

**Before the Appellate Tribunal for Electricity  
Appellate Jurisdiction**

**Appeal No. 202 of 2005**

**Dated: 4<sup>th</sup> October, 2006.**

Present: Hon'ble Mr. Justice Anil Dev Singh, Chairperson  
Hon'ble Mr. A. A. Khan, Technical Member

**IN THE MATTER OF:**

Tata Power Company Ltd, Bombay House,  
Homi Mody Street, Mumbai-400 001.

Appellant

Versus

1. Reliance Energy Ltd, Nagin Mahal (6<sup>th</sup> Floor),  
82, Veer Nariman Road, Mumbai- 400 020.
2. Maharashtra State Electricity Board,  
Ali Yavar Jung Road, Prakash Gadh,
3. State of Maharashtra, Ministry of Industry,  
Energy & Labour, Mantralaya, Mumbai.
4. Maharashtra Electricity Regulatory Commission,  
13<sup>th</sup> Floor, Centre No. 1, World Trade Centre,  
Cuffe Parade, Colaba, Mumbai-400 005.
5. Mumbai Grahak Panchayat, Grahak Bhavan,  
Sant Dnyaneshwar Marg, Behind Cooper Hospital,  
Vile Parle (West) Mumbai-400 056
6. Prayas,4, OMKrishna Kunj Society, Ganagote Path,  
Opp. Kamla Nehru Park, Erandavane, Pune-411 006.
7. Thane-Belapur Industries Association, Plot No. P-14,  
MIDC, Rebale Village, Post Ghansoli, Navi, Mumbai-71.

8. Vidarbha Industries Association, 1<sup>st</sup> Floor, Udyog Bhavan, Civil Lines, Nagpur-440 001.
9. National Textile Corporation Ltd, NTC House, 15, N.M. Marg, Ballard Estate, Mumbai- 400 001.
10. National Textile Corporation Limited, Apollo House, 382, N.M. Joshi Marg, Chinchpokli, Mumbai-400 011.
11. Brihan Mumbai Mahanagar Palika, BEST Bhavan, Colaba, Mumbai- 400 005.
12. The Chief Engineer (Electrical), Western Railways, 5<sup>th</sup> Floor, Churchgate Station Building, Churchgate, Mumbai- 400 020.
13. The Chief Engineer (Electrical), Western Railways, New Parcel Office Building, C.S.T., Mumbai- 400 001.
14. The Mill Owner's Association, Elphinstone Building, 10 Veer Nariman Road, Mumbai- 400 001.
15. Bombay Small Scale Industries Association, Madhu Compound, 2<sup>nd</sup> Floor, Sonawala Cross, Road No. 2, Goregaon (E), Mumbai- 400 063.
16. The Central Electricity Authority, 212, Sewa Bhawan, R.K. Puram, New Delhi- 110 066.
17. R.K. Jain, Indian Inhabitant, Member, C.E.A, 212, Sewa Bhawan, R.K. Puram, New Delhi-110 066.

...Respondents

Counsel for the appellant : Mr. Iqbal Chagla, Sr. Advocate  
Mr. Janak Dwarkadas, Sr. Advocate  
Mr. Darius Khambatta, Sr. Advocate  
Mr. Dushyant Dave, Sr. Advocate  
Mr. Ramji Srinivasan, Advocate  
Mr. Ms Rubi Singh Ahuja, Advocate  
Mr. M/s Ruchiya, Advocate  
Mr. Shrikant Doijode, Advocate  
Mr. Ruchika Gupta, Advocate

Mr. Ms Pragya Baghel, Advocate  
Mr. Pribrat Thripathi, Advocate  
Mr. P.A. Kabadi. Advocate

Counsel for the respondents : Mr. Soli J. Sorabjee, Sr. Advocate  
Mr. Harish N. Salve, Sr. Advocate  
Mr. J.J. Bhatt, Sr. Advocate  
Mr. Chetan Sharma, Sr. Advocate  
Mr. A.M. Singhvi, Sr. Advocate  
Mr.Mr. Babu G with Vani Mehta, Advocate  
Mr. Vinod Kumar, Advocate  
Mr. Ms Anjali Chandurkar, Advocate  
Mr. Syed Naqvi, Advocate  
Ms Smieeta Inna, Advocate  
Mr. Sham Diwan, Advocate  
Mr.Rajiv Nanda, Advocate  
Ms Alpana Dhake, Advocate  
Mr. Nishant Gupta, Advocate  
Mr. Anand Mishra, Advocate  
Mr. A.K. Prasad, Advocate  
Ms Gargi Hazarika, Advocate  
Mr. Phiroze Palkivalla, Advocate  
Mr. Mukesh Tyagi, Advocate  
Mr. D.J. Kakalia, Advocate  
Mr. Arijit Maitra, Advocate  
Mr. Saurabh Mishra, Advocate

**Under Section 111 (2) of The Electricity Act, 2003** : Against the order of Maharashtra Electricity Regulatory Commission dated 31.05.2004 in MERC case No. 7 of 2000

## Judgement

### **Per Hon'ble Mr. A.A. Khan, Technical Member**

1. The Appellant Tata Power Company Ltd. (hereinafter referred to as TPC) is a company incorporated under the Indian Companies Act 1956. The Appellant is a generating company within the meaning of

clause (28) of Section 2 of Electricity Act-2003 and also clause (4A) of Section 2 and a bulk licensee within the meaning of subsection (3) of Section 2 of the Electricity (Supply) Act. of 1948(hereinafter referred to as ESA-1948). TPC has been generating and distributing electricity to consumers in Mumbai area for over 80 years. It directly supplies power to railways, refineries, textile mills, port and other vital installations in addition to other industrial, commercial and domestic consumers and also through two distribution Licensees viz BSES (Bombay Suburban Electricity Supply Ltd. – now known as Reliance Energy Ltd. – REL) and BEST (Brihan Mumbai Electricity Supply and Transport Undertaking). The first respondent i.e. Reliance Energy Limited (hereinafter referred as REL) formerly known as Bombay Suburban Electricity Supply Ltd. (herein after referred as BSES) is a public limited company and has been a licensee for generation and distribution of power to the suburban areas of Mumbai. Till 1995, REL had no generating station of its own and used to purchase its entire requirement of electricity in bulk from TPC and distribute the same to the consumers in its licensed area of Mumbai. The second respondent i.e. Maharashtra State Electricity Board (hereinafter referred as MSEB) is an instrumentality of the Government of Maharashtra (hereinafter referred to as GOM). The respondent no. 3 i.e. Maharashtra Electricity Regulatory Commission (hereinafter referred as MERC) is constituted under Section 17 of the Electricity Regulatory Commissions Act 1998 (hereinafter referred to as ERC Act-1998) and continue to function in terms of proviso to Section 82 (1) of the EA 2003. The said State Commission has passed the impugned order dated 31.05.2004. Respondent no. 4 i.e.

BEST is a licensee for distribution of electricity to its consumers in its licensed area in the island city of Mumbai. BEST does not generate any electricity and is a bulk purchaser of electricity from TPC and distribute to its consumers within its licensed area.

## **BRIEF BACKGROUND OF PROCEEDINGS**

2. The Appellant (TPC) has filed this Appeal no. 202 of 2005 under Section 111(2) of EA 2003, challenging the impugned order dated 31.05.2004 passed by MERC in case No. 7 of 2000. The case No. 7 of 2000 was filed on 04.12.2000 by BSES/REL for adjudication of disputes under Section 22(2)(n) of ERC Act-1998, to fix and determine the standby charges payable by REL to TPC in return of TPC providing a standby support of 275 MVA to REL. MERC passed order on 07.12.2001 in case No. 7 of 2000, which was set aside by the Bombay High Court by its judgement and order dated 03.06.2003 and remitted proceedings to MERC for de-novo consideration and decision in accordance with the law.

As against the judgement of Bombay High Court in MERC Appeal No. 1 of 2002 (TPC Vs. REL & Ors.) and MERC Appeal No. 2 of 2002 (REL Vs. TPC) special leave petitions were moved before the Hon'ble Supreme Court, Hon'ble Supreme Court by its judgement dated 17.10.2003 dismissed both the Appeals with cost and confirmed the High court's Order of remand to MERC with a direction to MERC to decide the dispute expeditiously.

After remand MERC by its' order dated 31.05.2004 disposed of the case. However, the MERC's order was challenged by TPC by filing

Writ Petition No. 1471 of 2004 before the Bombay High Court which disposed of the said Writ Petition by judgement dated 24.12.2004. Hon'ble Supreme Court which was approached by appellant, through its order dated 30.11.2005, granted liberty to TPC to file an Appeal against the MERC's order dated 31.05.2004 before this Appellate Tribunal. Hence, this instant Appeal.

The Appellant has prayed for the following reliefs:

- (a) that this Hon'ble Tribunal be pleased to call for the records and proceedings in Case No.7 of 2000 filed before the MERC and which culminated in the impugned order dated 31<sup>st</sup> May 2004 (Exhibit "A" hereto) and after going into the legality and propriety of the same, be pleased to quash and set aside the impugned order;
- (b) that this Hon'ble Tribunal be pleased to:
  - (i) order and declare that Respondent No.1 has been and will be liable to pay to the Appellant the charges at the same rate for the standby facility of 275 MVA provided by the Appellant to Respondent No.1 as charged by Respondent No.2 for and in relation to the standby facility of 550 MVA provided by Respondent No.2 to the Appellant;
  - (ii) order and direct Respondent No.1 to pay to the Appellant a sum of Rs.80.65 crores with interest and DPC; and
  - (iii) order and direct Respondent No.1 to pay to the Appellant

an aggregate sum of Rs.289 crores paid by it to Respondent No.2 and interest and DPC thereon;

(iv) order and direct Respondent No.1 to pay to the Appellant such amount as has been paid by the Appellant to Respondent No.2 in excess of its shares of 50% standby charges since June, 2004 onwards together with interest and DPC;

3. The appeal is resisted by the first respondent, M/s Reliance Energy Limited while the second respondent, Maharashtra State Electricity Board (MSEB for brevity) and the eleventh respondent, Brihan Mumbai Electric Supply and Transport Undertaking who have not chosen to prefer appeal, support the appellant. The respondent No.16 & 17 also appeared through their counsel and their interest is confined to the reports submitted by the 16<sup>th</sup> respondent to MERC. The other respondents have not chosen to enter appearance nor have chosen to come and argue before us.
4. The above appeal came to be presented before this Appellate Tribunal as per the orders of the Hon'ble Supreme Court dated 30<sup>th</sup> November, 2005 made in Civil Appeal No.1773 of 2005. Before we advert to the facts of the case, we may set-out out the list of dates culled out from the Appeal paper-book, since there is hardly any controversy between the parties thereto.

## RELEVANT DATE AND EVENTS :

S. No	Dates	Events
1.	18.3.1964	Agreement between Tata Power and MSEB whereby Tata Power was required to take from MSEB all the electrical energy as may be supplied from MSEB's hydro generating station at Koyna, Maharashtra.
2.	12.3.1985	<p>Meeting between Tata Power and MSEB. Finalisation of interconnection between representatives of Tata Power and MSEB wherein the following decisions were arrived at:-</p> <p><u>“A) Demand Charges</u> Effective 1.2.84 a monthly firmed demand of 300 MVA would be billed by MSEB. This would increase by 50 MVA each year effective 1.4.1985 to take care of TECs own load growth annually. This is irrespective of TEC's actual net off-take recorded at the 4 interconnecting points of supply and also irrespective of MSEB's total off-take from TEC system.</p> <p><u>C. Duration of the Agreement</u></p> <p>All the MSEB provisional bills for power supply preferred on TEC for the period February 1984 to February 1985 would be revised and finalized on the above basis. MSEB's provisional power supply bills for January 1984 will be treated as final. From March 1983, billing by MSEB will be on the basis of above discussions and this arrangement will continue till any major change in the TEC system take places e.g. BSES take over by MSEB or TEC's unit number 6 is commissioned into service etc.</p>



3.	6.7.1990	<p>Letter from MSEB to Tata Power recording as follows:-</p> <p>“TEC have agreed for continuation of the billing maximum demand of 550 MVA till the combined cycle generating unit of 180 MW at Trombay is commissioned. Accordingly, the relevant term (demand charges) in our letter no. PLE-1 (A)/5-00 MW/ unit II/11277 of 21.3.1990 will stand modified to this extent. The position regarding M/s TEC’s demand requirement will accordingly be reviewed after commercial commissioning of the 180 MW combined cycle unit.</p> <p>Since, the above modification in the revised tariff is being done at your request, the date of implementation of revised tariff mentioned in the notice dated 28.4.1990 shall remain unchanged. Thus, the new rates indicated in the schedule enclosed will be effective from the billing month of August, 90. All other terms and conditions of supply continue to be applicable.”</p>
4.	30.5.1992	<p>A Notification was issued amending BSES’ (now REL) 1926 license, inter alia providing as under: Insert a new clause 7B as under: -</p> <p>“7(B) (1): The Licensee has complied with sub clauses (1) and (2) above and the Government of Maharashtra has extended further the companies licence till 15<sup>th</sup> August 2011 as mentioned in Clause 13 herein below.</p> <p>7(B)(2): On the commencement of generation from the said generating station referred to in Clause 7A, the Licensee shall supply the power so generated to their consumers by making their own transmission and distribution arrangements.</p> <p>7(B)(3): The Licensee shall also execute suitable interconnection with the system of Tata Electric Companies with the approval of the Central Electricity Authority, New Delhi.</p> <p>7B(4): If the Government of Maharashtra is of the opinion that the Licensee has not duly carried out its</p>

		<p>obligations specified in Sub-clauses (2) and (3) hereof or the Licensee has not complied with any of the terms and conditions of this License, this License shall be liable to be revoked.”</p> <p>The Provisions of Clause 13A of the License were also amended to read as under:  “13A:  The licensee agrees that in the event of dispute regarding whether the Licensee has carried out its obligations mentioned in Sub-clause 4 of Clause 7B, the decision of the State Government in respect thereof shall be final.”</p>
5.	29.6.1992	<p>A meeting was held between Tata Power and BSES wherein it was agreed that:-</p> <p>“4.0. <u>INTERCONNECTION</u>:</p> <p>BSES have confirmed that they are going ahead with the establishment of their own 220 kV transmission network to evacuate generation from Dahanu plant. The interconnection with TEC will only be via 220 KV Lines to TEC’s proposed Borivali GIS switching station as agreed between TEC and BSES earlier and conveyed to CEA subsequently.</p> <p>12.0  The interconnection is being provided to take care of emergencies in BSES 220 KV system. Tata’s already have an arrangement with MSEB wherein standby capacity is provided by MSEB to Tatas in case of emergencies in Tata system. Standby capacity to BSES may be provided from the standby capacity reserved by Tata, with MSEB and appropriate sharing of charges by BSES could be worked out.”</p>
6.	02.1.1995	<p>After Tata Power commissioned (in 1993-94) its 180 MW combined cycle plant (Unit No.7 at Trombay) as decided on 6.7.1990, Tata Power approached MSEB for review of the said standby facility.</p> <p>[NOTE: However, MSEB again deferred the request suggesting that the present arrangement could be</p>

		reviewed after Tata Power's 150 MW Pumped Storage Unit at Bhira became operational – this was scheduled for 1995.]
7.	Prior to September, 1995	BSES was purchasing its entire requirement of power from Tata Power and distributing it within its licensed area as Tata Power's distributing licensee.
8.	After September, 1995	After its two Dahanu generating units were commissioned in January/March 1995, BSES started bringing the power generated at Dahanu to supply to its consumers in the suburbs of Mumbai City.
9.	28.6.1996	MSEB issued a notice revising its tariff to Tata Power effective from 1 <sup>st</sup> October 1996. Amongst other things, MSEB raised its maximum demand charge (per month) in respect of stand-by facility / supply from Rs.190 per KVA to Rs.450/- per KVA.
10.	30.7.1996	Tata Power issued a notice to BSES under the VI <sup>th</sup> schedule to the Electricity (Supply) Act, 1948 giving notice of its intention to enhance charges with effect from 1 <sup>st</sup> October 1996 (i.e. 60 days notice).
11.	Thereafter	Correspondences ensued between Tata Power and BSES as regards Tata Power's tariff revision notice. BSES objected to the proposed tariff revision including the portion enhancing BSES's share of the stand-by charges payable to Tata Power. Tata Power agreed to discuss and agree upon inter alia, the said increase in BSES's share of stand-by charges.
12.	December, 1996	In the meantime, Tata Powers' Bhira Pumped Storage unit was commissioned.
13.	9.9.1997	After its Bhira Pumped Storage unit had been commissioned, Tata Power asked MSEB to bill BSES directly for 275 MVA of standby as agreed in the meeting on 8.9.1997 with the Dy. Chief Minister.

