BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY
APPELLATE JURISDICTION, NEW DELHI

Appeal No. 202 of 2005 on a reference

Dated this 13th day of December 2006

Present : **Hon'ble Mr. Justice E Padmanabhan, Judicial Member**

M/s Tata Power Company Limited
Bombay House, Homi Mody Street,
Mumbai – 400 001.

……Appellant

Versus

1. M/s. Reliance Energy Limited
(formerly BSES Ltd.)
Nagin Mahal, 6th Floor,
82, Veer Nariman Road,
Mumbai – 400 020.

2. The Maharashtra State Electricity Board
Ali Yavar Jung Road,
Prakash Gadh, Bandra (East),
Mumbai – 400 051.

3. The State of Maharashtra
Through the Ministry of Industry,
Energy and Labour
Mantralaya, Mumbai.

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

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

6. Prayas
4, OM Krishna 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 – 400 071.

8. Vidarba Industries Association
1st Floor, Udyog Bhavan, Civil Lines,
Nagpur – 440 001.

9. The National Textile Corp. (Maharashtra North) Ltd.
N.T.C. House, 15, N.M. Marg,
Ballard Estate, Mumbai – 400 001.

10. The National Textile Corp. (South Maharashtra) Ltd.
Appollo 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,
5th Floor, Churchgate Station Bldg.,
Churchgate, Mumbai – 400 020.

13. The Chief Electrical Engineer,
Central Railways,
Head Quarters Office,
New Parcel Office Bldg.,
C.S.T. Mumbai – 400 001.

14. The Mill Owners's Association
Elphinstone Building,
10, Veer Nariman Road,
Mumbai – 400 001.

15. Bombay Small Scale Industries Association
Madhu Compound, 2nd Floor,
Sonawala Cross Road No.2,
Goregaon (E), Mumbai – 400 063.

16. The Central Electricity Authority
212, Sewa Bhawan, R.K. Puram,
New Delhi – 110 006.

17. R. K. Jain
Member & Ex-Officio Addl. Secy. To Govt. of India,
Central Electricity Authority,
212, Sewa Bhawan, R.K.Puram,
New Delhi – 110 006. … Respondents

Counsel for the appellant : Mr. Iqbal M. Chagla, Sr. Advocate
Mr. Darius. J. Khambata, Adv.,
Mr. Srikant V. Doijode, Adv.,
Mr. P. A. Kabadi, Advocate
Ms. Pragya Baghel, Advocate
Ms. Ruby Singh Ahuja, Advocate

Counsel for the respondents: Mr. J. J. Bhatt, Sr. Advocate,
Ms. Anjali Chandurkar, Advocate
Ms. Smieetaa Inna, Advocate
Ms. Gargi Hazarika, Advcoate
Mr. Syed Naqvi, Advocate,
Mr. D. J. Kakalia, Advocate

J U D G M E N T

1. This appeal was heard by the Hon'ble 1st Bench of this Appellate Tribunal, consisting of The Hon'ble Chairperson and the Hon'ble Technical Member (Hon'ble Mr. A.A.Khan). The Hon'ble Technical Member by his Judgment dated 04th October, 2006 set aside the Impugned Order dated 31st May, 2004 passed by Maharashtra Electricity Regulatory Commission challenged in the appeal and also concluded that towards the cost of standby service, the appellant M/s. Tata Power Co. Ltd. is entitled to recover from M/s.Reliance Energy Limited various sum for the period 1998-99 to 2003 to 2004 as set out here under :

"(a)	*Financial Year*	*Amount (in Crores)*
	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	*Rs. 91.85*
	TOTAL	*Rs.458.07*
		Rs.458.00 (rounded of)

2. The Technical Member also directed refund of excess amounts collected by TPC to REL with interest as detailed hereunder:

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* *Rs. 354.00 crores"*

3. Apart from the above conclusions, the learned Technical Member also observed that M/s. Reliance Energy Ltd. is at liberty to avail stand-by, if needed from any other source and it is for M/s. Tata Power Co. Ltd to decide whether to extend stand-by facility to M/s. Reliance Energy Ltd. or not.

4. The Hon'ble Chairperson, by a separate Judgment dated 04th October, 2006 dissented from the judgment of the Hon'ble Technical Member and concluded that the standby charges payable to MSEB has to be shared by M/s. Tata Power Co. Ltd. and M/s. Reliance Energy Ltd. in the ratio of 2:1 and computing at the said ratio, it has been further held that M/s. Tata Power Co. Ltd. is liable to refund a sum of Rs. 133 Crores to M/s. Reliance Energy Ltd. as per Table-1 and Rs. 10.3 Crores being the interest payable to M/s.Reliance Energy Ltd. by M/s. Tata Power Co. Ltd. was also taken into consideration.

