**Before The Appellate Tribunal for Electricity**
**APPELLATE JURISDICTIION, NEW DELHI**

Appeal No. 32 of 2005

Dated this 22nd day of May 2006

Reliance Energy Limited
Santa Cruz (E), Mumbai – 400 055 … Appellant

Versus

1. The TATA Power Company Ltd.,
   Bombay House, Homi Modi Street,
   Mumbai – 400 001

2. The State of Maharashtra through the
   Ministry of Industry, Energy & Labour

3. Maharashtra Electricity Regulatory Commission
   World Trade Centre No.1, 13th Floor, Cuffe Parade,
   Colaba, Mumbai – 400 005

4. Bombay Small Scale Industries Association
   Sonawala Cross Road No.2, Goregaon (E)
   Mumbai – 400 063

5. The President, Mumbai Grahak Panchayat,
   Grahak Bhavan, Sant Dyaneshwar Marg,
   Behind Cooper Hospital, Vile Parle (West),
   Mumbai – 400 056

6. Prayas,
   4, Om Krishna Kunj Society, Gamagote Path,
   Opp. Kamla Nehru Park, Erandavane,
   Pune-411006.

7. The President, Thane-Belapur Industries Assn.,
   Plot No. P-14, MIDC, Rabale Village,
   Post Ghansoli, Navi Mumbai – 400 071.

8. The President, Vidarbha Industries Assn.,
   1st floor, Udyog Bhavan, Civil Lines,
   Nagpur – 440 001. … Respondents

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| Counsel for the Appellant | : | Mr. J. J. Bhatt, Sr. Adv., Mr.D.J. Kakalia, Ms.Anjali - Chandurkar, Mr. Syed Naqvi and Ms. Smieetaa Inna, Advocates |
| Counsel for the Respondents | : | Mr.Darius J. Khambatta, Sr. Adv. Mr.P.A.Kabadi, Ms. Pragya Singh Baghel, Ms. Ruchira Gupta, Mr. Ramji Srinivasan, Mr. Shrikant Doijode, Ms. Shubhangi Tuli, Ms.Jyotsna Tewari, Ms.Ruby Singh Ahuja – Advocates<br>Mr.R.P.Abrol and Mr.B.J.Shroff for BSSIA |

## JUDGMENT

1. Being aggrieved by the order dated 20th February, 2004 passed by the Maharashtra Electricity Regulatory Commission, the 3rd respondent herein, in Case No. 1 of 2003, in so far as the said order has sustained the objection raised by the 1st respondent with respect to grant of rebates by appellant to its consumers, the present appeal has been preferred. The appellant has prayed for setting aside the order dated 20th February, 2004 passed by Maharashtra Electricity Regulatory Commission in its entirety.

2. Heard Mr. J. J. Bhatt, advocate appearing along with Ms. Anjali Chandurkar, Mr. Syed Naqvi, Ms. Smieetaa Inna advocates for the appellant and Mr.D.J.Khambatta, advocate appearing along with Mr.P.A.Kabadi, Mr.Ramji Srinivasan Advocates for the 1st respondent and Ms. Jyotsana Tiwari for Ms.Shubhangi Tuli appeared for 2nd respondent and none appearing for other respondents. On 5th April, 2006, arguments were concluded and judgment was reserved. Most of the parties submitted written submissions, which were considered by us.

3. The first respondent TATA Power Company, here-in-after, referred as "TPC" moved a petition on 16.01.2003 before the Maharashtra Electricity

Regulatory Commission (MERC for brevity) praying the said commission to direct M/s. BSES the appellant, since renamed as "Reliance Energy Limited" (REL), (i) to recover from its consumers the tariff fixed by the respondent and (ii) to forthwith cease and desist for all times, the practice of manipulating its tariff, either by grant to any consumer rebate or discount in tariff or any other manner whatsoever and (iii) also to direct the REL to recover from the consumers the entire amount that was illegally offered as rebate, either through its periodical bills or otherwise by withdrawing earlier bills and preferring amended bills at authorized tariff rates. TPC also prayed for a direction to restrain REL from granting any rebate or discount to its consumers in any form pending disposal of its petition and also to direct REL to initiate recovery from all customers the amount of rebate / discount paid by REL.