14.	1.12.1997	By its letter addressed to Tata Power, MSEB refused to reduce the stand-by charges billed to Tata Power and stated that these aspects had to be sorted out not by unilateral reduction by Tata Power, but by holding discussions including with the Government for its concurrence.
15.	17.12.1997	Tata Power again requested MSEB to bill Tata Power for only 275 MVA standby facility.
16.	19.1.1998	<p>GOM issued an order as follows:</p> <p>“Taking into account the recommendations of the Committee, following are orders of the Government:</p> <ol style="list-style-type: none"> <li>1. BSES should complete interconnection at Borivali by January 26, 1998.</li> <li>2. BSES should take 275 MVA stand-by power supply from TEC for Dahanu generating station.</li> <li>3. For taking above stand-by supply, BSES should pay stand-by charges to TEC.</li> <li>4. After the interconnection is commissioned, BSES should stop selling electricity through MSEB’s, Boisar sub-station to Western Regional Grid.</li> <li>5. TEC may charge stand-by charges for 275 MVA supply to BSES.</li> </ol>
		<ol style="list-style-type: none"> <li>6. Whenever required during emergency, additional electricity may be taken for areas outside Mumbai region through MSEB’s Boisar sub-station. For this purpose, MSEB should make proper arrangements.</li> <li>7. As per Committee’s recommendations and taking into account, TEC’s electricity supply to BSES, TEC’s stand-by supply from MSEB, charges thereof and TEC’s and BSES’ financial conditions, BSES should make a payment of Rs.3.5 crores every month for stand-by supply. On this basis, rate per KVA should be fixed and commercial agreement finalised.</li> </ol>

		<p>8. Above stand-by charges are based on TEC's and BSES' electricity supply tariffs. The stand-by charges may be reviewed during tariff revisions in future.” [Note: This GoM Order has not been challenged and has been accepted as valid by all the parties.]</p>
17.	31.1.1998	<p>Principles of Agreement signed by Tata Power and BSES in order to achieve the Borivali interconnection for standby facility in which it was amongst other things stated that:</p> <p>“(2) BSES shall pay to TEC for the 220 KV interconnection at Borivali Rs.3.5 crores per month as standby charges for 275 MVA as per Government orders.”</p> <p>(3) BSES off-take of energy at 200 KV Borivali interconnection will be billed at Rs. 2.09 per Kwh plus F.C.A. (which is presently at Rs. 0.45) as applicable from time to time at other points of supply. This average energy charge as based on an estimated annual flow of 250 million units of energy through Borivali interconnection”.</p> <p>(5) As soon as the interconnection between TEC and BSES at 200 KV Borivali is established.</p> <ul style="list-style-type: none"> <li>• The interconnection between MSEB and BSES at Boisar will be opened out.</li> <li>• BSES shall use this interconnection at Borivali fully for the standby type of service.”</li> </ul> <p>(8) Both the parties have agreed to cooperate in order to ensure that the orders of the Government dated 19.1.1998 are implemented in the spirit of it.</p> <p>(9) A detailed Power Supply Agreement on mutually agreed basis incorporating the above, will be executed by 21<sup>st</sup> of April 1998.”</p>
18.	14.2.1998	<p>Pursuant to the aforesaid Order dated 19.1.1998, interconnection was established between Tata Power and BSES.</p>

19.	8.7.1998	Tata Power again wrote to the GoM objecting to the fixing of standby charges at Rs.3.5 crores per month and reiterated that this was on the clear understanding that this would be revised upwards in the future.
20.	31.8.1998	With effect from 1 <sup>st</sup> December 1998, MSEB revised its tariff by issuing a notice under the Agreement between MSEB and Tata Power. The charges for standby facility for Tata Power were also increased from Rs.450 / KVA / month to Rs.550 / KVA / month (i.e. Rs.363 crores per annum equal to Rs.30.250 crores per month).
21.	30.9.1998	<p>Tata Power by notice to GoM proposed some revision (w.e.f. 1.12.1998) of its tariff and other matters. This notice was given under the VI<sup>th</sup> Schedule to the Electricity (Supply) Act, 1948.</p> <p>The said notice also indicated that the standby charges payable by BSES were also revised from Rs.3.5 crores per month to Rs.15.125 crores per month (Rs.181.5 crores per annum). Hence BSES and Tata Power would each pay Rs.181.5 crores per annum to meet MSEB's Bill for Rs.363 crore per annum for standby charges (of Rs.15.125 crores per month). A copy of this notice was forwarded to BSES.</p>
22.	Sept. 1998 to Nov. 1998	Tata Power addressed correspondence to the GoM stating that since Tata Power's requirements for standby stood reduced to 275 MVA, MSEB should bill Tata Power for only 275 MVA w.e.f. 1.12.1998.
23.	16.11.1998	MSEB requested the GoM to convene a meeting between MSEB, Tata Power and BSES to sort out the problem. Tata Power was requested not to make any unilateral deduction in MSEB's bills on account of standby charges till the GoM resolved the issue and gave directives.
24.	4.3.1999	GoM called a meeting under the Chairmanship of the then Dy. Chief Minister at which the following was, inter alia, ordered:

		<p>“After hearing the argument of both i.e. TEC &amp; BSES, Hon'ble Dy. Chief Minister advised the TEC &amp; BSES to settle the issue amicably between themselves without referring to the Government and directed the Licensees as below:-</p> <p>1. BSES should share Rs.9 crores out of Rs.22 crores additional standby charges levied by MSEB to TEC from 1-12-98 to 31-3-99.</p> <p>2. Issue regarding sharing of standby charges between TEC &amp; BSES from the year 1999-2000 and onwards be referred to a committee to be constituted by the State Government.”</p>
25.	27.5.1999	<p>GoM constituted a committee consisting of members of GoM, MSEB, Tata Power and BSES, to submit its report on:</p> <p>“(a)The amount of standby charges payable by BSES to the Tata Electric Companies from the year 1999 to 2000 and onwards.</p> <p>(b) – (e) ....”</p>
26.	21.7.1999	<p>The Committee met and BSES was directed to pay Rs.9 crores immediately as per the said Order dated 4.3.1999. (BSES objected to the same). The Chairman informed the Committee, “the issues regarding rationalization of tariff will be dealt with by the State Electricity Regulatory Commission to be constituted by Govt. of Maharashtra in due course.”</p>
27.	5.8.1999	<p>MERC constituted and therefore tariff had to be determined by MERC under Section 22 (1) of the Electricity Regulatory Commissions Act, 1998 (“ERC Act, 1998”).</p>
28.	15.3.2000	<p>The Committee made its Report. [NOTE: BSES’ representative did not sign the Report]</p>
29.	22.3.2000	<p>The GoM passed the following Order:</p>

		<p>“1. The assumptions that have been taken into consideration while levying the stand-by charges to TEC by MSEB (Zero purchasers of electricity units) or the assumptions that may be taken into consideration and the rate at which the stand-by charges have been levied (Rs.550 per KVA per month) or the rate that may be levied, on the same assumptions and at the same rate TEC should levy stand-by charges to BSES Ltd for 275 MVA from the year 1999-2000 onwards.</p> <p>2. For the period from 1-12-1998 to 31-3-1999 as decided earlier, BSES should pay Rs.9 crores as standby charges to Tata Electric Companies immediately. BSES Ltd. should take necessary action to pay standby charges to Tata Electric Companies as per the Government Resolution and should kindly inform regarding the actions taken to the Government.”</p> <p>[NOTE:- Both the Hon’ble Bombay High Court and the Hon’ble Supreme Court of India have held the GoM’s order dated 22<sup>nd</sup> March 2000 to be without jurisdiction.]</p>
30.	4.12.2000	<p>BSES filed an application to MERC in respect of the sharing of standby charges between it and Tata Power. The application was filed under Section 22 (2) (n) of the ERC Act, 1998.</p> <p>[NOTE : The application (being Complaint/ case no.7 of 2000) prayed for the following as final reliefs:-</p> <p>a) THAT this Hon’ble Commission be pleased to issue suitable orders and directions regulating the actions of the Respondent Nos.1, 2 and 3 and the charges levied by them on the petitioner;</p> <p>b) THAT this Hon’ble Commission be further pleased to fix and determine the standby charges payable by the petitioner/ complainant to the respondents;</p> <p>c) THAT this Hon’ble Commission be pleased to order and direct the respondents no. 1, 2 and 3 to cancel and</p>



		<p>/or withdraw the charges and the demand made by their bill dated 23.3.2000 and demand / letter dated 23.3.2000, and letter dated 16.9.2000, 22.9.2000 and subsequent demand letters issued by Respondent Nos. 1, 2 and 3 (TEC) and to desist from in any manner acting upon the same;</p> <p>d) THAT this Hon'ble Commission be pleased to order and direct Respondent Nos. 1, 2 and 3 to refrain from disconnecting the electric supply as threatened in the letters dated 16.9.2000, 22.9.2000 and 30.9.2000 and subsequent letters resting with their letter dated 29.11.2000 or otherwise;</p>
31.	18.12.2000	MERC admitted BSES's application (Case No. 7 of 2000).
32.	20.12.2000	<p>MSEB wrote to GoM stating the adverse impact of GoM's actions:</p> <p>“The above narration shows clearly the finality of Government decision both on the quantum and rate for standby charges payable by the BSES. The representations of BSES were duly considered 2-3 times and after application of mind on 4-10-2000 GoM affirmed the decision to charge standby charges unequivocally. This decision protected the MSEB's commercial interest since we were to receive Rs.156 crore or more per year. However, GoM's letter of 22<sup>nd</sup> October 2000 to my predecessor changed the picture significantly. It informed the MSEB that the issue of standby charges for Dahanu plant was to be referred to MERC and the MSEB and the MSEB should modify the terms of grant of consent to BSES for their Saphale plant as well. The total effect of this letter is as follows:</p> <p>(a) It defers MSEB's realisation of at least Rs.156 crore per annum against standby charges for Dahanu plant indefinitely; and</p> <p>(b) By its silence on additional standby charges for Saphale (495 MW), it fails to seek additional compensation for MSEB and Tatas from BSES for loss of cross subsidy/potential revenue.”</p>

33.	Jan. 2001	Tata Power filed Writ Petition No.31 of 2001 before the Hon'ble Bombay High Court challenging inter alia the said Order dated 18 <sup>th</sup> December, 2000 passed by MERC.
34.	19.3.2001	<p>The Hon'ble Bombay High Court passed an Order in terms of the Minutes of the Order tendered by the parties redirecting the parties to MERC.</p> <p>An interim order was passed in the following terms:  “1. Respondent No. 1 (BSES) hereby undertakes to this Hon'ble Court that BSES shall :</p> <p>(a) on or before 28.3.2001 deposit with Respondent No. 4 (“MERC”) a sum of Rs. 26 crore</p> <p>(b) on or before 15.4.2001 deposit a further sum of Rs. 26 crores with MERC; and</p> <p>(c) deposit Rs. 8.25 crores per month with MERC on the 15<sup>th</sup> day of each month (the first such deposit to be made on or before 15.4.200) until the Petition / application filed by BSES on 4.12.2000 is disposed of finally and subject to such adjustments as may become necessary as a result thereof. This sum includes Rs. 3.50 crores payable by BSES to the petitioners, pursuant to the order dated 19.1.1998 read with the agreement dated 31.1.1998</p> <p>5. Pending the hearing and final disposal of BSES's petition and for a period of 4 weeks thereafter:</p> <p>a) the interim order passed by MERC and contained in paragraph 18 of the order dated 18.12.2000 shall continue;</p> <p>b) the petitioners shall continue to pay 50% of the standby charges to MSEB for 550 MVA standby facility.”</p>

		<p>It was further ordered as under :-</p> <p>“6. The petitioners are at liberty to adopt appropriate proceedings, if permissible, in law, to seek appropriate relief for terminating the standby interconnection and facility for BSES Dahanu generating station and/or for an order that the same shall be provided by MSEB directly to BSES and consequently that the petitioners should be liable to take standby only of 275 MVA from MSEB and pay to MSEB the standby charges for 275 MVA only. This will be without prejudice to the right of BSES to contend that such an action is not legally permissible.</p> <p>9. In view of the above, the Petitioners apply to withdraw the Petition with liberty to raise all contentions and submission raised in the above Petition before MERC. Petition allowed to be withdrawn. The Petitioners shall be liberty to raise all contentions, including these raised in the Petition, before MERC including the Petitioners contention as to the jurisdiction of MERC.”</p>
35.	7.12.2001	<p>MERC held that the GoM Order dated 22 March 2000 was of</p> <p>“doubtful legal validity and therefore cannot be acted upon” and further that “As already mentioned by the Commission in its interim order dated 18<sup>th</sup> December 2000, there is still an ambiguity in para 1 of the State Government’s ‘decision’ dated 22 March 2000. That para does not mention in unambiguous terms as to how much the BSES should pay by way of standby charges to the TPC.”</p> <p>MERC therefore held that there was still a dispute between the two parties and that therefore MERC had jurisdiction to adjudicate the matter.</p> <p>MERC directed BSES to make payment of a sum Rs.119.06 crores for the year 1999-2000 together with interest thereon within 4 weeks. Tata Power was directed to pay the balance amount remaining out of Rs. 363 crores (approximately Rs.244 crore) together with interest to MSEB, within 1 week thereafter.</p>
36.	25.1.2002	Tata Power’s Appeal No.1 of 2002 and BSES’ Appeal No.2 of 2002 were admitted by the Hon’ble Bombay

		High Court under Section 27 of the ERC Act 1998 (a statutory First Appeal). An Interim Order was passed whereby the impugned order dated 7 <sup>th</sup> December 2001 was stayed and the consent Interim Order dated 19 <sup>th</sup> March 2001 passed in Writ Petition No.31 of 2001 was continued.
37.	3.6.2003	The Hon'ble Bombay High Court disposed of the Appeals filed by both Tata Power and BSES. The Order of MERC dated 7 <sup>th</sup> December 2001 was set aside and the matter was remanded to MERC on the following terms:-  "30. In the result, therefore, both the appeals succeed. Both these appeals are set aside. Proceedings are remanded back to the Commission for de novo consideration and decision in accordance with the law as also in the light of the observations made above."
38.	17.10.2003	The Hon'ble Supreme Court dismissed the Appeals filed by both BSES as well as Tata Power against the aforesaid judgment and order dated 3 <sup>rd</sup> June 2003 of the Hon'ble Bombay High Court. The remand made by the Hon'ble Bombay High Court to MERC by the aforesaid judgment and order dated 3 <sup>rd</sup> June 2003 was confirmed.
39.	6.11.2003	Pursuant to the liberty granted by the said Order dated 3 <sup>rd</sup> June, 2003 passed by the Hon'ble Bombay High Court, REL filed an Interim Application before the MERC seeking installments in payment of arrears of the standby charges.
40.	10.11.2003	MERC passed an Order directing REL to pay the balance amount in four bi-monthly installments starting from 1 <sup>st</sup> January, 2004.
41.	6.11.2003 And 14.11.2003	Hearings on the Main Petition were held before the MERC.
42.	28.11.2003	For the first time, in course of the hearing, MERC asked Counsel for Tata Power to respond to the observation that the Central Electricity Authority ("CEA") be asked what might be a fair proportion of the standby charges. Tata Power submitted through its Counsel that MERC would be abdicating its jurisdiction to someone else. To MERC's clarification that it would not be abdicating, but seeking

