6.11.2007.
- iii) Directing TPC-G to renege from its contractual obligations as enunciated in the PPA between TPC-G and Tata Trading.

These directions are beyond the jurisdiction of the State Commission and contrary to the judgments of the Hon'ble Supreme Court and the Tribunal.

9.2. According to learned Senior counsel for the State Commission, the State Commission had only directed the Appellant TPC-G to fulfill its commitment under the approved Power Purchase Agreement with BEST and TPC-D before it sells any power from Unit No. 8 to Tata Power Trading under short term contracts. Only "surplus" or "balance" power has been agreed to be sold to Tata Trading. The State Commission is empowered to ensure that the generator which has a subsisting approved PPA with the distribution licensee abides by the stipulations contained in the PPA. Under Sections 62(1)(a) and 86(1)(b) of the 2003 Act, the power procurement process of the distribution licensee has to be approved by the State Commission.

The State Commission has also decided the tariff at which the TPC-G has to sell power to the distribution licensees under the PPA. Unless there is a firm contracted capacity agreed to be sold to the distribution licensees, there cannot be an allocation of capital cost or determination of a per unit tariff. The State Commission has to keep public interest in mind while approving PPA. PPA between the generator and the distribution licensee where the firm capacity could be reduced to maintain proportionate supply on merchant basis to a trading licensee cannot be approved as it will not be in the public interest nor permit equitable distribution of electricity.

9.3. Learned counsel for BEST, Respondent No. 3 herein, has argued that the PPA signed by the distribution licensee of Mumbai viz. BEST and TPC-D with TPC-G was much earlier than the balance

capacity contracted with Tata Trading and, therefore, the Mumbai distribution licensees will have precedence and priority over Tata Trading. The Unit No. 8 also utilizes common facilities of Unit Nos. 5, 6 and 7 of Trombay for which the Mumbai distribution licensees have paid the fixed charges. As such the Mumbai licensees being the existing set of consumers should have precedence and priority over the supply by TPC-G from Unit No. 8 to other entities outside the State of Maharashtra. He also referred to Article 4.2 of the PPA in regard to priority in supply to BEST. Moreover, the protection of consumer interest is a fundamental feature of the 2003 Act as such no prejudice will be caused to Tata Trading if precedence or priority is given to BEST. Tata Trading had willfully chosen not to represent itself before the public hearing for deciding the tariff of Trombay Unit No. 8 and,

therefore, it cannot raise the issue about lack of notice in the matter.

9.4. Let us first examine the PPA dated 21.12.2006 signed between Tata Power Company and BEST, the second and the third respondents respectively.

9.5. Article 4 deals with obligation to supply and take energy. Article 4.1 stipulates the contracted capacity. The relevant paragraphs 4.1.1 and 4.1.3 are reproduced below:

“4.1.1 TPC (G) shall allocate 800 MW generating capacity (at TPC’s generator terminal) from its power stations for supply to BEST. A total generating capacity of 800 MW shall be allocated and earmarked for use of BEST from the following installed generating capacity owned, operated and maintained by TPC (G):

Table 1: Generation Capacity Allocation to BEST

<i>Sr.</i>	<i>Name of Generating Station</i>	<i>Type of Plant</i>	<i>Installed Capacity (MW)</i>	<i>Generating Capacity contracted to BEST (MW)</i>
1.	<i>Khopoli</i>	<i>Hydro</i>	<i>72</i>	$800 \times 72 / 1777 = 32.41$
2.	<i>Bhihpuri</i>	<i>Hydro</i>	<i>75</i>	$800 \times 75 / 1777 = 33.76$
3.	<i>Bhira</i>	<i>Hydro</i>	<i>300</i>	$800 \times 300 / 1777 = 135.06$
4.	<i>Trombay</i>			
4.1	<i>Unit 4</i>	<i>Thermal</i>	<i>150</i>	$800 \times 150 / 1777 = 67.53$
4.2	<i>Unit 5</i>	<i>Thermal</i>	<i>500</i>	$800 \times 500 / 1777 = 225.10$
4.3	<i>Unit 6</i>	<i>Thermal</i>	<i>500</i>	$800 \times 500 / 1777 = 225.10$
4.4	<i>Unit 7</i>	<i>Thermal</i>	<i>180</i>	$800 \times 180 / 1777 = 81.04$
	<i>Total Capacity Allocation</i>		<i>1777.00</i>	<i>800</i>

“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 despatch generation from them such that BEST load of 800 MW (at TPC's generator terminal) is met".

9.6. Thus, according to the PPA, BEST is entitled to 800 MW capacity out of the total installed capacity of 1770 MW and the contracted capacity has been allocated to the different generating units on pro-rata basis. However, supply of contracted capacity is subject to availability from the generating station. The availability is defined in article 1.1 (d) as under:

“(d) “Availability” for any period means the average of the daily average Declared Capacities (DCs) for all the days during that period expressed as a percentage of the installed capacity of the generating station minus auxiliary consumption in MW, and shall be computed in accordance with the

following formula:

$$\text{Availability} = 10000 \times \sum_{(=)}^N \text{DCi} \{ N \times \text{IC} \times (100 - \text{AUX}) \} \%$$

Where

IC=Installed Capacity of the generating station in MW

DCi = Average declared capacity for the ith time block in such period in MWs,

N = Number of time blocks in the given period,

AUX = Normative Auxiliary Energy consumption in MW for each Unit / Plant of TPC expressed as a percentage of gross Generation as specified by the Commission from time to time”.