4. It is the case of TPC that REL illegally granted rebate in bills to select customers, which are without any legal basis. It is pointed out by TPC that reduction from tariff fixed is not permissible under The Electricity Regulatory Commissions Act of 1998 and without prior permission of the Commission which was constituted on 05.08.1999. The Act of offering rebates that too selectively and with an option of again raising the bills without the Commission's sanction is contrary to law. Schedule VI of The Electricity Act 1948 is deemed to have been incorporated in the REL's license. The said Schedule prescribed the manner, modalities and circumstances under which the charges for electricity supply can be made. In terms of the Electricity Regulatory Commissions Act 1998, the Commission fixes a tariff taking into consideration of various factors as prescribed in Section 29 read with Schedule VI. In case of any excess of clear profit over reasonable return, Schedule VI stipulates such excess shall be distributed as a proportional rebate or carried forward for distribution to consumers in future in such manner as the State Government may direct, keeping in view the totality of factors.

5. It is the claim of TPC, that it is licensed to supply energy to consumers in Mumbai and also supply in bulk to REL. As REL has not restricted rebates to consumers with maximum demand above 1000 KW but was arbitrarily offering different rates of rebate to different consumers, which is a deviation without prior permission of the Commission and from clear profit earned by it. It is further alleged that REL approached TPC's existing consumers with an offer of "Bulk Supplier's Tariff Differential Rate" which is contrary to law. TPC has referred to earlier proceedings initiated before MRTPC Commission. It is therefore alleged by TPC that REL is charging an illegal and unauthorized tariff and is leading to reduction in competition, efficiency and economy in the electricity industry and not providing a fair deal to the consumers.

6. REL filed a reply dated 02.05.03 opposing the admission of the very application. REL contended that TPC has no lucus standi in as much as TPC is only a bulk supplier to REL and not an aggrieved party by grant of rebate. REL also contended that the present petition is premature and further pointed out that the petition should be adjourned pending disposal of REL's own petition No. 14 of 2002. It is alleged that TPC has moved the petition with a malafide intention. The real objective of the Petition is to contain certain categories of consumers and so as to enable TPC to lure REL's customers away.

7. By their further reply dated 02.05.2003 REL rebutted the entire case of TPC. REL complained that TPC has been poaching their customers in violation of terms of their licenses, which is the subject matter of enquiry in case No. 14 of 2002. REL submitted that it was to meet the unlawful and predatory conduct of TPC and to retain their energy sales, REL has been forced to give rebate. REL found TPC offering a lower tariff even to some consumers whose maximum demand was less than 1000 KVA and REL was compelled to loose those categories by the unfair competition, besides incurring revenue loss. Only to maintain the customers' sales rebate was offered and even after the rebate REL charged lesser than the higher cost of

procurement of power. Therefore it is clear that REL is not violating statutory provisions or the tariff notification. REL also denied that discounts were being given arbitrarily.

8. After the admission of the Petition both sides filed substantive affidavits. In their reply dated 30.06.2003 REL elaborated its stand and contended that they are not violating any of the statutory provisions by granting rebates. The Regulatory Commission after considering the case and counter case of the parties on 20th February, 2004 passed final order. The Commission held that the payment of rebate is illegal and the appellant shall bear the entire quantity of rebate from its sources / funds. The said order is being challenged in this appeal.

9. In this appeal the following points arise for consideration :

I. Whether grant of rebate by REL to its consumers is illegal and violative of statutory provisions of The Central Acts 54 of 1948, 9 of 1910 and 14 of 1998 and Tariff Notification ?

II. Whether TATA Power is an aggrieved party ? Whether it could maintain a complaint ? Whether such complaint is bonafide ?

III. Whether the directions issued by MERC in para 51 of its order is sustainable or liable to be set aside ?

IV. Whether the order of MERC in Case No. 1of 2003 dated 20.02.2004 is liable to be interfered ?

V. To what relief, if any, the appellant is entitled to ?

10. It is seen from the averments set out in the complaint lodged by TATA Power before MERC that prior to 2001-02 REL a DISCOM granted rebate to its consumers on certain basis of its own when the tariff fixed under the Electricity (Supply) Act 1948 was in force with effect from 01.03.1997. The Electricity Regulatory Commissions Act 1998 came into force with retrospective effect from 25.04.1998. It is not in dispute that during the material period, the provisions of The Indian Electricity Act 1910 (Act 9 of 1910) and the Electricity (Supply) Act 1948 (Act 54 of 1948) were in force.