		<p>assistance from another expert body, Tata Power submitted that a technical expert was not required when the Hon'ble Supreme Court has held that the MERC was the expert body to go into the matter of tariff. MERC observed that CEA's views could be put to the parties, their say considered, and then a decision taken. Tata Power submitted that the matter was concluded in a sense, or that alternatively there are findings as far as this Hon'ble Court is concerned, or at least prima facie findings. Unless MERC comes to the conclusion that it is not going to follow them, there is no scope for reference to anyone else. In other words, MERC must first come to the conclusion, with reasons, that the expert Committee, the State Government, the Hon'ble Bombay High Court and the Hon'ble Supreme Court are wrong. Tata Power submitted that the remand is to the MERC and not to a third party, and it is for MERC to decide it in accordance with law and also in accordance with the observations made by the Hon'ble Bombay High Court and confirmed by the Hon'ble Supreme Court. Tata Power submitted that the Hon'ble Bombay High Court and the Hon'ble Supreme Court had explained the concept of standby, and MERC could not ask any expert body to tell it otherwise.</p>
43.	4.12.2003	<p>A further hearing was held before the MERC at which various submissions were made on behalf of REL. REL inter alia submitted that with regard to the appointment of independent consultants such as CEA as suggested by MERC, it is now upto MERC to decide REL's submissions in accordance with the observations of the Hon'ble Supreme Court (REL's contention was Rs 3.5 crore on that basis) or to decide in accordance with Tata Power's submissions with the binding observations of the Hon'ble Supreme Court as claimed by them. REL further submitted that MERC may reject either of their contentions and come to the conclusion that MERC would undertake the exercise of determination of standby independently and MERC has the right to take any assistance under Regulations 70 and 71 of the Conduct of Business Regulations in accordance with the procedure prescribed, as they had applied on the last occasion also. If MERC decides to take the assistance of an expert body or consultants, then REL would give their written submissions to MERC on their advice or findings.</p>

44.	15.12.2003	Tata Power received a letter dated 12 <sup>th</sup> December, 2003 from CEA stating that MERC had approached the CEA for detailed expert opinion in the Standby matter, by its letter dated 25 <sup>th</sup> November, 2003. Tata Power was requested to attend a meeting with the CEA at New Delhi on 19 <sup>th</sup> December, 2003.
45.	16.12.2003	Tata Power by its Advocates' letter addressed to the Secretary, MERC reiterated the contentions raised on its behalf in the hearings held on 28.11.2003 and 4.12.2003 and expressed surprise that the MERC had approached the CEA before giving a decision on the rival contentions raised before it and in fact even before the query was put to Tata Power's Counsel in the hearing held on 28.11.2003. Tata Power inquired whether in light of the said reference and that the CEA had fixed a meeting on 19.12.2003 whether the hearing scheduled before the MERC on 18.12.2003 would be proceeded with or not. Tata Power also sought a copy of the said letter dated 25.11.2003 addressed by MERC to CEA.
46.	17.12.2003	Tata Power by its letter addressed to the CEA set out some of the submissions it had made before the MERC as to why the issues could not be referred to the CEA and noted that it would attend the proposed meeting on 19 <sup>th</sup> December, 2003 without prejudice to its rights and contentions.
47.	18.12.2003 to 08.01.2004	Deliberations by CEA's expert committee Tata Power and REL made, submissions and representations before the CEA's committee.
48..	28.1.2004	The MERC forwarded a copy of CEA's Report dated 19 <sup>th</sup> January, 2004 ("the CEA Report") and sought the views and comments of the parties thereon by 10 <sup>th</sup> February, 2004.
49.	10.2.2004	Tata Power filed an Affidavit objecting to various aspects of and findings in the CEA Report. Tata Power submitted that the MERC should not take into consideration the CEA Report while deciding the dispute between Tata Power and BSES on sharing of standby charges.

50.	11.2.2004	MSEB also filed an Affidavit stating that the reference to the CEA so far as it relates to (i) standby facility required to be availed by Tata Power and BSES, respectively; and (ii) definition and technical significance of standby capacity was beyond the scope of Petition No.7 of 2000 and beyond the scope of remand by the Hon'ble Supreme Court and as such there is no justification for seeking the view of the CEA in relation, thereto.
51.	17.2.2004	A hearing was held before MERC on the CEA Report when Tata Power repeated its objections to the reference and the CEA Report. Without prejudice to its contention that the matter could not have been referred to the CEA, Tata Power made a presentation on the technical aspects with the help of slides.
52.	1.3.2004	The last hearing was held and the MERC reserved its order.
53.	17.3.2004	A copy of a Report of one Edward Kee filed by REL with MERC was made available to Tata Power by MERC.
54.	23.3.2004	Tata Power by its letter addressed to the Secretary, MERC expressed shock that REL had sought to file the said Report after conclusion of the hearings. Tata Power requested the MERC not to consider the same.
55.	29.3.2004	Tata Power received a copy of the letter dated 26 <sup>th</sup> March, 2004 addressed by MERC to REL stating that the MERC had acceded to REL's request to withdraw the said Report of Edward Kee.
56..	28.4.2004	Tata Power received a letter dated 27 <sup>th</sup> April, 2004 from REL enclosing a copy of the Application filed by REL with MERC seeking 60 days' extension for the 3 <sup>rd</sup> instalment due on 1 <sup>st</sup> May, 2004 and extension of the due date of the 4 <sup>th</sup> instalment to 1 <sup>st</sup> September, 2004.

57.	31.5.2004	MERC passed the impugned order in case No. 7 of 2000
58..	14.6.2004.	Tata Power filed Writ Petition No.1471 of 2004 under Article 226 of the Constitution of India challenging the order dated 31 <sup>st</sup> May 2004 passed by MERC.
59.	1.7.2004	Order passed by a Division Bench of the Hon'ble Bombay High Court granting ad interim reliefs.
60.	7.7.2004	SLP No.12447 of 2004 was filed by REL impugning the Order dated 1 <sup>st</sup> July, 2004.
61.	29.7.2004	Writ Petition No.1471 of 2004 was admitted by the Hon'ble Bombay High Court.
62.		Writ Petition No.1471 of 2004 was finally heard on merits. Tata Power, REL and MSEB filed Written Submissions on merits and the Judgement was reserved.
63.	24.12.2004	The Bombay High Court while disosing of the Writ Petition, observed that the issues raised were of technical nature and therefore be decided by the Appellate Tribunal established under Section 110 of the Act of 2003 which was likely to become functional by 17 <sup>th</sup> January, 2005 and in the meantime continued the interim Order passed on 1 <sup>st</sup> July, 2004.
64.	20.1.2005	SLP filed by REL being SLP No. 4899 of 2005 against the continuation of interim order passed by the Bombay high Court dated 24 <sup>th</sup> December, 2004 was granted by the Hon'ble Supreme Court.
65.	14.3.2005	The Hon'ble Supreme Court granted SLP No.4899 of 2005 to Appeal against the said Judgment and Order of the Hon'ble Bombay High Court.
66.	Between 25 <sup>th</sup> Dec. 2004 till April, 2005	The Appellate Tribunal established under Section 110 of the Act of 2003 was not made functional.
67.	12.4.2005	Hence, Tata Power filed Special Leave Petition No.7961 of 2005.



68.	26.4.2005	SLP of the Tata Power was granted by the Hon'ble Supreme Court and the SLP was converted into Civil Appeal No.2915 of 2005.
69.	21.7.2005	This Tribunal became functional.
70.	30.11.2005	The Hon'ble Supreme Court granted liberty to Tata Power to file an appeal against the Order dated 31 <sup>st</sup> May, 2004 before this Hon'ble Tribunal and required this Hon'ble Tribunal to entertain the appeal if filed within two weeks.
71.	12.12.2005	Hence, this Appeal.

5. When we narrate the facts and analyze them it will show that though the only and substantial point required to be decided is: What is the quantum of charges which the appellant is entitled to collect from the first respondent for the standby facility provided by it, to the first respondent qua generator? The other contentions, if at all, are nothing but side tracks which we may refer in the course of our Judgement.

### **FACTS AND THEIR ANALYSIS**

6. TPC has been a licensee to generate and supply electricity and, inter-alia, directly supplies power to railways, refineries, textile mills, port, commercial and domestic consumers and indirectly through two distribution licensee viz. REL and BES&T in their respective licensed areas.
7. TPC's system was interconnected with MSEB system in 1962 to meet the TPC's shortfall. An agreement dated 18.03.1964 was signed between MSEB and TPC by which all electrical energy as may be

generated by MSEB's Koyna Hydel Generating Station was to be purchased by TPC. In course of time TPC's own installed capacity of generation augmented to the present level of 1774 MW (Hydel 444MW and Thermal -1330 MW).

8. REL, a distribution licensee since 1926 for suburban Mumbai area, has been purchasing its total demand of electricity from TPC right from inception. It was only in 1995, when REL commissioned its own 500 MW (275 MW x 2) Dahanu Thermal Station that it also became a generator and the power so generated is to be distributed within its area of supply in addition to being a bulk consumer of TPC and distributor. An amendment to REL's license as issued by GOM in 1992 imposed certain conditions which inter-alia reads thus:

*"7(B)(1) The Licensee has complied with Sub-clauses(1) and (2) above and the government of Maharashtra has extended further the Company's License till 15<sup>th</sup> August, 2011 as mentioned in Clause 13 herein below"*

*(2) On the commencement of generation from the said generating stations referred to in Clause 7A, the Licensee shall supply the power so generated to their consumers by making their own transmission and distribution arrangements.*

*(3) The Licensee shall also execute suitable interconnection with the system of Tata Electric*

*Companies with the approval of the Central Electricity Authority, New Delhi.*

*(4) If the government of Maharashtra is of the opinion that the Licensee has not duly carried out its obligations specified in Sub-clauses(2) and (3) hereof or the Licensee has not complied with any of the terms and conditions of this License, this License shall be liable to be revoked.*

*13A. The Licensee agrees that in the event of dispute regarding whether the Licensee has carried out its obligations mentioned in Sub-clause (4) of Clause 7 B, the decision of the State Government in respect thereof shall be final"*

9. According to TPC, as a result of increase in the installed capacity of TPC, it became necessary to revise its agreement dated 18.03.1964 with MSEB and therefore a fresh agreement was arrived at between MSEB and TPC on 12.03.1985 effective from 01.02.1984. It was agreed between the said two that from 01.02.1984 onwards, MSEB would bill the fixed demand of 300 MVA to TPC to meet the load growth of the city of Mumbai and this fixed demand would be stepped-up by 50 MVA each year w.e.f. 01.04.1985. This fixed demand of standby facility was frozen at the level of 550 MVA by the year 1990. This special arrangement fixed demand charge for standby facility to be paid by TPC to MSEB irrespective of its drawing electricity or not and if electricity is drawn, actual payment for such

drawl is to be made to MSEB over and above the quantum of standby charges. The said standby facility, in its true sense, is therefore, an entitlement to draw up to a specified level of MVA support by TPC, without penal charges for over-drawl, for which fixed quantum of charges is to be paid by the TPC, regardless of whether the facility is used by it or not. In case, the TPC draws the electricity through the facility, the payment of electricity actually consumed will have also to be paid additionally. The concept of this special arrangement of standby facility emanated from the concern of GOM/MSEB to provide extended reliability of power supply to ultimate beneficiaries of metropolis of Mumbai on one hand and to make TPC share a portion of burden of subsidy being given by MSEB to poor agricultural consumers in rural areas and similar other sectors on the other hand. TPC, however, stated that the standby facility sized to the largest generation unit is meant to provide back-up support in the event of planned or unplanned outages of the TPC generation units. As 500 MW was the largest size of TPC Generating Unit, the standby facility up to 550 MVA was provided by MSEB to TPC.

10. It appears that the concept of fixed demand (standby facility) between TPC and MSEB was based on:
  - (a) MSEB shares the load in the TPC system whenever there are outages or failure of TPC's generating units for any reason.
  - (b) to cross-subsidize a portion of the agricultural

and other weaker sections by sharing a portion of the burden of subsidy by MSEB, as it distributes Power to rural Maharashtra and agricultural connections.

11. The above, is clear from MSEB's proposal for tariff revision submitted to the MERC on 15.03.2001, which reads thus:

*'There exists a standby arrangement between MSEB and TEC, which MSEB has provided with a view to extend system support required for TEC's stable operations. Due to this arrangement, MSEB shares the load in the TEC system whenever there are outages of TEC's generating units. As per the arrangement agreed between TEC and MSEB, TEC is liable to pay fixed demand charges to MSEB for the specified demand (termed as standby demand) which enables TEC to draw additional power from MSEB and also to share burden of subsidy being given to agriculture and other categories of consumers in Maharashtra as and when required. The current 'standby charges' are at Rs. 600/kva/month for 550 MVA, which have been determined by MERC and are effective since 1<sup>st</sup> August 2000'*

This is also clear from the letter dated 28.12.2000 which originated from the Chairman of MSEB addressed to GOM, (produced by TPC)

which reads as under:

*“Among all suppliers and distributors of power in the State, the MSEB has so far shouldered the major responsibility of supplying power (below cost) to the rural areas of the State. So when Tatas put up their 500 MW plant in Trombay, MSEB sale to Tatas in Mumbai, which is the most profitable area suffered, making it necessary for Tatas to compensate MSEB. This in effect partly financed the cross subsidy. In course of time when MSEB sales to Tatas became zero, this compensation took the form of standby charges. For 2000-2001, the rate of standby charges Rs. 600/KVA/m for 500 MVA was also approved by the MERC.”*

12. From the aforesaid matrix it follows that:
- (a) The concept of standby was introduced by MSEB to compensate for its loss of revenue due to reduction of energy sales to TPC, (who has historically been a major bulk purchaser of MSEB) which supplemented its own generation capacity for supplying to the Greater Bombay area. The agreement reached between MSEB and TPC on 12.03.1985, but made effective from the date of 01.02.1984, was in the backdrop of commissioning of TPC’s Trombay unit No. V of 500 MW in January 1984. In any case prior

to January, 1984 TPC had been sourcing supply to supplement their own generation, whenever required by paying fixed demand and variable energy charges to MSEB. Chairman, MSEB's letter dated 28.12.2000 referred above, lamented that *"In course of time when MSEB sales to Tatas became zero, this compensation took the form of standby charges"* is to be read in the above context. Further, as more capacity addition by TPC was in pipeline viz. Unit No. VI of 500 MW (commissioned in 1990) and closed cycled unit No VII of 180 MW (Commissioned in 1993-94), and 150 MW pumped storage units scheduled for 1995, the purchase from MSEB, necessarily reduced or eliminated. The condition of stepping up of standby quantum annually by 50 MVA from 01.02.1985 taking the total quantum of standby to 550 MVA in 1990, was, therefore, incorporated in the said agreement.

- (b). TPC, too, was threatened to loose it's market share of sale of electricity in Greater Mumbai area as commissioning of REL's Dahanu Power Plant of 2 x 250 MW was imminent and had potential of reducing the REL's off-take from TPC by about 3000 MU per annum. Also, TPC's repeated requests for reducing the quantum of standby requirement at different stages of its capacity addition was postponed and finally not

agreed to by MSEB.