5. The Hon'ble Chairperson, in the penultimate Para of his Judgment recorded his disagreement with the Hon'ble Technical Member as under :

"1. That the terms of reference framed by the MERC for the opinion of the CEA were beyond the scope of the issues which were required to be decided pursuant to the order of remand;

2. The question raised by the appellant regarding alleged bias of the CEA is not relevant, since the report of the CEA has not been considered for resolution of disputes in the appeal for reasons advanced in the main judgment by my learned brother;

3. The quantum of the stand-by capacity is related to the largest unit size of generation in either system;

4. The stand-by facility to manage the outages is independent of the peaking and non peaking load situations in the system;

5. The systems of the TPC and the REL are independent of each other; and

6. The impugned order of the MERC is set aside."

6. After delivering separate Judgment, the two-member 1st Bench, made the present reference in accordance with Section 123 of The Electricity Act 2003, as there is disagreement between the two Hon'ble Members of the 1st Bench.

7. Accordingly, the Hon'ble Chairperson referred the matter to the 3rd Member (Judicial Member) of this Appellate Tribunal. After making a reference to the 3rd Member, the 1st Bench after notice to parties and after hearing, modified the reference. The modified reference alone needs to be considered and answered by the 3rd Member in terms of Section 123 of The Act.

8. The following are the points on which, there is divergence of opinion as pointed out by the two-member 1st Bench, in super- session of the points which were framed originally. In other words the following are the points on which there is divergence of opinion, which need to be taken up for consideration and answered by the 3rd Member, in terms of Section 123 of The Electricity Act, 2003:-

"*1. Whether charges for the stand-by of 550 MVA provided by the MSEB need to be shared by the TPC and the REL in the ratio of 2:1?*

2. Whether the spinning reserve has any relevance to the stand-by support for the REL?

3. *Whether the spinning reserve of 317 MVA is to be considered for the purpose of calculating the stand-by charges payable by the REL to the TPC and that too at zero cost?"*

9. After the said reference, notices were issued and further arguments were advanced on behalf of the appellant, M/s.Tata Power Co. Ltd. (TPC for brevity) as well as on behalf of the first respondent, M/s.Reliance Energy Ltd. (REL for brevity). Respondents 2 to 17 have not taken part in the proceedings before the 3rd Member.

10. Heard Mr.Iqbal Chagla, learned senior counsel appearing for the appellant along with Mr. Darius J. Khambatta, Ms.Pragya Baghel, Mr. P. A. Kabadi Advocates and Mr.S.V.Doijode. Heard Mr. J .J. Bhatt, senior advocate appearing along with Ms. Anjali Chandurkar and Mr. Syed Naqvi, advocates for the first respondent. Both sides made their submissions. On behalf of both sides it was represented that they shall submit written submissions within a week from 02.11.2006. It is noticed that both sides did not file their written submissions. However, on behalf of the first respondent, M/s. Reliance Energy Ltd., written submission was submitted only on 28th November, 2006. The appellant has not chosen to submit its written submissions, till 8.12.2006 though the Deputy Registrar of this Appellate Tribunal reminded the counsel on record for

the appellant on more than three occasions. As the appellant had omitted to file its written submissions for reasons best known, the third Member proceeded further to answer the reference.

11. Taking into consideration of the pleas advanced, materials placed, arguments submitted during hearing, and on a careful consideration of the entire matter and various contentions advanced in the appeal and the differing judgments, the reference is answered by the 3rd Member by the following JUDGMENT:

12. Mr. Iqbal Chagla, learned senior counsel appearing for the appellant contended that, the conclusions of both the Hon'ble Chairperson and the Technical Member are neither correct nor legally sustainable and the 3rd Member may or is required to take a different view from the said two differing judgments. The learned senior counsel contended that the Judgment rendered by both the Members are not correct and not acceptable to the appellant and that the appellant is challenging the views taken by both the Hon'ble Chairperson and the Hon'ble Technical Member. It is further contended that the entire approach and conclusions of the two differing members are not according to law, nor it reflects the correct legal position nor it is in conformity with the decision of the Hon'ble Supreme Court as seen from its Judgment and earlier orders.

13. Per contra, Mr.J.J.Bhatt, the learned senior counsel appearing for the 1st respondent REL contended that they accept the Judgment and views of the Technical Member, while contending that the Judgment and views of the Chairperson are not sustainable and not to be accepted and that the Judgment of the Technical Member deserves to be preferred and accepted by the third Member.