Chapter VI of the 1998 Act exhaustively provides for "ENERGY TARIFF" to be determined in terms of the 1910 Act and 1948 Act and in particular Sixth Schedule. Hence we are to go by the said provisions which were in force and they alone govern. We have to decide the points framed in accordance with the 1948 Act and its Schedules and / or 1910 Act and 1998 Regulatory Commissions Act, which were in force. All the above points could be considered together in the light of the above referred statutory enactments as they stood.

11. One of the point that arise for consideration is whether the appellant, Reliance Energy, has violated the provisions of the Indian Electricity Act in offering rebate to its customers during the relevant period. It is contended by the learned counsel appearing for the appellant that the appellant has not violated any of the provisions of law, much less the Indian Electricity Act 1910 or Electricity (Supply) Act or The Regulatory Commissions Act 1998 or The Electricity Act 2003 or rules made there-under in offering rebate to its customers. In terms of Section 21 (2) of The Regulatory Commissions Act 1998, the licensee can charge the existing tariff fixed under Sixth Schedule read with Section 57 of The Electricity (Supply) Act 1948. It is rightly pointed out by the counsel for the appellant that the appellant has not charged the customers in excess of tariff nor it has charged below the tariff as approved and notified. The licensee/appellant has given a rebate to its customers in terms of Sixth Schedule to The Electricity (Supply) Act 1948, which is deemed to have been incorporated in the license, granted to it. In terms of Section 57 of the said act, the licensee shall comply with the provisions of the Schedule. Section 57(a) also provides that provisions of the said Section shall have effect in relation to the licensee. Nothing in the Sixth Schedule has been pointed out by the learned counsel for the appellant, which bars the licensee from giving rebate to its consumers.

12. The Sixth Schedule= Financial Principles and their application and in particular clause II which is on the point and which squarely applied to the case reads thus :

"**II**. (1) If the clear profit of a licensee in any year of account is in excess of the amount of reasonable return, one-third of such excess, not exceeding [five per cent.] of the amount of reasonable return, shall be at the disposal of the undertaking. Of the balance of the excess, one-half shall be appropriated to a reserve which shall be called the Tariffs and Dividends Control Reserve and the remaining half shall either be distributed in the form of a proportional rebate on the amounts collected from the sale of electricity and meter rentals or carried forward in the accounts of the licensee for distribution to the consumers in future, in such manner as the State Government may direct.

(2) The Tariffs and Dividends Control Reserve shall be available for disposal by the licensee only to the extent by which the clear profit is less than the reasonable return in any year of account.

(3) On the purchase of the undertaking under the terms of its licence any balance remaining in the Tariffs and Dividends Control Reserve shall be handed over to the purchaser and maintained as such Tariffs and Dividends Control Reserve:

[Provided that where the undertaking is purchased by the Board or the State Government, the amount of the Reserve may be deducted from the price payable to the licensee.]

(4) On the purchase of the undertaking after the expiry, or on the revocation, of its licence or otherwise, all amounts of rebate lying undistributed to the consumers on the date of such purchase, shall be handed over to the purchaser who, in turn, shall enter the same in his books of account, under the heading Consumers' Rebate Reserve and any amount lying undistributed in that Reserve shall be carried forward for distribution to the consumer concerned :

Provided that the share of money in the Consumers' Rebate Reserve payable to the consumers who are not traceable or who have ceased to be consumers in relation to that undertaking, may be utilized in the development works of the purchaser]

13. In fact Clause II of Sixth Schedule provides for proportionate rebate on the amounts collected from the sale of electricity and meter rentals. Clause II of Sixth Schedule throws light in this respect as to whether there could be a distribution of rebate by the licensee. The said provision supports the claim and contention of the appellant. On the first principle it is being pointed out that there is no illegality in the rebate given by the appellant as there is neither prohibition nor there is a bar either in The Electricity Regulatory Commissions Act of 1998 or in the Indian Electricity Act 1910 or

The Electricity (Supply) Act 1948 in this respect. There is force in the contention advanced by the learned counsel of the appellant.