13. As a matter of fact in an elaborate letter written to GOM dated 03.02.2000, the TPC has aired its grievances, stating thus:

*“In the year 1995, sales of TEC were of the order of 9900 Mus. With the normal growth of around 5% to 6% per year, the sales for the year ending 31<sup>st</sup> March, 2000 would have been 12600 MUs. TEC’s sales as estimated now are of the order of 8300 MU’s. However, BSES commissioned their Dahanu Power Station of 500 MW capacity in the year 1995 and started transferring the load. TEC’s sale got reduced and are further getting reduced continuously thereby adversely affecting the sales of 3000 MUs per year”.*

14. In the same letter with reference to Govt.’s sanction of another project of 495 MW to REL at Saphale TPC stated thus:

*“TEC has lost 3000 MUs of sales on account of Dahanu Power Station set up by BSES. If Government sanctions another project of 495 MW to BSES at Saphale and allows the electricity generation to be brought to licensed area in Mumbai, it will enable BSES to take away TEC’s, consumers by connecting them to their new generating station. This will further*



*reduce sales of TEC to the extent of 6000 MUs per year. Under such circumstances, TEC will not be needing an standby support from MSEB. As result TEC will be in position to operate their system independently. MSEB will not get any standby charges from TEC. At present, TEC are not taking any supply of electricity from standby facility with MSEB. Even during the forced outage TEC will not be requiring standby support as they will be surplus of 800 MW of generation capacity.” (Emphasis supplied).*

15. The resultant position being whether standby is required or not, TPC has to pay for 550 MVA to MSEB even though the TPC has increased its generating capacity in different plants to the magnitude of 1774 MW. To state it further, it is the case of TPC and it would not be an exaggeration, to state that TPC no longer requires standby from MSEB, yet it was compelled to bear the brunt of standby charges to the extent of 550 MVA whether required or not. The TPC also addressed GOM on 03.02.2000 in this respect putting forth that TPC is not taking any supply of electricity from standby facility with MSEB even during forced outage also. Factually TPC does not require standby support from MSEB as its claims to have a substantial surplus generation capacity from its group of generating plants numbering sixteen with an aggregate generating capacity of 1774 MW. However, it is an admitted fact that TPC, as a generator had accepted and was paying standby charges for the capacity of 550 MVA to MSEB till a direction was issued by GOM on 26.01.1998,

when REL's Dahanu Generation became operational and GOM directed TPC to provide 275 MVA standby to REL. REL, one of the distributors of Power generated by TPC till 1996 also became a generator and distributor of Power during 1995-96. REL becoming a Generator, ignited the differences between TPC and REC and turned out to be the root cause for the prolonged and innumerable litigations.

16. It is pertinent to note that MERC, also in their order dated 07.12.2001, recorded that TPC had the 'spinning reserve' of 317 MVA. This brought the total available reserve with TPC to the level of 867 MVA. This position is not in dispute before us. TPC has, therefore, been submitting that due to the availability of 'spinning reserve' its requirement of standby capacity is not more than 233 MVA (i.e.550-317)MVA. It is also submitted by TPC that REL does not have any 'spinning reserve' and the same has not been disputed by REL.
17. The arrangement of providing standby facility by MSEB to TPC as indicated above was increased to 550 MVA by the year 1990 and frozen at that level and was formalized by MSEB's letter of 06.07.1990, addressed to TPC. The planned establishment of 2 x 250 MW Dahanu Power Plant by REL which was to bring the entire electricity generated to REL's licensed area in suburban Mumbai for distribution resulted in reduction of the TPC's sale to REL. In order to maintain the commercial equilibrium between MSEB viz-a-viz TPC on one hand, and TPC viz-a-viz REL, on the other, REL with the establishment of Dahanu Power Plant was also required to have similar standby facility for their generating system and for exclusively receiving the standby support from TPC, the REL was required to

execute interconnection with the system of TPC with the approval of the CEA.

18. It may be worthwhile to mention here that as per the submission of TPC, in their letter dated 17.12.1997 to MSEB, it was stated that it was fully capable and willing to supply standby Power as well as start-up power to REL for its Dahanu Plant and, therefore, Tata Power should be billed for only 275 MVA standby facility for their consumers other than REL (as a generator). It implies that TPC had a plan to use 275 MVA support from MSEB and the available surplus/spinning reserve only to support its own generating system and requirement of 275 MVA standby by REL (Gen.) will be provided from standby procured from MSEB. In reality the TPC's affidavit submitting the data of drawl of standby support from MSEB for the period from February 1998 – October, 2003 indicating date, time, duration and causes of failures of REL generating system show that in about 90% of occurrences of the outages in Dahanu Generating Station of REL, the TPC has actually provided standby support to REL without its drawl of the corresponding quantum of support from MSEB. The analysis of the data also shows that during the aforesaid entire period, on an average of more than 63% of the standby supply has been availed by REL from the spinning reserve available with TPC. Therefore, while computing the standby charges leviable to REL the cost of combined reserve of 867 MVA standby including the spinning reserve is to be factored in. It is also observed that while the planned outages in the generating system of TPC and REL could be managed easily, the probability of unplanned outages occurring simultaneously in both systems are likely to be remote and rare, but on

its occurrence about 825 MVA capacity is required to sustain both the systems. Applying this hypothesis in the instant case with 300 + MVA capacity as spinning reserve and only 275 MVA from MSEB, the resource of 575 + MVA capacity is adequate to cater to the TPC's requirement of 550 MVA to manage planned outages which do not normally occur simultaneously with that of REL system. Similarly the emergencies in REL generating system requiring 275 MVA capacity support could easily be sustained with available resource of 275 + MVA capacity with the TPC.

19. From the aforesaid the following emerge:
  - (a). On commissioning of Dahanu Power Plant in 1995-1996, REL too, was required to have standby support equivalent to 275 MVA from TPC, who became the provider of standby support facility as also bulk power supplier to REL and for that an interconnection arrangement between REL and TPC systems was established. It may be pertinent to mention, here, that during the period 1984 to 1996-97, load growth of TPC was not commensurate to the rate of capacity addition, and their oft-repeated requests to MSEB for scaling down the quantum of standby not being agreed to, resulted into overall Plant Load Factor of TPC's generation units coming down indicative of poor utilization of the capacity. MERC, after in-depth examination of TPC's accounts and records for their generating units by a Chartered Accounting firm, in their order dated 07.12.2001, has inter-alia held that TPC had the 'spinning reserve' of 317 MVA, whereas REL did

not have any such reserve.

- (b) The aforesaid quantum of "spinning reserve" is adequate to provide standby support of 275 MVA to REL. The TPC has already been recovering the fixed cost of the generation units through tariff from its consumers including REL. Thus TPC, has the option to provide standby support to REL either from its' own spinning reserve or from what is available from MSEB or both.

20. REL's Dahanu Power Plant needed the start-up power and an arrangement was finalized between MSEB and REL to provide an interconnection at Boisar between MSEB and REL systems. It was not to be used for parallel operations of the two systems as MSEB apprehended that would enable flow of power from REL units to MSEB's area of supply. However, the Boisar interconnection continued even after Dahanu power Plant started operations. A meeting presided by the Union Power Secretary on 23.06.1990 attended by the representatives of CEA, MSEB and REL suggested that interconnection at Boisar be discontinued and an interconnection between REL and TPC systems be established. The relevant portion of the Minutes of meeting reads thus:

*"They suggested that it will be better if BSES system is connected in parallel with Tata system at Salsette or some nearby place. After discussions, it was agreed that BSES system may be interconnected with Tata Electric Co. system at 220 KV at Salsette or any other suitable location"*

21. Sequel to the above decision, GOM amended the REL's license issued under the provisions of 1910 Act and incorporated the condition of interconnection. A meeting in regard to establishment of interconnection was held on 29.06.1992 between REL and TPC. One of the terms of agreement in the said meeting was that TPC "may" provide standby capacity to REL from the standby capacity reserved by TPC with MSEB and that sharing of charges would be worked out in future. The relevant extract from the Minutes of the Meeting reads as under:

*"The interconnection is being provided to take care of emergencies in BSES 220 KV system. Tata already have an arrangement with MSEB whereby standby capacity is provided by MSEB to Tatas in case of emergencies in Tatas system. Standby capacity to BSES may be provided from the standby capacity reserved by Tatas with MSEB and appropriate sharing of charges by BSES could be worked out"*

22. At this stage neither the allocation of quantum of standby capacity nor the charges thereof was decided nor agreed to. However, in the run-up to formalize the interconnection agreement, the differing perceptions of the parties on the commercial issues involved gave rise to differences between them and needed intervention from GOM during the year 1997-98 for resolution.

23. REL had established 2 x 250 MW power plant at Dahanu and commissioned it for commercial operation w.e.f. August, 1995 and commenced supplying power to its own licensed area through the temporary interconnection at Boisar provided by MSEB as per the conditions of the license. Despite Commissioning of Dahanu Power Plant, REL continued to be bulk purchaser of electricity from TPC though at a reduced level, to meet the demand of its licensed area.
24. TPC vide their letter dated 30<sup>th</sup> July, 1996 issued 60 days notice as required by sixth Schedule (para 1 and 3<sup>rd</sup> proviso) of ESA – 1948 for revision of tariffs, to be effective from 1<sup>st</sup> October 1996 which also included 275 MVA standby facility to REL and the charges were sought to be increased from Rs. 190/KVA/month to a fixed monthly rate of Rs. 450/KVA/month. It is to be noted that since the date of the agreement for standby between MSEB and TPC, the fixed charges for the standby facility was close to demand charges for H.T. category of consumers. It was only in Oct 1996, the increase in the fixed charge from Rs. 190/KVA/month to 450 KVA/month delinked it from the demand charges of H.T. category.
25. As indicated above the standby facility to REL by TPC was to be provided through interconnection, but even though the technical arrangements for interconnection were completed, the same was not established for a long time due to differences on commercial terms between REL and TPC.
26. The dispute related to REL not yielding to the demand of TPC for a

fixed monthly standby charges at Rs. 450/KVA/month, for availing of up to 275 MVA standby facility, which was fixed on par with rate at which TPC was paying to MSEB for standby demand of up to 550 MVA.

27. It is to be pointed out that the dispute was not on the quantum of standby facility of 275 MVA that TPC is to provide to REL, but the rate of standby charges demanded by TPC from REL and REL was not agreeable to pay at the same rate as TPC was paying to MSEB.
28. GOM appointed a committee under the Chairmanship of Principal Secretary (Energy) of which the representatives of MSEB, TPC and REL were members. It may be pertinent to point out here that the said committee in its report dated 01.09.1997 reported as under:

*“TEC claims that they will be commercially hit due to less purchase by BSES (on account of Dahanu’s commissioning) and this fact needs to be considered while deciding standby charge. Otherwise, TEC would not achieve reasonable return in 1997-98”*

29. The Committee further reported that:

*“However, on detailed deliberation on this issue the Committee members have agreed that the standby charges on 275 MVA demand are payable. However, rate could be jointly decided or negotiated.”*



30. Also the Committee found that the realistic financial projections for TPC and REL revealed that while TPC was in deficit by Rs. 44.58 crores to achieve reasonable return for the year 1997-98, REL was in surplus after payment of tax by Rs. 80.18 crores, if special appropriations were not allowed, else their net surplus over Rate of Returns was Rs. 52.34 crores.
31. The Committee under the head “POINTS FOR DECISION” also reported in para 2 *“that while recommending actual rate (for standby charges) we have to ensure that there is no need for any tariff revision during the current year and that the rate is reasonable. On the basis of the assessment carried out as narrated above, standby charges creating a burden of between Rs. 40 to 50 crores on the BSES system during the current year would be considered reasonable for a standby of 275 MVA which will mean a rate ranging between Rs. 225 to 300/KVA/month. The actual rate may be decided by Hon’ble Dy. C.M. A review of the position may be taken after one year.”*[Emphasis supplied]
32. As per consensus arrived at before the then Dy. Chief Minister of Maharashtra, REL was directed to pay Rs. 3.5 crores/month for 275 MVA standby facility to TPC. It is clear that the rate of standby was fixed at Rs. 127.27/KVA/month as against the rate of Rs. 450/KVA/month at which TPC has to pay to MSEB, which is not a standby charge simpliciter but an arrangement to make good the loss of MSEB towards its service to rural area.

33. The Committee in its recommendations beside recommending payment of standby charges on a demand of 275 MVA (equivalent to the capacity of one unit) by REL to TPC also recorded its report in para 6(ii) and para 6 (iii) which reads as under:-

*“6 (ii). MSEB’s standby charge on TEC at the rate of Rs. 450/KVA/month on 550 MVA demand envisages zero exchange of energy. However, in case of TEC, BSES has agreed to purchase 2875 MUs from TEC. Due to existence of purchase of energy component standby charge rate of TEC on BSES should be lesser than MSEB’s rate on TEC.”* (Emphasis supplied).

*6(iii). TEC is in deficit by about Rs. 45 crores to meet reasonable return, while BSES is in excess over the reasonable return by about Rs. 80 crores as per present realistic projections without provisions for special appropriations. The deficit of TPC should be compensated through payment on standby charges”*

34. The above indicate that the cost of standby charge by BSES to TPC, worked out at the rate of Rs. 3.5 crores per month (Rs. 42 crores per annum) was fixed only for 1997-98 with the objective of ensuring that TPC and REL could achieve the reasonable return during 1997-98 without change in tariff rates.

35. The dispute between TPC and REL was not on 275 MVA standby support that TPC was to provide to them but on the rate of charge at which the payment for the standby was to be made by REL to TPC. REL was not agreeable to pay at the rate demanded by TPC viz at the same rate as TPC was paying to MSEB for 550 MVA standby support. The committee's recommendations also included that the standby charge rate of TPC on REL should be lesser than MSEB's rate on TPC as the standby of 550 MVA was envisaged on zero-exchange of energy whereas REL had agreed to purchase 2875 MUs from TPC, (as a matter of fact REL had agreed to purchase 2875 MUs and max. demand of 6900 MVA per annum and a minimum guaranteed off-take clause was to be included in the commercial agreement between the parties). The said administrative decision fixing the rate at Rs. 127.27 KVA/month equivalent to Rs. 3.5 crores per month, or Rs. 42 crores per annum by both parties (as against Committee's recommendations of between Rs. 225 to 300/KVA/month) for 275 MVA standby availment was accepted by all. It is pertinent to point out that the Committee consisted of representatives from TPC, REL, MSEB and GOM and had made the above important recommendations and the order to pay Rs. 3.5 crores per month for the said allocation was not challenged by anyone but it was accepted and acted upon.
36. After taking into consideration of the recommendations of the Committee, GOM on 19.01.1998 directed TPC and REL to make interconnection at Borivali operational and further directed that TPC

to provide standby facility of 275 MVA to REL and REL to pay standby charges for 275 MVA to TPC at the rate of Rs. 3.5 crores per month (Rs. 42 crores per annum). In order to resolve the incongruity between the Committee's recommendations and GOM's decision of payment by REL to TPC for 275 MVA standby at the rate of Rs. 3.5 crores/month, this Tribunal vide its order dated 24.07.2006 directed the GOM to furnish the contemporaneous record with regard to its decision. The written submission along with the Government's notings indicate that the decision was taken independent of the Committee's report and it was not referred to, in the notings. The said order also indicated that the standby charges were based upon the existing tariffs of TPC and REL and the same may be reviewed during the tariff revision in future. The GOM in its order dated 19.01.1998 also noted thus:

*“It has come to the notice of the Government that due to dispute on commercial terms between BSES and TEC, interconnection is not established at Borivali even though technical arrangements are ready. Similarly, additional electricity generated at Dahanu is being sold to the Western Regional Grid through MSEB's Boisar interconnection. As a result Government's main objectives that electricity generated at Dahanu should be used within BSES area of supply has not been met and BSES license conditions is violated.”*

37. The said government order directed REL to establish interconnection at Borivali by 26.01.1998 and take 275 MVA standby facility from TPC and pay charges for the same to TPC as extracted below:

*“BSES should take 275 MVA standby power supply from TEC for Dahanu Generating Stations”*

The said order also directed that:

*“TEC may charge standby charges for 274 MVA supply to BSES”*

The order further provided thus :

*“As per Committee’s recommendations and taking into account TEC’s electricity supply to BSES, TEC’s standby supply from MSEB, charges thereof and TEC’s and BSES’s financial conditions, BSES should make a payment of Rs. 3.5 crores every month for standby supply.”*

The order further proceeded that:

*“Above standby charges are based on TEC’s and BSES’s electricity supply tariffs. The standby charges may be reviewed during tariff revisions in future.”*

38. A POA (Principles of Agreement) reflecting the above was thereafter executed between TPC and REL on 31.01.1998 and the

interconnection between the two systems of TPC and REL was established on 14.02.1998. As per the Agreement both parties agreed to cooperate in order to ensure that the orders of GOM dated 19.01.1998 are implemented in the spirit of it and committed that a detailed Power Supply Agreement on mutually agreed basis will be executed by 21.04.1998. The proposed standby Agreement remains a mirage till date. Thus, there is no privity of agreement between MSEB/TPC and REL. On 30.04.1998, TPC on its own submitted a proposal for revision of its tariff while claiming equal sharing of standby charges, which REL resisted.