9.7. Article 4.2 stipulates priority of supply to BEST by TPC-G in the event of breakdown of power system resulting in any partial dislocation of supply in BEST.

The same is reproduced below:

“4.2. Priority to BEST:

In the event of break-down of the power system resulting in any partial dislocation of supply to BEST, TPC(G) shall supply the power to BEST as per the priority list of load in BEST distribution as

provided by BEST or as much of it as possible in priority to every other person, firm or company, except that TPC(G) shall be bound by the directions of the State Government, MERC and SLDC/WRLDC if any in this regard”.

The above provision is only in exigency of break down in supply in BEST’s power system resulting in partial dislocation of supply and is not applicable in normal operating conditions.

9.8. Article 4.3 stipulates obligation of supply by TPC-G to BEST its requirement to the extent of the contracted capacity of 800 MW less the normative auxiliary consumption of the generating station, subject to the Article 4.1.3 which includes subject to availability of the generating station.

9.9. Article 4.4 provides for compensation by TPC-G to BEST in case availability of the generating stations of TPC-G falls below 85% on annual basis till the time

the State Commission specifies the billing and settlement code for intra-state transmission or ABT on intra-state transmission system.

9.10. Article 4.5 describes the Right to Electrical Output. The relevant paragraphs 4.5.1 and 4.5.2 are reproduced below:

“4.5.1. TPC (G) agrees that it shall supply to BEST from its existing installed capacity of 1777 MW, the allocated capacity subject to maximum of 800 MW. In the event of availability less than 1777 MW, TPC(G) shall meet BEST requirement in proportion to the available capacity (For e.g. if available capacity is 1200 MW at a point of time, the capacity available during that point of time to BEST shall be $(800 \times 1200) / 1777$).

4.5.2. TPC(G) shall not sell the power generated out of capacity contracted to BEST directly to third parties before meeting demand of BEST and subject to the limitation provided article 4.1.3

above. Where the total schedules on day ahead basis of BEST becomes less than the contracted capacity of BEST with TPC(G) and TPC(G) is required to back-down generation, under such circumstance TPC(G) may supply such un-availed capacity on short-term basis to third parties other than BEST. In the event, TPC is able to sell such surplus capacity at a price higher than its variable cost, such excess recovery over the variable energy charges shall be reduced from the fixed charges payable by BEST”.

Article 4.2.1 stipulates that in the event of availability of power stations of TPC-G being less than the installed capacity of 1777 MW, the entitlement of BEST will reduce in proportion to the available capacity. Article 4.5.2 puts restriction on TPC-G to sell power out of the capacity contracted to BEST to third parties.

9.11. Article 4.6 deals with contracted capacity from the future generating units of TPC(G), including Unit No. 8 at Trombay. The relevant paragraph is reproduced below:

“The parties acknowledge that TPC(G) is in the process of setting up 100 MW DG sets and 250 MW coal based thermal Unit No. 8. Subsequent to commissioning of Unit No. 8, existing Trombay Unit No. 4 will be decommissioned. The contracted capacity allocation from TPC(G) to BEST after commissioning of the proposed generating units and decommissioning of Trombay Unit No. 4 shall be as given in Table-2. This shall be in addition to the capacity allocated as on date of this agreement in Table in 1.

Table-2 Addition of Contracted Capacity in future

Sl.No.	Name of Generating Unit	Type of Plant	Installed Capacity (MW)	Future Generating Capacity contracted to BEST (MW)
1.	DG Sets	Diesel	100	40
2.	Trombay Unit 8	Thermal	250	100
3.	Reduction due to decommissioning of Unit No.4	Thermal	-150	-67.53
	Total		200	72.47”

Thus, on commissioning of DG sets and Trombay Unit No. 8 and decommissioning of Unit No. 4, the net increase in installed capacity of TPC-G will be 200 MW out of which 72.47 MW will be the contracted capacity of BEST. This capacity addition will be over and above the capacity allocated as per Table-1.

9.12. Article 6.2.1 stipulates that TPC-G and BEST would abide by Balancing Mechanism/ABT Mechanism established by the State Commission.

9.13. Article 8.1 regarding recovery of fixed charges stipulates that in case of the thermal generating stations full recovery of annual fixed charges shall be at 80% availability and in case of availability reducing below 80%, the recovery of fixed charges shall be on pro-rata basis in accordance with the Tariff Regulations, 2005.

9.14. Now we will examine the order dated 6.11.2007 the State Commission approving the above PPA with BEST. The relevant clauses are extracted below:

“(d) Penalty Clause

.....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%”

“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”.

“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”.

The State Commission in the above order held that BEST will have to ensure that it contracts for adequate generation capacity to meet its requirements, assuming availability of TPC-G at 80%. The State Commission has also approved the PPA between TPC-G and BEST and the arrangement of power supply from TPC-G to TPC-D. We also notice from the order dated 6.11.2007 that some objectors had raised the issue of supply of power to BEST on first priority and not on pro-rata basis which was duly supported by BEST but the State Commission approved the PPA without any amendment.

9.15. Now we shall examine the Power Purchase Agreement dated 21.12.2007 signed between TPC-G

and Tata Trading. The relevant clauses of the Power Purchase Agreement are reproduced below:

“WHEREAS:

TPC inter alia owns and operates coal based 250 MW unit no: 8 at its Trombay Thermal generating plant as a Generating Company. Ex-Bus Surplus power of about 92 MW is available with TPC from this unit on round the clock basis throughout the year. TPC is desirous to sell this surplus power of 92 MW as well as any additional power available from the said unit. TPTCL is desirous to purchase said 92 MW power and any additional quantity available on the unit on round the clock basis (00:00 hrs. to 24:00 hrs.) throughout the year, for trading.