14. Whatever be the reason that prompted the appellant to give rebate to its customers, there being no illegality nor prohibition it cannot be said that it is illegal to grant rebate. Further grant of rebate is neither barred nor it is in violation of Tariff Notification or the Indian Electricity Rules or other rules framed under the said enactments. In the case on hand the REL billed the consumer as per Tariff Notification but granted cash rebate or incentive. In this respect there is neither a restriction nor direction by MERC to desist or not to prompt the consumers with a cash rebate or incentive. Hence it follows REL has not contravened the provisions governing distribution of power.

15. The appellant sought to contend that the conduct and unhealthy competition resorted to by TATA Power has led to the appellant giving rebate to its customers to retain them. It is true that some customers have been won over and there is difference in figures which were given by either side. Whether the said act of TATA Power is the cause or is proximate cause or immediate cause may not be relevant for the purpose of this appeal. The important question is whether Reliance can give rebate to its customers? Whether giving of rebate is in contravention of statutory provision is the question that arises for consideration. We decline to go into the complaint made by Reliance, against TATA Power, as in our view even assuming that the allegations made by Reliance against TATA Power are true, it may not prejudice TATA Power nor it will have such a bearing on this appeal. However, we have to examine as to whether there is any contravention in giving rebate? Whether giving rebate is in accordance with any of the provisions of the Act or giving rebate is barred or prohibited by statutory provisions of the Act or Rules framed there-under.

16. The learned counsel for the respondent is unable to point out any of the provisions of The Electricity Act 1910 or rules framed there-under or The

Electricity (Supply) Act or The Electricity Regulatory Commissions Act to show that grant of rebate is barred or prohibited or made punishable. Section 3(38) of The General Clauses Act, 1897 defines the expression "offence" thus :

"Offence" shall mean any act or omission made punishable by any law for the time being in force;".

17. No provision in the Electricity Act 1910 or The Supply Act or The Regulatory Commissions Act of 1988 or Electricity 2003 Act has been pointed out to show that the Act of giving remission has been prohibited or made punishable by the provisions of the said enactment. What is not prohibited or what is not barred in this respect under of the Act is permitted and it cannot be said that the appellant has contravened one or more of the provisions. The tariff notification also provides that the licensee is entitled to collect the charges in terms of the tariff notifications. No provision of the Electricity code has been pointed out providing otherwise or barring grant of rebate. It is true that substantial time has been spent before the Regulatory Commission as well as before this forum to contend that grant of rebate is illegal or prohibited or an offence.

18. Incidentally, the attention of this Tribunal is drawn to statutory rules namely The Standards of Weights and Measures (Packaged Commodities) Rules, 1977 and our attention is drawn to Rule 3, which provides for notifying the maximum price for a commodity in packaged form to the ultimate consumers. The maximum retail price (MRP) has been set out in the package. What has been made punishable is exceeding the maximum retail price or excess amount is collected. But there is no bar for a retailer to sell at a price less than the maximum retail price.

19. Our attention is also drawn to Drugs (Prices Control) Order, 1979 which prescribes that sale for an amount in excess of maximum retail price fixed is punishable under para 21 read with para 18 of the order. In *Mohd.*

*Rajab Gujari v. State of J&K reported in 1974 2 SCC 190,* in respect of a case arising out of Essential Commodities Act 1956 and The Hoarding and Profiteering Prevention Ordinance, the Supreme Court held thus :

"There can be no doubt that when Government regulates the price of a commodity, it begets a tendency in the market to raise the price of the commodity at least to the level of the price fixed by the Government. No person would normally agree, after the notification, to sell or supply milk at a price lower than the one fixed by the Government even though there is no bar to his selling the same at a lower price.

Fixation of the maximum price at which an article shall be sold is the controlled rate for the supply of that article within the meaning of the agreement. The fact that sellers are free to sell the article at the price lower than the maximum fixed by the Government would not show that there was no control of the commodity. Control of any of the articles contemplated by the parties under the agreement was a control of the price of the articles. An article cannot be controlled under S. 3 of the Hoarding and Profiteering Prevention Ordinance, except by a notification fixing the maximum price for the sale of the articles."