39. From the aforesaid the following aspects emanate:

- (a) Besides enhancing the reliability of the generating units in the event of failure/non-availability of Generating Systems for any reason the purpose of standby facility was to compensate MSEB and TPC for loss of sale of electricity due to increased addition of generation capacity by TPC on one hand and commissioning of Dahanu Power Plant on the other, respectively. This also made TPC partially sharing the burden of subsidy provided by MSEB to agriculture and similarly placed other weaker sectors.
- (b) As per the Government of Maharashtra's order dated 19.01.1998, REL shall pay for the standby capacity of 275 MVA to TPC. 'Principle of Agreement' reflecting

the above was also signed between TPC and REL on 31.01.1998. This order has not been challenged by anybody. REL is to receive 275 MVA standby facility from TPC.

- (c) If the requirement of 275 MVA of standby facility of REL is to be met out of TPC's confirmed reserve of 317 MVA, the REL is required to make much less payment to TPC as REL along with other consumers of TPC have been paying fixed cost for TPC's generating units. In the GOM, order dated 19.01.1998, there is no mention in the said order that the standby supply of 275 MVA is out of 550 MVA secured by TPC with MSEB.
- (d) As brought out in para 18 above, TPC in its letter dated 17.12.1997 had conveyed its plan to use 275 MVA support from MSEB only for their consumers including REL and requirement of 275 MVA standby by REL as generator was perhaps planned to be provided from TPC's internal resource, or standby or both.
- (e) As observed earlier, the committee had come to the conclusion that the standby charge rate of TPC on REL should be lesser than MSEB's rate on TPC, as the standby of 550 MVA to TPC was envisaged on zero-exchange of energy between MSEB and TPC, whereas REL had agreed to purchase 2875 MUs and max.

demand of 6900 MVA per annum from TPC and further a minimum guaranteed off-take clause was to be incorporated in the proposed commercial agreement to be entered between the parties. The said agreement remains a still born.

40. TPC was being charged an amount of Rs. 24.75 crores per month equivalent to Rs. 297 crores per annum by MSEB towards the thrusted facility of 550 MVA. MSEB for revising the charges for standby facility, served notice on TPC on 31.08.1998 to enhance it from Rs. 24.75 crores to 30.25 crores per month equivalent to Rs. 363 crores per annum, w.e.f. 01.12.1998. Accordingly, TPC *suomoto* issued a notice dated 30.09.1998 to REL conveying its intention to enhance the charges for the standby facility of 275 MVA provided to REL from Rs. 3.5 crores per month to Rs. 15.125 crores per month w.e.f. 01.12.1998. It may be appropriate to mention here that the ERC Act, 1998 came into force on 25.04.1998 and the Maharashtra Electricity Regulatory Commission was constituted on 05.08.1999.
41. TPC's demand of Rs. 15.125 crores per month from REL is based on the charges for standby facility of 550 MVA between TPC and REL and the same to be shared in the same proportion as the proportion in which the quantum of 550 MVA standby support is shared. Thus, according to TPC, if the quantum of standby facility of 550 MVA is shared in equal proportion (i.e. 275 MVA each to TPC and REL) then the sharing of charges should also be equal between TPC and REL. The notices were given under third proviso of the paragraph-I of sixth



schedule of ESA 1948, which stipulates that licensee shall not enhance the charges for the supply of electricity until after the expiry of the notice in writing of not less than 60 clear days of its intention to enhance the charges.

42. The notice given by TPC to REL to increase charges for standby facility of 275 MVA being availed by REL flared up resistance and started a fresh dispute among the parties.
43. The dispute between TPC and REL is not on quantum of standby but on cost / charges to be paid for standby facility. The said dispute was taken up with the GOM, the licensing authority of both the parties, and a meeting was convened by the Dy. Chief Minister of Maharashtra on 04.03.1999 wherein representatives of both the sides were present. The Dy. Chief Minister, while advising both the parties to settle the issues amicably between themselves, also issued certain directions including that REL should share Rs. 9 crores out of Rs. 22 crores of additional standby charges (difference of Rs. 319 crores and Rs. 297 crores) levied by MSEB upon TPC for the period from 01.12.1998 to 31.03.1999 thereby attempted to settle standby charges till the year 1998-99. A direction was also given that the issue regarding sharing of standby charges for the period from 01.04.1999 onwards be referred to a Committee to be constituted by the State Government.
44. On 05.08.1999, a notification was issued by the GOM conferring the power on MERC under Section 22(2)(n) of The Electricity Regulatory

Commission Act, 1998 to adjudicate upon the dispute and differences between the licenses and utilities. On issue of this notification GOM advised REL to approach MERC for adjudication.

45. In the meanwhile, GOM passed an Order on 22.03.2000 whereby REL was directed to pay 50% of standby charges which TPC pays to MSEB. GOM also reiterated that REL should pay Rs.9 crores as standby charges for the period 01.12.1998 to 31.03.1999. Such directions not being acceptable, REL moved MERC under Section 22(2)(n) of ERC Act, 1998 raising a dispute on 04.12.2000. In the meanwhile, on 22.03.2000, GOM passed an Order to the effect that it is withholding its decision dated 22.03.2000 till MERC decides the dispute.
46. MERC issued an interim direction relating to sharing of standby charges which was challenged by TPC in WP No.31 of 2001 on 30<sup>th</sup> September, 1999 on the file of the High Court of Judicature at Bombay. The Writ Petition came to be disposed of in terms of consent order, by which REL undertook to deposit the specified amount with MERC and MSEB was permitted to withdraw. The said arrangement was without prejudice to the respective contentions in the proceedings pending before MERC. REL continued to deposit the amount as per the orders of the High Court.
47. On 07.12.2001, MERC passed an order on the petition filed by REL. Two out of three members of MERC recorded their findings and conclusions, while the Chairman recorded his grievance that he was

not informed of the meetings held by the other two members of the MERC with the consultants, who were appointed to assist MERC in working out a formula.

48. The challenge was made by TPC as well as REL on the file of the High Court of Judicature at Bombay by filing appeals. By a Common Judgment dated 03.06.2003, the Division Bench of the Bombay High Court while holding that MERC alone has exclusive jurisdiction to determine the standby charges, which is an element of tariff and GOM will have no jurisdiction to decide the issue, set aside the said Order of MERC and remanded the matter to MERC for de novo consideration and decision in accordance with law, as they sustained the contention of violation of principle of natural justice.
  
49. The Hon'ble High Court further directed that during the pendency of the proceeding before MERC for the period 01.07.2003, REL shall pay to TPC 50% of the standby charges that are payable by TPC to MSEB and TPC pay 50% of the standby charges to MSEB. As regards the arrears of the standby charges, the High Court directed that 80% of the amount shall be paid by REL to TPC and balance 20% by TPC and further directions were issued in this behalf. Challenging the said Judgment of the Division Bench of the Bombay High Court, Civil Appeal Nos. 8362 & 8363 of 2003 were preferred by TPC and 8360 & 61 of 2003 were preferred by REL before the Hon'ble Supreme Court. The Hon'ble Supreme Court dismissed both the sets of appeals by its Judgment dated 17.01.2003 and directed the MERC to decide and dispose within three months on production of a copy of

its Judgment. On few of the points raised before it, the Hon'ble Supreme Court, as seen from its Judgment, ruled thus:-

- (a) GOM will have no jurisdiction to decide the issue after constitution of MERC on 05.08.1999. GOM's order dated 22.03.2000, which was kept by them in abeyance, is without jurisdiction and cannot be revived after MERC's order dated 07.12.2001.
- (b) Standby charges being one of the components of tariff, needs to be decided as tariff determination by MERC after coming into force of ERC Act on 28.05.1999. The MERC has exclusive jurisdiction to determine the tariff.
- (c) TPC's notice dated 30.09.1998 revising the charges of standby facility provided to REL from Rs.3.5 crores to Rs.15.125 crores per month w.e.f. 01.12.1998, without the approval of MERC, is invalid. The notice to enhance the charge issued by TPC, being subsequent to the commencement of ERC Act, will have no legal effect, by itself.
- (d) In substance the dispute is what should be paid by REL to TPC for the standby facility provided to it.
- (e) The procedure by MERC was not fair and proper in as

much as the Chairman did not participate in the meetings for want of information while other two members held meeting with the consultants, whereunder a formula was devised. Under Regulations 21, the quorum for proceeding before the MERC shall be three. In these circumstances, the High Court was perfectly justified in setting aside the order and remitting the matter to Commission for de novo consideration.

(f) Regarding the concept of standby and nature of the facility enjoyed by REL from TPC the Hon'ble Supreme Court held thus:-

(i) Standby facility is an alternative arrangement that a generator of electricity could fall-back upon in the event of their generation machinery coming to a halt.

(ii) The standby arrangement for 550 MVA entered by TPC was for the purpose that in the event its generation fell short for any reason, it will be able to immediately draw the aforesaid quantity of power from MSEB.

(iii) The arrangement entered into by MSEB with TPC ensured the former of immediate availability of 275 MVA power in the event of any breakdown or stoppage of generation in its' Dahanu generation facility [Emphasis supplied].

50. As per the orders of the remand, MERC took up the matter for *de novo* consideration, afforded opportunity to either side, passed an order on 31.05.2004 on the petition filed by REL before it on 04.12.2000 under Section 22 (2)(n) of the ERC Act, 1998 and connected Regulations. Before passing the said order, MERC also called for a report from Central Electricity Authority (CEA) which gave rise to further dispute between the parties. MERC in Case No.7 of 2000, after elaborate consideration, computed the standby charges based on the formula recommended by CEA from FY 1999 to FY 2004 and directly computed the amount payable to TPC on standby charges besides awarding interest. In the result, the MERC computed the monetary value of payment to be collected by TPC from REL based on data furnished to it by the party. It may not be necessary to set out the exact figures, which MERC ordered.

51. TPC filed WP No.14 (71) of 2004 on the file of the High Court of Judicature at Bombay. The Division Bench of the Bombay High Court granted interim stay to the limited extent by Order dated 1<sup>st</sup> July, 2004. Ultimately by Judgment dated 24<sup>th</sup> December, 2004 while

noting that this Appellate Tribunal is likely to become functional by 17<sup>th</sup> January, 2005, directed the parties to move this Appellate Tribunal, besides directed the parties to pay according to the Interim Order passed by the said Court.

52. TPC moved special appeal No.69, 71 of 2005 on the file of Hon'ble Supreme Court and by Order dated 30<sup>th</sup> November, 2005, their Lordships directed TPC to file an appeal against the Order of MERC dated 31.05.2004 within two weeks from 30<sup>th</sup> November, 2005. The Order of the Hon'ble Supreme Court reads thus:-

*“We have heard counsel for the parties.*

*After some argument, on our suggestion, learned counsel for the parties have agreed to the passing of the following Order:-*

*“M/s Tata Power Co. Ltd. shall file an appeal against the Order of the M.E.R.C. dated 31.5.2004 within two weeks from today. Counsel fro Reliance Energy Ltd. states that he will not raise any objection on the question of limitation. The Tribunal shall entertain the said appeal and fix a date for hearing of the application for interim relief, if any, and dispose it of within two weeks of the date of filing of the appeal.*

*The interim order extended by the impugned order of the High Court shall be operative only till the disposal of the application*

*for interim relief by the Appellate Tribunal. We expect the Appellate Tribunal to pass an appropriate order disposing of the interim application within four weeks from today.*

*The Bank guarantees will be kept in force till passing of appropriate order by the Appellate Tribunal, and thereafter the parties shall act in accordance with the order that the Appellate Tribunal may pass.”*

*Accordingly, these appeals are disposed of.”*

53. As directed, this appeal has been preferred by TPC. Detailed arguments were addressed on a number of days and very many learned senior counsels appeared on behalf of the Appellant and Respondents.
54. On a consideration of the entire matter, we are to decide the crux of the dispute between the parties, which related to the quantum of standby charges which TPC is entitled to collect from REL and the quantum of charges which REL is liable to pay to TPC for this 275 MVA standby facility. In the instant Appeal we are to examine the following points to adjudicate the dispute:
- (A) What is the purpose of standby?
  - (B) Whether REL is required to share the standby charges in the same proportion in which the TPC is paying for the standby facility provided by MSEB?



- (C) Whether reference made to the CEA by MERC is warranted?
- (D) To what relief, if any?
- (E) Apart from the above questions, the incidental questions that also arise are:
  - (i) Whether MERC acted properly in calling upon CEA to submit its report? Whether the terms of reference by MERC to CEA is in order?
  - (ii) Whether the report of CEA deserves to be considered and given any weight?
  - (iii) Whether TPC would be entitled to recover 50% of the standby charges which it pays to MSEB?

55. We will first take-up the incidental questions of 54 (E) above. We now examine the pertinence of MERC's referral to CEA to seek their advice on the matter. In the proceedings before MERC, the TPC has alleged that for the first time on 28.11.2003, MERC asked counsel for TPC to respond to the observation that CEA be asked what might be a fair proportion of sharing of standby charges. TPC responded that MERC would be abdicating its jurisdiction to someone else, particularly when the Hon'ble Supreme Court has held that MERC is the expert body to go into the matter of tariff. TPC further submitted that the MERC, before coming to conclusion of leaving it to somebody else to come-up with some formula, ought to have appreciated the conclusion reached by the expert body, GOM and views of the Bombay High Court and the Supreme Court. TPC also submitted that MERC ought to have referred to the judgements of the

High court and the Hon'ble Supreme Court to find the meaning of the term 'standby'. It is contended that it is not open to the MERC now to ask any other body to say otherwise. Thus the question of what constitutes standby is no longer at all open for anyone to canvas.

56. On 01.12.2003 REL submitted before the MERC that with regard to appointment of CEA as consultant, it is up to MERC to decide REL's submissions in accordance with the observations of the Hon'ble Supreme Court or to decide in accordance with the TPC's submissions with the binding observations of the Bombay High Court as claimed by them. REL further stated that MERC may reject either of the contentions and come to the conclusion that MERC would undertake the exercise of determination of standby independently. REL also submitted that the MERC under Regulations 70 to 71 of the conduct of Business Regulations has the right to take any assistance. The hearing was adjourned to 18.12.2003. On or about 15.12.2003 TPC received a letter from CEA dated 12.12.2003 stating that MERC had approached the CEA for detailed expert opinion and report in the standby matter by their letter dated 25.11.2003. It seems MERC had approached CEA even before it had made the suggestions in the hearing held on 28.11.2003 and solicited the views of the parties, but, even at that stage did not share the terms of reference (TOR) with the parties for the advice sought by it from CEA. It is not in consonance with principles of natural justice by not discussing the terms of reference with the parties affected. Discussions do not imply seeking concurrence from the parties or limiting MERC's authority or constraining its' discretion but bringing the parties to the same plane

of understanding.