NOW THEREFORE, in view of the foregoing premises and in consideration of the mutual covenants and agreements herein after set forth, the TPTCL and the TPC hereby agree as follows:

1. *Quantum of Power*

TPTCL shall purchase and TPC shall sell 92 MW, Ex-Bus power on round the clock and round the year basis from coal based Trombay unit No. 8. The actual available quantum would be as per declared capacity by TPC”.

“10. TPC guarantees annual availability of 85% of quantum of power under clause 1. TPTCL guarantees annual off take of 90% of quantum of power offered by TPC.

TPTCL shall compensate TPC for any deficit in the offtake at the rate of Rs. 1.10 per kWh for actual offtake below 90% of offered quantum of power.

TPC shall compensate TPTCL for any deficit in the supply of quantum of power at the rate of Rs. 1.10 per kWh for actual supply below 90% of offered power”.

Thus, Tata Trading contracted for firm capacity of 92 MW on round the clock basis from Unit No. 8 at

Trombay. However, actual quantum available to Tata Trading would be as per the declared capacity of Unit No. 8 by TPC-G. The PPA is valid for a period of 25 years, i.e. it is a long term PPA. According to the PPA, TPC-G guarantees annual availability of 85% of the quantum of power contracted with Tata Trading and compensation to be paid to Tata Trading for any deficit in actual supply below 90% of offered power @ Rs. 1.10 per kWh.

9.16. On examination of the PPAs and order of the State Commission dated 6.11.2007 the following conclusion is arrived at:

- (i) BEST and TPC-D have contracted capacity of 100 MW and 50 MW respectively out of 250 MW capacity of Trombay Unit No. 8. The balance ex-bus capacity of 92 MW (100 MW gross capacity

less 8% auxiliary consumption) has been contracted by Tata Trading.

(ii) All the above PPAs are for firm capacity. However, PPA for the firm contracted capacity does not entitle firm availability of 100% capacity round the clock round the year nor it provides for priority to distribution licensee of Mumbai over Tata Trading from Unit No. 8 at Trombay.

(iii) Article 4.2 of the PPA between BEST and TPC-G only provides for priority in supply to BEST in the exigency of breakdown of BEST's power system resulting in partial dislocation of supply and is not applicable to normal conditions.

(iv) The power available to BEST, TPC-D and Tata Trading on day to day basis will depend on the generation availability at the power station. In case of reduction of generation availability below

the rated capacity, the entitlement of all the beneficiaries will reduce on pro-rata basis as envisaged in articles 4.1.1, 4.1.3 and 4.5.1 of the PPA between BEST and TPC-G and article 1 of the PPA between TPC-G and Tata Trading. Entitlement of power according to availability and reduction in entitlement on pro-rata basis in case of availability of Unit No. 8 going below its rated capacity of 250 MW as envisaged in PPA between BEST and TPC-G in paragraphs 4.1.3 and 4.5.1 is also applicable to Unit No. 8.

(v) However, in case of annual availability falling below 85%, TPC-G has to pay compensation to the distribution licensees. For annual availability less than 80%, the fixed charges also reduce on pro-rata basis, in accordance with the Tariff Regulations.

9.17. Now we will examine the findings in the impugned order dated 9.1.2010 in the Petition filed by TPC for approval of the capital cost and determination of tariff for Trombay Unit No.8.

9.18. The impugned order in paragraph 5 records the submission of the TPC regarding signing of PPA for Trombay Unit No. 8 with various licensees as under:

100 MW to BEST

50 MW to TPC-Distribution.

100 MW to Tata Power Trading Company, an inter-state trading licensee.

9.19. The State Commission has also noted that as per the MOU signed by TPC with the Government of Maharashtra with regard to capacity allocation of 50% of capacity to be sold in the State of Maharashtra, out

of 250 MW capacity of Trombay Unit No. 8, 150 MW (being 60% of the unit capacity) has been tied up for sale to BEST and TPC-G in Maharashtra.

9.20. The State Commission had also raised the issue of justification for apportioning 40% capacity of Trombay Unit No. 8 under Merchant basis instead of selling power to any distribution licensee. The relevant extracts are reproduced below:

“The Commission directed TPC to provide justification for apportioning 40% of Trombay Unit No. 8 capacity under Merchant basis instead of selling power to any of the distribution licensees in the state, as by adopting this approach it has earned windfall profit”.

After considering the submissions made by TPC, the State Commission has recorded its ruling on the

above issue as under:

“22. Sale of power from Trombay Unit-8

The Commission has taken note of TPC’s submission that it has entered into PPAs to sell power from Unit-8 with BEST for 100 MW, TPC-D for 50 MW and TPTCL for the remaining 100 MW. It has also taken note of TPC’s submission that restricting a Generator from selling power to any licensee or consumer if it so desires contravenes Section 10(2) of Electricity Act, 2003”.

9.21. Under paragraph 51 of the impugned order, the State Commission has recorded as under:

“TPC has entered into a PPA of 100 MW with BEST and 50 MW with TPC-D, the balance 100 MW is proposed to be sold to TPTCL, thus TPC-G can recover capacity charges only to the extent of 150 MW from the two Mumbai distribution licensees”.