20. The Regulatory Commission proceeds as if granting rebate is a change in tariff, which change if at all could be made by the Regulatory Commission and licensee by granting rebate has departed from the pre-existing tariff without the approval of the Commission. At a risk of repetition it is to be pointed out that tariff has been followed by the REL but it has given a rebate to consumers, which will not mean that REL has violated the tariff notification or modified the tariff. Giving rebate in commercial parlance is a business promotion activity.

21. Had there been collection of charges, in excess of the tariff, by the appellant, it would have been different and it is per se actionable. However, with respect to converse case, nothing follows as a consequence of such rebate, excepting the financial implications on REL the DISCOM.

22. The Commission in Para 51 of the order has directed that the burden of past rebates will have to be borne entirely by REL leaving the matter on how to compensate for any loss for REL to determine. In other words it has been indicated that in the ARR they will be slashing to the extent of total quantum of rebate granted by REL. The Hon'ble Supreme Court in *Assn. of*

*Industrial Electricity Users v. State of A.P., (2002) 3 SCC 711,* in a case arising out of Andhra Pradesh Electricity Reform Act, 1998 with respect to fixation of tariff held that the tariff which is fixed shall be so according to the purpose of the consumer of electricity but at the same time Section 26(9) of the Act permits differentiation according to the consumers load factor or power factor, consumers total consumption of energy, time at which supply is required or paying capacity of category of consumers and the need for cross subsidization or such tariff is just and reasonable to promote economic efficiency in the supply of consumption of electricity and the tariff may be such as to satisfy all other relevant provisions of the Act and the conditions of the relevant licensee.

23. Looking at it from a different angle also, we land at the same conclusion. Section 62 of The Electricity Act 2003, which provides for determination of tariff, further directs that if any licensee or a generating company recovers a price or charge exceeding the tariff determined, the excess amount shall be recoverable by the person, such price or charge along with the interest at the bank rate, without prejudice to any other liability, incurred by the licensee. Sub-Section (6) of Section 62 provides for refund to a person who has paid price or charge exceeding the tariff. But there is no provision to cover a converse case of charging less or grant of rebate when the licensee or a generating company recovers price less than the tariff determined under Section 62 or certain amounts as paid by the licensee as rebate to the consumer by way of business promotion.

24. There is no indication by the legislature as to how it is to be dealt with nor a bar or prohibition could be inferred. Section 42 of 2003 Act provides for distribution of electricity. Section 45 confers the power to recover charges. Sub-Section (4) of Section 45 provides that subject to Section 62, a distribution licensee shall not show undue preference to any person or class of persons. Sub-Section (5) of Section 45 provides that the charges fixed by the distribution licensee shall be in accordance with the provisions of this Act and the regulations made in this behalf. There was no parallel provision

to Sub Section (5) of Section 45 in the earlier enactments. Though there is a direction that charges fixed by a distribution licensee shall be in accordance with the provisions of the Act, there is no prohibition nor a provision has been introduced to make it punishable for charging less or giving rebate to consumers by a DISCOM or generator. There is no order by the Commission at any point of time earlier prohibiting the distribution licensee from collecting an amount less than the tariff rate or from granting rebate.

25. In *Ghatge and Patil Concerns' Employees' Union v. Ghatge and Patil (Transport) (P) Ltd.,* AIR 1968 SC 503 (1968) 1 SCR 300, it has been held that a citizen is free to so arrange his business so long as he does not break any regulatory enactment or any other law. In this respect the Supreme Court held thus :

" A transport company made arrangements with its drivers who joined the service voluntarily and agreed to work on the vehicles on contract basis. The drivers did it voluntarily because the terms were more favourable than the terms of their previous employment. There is no bar in law to the introduction of this system. The present case is not analogous to the case of contract labour where employment of labour through a contractor or middleman put the labour at a disadvantage in collective bargaining and thus robbed labour of one of its main weapons in its armoury. A person must be considered free to so arrange his business that he avoids a regulatory law and its penal consequences which he has, without the arrangement, no proper means of obeying."