57. E.A. 2003 recognizes the CEA as the statutory technical authority in the sector and as per Section 73 of E.A. 2003, CEA is empowered to advise the MERC if approached and MERC is fully entitled to avail of assistance of CEA or any other consultants under the Regulations governing its conduct of Business. The Hon'ble Supreme Court by its judgement has approved this position as seen from the following:

*"The changed scenario may give rise to problems of highly complex and technical nature between the generator, supplier and distributor of energy, which can be better resolved by technically qualified people who may constitute the aforesaid Regulatory Commission. They will have the additional advantage of taking assistance from consultants, experts and professional persons. Therefore, it will be proper to interpret the Act in a broad manner and not in a narrow or restrictive sense in so far as the jurisdiction of the Commission is concerned, so that the purpose for which the Act has been enacted may be achieved. (Emphasis supplied.)*

58. From the above it follows that the MERC is well within their statutory right to seek advice and consultancy from the CEA. As a matter of fact, Hon'ble Supreme Court in the said order indicated the availability of additional advantage with MERC for taking assistance

from consultants, experts and professionals.

59. Next we shall take up the very reference made to CEA. MERC had sought the opinion of the CEA with the following Terms of Reference (TOR):

- “(a) In the context of the Western Regional Electricity Grid, including its various constituents, and that of Mumbai grid and their operations, what is the standby capacity that is required to be availed by TPC and BSES respectively in view of their present generation capacity available as on January 31, 1998;
- (b) The definition and technical significance of standby capacity in view of the needs of the metropolis of Mumbai
- (c) The mechanism of the formula to arrive at a cost to provide such standby charge facilities.”

60. We find it appropriate at this stage to analyze the TOR of MERC in seeking the opinion from CEA.

- (a) The terms of Reference at para 59 (a) and 59 (b) for seeking a report from CEA is a total misconception and does not arise at all. It appears that MERC has not only de-emphasized the relevance of the historical facts of the

dispute but also has defocused the issues. The dispute for payment of standby charges by TPC and REL were deemed settled for the year 1997-98 and 1998-99. It may be noted that TPC in their Written Submissions dated 09.03.2004 before MERC has clarified that there was no dispute until April 1999. This is clarified when the MERC had observed that there was no dispute between TPC and BSES up to 1997-98. Also BSES, too, as per para 151 of MERC order dated 01.07.2004 has confirmed that there was no dispute regarding standby charges till 1998-99. In an affidavit submitted by TPC on 18.08.2006 it has stated that Tata Power had not requested to issue certificates for the years ended 31.03.1998 and 31.03.1999 because the dispute regarding sharing of standby charges is for the period 01.04.1999 until 2004.

- (b) As per para 59 (a) (the first item of TOR) the query is as to what is the standby capacity that is required to be availed by TPC and REL respectively in view of their generation capacity available as on 31.01.1998?

Whereas it is the common ground that under an agreement between MSEB and TPC on 12.03.1985, the fixed demand of standby facility was frozen at the level of 550 MVA. Further the GOM's order dated 26.10.1998 had directed REL to take 275 MVA standby

capacity from TPC, for Dahanu Generating station and pay charges for the same to TPC. The said order also decided that REL should make payment to TPC towards standby charges at the rate of Rs. 3.5 crores/month. Pursuant to the GOM order; both parties affirmed the aforesaid in a 'Principles of Agreement' dated 31.01.1998 prior to establishment of inter-connection between the two systems of TPC and REL, without explicitly mentioning the source of standby supply to REL.

- (c) Also GOM constituted committee in its report dated 01.09.1997 records that *“However, on detailed deliberation on this issue the committee members have agreed that the standby charges on 275 MVA are payable. However, rate could be jointly decided or negotiated.”* Moreover, the Hon’ble Supreme Court in para 18 of its judgement held thus:

*“The standby arrangement for 550 MVA made by TPC was for the purpose that in the event its generation fell short for any reason, it will be able to immediately draw the aforesaid quantity of power from MSEB. Similarly, the arrangement entered into by BSES with TPC ensured the former of immediate availability of 275 MVA power in the event of any breakdown or stoppage of generation in its’ Dahanu generation facility”(Emphasis supplied).*

61. From the aforesaid discussion the following transpire:
- (a) The standby facility was required to be availed by TPC and REL as was already determined and accepted by the parties concerned.
  - (b) The above terms of the reference relate to issue in the larger context of Western Regional Electricity Grid including its various constituents thus falling outside the scope of the dispute and diluting the focused issues. It has re-opened the issues already settled that TPC will receive upto 550 MVA standby support from MSEB and REL is entitled for a standby support up to 275 MVA.
62. Para 59 (b) of the TOR (the second item of TOR) seeks opinion of the CEA regarding the definition and technical significance of standby capacity. Whereas, the Hon'ble Supreme Court in para 18 of its, order dated 17.10.2003 has quite clearly held as to what standby is and what is its' operational significance. The said para reads thus :

*“Electricity is not a commodity which may be stored or kept in reserve. It has to be continuously generated and it is so continuously generated electricity which is made available to consumers. Any generator of electricity has to have some alternative arrangement to fall back upon in the event of its generating machinery coming to a halt. The standby arrangement*

for 550 MVA made by TPC was for the purpose that in the event its generation fell short for any reason, it will be able to immediately draw the aforesaid quantity of power from MSEB. Similarly, the arrangement entered into by BSES with TPC ensured the former of immediate availability of 275 MVA power in the event of any breakdown or stoppage of generation in its Dahanu generation facility. Heavy investment is required for generation of power. For this kind of a guarantee and availability of power, TPC had to pay charges for the same to MSEB. This payment was in addition to the charges or price which the TPC had to pay to MSEB for the actual drawl of electrical energy. The same is the case with BSES qua TPC. The charges paid for this kind of an arrangement whereby a fixed quantity of electrical energy was guaranteed to TPC and BSES at their desire, is bound to constitute a component of the price which they (BSES and TPC ) would be charging from their consumers towards the cost of the electrical energy actually consumed by them.(emphasis supplied)

63. While dealing with the standby we need to keep in view the fact that TPC and REL agreed during the meeting held on 29.6.1992, for interconnection arrangement that “load scheduling of Dahanu unit will be done by CLD (Tata). Backing down of



generation, particularly during night time, should follow the normally accepted principle of backing down proportionate to the generating capacity” Moreover the ‘Principles of Agreement’ signed between the parties dated 31.01.1998 at para-7, inter-alia, provided that Tata Load Dispatch Centre will provide the services of monitoring and coordinating dispatches etc for both the licensees (i.e. TPC as well as REL). The scheduled outages in generation units of TPC or REL could easily be planned, coordinated and managed to ensure that they do not occur coincidentally in time. However, unplanned outages and non-availability of generation for any reason cannot be anticipated as they could occur randomly and can only be managed by seeking support of standby facility available with TPC/MSEB. In any case, the probability of occurrence of unplanned outages at the same time in the generation systems of both the utilities is bound to be very low and the requirement of 275 MVA by REL could be provided out of the spinning reserve. We observe from the data furnished that for the period from February, 1998 to October, 2003 on an average of more than 63% of the standby supply has been availed by REL from the spinning reserve available with TPC. We may also hasten to add that the outages whether planned or unplanned, may occur at any point of time during the day and night and not at specific times of peaking or non-peaking hours. The lists of dates and timing and the occasions on which standby support has been availed by both TPC and REL as submitted by MSEB/TPC/REL are evidence enough to support the aforesaid observation. This leads us to the conclusion that in the instant case the

- requirement of drawl from standby facility to manage such outages by both TPC and REL, is independent of peaking and non-peaking situations and neither the sizing of standby facility from MSEB to TPC or from TPC to REL nor the agreement between them indicate the aforesaid criteria being the consideration.
64. The agreement between MSEB and TPC recognizes that fixed charges for 550 MVA will only be payable by TPC whether or not the standby support availed is more or less than 550 MVA. It has been observed that TPC as well as REL have been drawing, at different occasions, more than 550 MVA and 275 MVA from MSEB and TPC respectively.
65. In our opinion, the standby arrangement is for the purpose of providing support to generation units in the event of generation falling short for any reason and is not meant to provide support for Transmission and Distribution Systems. In the instant case since TPC also has spinning reserve available with them in addition to standby facility from MSEB, it has the flexibility to supply standby support to REL either from their own internal source or from the MSEB source or both.
66. The MERC in para 193 of its order dated 31.05.2004 has attempted to explain the objection raised by the TPC that some of the TOR were beyond the requirements of this case. It has explained thus:
- “The terms of reference posed to the CEA are advisedly more comprehensive, while at the same time encompassing the specific requirements of the present*

*case, since the Commission has to consider broader issues in a more general frame for the future in the context of the fundamental changes brought about by the EA, 2003, which is a watershed development in the framework for the country's power sector. Apart from the specifics of the present proceedings, the Commission is otherwise concerned with a macro view of the ground realities in this context, and the advice of the CEA on these matters is considered by the Commission to be an essential input for the discharge of its functions in the new scenario." (Emphasis supplied)*

67. From the aforesaid, the following comes into view:
- (a) The size of standby facility was determined apriori by an agreement between MSEB and TPC way back in the year 1985 (Whether or not it met the peaking demand) and the similar arrangement was extended by TPC to REL later in 1996-97 where from for the first time the difference over the rate of standby charges payable by REL to TPC had surfaced. The difference was deemed to have been resolved by the GOM, the licensor and statutory authority by exercising its' power under the ESA 1948 and in terms of the sixth schedule of the Act by its' order dated 26.01.1998 and the same was not challenged by any of the parties and had reached finality. It led to the settlement of dispute on standby charges between the parties for Financial Year 1997-98 and 1998-99. It may be pertinent to note that the said govt. order was based on the report and recommendation made by a Committee constituted by GOM with representatives from the Govt., SEB,

TPC and REL. We observe that the TOR as explained by MERC above, was formulated to *"consider broader issue in a more general frame for the future in the context of fundamental changes brought about by E.A. -2003..."* and *"with a macro view of the ground realities in this context.."* and *"at the same time encompassing the specific requirements of the present case."* The context of the specific requirements of instance case lies in the past in terms of agreement between the parties, GOM appointed Committee's report, GOM's order, Hon'ble Supreme Court's Judgement and the act governing them being ESA-1948 and its' sixth schedule but mixing them with more general frame for future in context of EA-2003 has completely diluted the specifics of the case. The issues are to be analyzed based on relevant agreements/orders, etc. governing the matters according to prevailing Law.

- (b). We are of the considered view that such TOR as this is a total misconception and beyond the scope of issue to be decided. This is a clear misalignment with the issues of the case and it is not at all likely to elicit appropriate solution to the dispute in accordance with law. The consultants are expected to study and report back on the TOR posed to them. And that is what CEA has justifiably done. Had the MERC discussed the TOR in its proceeding but, not necessarily to seek clearance from the parties involved, the infirmities in the TOR would have come to focus and MERC could have answered the reference one way or the other using its' discretion. If MERC's intention was not to share the TOR with the parties, where was the need of soliciting the views of the contending parties about

assigning the case to CEA and that, too, after it was already sent to CEA? MERC in its' earlier proceedings held for the same case had also appointed M/s Batliboi & Co. as consultants and the TOR given to them was discussed and finalized in consultation with the parties. The application of discretion by MERC in both the cases is markedly different.

- (c) In view of the aforesaid, we feel appropriate not to consider the CEA's report for resolution of the instant dispute. The appellant's allegations in the appeal against CEA for bias is no longer relevant as the report of the CEA is not being considered for resolution of the dispute.

68. Even though we find that the impugned order dated 01.07.2004 is vitiated on account of lack of natural justice in formulating the TOR for referral to CEA without discussion with the parties concerned and further the terms being totally misaligned with the issue of the case and out of scope of the remand, we feel it appropriate to point out the following with respect to the said order:

- (a) 'Standby capacity' from MSEB to TPC and from TPC to REL is considered by MERC is to provide support in the event of failure in not only generation but also in transmission and distribution of the integrated systems of TPC and REL in the Greater Mumbai. This negates the findings that the standby capacity is provided to enhance reliability to generating units of

the generators when for any reason there is shortfall in its generation of power. The purpose of standby capacity support for both systems is the same i.e. in the event of loss of generation for any reason. TPC and REL are two distinct entities owned and operated by different owners and operate two independent and distinct systems of generation and distribution /supply.

- (b) It is also common ground that MSEB is committed to provide up to 550 MVA standby capacity to TPC and TPC supplies up to 275 MVA to REL. The quantum of 'standby capacity' is related to largest unit size of generation in either systems. In this connection Hon'ble Supreme Court's finding at para 49(f) may be referred to.
- (c) The standby charge by MERC is considered as the cost of reliability extended to Mumbai. While the Mumbai Citizens are ultimate beneficiaries of the arrangement, basically the standby capacity is the cost of reliability extended to generators. It is simply the back-up provided for failures in generating system and is not related to peak demand as considered by MERC.
- (d) Accordingly, the view of the MERC that the standby support is mainly required when the system is operating at peaking load requirements is not on sound footing. In our opinion in the instant case the

requirement of drawl from standby facility to manage the outages (whether planned or forced) is independent of peaking and non-peaking situations [Refer para 63]. The normal operating condition of a system characterize the occurrence of peaking demand on the system on a regular basis and require matching of supply with the demand on a continuous basis. The standby capacity is involved only in the event when the generation fails for any reason of failures in the generating system. The outage of a generating unit would require immediate availability of the equivalent level of power either from the spinning reserve or alternate standby facility or both. Further, the agreements between MSEB and TPC on one hand and TPC and REL on the other are independent of each other.

- (e) The systems of TPC and REL are differing in consumer's demand profiles, applicable tariff regimes, and are independent of each other. However, combining them into a single system only on the demand side to determine the standby requirements and tariff thereof and not on the supply side of the two systems does not seem appropriate.

69. We have collectively addressed to incidental questions 54(E)(i) and 54(E)(ii) above and find that the process of formulating the TOR and

its referral to CEA without discussion with the parties concerned is vitiated on account of violation of principle of natural justice beside the terms being misaligned with the issues of the case. Therefore, the report of CEA does not provide any help and the impugned order of MERC dated 07.01.2004 is liable to be set aside and we proceed to fix the cost of standby on the materials placed other than CEA's report. The incidental question framed in para 54 (E) (iii) shall be dealt with in the later part of this judgement.