Thus, the TPC-G can recover capacity charges or fixed charges to the extent of 150MW (60% of capacity)

from the two Mumbai distribution licensees, corresponding to the capacity contracted by them. The State Commission also decided the tariff in respect of contracted capacity or 150 MW to be supplied to the Mumbai distribution licensees.

9.22. In paragraph 69, the State Commission records as under:

“With the above background, the Commission is not in a position to direct TPC to sell the remaining 100 MW power either to the existing set of consumers or to any specific set of consumers, as it would contravene provisions of Section 10(2) of the EA 2003. Hence the Commission is of the view that the existing consumers who bear the cost of common facilities as above, need to be adequately compensated for use of these facilities to generate and sell power to other users”.

Accordingly, the State Commission directed TPC to undertake detailed Techno-commercial audit of

such common facilities and based on such audit the State Commission would finalise a mechanism for the reimbursement in lieu of the common facilities.

9.23. However, in the concluding paragraph the State Commission has directed as under:

“The Commission directs TPC to ensure that it supplies power corresponding to the capacity contracted by Mumbai Licensees before it supplies power to other entities, subject to the schedule provided by the two distribution licensees”.

9.24. Now we will examine the consequences of the above direction of the State Commission.

9.25. The table below indicates the entitlements of BEST, TPC-D and Tata Trading for different generation availability scenarios of Trombay Unit No.8, if the entitlements of all the three beneficiaries vary on pro-rata basis according to the PPAs.

Table-1Entitlement of BEST, TPC-D and Tata Trading in different generation scenarios

	<u>Scenario-I</u>	<u>Scenario-II</u>	<u>Scenario-III</u>
1. Generation at Trombay Unit No. 8	250 MW	200 MW	150 MW
2. Entitlement of:			
a) BEST	100 MW	80 MW	60MW
b) TPC-D	50 MW	40 MW	30MW
c) · Tata Trading (ex-bus)	92 MW	73.6 MW	55.2 MW
· Auxiliary consumption Corresponding to Share of Tata Trading @ 8%	8 MW	6.4 MW	4.8 MW
Total	250 MW	200 MW	150 MW

In the above scenarios, in case of reduction in the availability of Trombay Unit No. 8 below the rated capacity, the entitlement of Mumbai distribution licensees and Tata Trading would reduce proportionate to their contracted capacity.

9.26. The table below indicates the entitlements of BEST and TPC-D as a result of the direction of the State Commission in the impugned order for according priority to Mumbai distribution licensees and the balance power available for Tata Trading under different generation availability scenarios of Unit no.8.

Table-2

Entitlement of BEST, TPC-D and Tata Trading as a consequence of the direction of the State Commission

	<u>Scenario-I</u>	<u>Scenario-II</u>	<u>Scenario-III</u>
1. Generation at Trombay Unit No. 8	250 MW	200 MW	150 MW
2. Entitlement of:			
a) BEST	100 MW	100 MW	100MW
b) TPC-D	50 MW	50 MW	50MW
c) · Tata Trading (ex-bus)	92 MW	46 MW	Nil
· Auxiliary consumption Corresponding to Share of Tata Trading @ 8%	8 MW	4 MW	-
Total	250 MW	200 MW	150 MW

As a consequence of the direction of the State Commission, in case of reduction in availability at Trombay Unit No. 8 upto 150 MW, the entire impact of the reduction in generation falls on Tata Trading's entitlement. The entitlement of the Mumbai distribution licensees remain 100% of the contracted capacity even upto reduction in generation to a level of 150 MW at Unit No. 8. The availability to Tata Trading will be zero at and below the generation level of 150 MW.

9.27. The above direction of the State Commission amounts to bringing new terms and conditions in the Power Purchase Agreement approved by the State Commission earlier by its order dated 6.11.2007. We are in agreement with the learned counsel for the Appellants that the State Commission having approved the Power Purchase Agreement by its order dated

6.11.2007 had become functus officio and could not have issued the direction affecting the PPA in the Petition filed for determination of tariff for Unit No. 8 as applicable to the distribution licensees of Mumbai. The direction given by the State Commission also impacted the terms of PPA between TPC-G and Tata Trading which was signed subsequent to the approval of the PPA with the distribution licensees by the State Commission by its order dated 6.11.2007.

9.28. Now in the above background we will examine if the State Commission has exceeded its jurisdiction in giving the impugned directions to TPC-G.

9.29. According to the learned counsel for the State Commission, the State Commission is mandated in law to safeguard consumer interest under Section

61(d) even while determining the tariff under Section 62(1)(a) and have “the public interest” in mind while approving a PPA. The State Commission may consider equitable distribution of electricity while approving a PPA under Section 86(1)(b). The Commission has all the powers to pass necessary directions to enforce the terms of a PPA that it has approved.

9.30. Section 62(1)(a) provides for determination of tariff in accordance with the provisions of the Act for supply of electricity by a generating company to a distribution licensee. Accordingly, the State Commission has determined the tariff for Trombay Unit No. 8 for the 150 MW capacity contracted by the distribution licensees of Mumbai by the impugned order on the basis of a petition filed by the TPC. It is also accepted that the State Commission has power to approve the PPA for supply of power by a generating

company to the distribution licensees under Section 86(1)(b) of the Act. Accordingly, the State Commission had approved the PPAs for the supply of power to the distribution licensees by its order dated 6.11.2007. Admittedly, the proceedings which resulted in the impugned order was for determination of the tariff under Sections 61 and 62 of the Act and in this order the State Commission could not give a direction not in consonance with the terms and conditions of PPAs approved earlier and adversely affecting the terms of conditions of PPA signed between TPC and Tata Trading. Section 62(1)(a) or 86(1)(b) do not empower the State Commissions to give the impugned direction. The State Commission under Section 86(1)(b) can also adjudicate upon disputes between the licensees and generating companies in regard to implementation, application or interpretation of the provisions of the

PPA. Admittedly, no such dispute was there before the State Commission while determining the tariff for Trombay Unit No.8.