14. Mr. J.J. Bhatt senior counsel appearing for the 1st respondent REL contended that the construction placed on Section 123 of The Electricity Act 2003 by Senior Counsel Mr.Chagla is neither tenable nor sustainable and that the only option open for the 3rd Member, is to answer the points referred, by accepting one of the views alone and a third view shall not be taken or resorted to in this reference nor it is legally permissible to take a 3rd view. The learned counsel for the first contesting respondent relied upon the pronouncement of the Patna High Court in *Anantram v. Chand Income Tax Comm. Reported in 1953 23 1TR 505* (DB) and Judgment of Punjab & Haryana High Court in *Commissioner of Income Tax v Bhai Sham Sher Singh & Sons, reported in 179 1TR 538 (DB).*

15. Before proceeding with the discussions on the points of difference referred for opinion, the amplitude of Section 123, the scope and/or powers of the third Member to whom

reference is made has to be examined. It is essential to refer to Section 123 of The Act to consider its amplitude and legislative intendment. Section 123 of the Act reads thus : -

> *"123.* ***Decision to be by majority*** *: If the Members of the Appellate Tribunal of a Bench consisting of two Members differ in opinion on any point, they shall state the point or points on which they differ, and make a reference to the Chairperson of the Appellate Tribunal who shall either hear the point or points himself or refer the case for hearing on such point or points by one or more of the other Members of the Appellate Tribunal and such point or points shall be decided according to the opinion of the majority of the Members of the Appellate Tribunal who have heard the case, including those who first heard it."*

16. As seen from Section 123, if two-members, who constituted the bench of the Appellate Tribunal, differ in their opinion on any point, they shall state the point or points on which they differ and make a reference to the Chairperson of the Appellate Tribunal. On such reference, the Chairperson who shall either hear the point or points himself or refer the case for hearing on such point or points by one or more of other Members of the Appellate Tribunal. Such point or points so referred shall be decided according to the opinion

of the majority of the Members of the Appellate Tribunal, who heard the case, including those who first heard it.

17. Section 123 of The Electricity Act 2003 is clear and there is no room for ambiguity. There is nothing to indicate that the third member could take a third view, if, such a course is allowed, it would mean not an answer to the reference but it would amount to deciding the lis independent of the reference arising out of two differing views. Such a construction and an approach is not contemplated in terms of Section 123 of The Act. On a reading of Section 123, this member is of the considered view that the course or the only course open is to accept one or the other view and not to take a different view or a third view.

18. In other words, it is impermissible for the third member to take a third view from the two differing views of the Members at whose instance the reference arises. The Division Bench of the Patna High Court, while construing the Section 5(A) of the Income Tax Act, which is in pari materia with Section 123 of The Electricity Act 2003, in *Hanutram Chandanmul Vs. C.IT (1953) 231 I.T.R. 505 (Patna)* ruled that the correct interpretation would be, the 3rd Member to whom the case is referred may only agree with one or the other differing members and it is not open to him to take a third view.

19. The Division Bench of Punjab & Haryana High Court in *Commissioner of Income Tax Vs. Bhai Shamsher Singh* reported in *179 1TR 538* while construing Sub Section (4) of 255 of The Income Tax Act 1961 observed on the facts of the said case that since the 3rd Member has not answered the question of limitation referred and the limitation remained undecided and there being no majority decision of the Tribunal on the facts of the case, the Division Bench of the High Court remitted back the case to the Tribunal for hearing of the entire appeal afresh and in accordance with law.

20. On a plain reading of Section 123, the point that has been referred has to be answered and the difference is to be resolved by a 3rd Member by agreeing with one or the other Member of the bench, who differed among themselves and made the reference. The construction placed by Mr. Chagla, learned senior counsel appearing for TPC on Section 123 is not acceptable to the third member and the course suggested by Mr. Chagla will lead to a situation where the point or difference remains unresolved as there will be no majority opinion with respect to the difference referred for the opinion of the 3rd Member.

21. Contextual interpretation of Section 123 will be the purposeful interpretation, which is required to be placed on Section 123 of The Act. In *Nathi Devi v. Radha Devi*

Gupta, (20050 2 SCC 271 : AIR 2005 SC 648, the Hon'ble Supreme Court held that the interpretative function of the Court is to discover the true legislative intent and it was held thus : -