70. The learned senior counsel appearing for TPC contended that (i) by the impugned order dated 31.05.2004, MERC has acted contrary to the judgement and order of the Hon'ble Supreme Court dated 17.10.2003; (ii) to the judgement and order of the Bombay high Court dated 03.06.2003 and (iii) contrary to several undisputed facts on record. The learned senior counsel submitted that ***“In substance the dispute is what should be paid by BSES / REL to TPC for the standby facility provided to it”*** and there was no dispute about availing of quantum of standby facility between REL and TPC.
71. The learned senior counsel for TPC drew our attention to the judgement of the Bombay High Court dated 03.06.2003 where the concept of standby and its purpose have been defined. In this regard High Court observed as under:

***“It is thus clear that the role that the standby facility between the TPC and MSEB plays is twofold –(I)***



*MSEB shares the load in the TEC system whenever there are outages of TPC's generating units and (2) enables MSEB to pass on a portion of burden of subsidy being given by MSEB to agricultural sector and other similar sectors. The total standby facility between MSEB and TPC admittedly is fixed at 550 MVA. That facility was divided by an order made by the State Government dated 19.01.1998 and the State Government directed that the BSES shall share standby capacity which is reserved by TPC from MSEB in equal proportion. This order continues to remain in force and has not been challenged by anybody. With the result, BSES is legally bound to share 50% of the standby facility reserved by TPC from MSEB.*

*It appears that there is substance in the contention urged on behalf of TPC that the standby capacity that is made available to BSES pursuant to the Government order dated 19.01.1998 is from the standby capacity secured by TPC from MSEB and therefore the finding of the Commission that these two arrangements are independent of each other is not correct. In any case, in view of the minutes of the meeting dated 29.06.1992 between TPC and BSES, correctness of which has not been disputed by anybody, it does not lie in the mouth of BSES that the standby capacity that the PTC provides to it is not from the standby capacity secured by TPC with*

*MSEB. [Thus, it is apparent that the standby capacity provided by TPC to BSES pursuant to the Government's order dated 19.01.1998 is not independent of the standby capacity secured by TPC with MSEB. But so far as the liability to pay charges for standby capacity to MSEB is concerned, by virtue of the agreement between MSEB and TPC, it is TPC which is liable to make payment to MSEB. Clause 5 of the Government order dated 19.01.1998 also states that the TPC is to charge standby charges for 275 MVA supply to BSES. Therefore, so far as payment of charges for the standby capacity made available to BSES is concerned, it is an issue between BSES and TPC to which MSEB would not be a party and therefore, so far as MSEB is concerned, the liability of TPC to make full payment of standby charges is absolute and is in no way dependent on the payment to be made by BSES to TPC. Whether by virtue of a Government order or an order made by the Commission or because of an agreement reached between TPC and BSES, the liability of BSES is reduced, still TPC would be liable to pay to MSEB the same amount which is agreed between the parties by agreement or the amount which may be determined by the Commission under the provisions of the Act. Thus, it is clear that the issue of payment of charges by BSES to TPC for making available to it is an issue of tariff. Therefore, the order of the Commission to that extent cannot be faulted.]*

The reliance, on minutes of meeting held on 29.06.1992 between TPC and REL to establish linkage of standby to REL with that of MSEB's standby support to TPC, and interpretation of the GOM's order dated 19.01.1998 directing that REL shall share standby capacity which is reserved by TPC from MSEB in equal proportion, do not match with the sense of words used in both. GOM's order uses the word 'take 275 MVA' and not 'Share' as it conveys different meaning than what is contained in the order. While there is no mention in the said order that the standby supply to REL is out of what is secured by TPC with MSEB, the "Principles of Agreement" signed between TPC and REL sequel to the aforesaid order is also silent about the source of the standby supply. Also the sharing of standby between TPC and MSEB in the equal proportion is merely an indirect deduction. Had it been so understood by GOM/MERC/CEA/The Hon'ble Supreme Court etc. the case would not have dragged for more than a decade.

72. The senior counsel submitted that these findings and observations were not prima facie but intended to be binding upon the MERC in the remand proceedings and is to be seen in the context of para 30 of the judgement and order of Bombay High Court which reads thus:

*"Proceedings are remitted to the Commission for de novo consideration and decision in accordance with law as also in the light of observations made above".*

The counsel submitted that this holds, notwithstanding the observation made by the High Court at para 35 of the judgement and order that reads as *"The observations that we have made in this order in relations to the rival cases about sharing of standby*

*charges by BSES to TPC have been made for the purpose of deciding these appeals and relevant for that purpose only.”* He further submitted that this condition of remand was also confirmed by the Hon’ble Supreme Court of India by para 9 of its’ order dated 17.10.2003.

73. The learned senior counsel for TPC further drew attention to para 18 of the judgement of Hon’ble Supreme Court dated 17.10.2003 wherein it has spelt out as to what standby is and what standby charges are :-

*“Electricity is not a commodity which may be stored or kept in reserve. It has to be continuously generated and it is so continuously generated electricity which is made available to consumers. Any generator of electricity has to have some alternative arrangement to fall back upon in the event of its generating machinery coming to a halt. The standby arrangement for 550 MVA made by TPC was for the purpose that in the event its generation fell short for any reason, it will be able to immediately draw the aforesaid quantity of power from MSEB. Similarly, the arrangement entered into by BSES with TPC ensured the former of immediate availability of 275 MVA power in the event of any breakdown or stoppage of generation in its Dahanu generation facility. Heavy investment is required for generation of power. For this kind of a guarantee*

*and availability of power, TPC had to pay charges for the same to MSEB. This payment was in addition to the charges or price which the TPC had to pay to MSEB for the actual drawl of electrical energy. The same is the case with BSES qua TPC. The charges paid for this kind of an arrangement whereby a fixed quantity of electrical energy was guaranteed to TPC and BSES at their desire, is bound to constitute a component of the price which they (BSES and TPC ) would be charging from their consumers towards the cost of the electrical energy actually consumed by them.* The determination or quantification of the amount which is payable for this kind of standby arrangement made in favour of TPC and BSES would in reality mean determination of the price or charges for wholesale or bulk supply of electricity. It will, therefore, clearly fall within the expression “determine the tariff for electricity, wholesale, bulk, grid or retail” as used in sub-clause (a) of Sub-section (1) of Section 22 and also in the expression “regulate power purchase.....including the price at which the power shall be procured from the generating companies....” as used in sub clause(c) of sub-section (1) of section 22. Therefore, the determination or quantification of amount which BSES has to pay to TPC falls within the jurisdiction of the State Commission under Section 22 of the Act. This legal position is also reflected by Section 29 of the Act which confers an overriding power and

*clearly lays down that notwithstanding anything contained in any other law the tariff for supply of electricity, wholesale, bulk or retail shall be subject to the provisions of the Act and shall be determined by the State Commission. This clearly ousts the jurisdiction of any other authority to determine the tariff.*" [Emphasis supplied]

74. The learned senior counsel for TPC also highlighted the contradictory approach of MERC in its order. In TPC's tariff petition (MERC case No. 30 of 2003), MSEB had applied for an order that TPC should not draw power from MSEB under normal circumstances to meet its peak demands. It was contended by MSEB that the arrangement provided drawl of 550 MVA by TPC only during the emergencies. MERC, therefore, by its' order dated 07.12.2004 restrained TPC from drawing power from MSEB except in case of exigencies. ***We observe that the aforesaid implies that the standby support provided by MSEB was not meant to be used for meeting peak demands under normal operating conditions. It was only permissible under emergencies causing shortfall in generation.*** MSEB also filed case no. 17 of 2005 for an order that TPC should not overdraw from its system as the unrestricted drawl of power by TPC in normal conditions to meet peak demand (i.e. not drawing in emergencies) is not within the perview of the standby facility. MERC passed an interim order on 16.08.2005 inter-alia holding that an arrangement for normal exchange of power between MSEB and TPC is independent of the standby facility provided to TPC which can be operated in certain

specific exigencies.

75. The judgment of the High Court ceases to hold the field and is subsumed in the judgement of the Hon'ble Supreme Court. Learned senior counsel of REL has submitted that the said judgement of the High court has merged with the judgement of the Hon'ble Supreme Court and has no existence in the eye of Law, as held by the Hon'ble Supreme Court in the case of Kunhayammed Versus State of Kerala reported in 2000 (6) SCC 359 and in the case of CIT Vs. Amritlal Bhogilal and Co. the Hon'ble Supreme Court in 2000 (6) SCC 359 held thus:

*"There can be no doubt, if an appeal is provided against an order passed by a tribunal, the decision of the appellate authority is the operative decision in law. If the appellate authority modifies or reverses the decision of the tribunal, it is obvious that it is the appellate decision that is effective and can be enforced. In law the position would be just the same even if the appellate decis on merely confirms the decision of the tribunal. As a result of the confirmation or affirmance of the decision of the tribunal by the appellate authority the original decision merges in the appellate decision and it is the appellate decision alone which subsists and is operative and capable of enforcement."*

76. In another pronouncement, namely of U.J.S. Chopra Versus State of

Bombay reported in 2000(6) SCC 370 it has been held as under:

*“A judgement pronounced by the High Court in the exercise of its appellate or revisional jurisdiction after issue of a notice and a full hearing in the presence of both the parties...would replace the judgement of the lower court, thus constituting the judgement of the High Court the only final judgement to be executed in accordance with law by the court below. “*

77. The learned senior counsel for REL has submitted that there are no findings in the judgement of the Hon’ble Supreme Court relating to the alleged sharing of standby charges in equal proportion between TPC and REL nor there is any such prima-facie observation of the High Court. It was further submitted that the Hon’ble Supreme Court has not held that the standby charges should be shared equally between the parties but left the entire matter to be decided by MERC. It is further submitted that the Hon’ble Supreme Court has only narrated the facts of the case without the expression of any binding finding on the merits of this contention. Learned senior counsel further submitted that there is nothing in para-3 nor in para-18 of the Hon’ble Supreme Court judgement which support the contention of the TPC. The senior counsel has submitted that even assuming that such observations can be squeezed out; the Supreme Court has reportedly warned that it is not permissible to read its observations made while narrating the facts of case or giving a birds-eye-view of



the statutory provisions as its ratio *decidendi*.

78. The learned senior counsel for REL submitted that GOM's order dated 22.3.2000 to levy standby charges on REL for 275 MVA on the same assumption and at the same rate as levied by MSEB on TPC has been held to be without jurisdiction both by the Bombay High Court and its order dated 03.06.2003 and by Supreme Court in the aforesaid judgement and this has reached finality. The senior counsel for REL averred that even on merit the said proposal is neither fair nor justified as it will end up REL paying an aggregate of nearly 67% of the total standby charges of 550 MVA payable by TPC to MSEB.

79. From the foregoing narrations the following points arise:

- (a) Since the peak demands are likely to occur routinely in a predictable manner on a seasonal or daily basis, it is taken to be a normal operating condition and is to be distinguished from exigencies/emergencies, that may arise because of shortfall in generation due to Generating Units coming to halt for any reason.
- (b) MERC's opinion in the instant case that the standby support is not limited only to generation failure but also failures of transmission and distribution and is needed primarily in the peak demand situations rather than in exigencies/emergencies is contrary to its own views and decision in the cases referred to, above..

- (c) The observations/findings of the Hon'ble Supreme Court judgement as brought out in para 49 above will only hold the field.
- (d) Hon'ble Supreme Court judgment in para 9 to the effect that "*The High Court allowed both the appeals and set aside the orders passed by the Commission and the proceedings have been remitted back to the commission for de novo consideration in accordance with the law in the light of the observations made in the order*" is simply a narration of the fact and cannot be considered as an 'observation' made by the Hon'ble Supreme Court for de novo consideration by the MERC as contented by the learned senior counsel of TPC.
- (e) TPC's tariff revision notification dated 31.07.1996 including the revision of standby charges did not come into effect as REL raised objection during the notice period and GOM did not accord its approval.
- (f) GOM's order dated 31.01.1998 based on the Govt. appointed Committee's report dated 01.09.1997, is the only order that survives and holds the field as of this day.

80. It may be appropriate to mention here that after completion of the hearing of the case and in the course of pursuance of the documentations by the bench presented during hearing of the case, the parties were called on 24.07.2006 to provide clarifications on the following issues:

- (a) Whether the TPC has recovered from its consumers through, tariff for electricity, standby charges only in respect of 275 MVA standby facility with effect from 01.04.199.
- (b) Inconsistencies observed between the recommendations made by the GOM appointed Committee and the GOM's order dated 19.01.1998 directing REL to pay to TPC the standby charges for 275 MVA capacity at the rate of Rs. 3.5 crores/month. Also the basis of GOM's direction to REL to pay an additional amount of Rs. 9 crores for the period from 01.12.1998 to 31.03.1999, out of Rs. 22 crores increased in standby charges by MSEB / TPC, required clarification. GOM was directed to furnish the contemporaneous records leading to the above decisions.

TPC and REL have filed additional affidavits in respect of issue at (a) above and GOM has furnished certain documents relating to issue at (b) above. On 24.08.2006, further hearing was held and the case was reserved for judgement.

- 81. In view of the judgment of the Hon'ble Supreme Court the issue needs to be decided as a tariff issue under Section 62 of Electricity Act 2003.
- 82. We now proceed to take up the main issues. -

**Point 'A'** While disposing the Appeal arising from SLP No. 4899 of 2005 the Hon'ble Supreme Court has already decided the question.

The relevant para of the judgement reads thus:

*“Electricity is not a commodity which may be stored or kept in reserve. It has to be continuously generated and it is so continuously generated electricity which is made available to consumers. Any generator of electricity has to have some alternative arrangement to fall back upon in the event of its generating machinery coming to a halt. The standby arrangement for 550 MVA made by TPC was for the purpose that in the event its generation fell short for any reason, it will be able to immediately draw the aforesaid quantity of power from MSEB. Similarly, the arrangement entered into by BSES with TPC ensured the former of immediate availability of 275 MVA power in the event of any breakdown or stoppage of generation in its Dahanu generation facility. Heavy investment is required for generation of power. For this kind of a guarantee and availability of power, TPC had to pay charges for the same to MSEB. This payment was in addition to the charges or price which the TPC had to pay to MSEB for the actual drawl of electrical energy. The same is the case with BSES qua TPC. The charges paid for this kind of an arrangement whereby a fixed quantity of electrical energy was guaranteed to TPC and BSES at their desire, is bound to constitute a component of the price which they (BSES and TPC ) would be charging from*

their consumers towards the cost of the electrical energy actually consumed by them.(emphasis supplied)

83. Thus the standby arrangement is linked of the generation and is a kind of a guarantee for the availability of power in the event of failure of generating system. The said ruling squarely applies on all fours though The Electricity Regulatory Commission's Act, 1998 has since been repealed by the provisions of The Electricity Act, 2003. The provisions of The Electricity Act, 2003 are in *pari materia* with The Electricity Regulatory Commission's Act, since repealed. The said pronouncement of the Supreme Court applies on all fours to the case on hand as it was between the same parties arising under 1998 Act, the said dicta has been laid down. Hence, we are to hold that the charges for standby facility is a dispute which The Regulatory Commission has to determine between two generators taking into consideration of the relevant materials and back ground of the case on hand. Accordingly, we hold that the standby facility is provided by a generator to a generator for the purpose that in the event of failure of generation, for any reason, it will be able to immediately draw up to the specified quantity of power from the generator providing the facility and thus is a kind of guarantee for the availability of power to improve the reliability of recipient generator.
84. **Point 'B'** The payment by TPC to MSEB towards standby facility of 550 MVA was ordered to be paid by GOM to compensate MSEB for

its loss of business in return of receiving standby support, and as MSEB had to sustain enormous expenditure by way of cross subsidy and providing power to poorer segment of the consumers in Maharashtra State. The direction issued by the GOM to pay to TPC for 550 MVA is not the cost of standby facility simpliciter but it is for the privilege of exclusivity of power generation and power distribution to TPC to the Metropolis of Mumbai, a prime and affluent area as against MSEB supplying the rural areas in the State of Maharashtra and its being denied of its sale of power through TPC as well. This is clear from the tariff revision proposal submitted by MSEB to MERC on 15.03.2001. The material portion of the said proposal reads thus:-

*“There exists a standby arrangement between MSEB and TEC, which MSEB has provided with a view to extend system support required for TEC’s stable operations. Due to this arrangement, MSEB shares the load in the TEC system whenever there are outage of TEC’s generating units. As per the arrangement agreed between TEC and MSEB, TEC is liable to pay fixed demand charges to MSEB for the specified demand (termed as standby demand) which enables TEC to draw additional power from MSEB and also to share burden of subsidy being given to agriculture and other categories of consumers in Maharashtra as and when required. The current ‘standby charges’ are at Rs.600/kva/month for 550 MVA, which have been determined by MERC and are effective since 1<sup>st</sup> August 2000”*

85. The same is made further clear by a letter dated 28.12.2000 written by the Chairman, MSEB to the Government of Maharashtra (produced by the appellant). The material portion of this letter reads thus:-

*“Among all suppliers and distributors of power in the State, the MSEB has so far shouldered the major responsibility of supplying power (below cost) to the rural areas of the State. So when TATAs put up their 500 MW plant in Trombay, MSEB sale to Tatas in Mumbai, which is the most profitable area suffered, making it necessary for Tatas to compensate MSEB. This in effect partly financed the cross subsidy. In course of time when MSEB sales to Tatas became zero. This compensation took the form of standby charges. For 2000-2001, the rate of standby chares Rs.600/kv/A/m for 500 MVA was also approved by the MERC.”*

86. From the above, it follows that the concept of standby was primarily introduced to compensate MSEB for the loss of revenue consequent to reduction of energy purchase by the appellant, who was a major bulk purchaser from MSEB supplementing its own generation to supply power to the Greater Bombay area. The agreement reached between MSEB and TPC on 12.03.1985 was made retrospective from 01.02.1984 and it was in the backdrop of TPC commissioning its Trombay Unit No.V of 500 MW during January, 1984.