9.31. Section 10(2) of the Act gives freedom to a generating company to supply electricity to a licensee and to any consumer. Tata Trading is a trading licensee which has signed a PPA for firm capacity of 92 MW (ex-bus) from Trombay Unit No. 8. The impugned directions would directly affect the interest of Tata Trading in terms of the PPA signed by it with TPC. Section 61 (d) provides for safeguarding the consumers' interest and at the same time, recovery of cost of electricity in a reasonable manner. The State Commission cannot rely on Section 61(d) relating to safeguarding of consumer's interest to give any direction which is beyond its jurisdiction. In our opinion, the State Commission by the impugned

direction has indirectly exercised control over supply from the balance capacity of TPC not contracted with the distribution licensees. Thus what the State Commission could not do directly, it has tried to do indirectly by issuing the impugned direction.

9.32. According to the learned counsel for the State Commission and BEST, the supply under long term contract with the distribution licensee should have precedence over intended short term supply by the Trading licensee and is in the consumer interest.

9.33. The distribution licensees of Mumbai have contracted for 150 MW capacity of Trombay Unit No.8. The Annual Fixed charges determined by the State Commission for the distribution licensees in the impugned order are also worked out on pro-rata basis for 150 MW contracted capacity. Accordingly, the

entitlement of the distribution licensees in case of reduction in availability at Unit No. 8 will also reduce on pro-rata basis. Tata Trading has a long term contract (25 years) for purchase of power from TPC-G. Tata Trading in turn, has also to enter into back to back PPA for supply of power to a consumer or a distribution licensee, which could be on short, medium or long term, to be ultimately consumed by a consumer. Thus any reduction in entitlement of Tata Trading as a result of the impugned direction will also affect the consumers ultimately served by Tata Trading. Trading is recognized as a licensed activity under the Act. There is no provision in the Act which gives lower priority in supply by a generating company to a trading licensee compared to a distribution licensee.

9.34. The contention of the learned counsel for the State Commission and BEST regarding firm capacity to the distribution licensees of Mumbai is misconceived. 150 MW capacity contracted by the distribution licensees of Mumbai from Unit No. 8 under the PPA is a firm capacity. However, availability of power in real time would depend on the availability of Unit No. 8, according to the PPA. In case the unit goes under outage no power can be made available by the generating company to the distribution licensee. Similarly, in case of reduction of generation on Unit No. 8 the availability to the distribution licensee will reduce on pro-rata basis. In order to keep the interest of the distribution licensee and the consumers, there is a provision for surcharge on the generation company for Annual Availability of the plant going below 85%. Below 80% annual availability, the fixed

charges payable to the generation company also reduce. The Respondents are contending a proposition where they are expecting 100% availability of the contracted capacity for the distribution licensees in case of reduction in availability from Unit No. 8 from the rated capacity at the cost of supply of power to Tata Trading which is not in consonance with the PPA.

9.35. Further, the impugned directions are also contrary to the findings of the Hon'ble Supreme Court in Tata Power Company Ltd. Vs. MERC & Ors. reported as 2009 ELR (SC) 246. The relevant portion of the Judgment is extracted as under:

“91. The generation company, thus, exercises freedom in respect of choice of site and investment of the generation unit: choice of counter-party buyer; freedom from Tariff Regulation when the generating company supplies to a trader or directly to the consumer.

92. If delicensing of the generation is the prime object of the Act, the Courts while interpreting the provisions of the statute must guard itself from doing so in such a manner which would defeat the purpose thereof. It must bear in mind that licensing provisions are not brought back through the side door of Regulations”.

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(13) Section 86(1)(b) of 2003 Act clearly shows that the generating company indirectly comes within the purview of regulatory jurisdiction as and when directions are issued to the distributing companies by the appropriate Commission but the same would not mean that while exercising the said jurisdiction, the Commission will bring within its umbrage the generating company also for the purpose of issuance separate direction”.

In our opinion, the impugned direction of the State Commission is contrary to the findings of the Hon’ble Supreme Court. The paragraph of the above

Judgment of Hon’ble Supreme Court referred to by the learned counsel for the State Commission are not relevant to the present issue.

9.36. That apart, we also notice that the impugned direction is also contrary to the observations made by the State Commission in its letter dated 26.8.2009 issued to the State Load Dispatch Centre while approving the Balancing and Settlement Code. The issue raised by the SLDC and the observations of the State Commission in the letter are as under:

“Issue No. 10E: Treatment of Open Access Users having Inter-State and intra-State contracts:

“Issue Description	Observations of State Commission
There would be cases where –in the Open Access generator would be supplying power to consumers located outside and within the state through inter-state and intra-state(collective) and intra state bilateral transactions. In case of such open access users, MSLDC would have to first allocate part of the injection to the inter –state	As per principles outlined under the Intra_-State ABI Order and principles of non discrimination all transacting whether Inter-State or intra-State shall be treated on par. Accordingly, the shortfall in injection or actual injection will have to