"The interpretative function of the court is to discover the true legislative intent. In interpreting a statute the court must, if the words are clear, plain, unambiguous and reasonably susceptible to only one meaning, give to the words that meaning, irrespective of the consequences. Those words must be expounded in their natural and ordinary sense. In such a case no question of construction of statute arises, for the Act speaks for itself. Literal interpretation should be given to a statute if the same does not lead to an absurdity. Even if there exists some ambiguity in the language or the same is capable of two interpretations, it is trite that the interpretation which serves the object and purport of the Act must be given effect to. In such a case the doctrine of purposive construction should be adopted. Courts are not concerned with the policy involved or that the results are injurious or otherwise, which may follow from giving effect to the language used. If the words used are capable of one construction only then it would not be open to the courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act. In considering whether there is ambiguity, the court must look at the statute as a whole and consider the appropriateness of the meaning in a particular context avoiding absurdity and inconsistencies or unreasonableness, which may render the statute unconstitutional. Moreover, effort should be made to give effect to each and every word used by the legislature. The courts always presume that the legislature

inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect. A construction which attributes redundancy to the legislature will not be accepted, except for compelling reasons such as obvious drafting errors."

22. The Hon'ble Supreme Court in Reserve Bank of India v. Peerless General Finance & Investment Co. Ltd., (1987) 1 SCC 424 held that the interpretation must depend on text and context. In that respect it has been held thus : -

"Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be

construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place."

23. In special reference No.1 of *2002 INRE Gujarat Assembly matter reported in 2002 (8) SCC 237* Hon'ble Mr. Arijit Pasayat J speaking for a larger Bench, while agreeing with the majority view of the larger bench, ruled thus :

"**136**. *In providing key to the meaning of any word or expression the context in which it is said has significance. Colour and content emanating from context may permit sense being preferred to mere meaning depending on what is sought to be achieved and what is sought to be prevented by the legislative scheme surrounding the expression. It is a settled principle that in interpreting the statute the words used therein cannot be read in isolation. Their colour and content are derived from their context and, therefore, every word in a statute must be examined in its context by the word "context". It means in its widest sense as including not only other enacting provisions of the same statute but its preamble, the existing state of the law, other statutes in pari materia and the mischief which the statute intended to remedy. While making such interpretation the roots of the past, the foliage of the present and the seeds of the future cannot be lost sight of. Judicial interpretation should not be imprisoned in verbalism*

and words lose their thrust when read in vacuo. Context would quite often provide the key to the meaning of the word and the sense it should carry. Its setting would give colour to it and provide a cue to the intention of the Legislature in using it. A word is not a crystal, transparent and unchanged; it is the skin of living thought and may vary greatly in colour and content according to the circumstances and the time in which the same is used as was observed by Holmes, J. in Towne v. Eisner.

137. *The following passage from* Statutory Interpretation *by Justice G.P.Singh (8th Edn., 2001 at pp. 81-82) is an appropriate guide to the case at hand:*

" 'No word', says Professor H.A.Smith 'has an absolute meaning, for no words can be defined in vacuo, or without reference to some context'. According to Sutherland there is a 'basic fallacy' in saying 'that words have meaning in and of themselves', and 'reference to the abstract meaning of words', states Craies, 'if there be any such thing, is of little value in interpreting statutes' … in determining the meaning of any word or phrase in a statute the first question to be asked is – 'What is the natural or ordinary meaning of that word or phrase in its context in the statute? It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature, that it is

proper to look for some other possible meaning of the word or phrase.' The context, as already seen in the construction of statutes, means the statute as a whole, the previous state of the law, other statutes in pari materia, the general scope of the statute and the mischief that it was intended to remedy."

24. As already pointed Section 123 of The Electricity Act 2003, provides, in case of difference for a reference to a third member on such point/s, while Section 392 of the Code of Criminal Procedure Code 1973, which provides for identical situation provides thus:

Section 392 : Procedure where Judges of Court of Appeal are equally divided :

" When an appeal under this Chapter is heard by a High Court before a Bench of Judges and they are divided in opinion, the appeal, with their opinion, shall be laid before another Judges of that Court, and that Judge, after such hearing as he thinks fit, shall deliver his opinion, and the judgment or order shall following that opinion;

Provided that if one of the judges constituting the Bench, or, where the appeal is laid before another Judge under this section, that Judge, so requires the appeal shall be reheard and decided by a larger Bench of Judges."

25. While construing Section 392 of the Code of Criminal Procedure, a full Bench of the Hon'ble Supreme Court after reviewing the earlier pronouncements, in *Radha Mohan Singh Vs. State of U.P. reported in 2006 (2) SCC. 450* held thus:

"Section 392 Cr.P.C. lays down that when an appeal under Chapter XXIX is heard by a High Court before a Bench of Judges and they are divided in opinion, the appeal with their opinions, shall be laid before another Judge of that Court, and that Judge, after such hearing as he thinks fit, shall deliver his opinion and the judgment and order shall follow that opinion. The settled position being that the third judge is under no obligation to accept the view of one of the judges holding in favour of acquittal of the accused either as a rule of prudence or on the score of judicial etiquette"

26. In view of the difference in the language between section 392 of The Code of Criminal Procedure and Section 123 of The Electricity Act 2003, the only course open to the third member is to answer the reference in terms of section 123 and it is not open to the third member, as has been provided in Section 392 of the Code of Criminal Procedure to proceed, as laid down in the above pronouncement of the Supreme Court.