26. We have already extracted the relevant provisions of Indian Electricity Act, 1910 and no provision of Electricity Act 1910 or Supply Act 1948 has been shown to hold that either granting rebate or payment of bonus to its consumers by a DISCOM is barred or prohibited. It is well settled that in law what is not barred or prohibited is permissible and there can be no action at all for carrying out which is not prohibited by the statutory provisions. On a conspectus reading of the provisions of the Act and precedents we hold that there is no illegality or violation or contravention in grant of rebate by the appellant any of the provisions.

27. The Regulatory Commission while taking note of the quantum of rebate has issued a direction that the total amount of rebate so given shall be from the fund of the appellant and that it shall not be taken for ARR of the DISCOM. As regard the second aspect of the matter whether the amount given as a rebate to the consumers could be treated as an allowable expenditure. We came across the pronouncement by three Judges Bench of Supreme Court. Their Lordships considered the very same provision and position in *Workmen Vs Management of Sijua (Jherriah) Electric Supply Co. Ltd. reported in (1974) 3 SCC 473.* Though this pronouncement arose out of The Payment of Bonus Act 1965, three judges bench of Supreme Court had considered not only III Schedule of the Bonus Act but also considered the Sixth Schedule to The Electricity (Supply) Act, 1948 and it has been held that the rebate disbursed has to be deducted before profits could be computed. With reference to Sixth Schedule of Electricity (Supply) Act, there were detailed consideration and it was held that there could be a valid appropriation of such amount and it could be appropriated as a development reserve. In this respect the Supreme Court held thus :

" It may be mentioned that Paragraph II(i) of the Sixth Schedule to the Electricity (Supply) Act provides that if the "clear profit" of a licensee exceeds the amount of reasonable return, the excess has to be divided into three equal portions. One portion has to be given as a rebate to the consumers; another portion is set apart as Tariffs and Dividends Control Reserve ; and the third portion is kept apart for distribution as a proportionate rebate on the amounts collected from the sale of electricity and meter rentals or carried forward in the accounts of the licensee for distribution to the consumers in future in such manner as the State Government may direct. A perusal of Paragraph II(i) of the Sixth Schedule to the Electricity (Supply) Act would show that the portion that is set apart as a rebate to the consumers has not been described as a reserve in the same manner as the other portions have been described, for the simple reason, that the amount has to be returned to the consumers in the form of a rebate. If rebate is given to the consumers in respect of the electricity consumed by them and for which payment has already been made, it is apparent that the price of electricity which the consumers will in fact pay, after receiving the rebate, would be the actual price paid by them for the electricity consumed. To put it differently the charges paid by the consumers of electricity before the rebate is given to them would be treated as payments on account or provisional payments, and it is only after the end of the year when rebate is ascertained and paid to them in accordance with the provisions of the Electricity (Supply) Act that the charges recovered for supply of electricity could be said to be finalized.

In Poona Electric Supply Co. Ltd. v. Commissioner of Income Tax, Bombay,1 this Court, while dealing with the Income Tax Act, considered the effect of Paragraph II(i) of the

Sixth Schedule to the Electricity (Supply) Act and held that the amounts set apart for rebate and for which deduction was claimed were a part of the excess amount paid to the assessee company and reserved for being returned to the consumers. They did not form part of the assessee's real profits and, therefore, to arrive at the taxable income of the assessee from the business under Section 10(1) of the Income Tax Act, the said amounts had to be deducted from its total income. Even though, this case was decided under the Income Tax Act, the provision of the Electricity (Supply) Act which we have interpreted was also interpreted by this Court in that case. In Jabalpur Bijlighar Karamchari Panchayat v. Jabalpur Electric Supply Co. Ltd. and Another,2 the question was again considered by a Bench of this Court to which one of us (Jagmohan Reddy,J.) was a party. At p. 75, it was observed by reference to what the Tribunal had held :

"This goes to show that the rebate to the consumers is not to be utilized by the company except for distribution to the consumers as may be directed. If the company cannot have the benefit of it, it stands to reason that the worker cannot ask for a share and the claim of the appellant for inclusion of this sum must be rejected."