<p>transaction as per REA/intra-state collective transactions and the balance would then be allocated to the intra-state utility having contract with the said generator. This would mean that any under-generation on the part of the Open Access generator would affect the intra – state utilities in a major way as their share from the injected power would be curtailed to the extent of the shortfall.</p>	<p>allocated on pro-rata basis to all Pool Participants uniformly in proportion to their Contracts, Irrespective of the fact whether the transaction is inter-State or intra-State</p>
<p>ISSUE NO 10 F : Allocation of power of Unit- 8 of TPC-G</p>	
<p>In continuation to the above ,similar issue will be relevant in the context of allocation of generation from newly commissioned 250 MW Unit 8 . Out of the total capacity of the plant. 100 MW in contracted with BEST. 50 MW with TPC-D and balance 100 MW to trader TPTCL. As discussed above, in case of under- generation by Unit 8 and if TPTCL engages in inter-state transactions, then the allocation of power on an actual basis would be contentious since MSLDC would have to allocate the full share to the trader TPTCL (because of the inter-state transactions over which MSLDC has no power to control) and then re-allocate the remaining power between BEST and TPC-D which will affect PPA of BEST TPC-D”.</p>	<p>Same as above</p>

Thus, the impugned direction is contrary to the direction of the State Commission to the SLDC for pro-

rata reduction in entitlement of BEST, TPC-D and Tata Trading in case of reduction in generation of Unit No.8.

9.37. According to learned counsel for BEST, the PPA between TPC and Tata Trading was signed much later than the PPA executed and approved for supply to the distribution licensees of Mumbai and therefore, the same should yield to the latter PPA when neither of the PPAs contain any stipulation for proportionate reduction in the event of shortfall of generation. Moreover, the PPA with Tata Trading is only for sale of “surplus” power.

9.38. In our opinion, the above contention is misconceived. TPC had signed PPA for 150 MW capacity out of 250 MW with the distribution licensees of Mumbai. Having contracted for 150 MW capacity to the distribution licensee TPC-G had a surplus capacity

of 100 MW. TPC, accordingly, contracted for 92 MW (ex-bus) power with Tata Trading after accounting for 8% auxiliary consumption on the remaining 100 MW gross capacity. The 'surplus' cannot be construed to be excess capacity after meeting the full contracted requirements of BEST and TPC-D in the available capacity, irrespective of the level of the actual generation level. We also notice that the PPA between TPC and Tata Trading is for 25 years and not a short term agreement as contended by the Respondents. Even otherwise, the tenure of the agreement for the balance power not contracted by the distribution licensees, will not affect the priority of supply. There is also no force in the contention of the Respondents that date of signing of the PPA will decide the priority of supply from the generating unit.

9.39. In view of above reasonings, the first issue is decided in favour of the Appellants. The impugned direction of the State Commission is accordingly set aside.

10. The second issue is regarding non-consideration of Octroi payment to determine the capital cost.

10.1. According to the learned counsel for the Appellant, the State Government despite the follow up action by the Appellant, has not agreed to exempt levy of Octroi on Machinery and other equipments installed at Trombay Unit No. 8. In spite of the Appellant incurring expenditure on Octroi, the State Commission has disallowed the same in contravention to its own Regulations.

10.2. According to the learned counsel for the State Commission, the Appellant has failed to show as to what concrete steps it had taken to ensure that the

State Government extends the concessions agreed under the MOU.

10.3. The relevant Tariff Regulation is extracted below:

“30. Capital cost

30.1. Subject to prudence check by the Commission, the actual expenditure incurred on completion of the project shall form the basis for determination of the original cost of project. The original cost of project shall be determined based on the approved capital expenditure actually incurred upto the date of commissioning of the generating station.....”.

According to the State Commission, the Octroi has been disallowed, after prudence check.

10.4. According to learned counsel for the Appellant, the matter had been pursued with the Government of Maharashtra but there was no response and this was also brought to the notice of the State Commission.

10.5. We now examine the findings of the State Commission in this matter. The relevant extracts are reproduced below:

“Sub item 2.6: Taxes & Duties: Octroi Charges

The Commission observes that TPC has included items like Taxes and Octroi levied on various equipments as part of the capital costs for this project. However, at point (iv) of the Memorandum of Understanding signed between the Government of Maharashtra and Tata Power Company Limited on the July 4, 2005, in line with the policy decision of the State Department of Industries, Energy and Labour vide policy no PSP -2005/CR – 2068/NRG – 7 dated March 28, 2005 seeking to promote private sector participation in the field of power generation in the State of Maharashtra to mitigate the power shortages, it states as follows:

“ (iv) Government of Maharashtra will grant 100% exemption from stamp duty, registration charges for the projects and 100% exemption for Octroi for

machinery and other equipment required for initial setting up of the Projects.....”

As such, the Commission has not considered any Octroi payment to determine the capital cost for the project and directs TPC to approach the Govt. for the exemption of Octroi, or if the Octroi has already been paid by TPC then for the refund of the same”.

Thus the State Commission has not considered Octroi payment in view of the MOU signed between the Government of Maharashtra and TPC on 4.7.2005 and directed the TPC to approach the Govt. for exemption of Octroi.

10.6. Admittedly, the Appellant has taken up the matter with the State Government on various occasions before and during execution of the project and after commissioning of the project. We also find on record copies of letters dated 20.6.2006, 18.1.2007

and 7.7.2009 by TPC to the Govt. of Maharashtra filed by the Appellant. The State Commission in its reply dated 5.8.2010 has stated that the impugned direction was issued in view of the fact that at no time, Govt. of Maharashtra backed out of its commitment as set out in the MOU. However, the Govt. of Maharashtra subsequently by its communication dated 4.8.2010 has since refused to grant exemption for the Octroi duty. The State Government earlier did not issue exemption certificate and has now communicated by its letter dated 4.8.2010 its decision not to allow exemption on Octroi. We also notice from the State Govt. of Maharashtra Policy dated 28.3.2005 paragraph 1) that Thermal Power Plants of minimum size of 500 MW and above shall be eligible to get the benefits under the Policy, though this was not pointed out either by the Appellant or the Respondent.