87. It is also not in dispute that prior to January, 1984, TPC had been

- sourcing supply to supplement its own generation whenever required by paying fixed demand and variable energy charges to MSEB. As set out by MSEB in its letter dated 28.12.2000, in the course of time, when MSEB sales of Power to TPC became zero, this compensation took the form of standby charges at the insistence of MSEB, a dominating state authority. As TPC added its generation capacity, there is consequential reduction in the purchase of power by TPC from MSEB. This increase in generation of TPC was the cause for stepping up of 50 MVA standby, annually from 01.02.1985 and freezing it at the level of 550 MVA in the year 1990, as if it is a standby to TPC generation. In reality TPC has been agitating for a long period that they do not require standby of 550 MVA as they have adequate surplus available with them. In fact, the TPC has a combined reserve capacity of 867 MVA against the total requirement of 825 MVA for itself and REL. Therefore, it leads to the conclusion that the sharing of 275 MVA capacity of standby by REL is from the total available reserve of 867 MVA.
88. MSEB on its own fixed the standby charges, which TPC was paying at the rate as demanded by MSEB. In other words, the payment for standby facility was to make good the losses of MSEB, which was the statutory functionary in the State of Maharashtra, and which had the benevolence of GOM. Only at the instance of MSEB, such a rate has been fixed to enable MSEB to improve its finances.
89. It is, therefore, clear that there is neither reason nor any justification for TPC to call upon REL to pay standby facility in proportion to or at the rate at which it pays to MSEB. The amount which is being paid by TPC to MSEB is not exactly the cost or value of standby facility.



Hence we do not find any merit in the stand taken by the TPC that REL should be directed to share exactly 50% of the charges which TPC is paying to MSEB by way of standby cost or tariff.

90. Therefore, we hold that appellant cannot seek standby charges in the same proportion as the Appellant has been and continue to pay to MSEB towards standby services.
91. In the light of the discussions at para 67, **Point 'C'** is answered.
92. In so far as **Point 'D'** is concerned, the same will be established later in the judgement after the standby charges are determined by us.
93. The next and substantial question that arises for consideration is on the facts and special circumstances of this case as to what is fair cost which the appellant TPC is entitled to recover towards 275 KV standby facility which it provides and continue to provide to REL?

Normally standby is an arrangement between the two generators and they have to agree between themselves on the terms including the cost of such service with the approval of the Regulatory Commission. In the present adjudication we make it clear that our decision cannot be taken as a precedent for fixation of cost of standby service provided by one generator to another generator.

**Mechanism to adjudicate the dispute of standby charges**

94. We adopt the following criteria to adjudicate the dispute of standby

between the parties taking into account the following facts:

- (a) MSEB provided up to 550 MVA standby capacity to TPC and TPC provided up to 275 MVA standby capacity to REL to support its' generating systems in the event of emergencies causing shortfall in the generation of power. This standby capacity is not to be linked to maximum demand or peak demand as it was not the condition of the agreement.
- (b) From the data of drawl of standby capacity furnished by TPC for the period between February 1998 to October, 2003, it is observed that in 90% of the occurrences of failures in REL generating systems the TPC has actually provided standby to REL, without TPC's drawl of the corresponding quantum of support from MSEB. This could only be feasible if TPC has surplus/spinning reserve and using it to provide standby to REL. TPC has been insisting for many years that they have surplus power of their own and do not require more than 275 MVA standby capacity to begin with and later opted out. In the event of exigencies and for economic and efficient operation of the generating system and considering the rate of energy charges, the available spinning reserve is necessarily utilized first out of combined resources available for standby. As earlier mentioned more than 63% of the standby availed by REL from TPC to manage machine failures during the entire period of February, 1998 to October, 2003 had been sourced from the spinning reserve. Therefore, while computing the standby charges leviable to REL the cost of combined reserve of standby of 592 MVA capacity including the spinning reserve is to be factored in.

- (c) Out of 550 MVA standby capacity procured by TPC from MSEB 275 MVA is allocated for TPC's consumers including REL-(Distribution) and the cost of it is being recovered by TPC through tariff. It is to be remembered, however, that REL (Distribution) and REL (GEN) are combined into a single and unified legal entity like TPC.
  
- (d) It appears that the strategy of TPC has been to use 275 MVA standby support to TPC generation system for supply of electricity to consumers including REL (Distribution) and to utilize balance 275 MVA from MSEB and/or a part of spinning reserve capacity to support REL (Gen.). Thus the spinning reserve is the common resource being utilized for TPC's own generation as well as more than 63% of standby requirement of REL(Gen.). In this mechanism 275 MVA standby support from MSEB to TPC's generating system will continue to be available unhindered and the cost of it recovered through tariff as at present.
  
- (e) In order to discover the cost of standby payable to TPC by REL in the instant case, MERC's consultant, M/s S.R. Batliboi, Chartered Accountants and Consultancy Company, inter-alia, reported that in the 1999-2000 the TPC's reserve capacity (over and above the highest maximum demand) for meeting the standby worked out to be 317 MVA. This report was

considered by the MERC in its order dated 07.12.2001, which order of MERC since been set aside. The said determination was based on fixed cost of the TPC Generating System worked out by them. The level of spinning reserve for subsequent years i.e. 2000-01 onwards will be dependant on the cost of operation of each year and the level of sale to consumers. The Appellant has also been agitating for many years that their requirement of 550 MVA from MSEB has reduced to less than 275 MVA. If the requirement of the standby support is linked to the size of the largest generating unit (i.e. 550 MVA corresponding to 500 MW), it will lead to the conclusion that the Appellant has reserve capacity of more than 275 MVA of its own. Therefore, we have taken 317 MVA as the spinning reserve available every year till March 2004 for the purpose of determining the arrears of standby cost payable by REL to TPC. It may be pointed out that the entire fixed cost of the TPC generation system is borne by the consumers of TPC including REL (Distribution). It is also pointed out that standby support service is from generator to generator and in the instant case TPC providing the support to REL is recovering the full cost of their generating system. If the spinning reserve is available any additional charge would amount to recovering more than the fixed cost incurred on the generating system and is not permissible. In any case the standby capacity when invoked by the recipient of the service will necessarily pay for the charges for the energy to the extent drawn. As mentioned earlier TPC has been extending standby cover to REL using spinning

reserve and the same is not liable to be charged particularly when the TPC is a single-source provider of bulk supply and the standby support to REL. The entitlement of 275 MVA capacity available by TPC is being paid for by all the consumers including REL without demur.

- (f) As the parties have submitted that there is no dispute till March 1999, the standby charges needs to be worked out from FY 1999-2000 to FY 2003-2004. Additionally Rs. 9 crores payable by REL to TPC as arrear for financial year 1989-99, is also to be provided for.

95. Taking into account the above parameters, criteria, the conduct of parties and totality of facts standby charges payable by REL to TPC have been arrived at for the financial year 1999-200 to financial year 2003-04, are as worked out hereunder. The said computation for the FY 1999-2000 as made is indicated below:

Cost of providing 275 MVA standby from TPC to REL (Financial Year 1999-2000)

- |     |  |           |
|-----|--|-----------|
| (a) | Quantum of standby capacity available with TPC from MSEB                               | = 550 MVA |
| (b) | Quantum of spinning reserve admittedly available with TPC at zero cost for the purpose | = 317 MVA |

- (c) Total available reserve i.e. [(b)+275 MVA] including 275 MVA earmarked for TPC's own generation system the cost of which is recovered through tariff = 592 MVA
- (d) Cost of standby charges payable by TPC to MSEB for 275 MVA/annum as fixed and accepted by TPC =Rs.181.50 crores/annum
- (e) Cost of standby capacity [(d) ÷ (c)] = 0.306 Crore/MVA
- (f) Requirement of standby capacity by REL(GEN) = 275 MVA
- (g) Cost of standby charges payable by REL to TPC for 275 MVA standby capacity to TPC= (e) x (f) = Rs. 84.15 crores
96. Following the above method for the subsequent years for which the data is available with the Tribunal (i.e. for 2000-2001, 2001-02, 2002-03 and 2003-04), the cost of standby to be paid by REL to TPC are worked out as under:

**Table No. 1**

S. No.	Description	1999-00	2000-01	2001-02	2002-03	2003-04	Total (Crores)
1.	Cost borne by TPC						
	(a) Cost of standby payable to MSEB for 550 MVA capacity (crores)	363	385	396	396	396	1936
	(b) Spinning reserve capacity of 317 MVA at zero cost	0	0	0	0	0	
	(c) Total cost of standby (crores)	363	385	396	396	396	
2.	Amount paid by TPC to MSEB (Crores)	182	230	298	198	279	1087
3.	Balance amount payable by TPC to MSEB (crores)	182	155	198	198	117	849
4.	Total available standby reserve capacity = 317 + 275 MVA	592	592	592	592	592	
5.	Total Cost of 275 MVA standby [crores]	181.5	192.5	198	198	198	
6.	Standby cost / MVA (crore/MVA) = Col.(5) ÷ Col.4	0.306	0.325	0.334	0.334	0.344	
7.	Cost of Standby capacity payable by REL to TPC 275 x Col. (6) [crores]	84.15	89.37	91.85	91.85	91.85	458 (Note 1)
8.	Total amount paid by REL including deposits (Crores)	42	151	101	99	404	797.00
9.	Net amount to be refunded to REL after considering REL Deposits (in crores) excluding the interest on excess deposit [Col. 8 – Col. 7]						339

Note No. 1 : Inclusive of outstanding Rs. 9 cores to be paid by REL for FY 1998-99. Thus the sum of Rs. 9 crores payable by REL is adjusted.

**Amount refundable by TPC to REL due to excess payment on account of cost of standby for the period FY 1999-2000 to 2003-04.**

97. We have computed the amount payable towards the standby charges based on the methodology indicated above for financial year 1999-2000 to 2003-04 as contained in Table No. 1. On aggregation of the figures, the following is the result:

<u>Particulars</u>	<u>Cumulative Amount from FY 1999-2000 to 2003-04 (Rs. In cores)</u>
(a) Total cost of standby charges payable to MSEB from FY 1999-2000 to 2003-04.	1936
(b) Actual amount paid by TPC to MSEB.	1087
(c) Balance amount payable by TPC to MSEB (a) – (b).	849
(d) Share of REL in the above cost of Standby at (c).	458
(e) Actual amount paid by REL over the period from FY 1999-00 to 2003-04.	797.00
(f) Amount refundable to REL i.e. (e) – (d).	<u>339</u>

The above working reveals that, REL has made excess payments over the disputed period from FY 1999-2000 to 2003-04, including the actual payment and deposits made by REL on the basis of interim orders of MERC/High Court's orders from time to time. Thus, the total amount refundable to REL against cost of standby payable by it over the period FY 1999-2000 to 2003-04 is Rs. 339 crores. Also TPC has to pay delayed payment charges and interest on the amount due to MSEB as described in the succeeding paragraphs.



98. MSEB has made claims for recovery of Delayed Payment Charges (DPC) and interest on arrears on the balance amount of standby charges payable to MSEB. As the liability to pay MSEB is solely that of TPC and REL has no privity of contract with MSEB, the DPC and interest on arrears have to be paid by TPC to MSEB. MERC is directed to ascertain the exact amounts for DPC and interest on arrears on the basis considered herein and payable by TPC to MSEB for the period of dispute (FY 1999-2000 to 2003-04).
99. This Tribunal has computed the interest payable by REL to TPC for delayed payments for the period of dispute i.e. (FY 1999-2000 to 2003-04) and the interest payable by TPC to REL on excess amounts deposited with TPC for onward payments to MSEB under directions from MERC/High Court. The interest rate taken is the SBI PLR rate prevailing in the respective years. The net (simple) interest payable by TPC to REL works out to be Rs. 15.14 crores as indicated in Table No. 2 below.

Table No. 2  
Short/Excess payments by REL vis-a-vis REL's share of standby  
Charges determined at Table No. 1.

FY	Outstanding amount (Crores)	SBI PLR (%)	Interest (Crores)	No. of years overdue	Remarks
1999-00	42.15 + 9 = 51.15	12	24.55	4	Rs. 9 crores outstanding for FY 1998-99 to be paid by REL
2000-01	-61.63	11.5	-21.26	3	MERC's interim order dated 18.12.2000.
2001-02	- 9.15	11.5	-2.10	2	MERC's order dated 07.12.2001.
2002-03	- 7.15	10.3	-0.73	1	Minutes of HC order dated 19.03.2002.
2003-04	-312.15	10.0	-15.60	0.5	HC order dated 03.06.2003.

Total interest accrued due from TPC to REL = Rs. 15.14 crores.

We are to point out that:

1. As parties have confirmed the settlement till 31.03.1999, adjudication is undertaken for the period from 01.04.1999 onward.
  2. SBI PLR rates taken are the same as considered in para 240 of the impugned order of MERC dated 31.05.2004.
  3. Admitted liability of Rs. 9 crores to be paid by REL to TPC for 1998-99 has been adjusted.
100. Thus, as detailed in paras 97 and 99, TPC is liable to refund to REL, as on 31.03.2004, the amount detailed below:

- |   |                                       |
|---|---------------------------------------|
| (a) Standby charges / amount refundable<br>by TPC to REL for 275 MVA capacity<br>for the period FY 1999-2000 to<br>FY 2003-04 | = Rs. 339 crores                      |
| (b) Interest on excess amount<br>deposited by REL (see Table No. 2)   | = Rs. 15.14 crores                    |
| (c) Total amount to be refunded to<br>REL by TPC  | = Rs. 354.14crores<br>~Rs. 354 crores |

The payments on account of cost of standby, delayed payment charges, overdue interest from or to the parties over the period FY 1999-2000 to FY 2003-04 have been worked out and the same need to be settled through payments within 30 days of the issue of this judgement. The payment should include an additional simple interest at the rate of 10% per annum on the amount payable on or after 01.04.2004 till the date of payment.

101. In the result we answer the **Point D**: and we hold that for the cost of standby service the appellant TPC is entitled to recover from REL as set out hereunder:

(a)	<u>Financial year</u>	<u>Amount (in Crores)</u>
	1998-1999	Rs. 9.00 (outstanding of 1998-99)
	1999-2000	Rs. 84.15
	2000-2001	Rs. 89.37
	2001-2002	Rs. 91.85
	2002-2003	Rs. 91.85
	2003-2004	<u>Rs. 91.85</u>
	TOTAL	<u>Rs. 458.07</u>
		~Rs. 458.00

- |   |  |   |
|---|--|---|
| 1 | Amount to be refunded by TPC to REL                | Rs. 339 crores                          |
| 2 | Add the interest on excess amount Deposited by REL | Rs. 15.14 crores                        |
| 3 | Total amount refundable to REL as on 01.04.2004    | Rs. 354.14 crores<br>~Rs. 354.00 crores |

(b) In the result we set aside the impugned order dated 31.05.2004 of MERC appealed against and we adjudicate the dispute in the above terms and parties shall bear their respective cost through out.

102. The issue relating to standby has caused a lot of acrimony and litigations between the parties. In this view of the matter we direct that REL is at liberty to take standby, if needed, from any source. Similarly it will be for TPC to decide whether to extend standby facility to REL or not.

The dispute is adjudicated in the above terms and the Appeal is, accordingly, disposed of.

( A. A. Khan)  
Member (Technical)

(Justice Anil Dev Singh)  
Chairperson