In our view there is no doubt that the amount payable as consumers' rebate under the Electricity (Supply) Act has to be deducted before profits could be computed and has been rightly held to be deductible by the High Court.

A reference to sub-paragraphs (1) and (2) of Paragraph VA of the Sixth Schedule to the Electricity (Supply) Act does not justify the submission that the sums which could have been appropriated for the years 1961-62, 1962-63 and 1963-64 were the amounts required to be appropriated in the accounting year 1964-65. Paragraph VA, in our view, deals only with appropriation to a development reserve for the year of account, which in this case would be 1964-65, and if in that year the whole of the development reserve could not be appropriated to the reserve, sub-paragraph (2) of Paragraph VA permits the appropriation in annual instalments spread over a period not exceeding five years from the commencement of that accounting year. Sub-paragraphs (1) and (2) of Paragraph VA of the Electricity (Supply) Act which are relevant are as follows :

"VA. (1) There shall be created a reserve to be called the Development Reserve to which shall be appropriated in respect of each accounting year a sum equal to the amount of income-tax and super-tax calculated at rates applicable during the assessment year for which the accounting year of the licensee is the previous year, on the amount of development rebate to which the licensee is entitled for the accounting year under clause (vi)(b) of sub-section (2) of Section 10 of the Indian Income Tax Act, 1922:

Provided, that if in any accounting year, the clear profit [excluding the special appropriation to be made under item (v-a) of clause (c) of sub-paragraph (2) of Paragraph XVII] together with the accumulations, if any, in the Tariffs and Dividends Control Reserve less the sum calculated as aforesaid falls short of the reasonable return, the sum to be appropriated to the Development Reserve in respect of such accounting year shall be reduced by the amount of the shortfall.

(2) Any sum to be appropriated towards the Development Reserve in respect of any accounting year under sub-paragraph (1), may be appropriated in annual instalments spread over a period not exceeding five years from the commencement of that accounting year."

28. In the light of the above pronouncement and discussions, we hold that the view taken by the Commission that no rebate is permissible by a

DISCOM and that the total amount of rebate given has to be borne by the DISCOM does not reflect the correct legal position and hence the order challenged is set aside. Accordingly there will be a direction to the Regulatory Commission to follow the dicta laid by Hon'ble Supreme Court and allow the amount as reserve for the years in question and in terms of Schedule VI of Electricity (Supply) Act 1948. In the circumstances the appeal is allowed and there will be a direction in the above terms.

29. (A) On the first point we are well founded in holding that the grant of rebate by REL to its consumers is neither illegal nor it is violative of statutory provisions of Central Act 9 of 1910, 14 of 1948 and Central Act 54 of 1998 as well as tariff notifications issued by the Maharashtra State Electricity Regulatory Commission. The point 1 is answered in favour of appellant.

(B) On the second point, though we are not called upon to decide this point yet we are constrained to indicate that TATA Power is not really an aggrieved party in the strict sense of term "aggrieved" party but it is only a competitor in the filed of power. There were number of proceedings between the parties and to spite each other for obvious reasons both parties have initiated proceedings or complaints against each other. Being a licensee to supply power in bulk and being a generator, TATA Power cannot be termed as an aggrieved party in so far as REL giving rebate to its consumers. At the best payment of rebate may be termed as unhealthy competition resorted to between the two Houses, who are engaged in generation and supply of energy in the city of Mumbai. This point is answered accordingly.

(C) As regard the third point, while following the judgment of Supreme Court in *Workmen Vs Management of Sijua (Jherriah) Electric Supply Co. Ltd. reported in (1974) 3 SCC 473* the directions issued by MERC is set aside as legally not sustainable and not called for.

(D) On the fourth point we hold that the order of MERC dated 20th February, 2004 is liable to be interfered and it is set aside.

(E) On the fifth 5th point, we allow the appeal and set aside the order of MERC dated 20th February, 2004 made in case No. 1 of 2003 and consequently the complaint of TATA Power will stand dismissed.

The parties shall bear their respective costs in this appeal.

Pronounced in open court on this 22nd day of May 2006.

**(Mr. H. L. Bajaj)**
**Technical Member**

**(Mr. Justice E Padmanabhan)**
**Judicial Member**

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No. of corrections : 16

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