10.7. It is not the case of the State Commission that the exemption on Octroi to power generating units in Maharashtra has been notified by the State Government which has not been availed by the Appellant generating company. It is also not the contention that similar exemption on Octroi has been availed by other generating stations in the state. In this case the State Government has gone back on its promise. The generating company cannot be made to bear the burden of Octroi without passing on the same to the beneficiaries of the project in the tariff. Admittedly, the Octroi has been paid by the Appellant and the expenditure on this account cannot be termed as imprudent expenditure.

10.8. Accordingly, the actual Octroi payment is to be allowed in the capital cost as per the Regulations. This issue is, thus, decided in favour of the Appellant.

11. The third issue is regarding wrongful treatment of income tax. This issue has already been decided by the Tribunal in its Judgment dated 23.3.2010 passed in Appeal No. 68 of 2009 read with Order dated 5.11.2009 passed in Review Petition No. 9 of 2010 in the matter of Torent Power Ltd. vs. Gujarat Electricity Regulatory Commission. The relevant extracts of the Judgment are reproduced below:

"52. A conjoint reading of the Regulation 7, Regulation 66 of the State Commission and Section 195(A) of the Income Tax Act, 1961 leaves no doubt that the recovery of income tax paid as an expense from the beneficiaries requires to be grossed up in such a manner as to ensure that the actual tax paid is fully recovered through tariff. Grossing up of the return would ensure that after paying the tax, the admissible post tax return is assured to the Appellant. In this way the Appellant would neither benefit nor loose on account of tax payable which is a pass through in the tariff. This would ensure that

the Appellant earns permissible return of 14% stipulated in Regulation 66 of the Regulations and mandate of Section 195A of the Income Tax Act is also complied with. The National Tariff Policy stipulates that the Regulatory Commission may adopt rate of return as notified by the Central Commission with appropriate modifications taking into view the higher risk involved in distribution and that a uniform approach is desired in respect of return on investment.

53. We agree with the contention of the Respondent Commission that CERC Regulations, 2009 are not applicable in this case of the Appellant. However, the provisions of CERC Tariff Regulations, 2004 will be of relevance. The relevant clause regarding tax on income of these CERC Regulations is extracted below:

“ 7. Tax on Income: (1) Tax on the income streams of the generating company or the transmission licensee, as the case may be, from its core business shall be computed as an expense and shall be recovered from the beneficiaries.

(2) Any under-recoveries or over-recoveries of tax on income shall be adjusted every year on the basis of income-tax assessment under the Income Tax Act, 1961, as certified by the statutory auditors.

Provided that tax on any income stream other than the core business shall not constitute a pass through component in tariff and tax on such other income shall be payable by the generating company or transmission licensee, as the case may be.

Provided further that the generating station-wise profit before tax in the case of the generating company and the region-wise profit before tax in case of the transmission licensee as estimated for a year in advance shall constitute the basis for distribution of the corporate tax liability to all the generating stations and regions.

Provided further that the benefits of tax-holiday as applicable in accordance with the provisions of the Income-Tax Act, 1961 shall be passed on to the beneficiaries.

Provided further that in the absence of any other equitable basis the credit for carry forward losses

and unabsorbed depreciation shall be given in the proportion as provided in the second proviso to this regulation.

Provided further that income-tax allocated to the thermal generating station shall be charged to the beneficiaries in the same proportion as annual fixed charges, the income-tax allocated to the hydro generating station shall be charged to the beneficiaries in the same proportion as annual capacity charges and in case of interstate transmission, the sharing of income-tax shall be in the same proportion as annual transmission charges.

54. The above provisions of Regulations, 2004 also make it clear that income tax payable on the income from the core business of the company is to be treated as an expense and recovered from the tariff payable by beneficiaries. The income earned by the licensee is net of tax and the tax payable is treated as a separate expenditure recoverable from the beneficiaries”.

The order dated 5.1.2011 in Review Petition No. 9 of 2010 in Appeal No. 68 of 2009 wherein this Tribunal has held as under:

“13. The Tribunal’s judgment dated 23.03.2010 in para 52 clearly shows that the Tribunal has considered Regulation 7 and Regulation 66 and Section 195 (A) of the Income Tax Act to arrive at the decision that grossing up of the tax has to be carried out to ensure that after paying the tax, the admissible post tax return is assured to the Appellant (Respondent in Review Petition), Torrent Power Limited. The Tribunal has also held in the judgment that the Appellant, Torrent Power Limited should neither benefit nor loose on account of tax payable which is a pass through in the tariff. Thus, there is no question of the generating company making profit on account of income tax. The excess recovery of income tax if any has to be reimbursed by the generating company to the distribution company as per the Regulations of the State Commission. In this case the excess recovery of income tax if any has to be adjusted in the true

up of the financials. Thus the judgment dated 23.3.2010 needs no review”.

In view of the above, the State Commission is directed to pass consequential order in the light of findings of the Tribunal in above judgment. Accordingly, this issue is decided in favour of the Appellant.

12. The fourth issue is regarding disallowance of actual rate of interest paid by TPC-G.

12.1. The learned counsel for the Appellant has argued that IDBI Tranche 3 loan was taken in October 2008 and at that time the funds in the market had considerably dried up and interest rate had risen substantially. The cost of loan available at that point of time was in the range of about 14%. Therefore, the interest actually paid by the Respondent should be allowed.

12.2. The learned counsel for the State Commission has argued that the loan sanction terms stipulate that rate of interest could be 276 BPS below Bank Prime Lending Rate (BPLR). At the time of disbursement in October 2008, the Bank Prime Lending Rate of IDBI was 14.25% hence as per loan sanctioned term, the interest paid which would have been applied by the Bank should be $14.25\% - 2.76\% = 11.49\%$. However, the Appellant has paid the interest at the rate of 14%. The Commission has thus, disallowed interest beyond 11.49%.

12.3. We find that the loan agreement dated 5.2.2008 signed between TPC and IDBI provides for the following regarding interest:

“1.2. Interest

The Borrower shall pay to the Lender interest on the principal amount of the Loan, outstanding from

time to time, and all other, monies from the date of disbursement of the Loan which shall accrue under the provisions of this Agreement commencing from the first day of the succeeding month of first disbursement of the Loan and thereafter on first of every month at a rate equivalent to IDBI's BPLR less 2.76% p.a. payable monthly. The interest rate would be fixed on the date of disbursement. In the event of more than one disbursement, the weighted average rate of interest would be applicable.

The interest will be reset after 2 years from the date of first disbursement and every 2 years subsequently ("Reset Date") on mutually agreeable terms linked with IDBI's BPLR. The Company would have the option to prepay the outstanding Loan on the Reset Date without payment of prepayment premium".

Thus, the interest according to the loan agreement was IDBI's BPLR less 2.76% p.a.

12.4. The Appellant has not provided any supporting document on record to establish the reason for availing loan at interest rate above the terms and conditions agreed by IDBI and steps taken with IDBI to get loan at the sanctioned interest rate. Therefore, we find no reason to interfere with the findings of the State Commission on this issue. Accordingly, this issue is decided as against the Appellant generating company.

13. Summary of our findings

13.1. The first issue is regarding the direction issued by the State Commission to ensure supplies corresponding to the capacity contracted by the Mumbai distribution licensees before supply to other entities. In our opinion, the above direction is contrary to the PPAs approved by the State

Commission earlier by its order dated 6.11.2007 and has affected the supply to Tata Trading under the PPA signed by it with TPC. Section 10(2) of the Act gives freedom to generating company to supply electricity to a licensee or to any consumer. In our opinion the State commission by the impugned direction has indirectly exercised control over the capacity contracted by the generating company with the Trading licensee without any jurisdiction. The impugned direction is also contrary to the findings of Hon'ble Supreme Court in Tata Power Company vs. MERC & Ors. reported as 2009 ELR (SC) 246. The impugned direction is also contrary to the directions dated 26.8.2009 of the State Commission to the SLDC for pro-rata reduction in entitlement of BEST, TPC-D and Tata Trading in

case of reduced availability from Unit no. 8. Accordingly, the impugned direction is set aside.

13.2. The second issue is regarding the non-consideration of Octroi payment to determine the capital cost. We find that the State Government has not issued the exemption certificate despite the follow up made by the Appellant Generating Company. Subsequently, the State Government vide its letter dated 4.8.2010 conveyed its decision not to allow exemption on Octroi. Admittedly the Octroi has been paid by the Appellant and the expenditure on this account cannot be termed as imprudent expenditure. The Regulations also provide for including the actual expenditure incurred on completion of the project subject to prudence check by the State Commission to be the

basis of determination of capital cost of the project. Accordingly, the Octroi payment is to be allowed in the capital cost as per the Regulations.

13.3. The third issue is regarding wrongful treatment of income tax. This issue has already been decided by the Tribunal in its Judgment dated 23.3.2010 passed in Appeal No. 68 of 2009 read with Order dated 5.11.2009 passed in Review Petition No. 9 of 2010 in the matter of Torrent Power Ltd. vs. Gujarat Electricity Regulatory Commission. The State Commission is directed to pass the consequential order in light of the findings of the Tribunal in the above judgment. Accordingly, this issue is decided in favour of the Appellant.

13.4. The fourth issue is regarding disallowance of actual rate of interest paid by TPC-G for IDBI Tranche 3 the loan was taken in October 2008. We notice that the loan agreement dated 5.2.2008 between TPC and IDBI provides for interest at IDBI's BPLR less 2.76% p.a. The State Commission has allowed interest at the prevailing BPLR of IDBI which was 14.25% less 2.76% according to the loan agreement. The Appellant Generating Company has not been able to provide any supporting document to establish the reason for availing loan at interest rate above the terms and conditions agreed by IDBI and steps taken with IDBI to get loan at the sanctioned interest rate as per the loan agreement. Therefore, we find no reason to interfere with the findings of the State

Commission. Accordingly, this issue is decided against the Appellant generating company.

14. In view of the above, Appeal No. 87 of 2010 is allowed and the impugned direction of the State Commission is set aside. Appeal No. 107 of 2010 is partly allowed to the extent indicated above. The State Commission is directed to pass consequential order as per the directions given in this Judgment. No order as to cost.

15. Pronounced in the open court on this **26th day of August, 2011.**

**(Rakesh Nath)
Technical Member**

**(Justice M. Karpaga Vinayagam)
Chairperson**

REPORTABLE / NON-REPORTABLE

VS