27. In the light of the pronouncements referred above and the construction placed on Section 123 and the said contention advanced by Mr. Iqbal Chagla the learned senior counsel, deserves to be rejected.

28. Incidental aspects require consideration in this case as it will enable this Tribunal to understand and appreciate the nuances/niceties of technical aspects. The learned senior counsel appearing on either side had not addressed on these aspects despite this Tribunal posing questions, as obviously they have not been briefed on such technicalities. Further the learned counsel appearing on either side, in their respective indomitable style, repeated the legal conundrums and highlighted their contentions. Electricity, being a highly technical subject, it is essential to understand at least the minimum qualities of electron, scope of generation, transmission, distribution, basic services and other ancillary services required for maintenance of generation or operation and nature of services. It is also essential to refer and find out what is "Spinning Reserve" in the context of the case.

29. The Hon'ble Supreme Court has already ruled, what "stand-by" is in the judgment between the very parties, reported in BSES Vs. Tata Power in 2004 91) SCC 195. Hence it is unnecessary to develve or take upon the said expression herein for consideration.

30. The expression “Generation”, “Transmission”, “Distribution” are defined in The Electricity Act 2003 and also in the enactments which have been repealed and their popular meaning is well understood. The meaning of “Basic Service” and “Ancillary Service” requires to be referred. “Basic Services” are generation, energy supply and power delivery. Ancillary services are those functions performed to support the basic services of generation, transmission, energy supply and power delivery. Ancillary services are required for the reliable operation of the power system. Automatic generation reserve (spinning and stand-by) load flowing, voltage control and black start capability are some of the commonly recognized, ancillary services. The generators typically provided these ancillary services but it is for a price, either to be agreed or auctioned in a competitive market, as exist in various other countries.

31. In “Power System Restructuring & Deregulation” edited by Dr. LOI LEI LAI City University, London, “ancillary service” has been analyzed thus:

“Two important considerations in procuring ancillary services are the costs of providing the services and the values of the services to the system. Depending on the organizational structures in different electricity markets, ancillary services may be provided by the system controller or be purchased.

xx xx xx xx

Some ancillary services can be mandated; for example, all generators could be required to provide frequency control as a precondition of connecting to the network (unless the system operator wishes to encourage some generators to provide more than others). However, mandatory ancillary services provision is a little inconsistent with the objectives of unbundling. Similarly, charging for ancillary services using a bundled rate is not equitable to users since this does not reflect actual usage.

xx xx xx xx

Generation- based ancillary services such as spinning reserves and AGC can be made competitive and separate from the energy market on the transmission side, ancillary service provision, mainly reactive power, has to be priced differently from that on the generation side. However, reactive power support which relies on both generators and requirements and installation of compensating devices, is probably better provided by a contribution mandated equipment owned by the transmission provider."

As already pointed out above, in India, it is the beginning of restructuring and deregulation and open market is yet to develop with respect to ancillary services between Independent System Operators. However, days are not far off in India as IPPs and CPPs have come up in large scale and competitive market is developing at a speed.

32. Ancillary Services, plainly mean, are those functions performed to support the basic services of generating capacity, energy supply and power delivery. The Ancillary services are split up into different services, e.g. active reserve, reactive reserve and system re-start. Such ancillary services are required for the reliable operation of the power system. The "ancillary services" generally refer to power system services other than the provisons of energy. To be more specific, ancillary services are those functions performed by equipment and people that generate, control, transmit and distribute electricity to support basic services of generation, transmission and distribution.

33. The normal or general approach of pricing ancillary services within competitive electricity markets is based on fixed contracts in a certain time period between independent system operators and market participants, who are able to provide the required ancillary services.

34. A system is said to be in a secure state, if it is able to improve the load demand without avoiding the operating constraints in case of a likely contingency, such as on line or generator outage.

35. Generators will not provide ancillary services unless they are adequately compensated. However, in some cases, generators may be obliged to provide ancillary services to another generator and it may be obliged to provide ancillary services in order to be allowed to participate in the energy market. It is essential to provide and improve quality of service to consumers. It is equally important to maintain the system reliability. To improve reliability measure, being system security and a system is said to be in a secure state if it is able to improve load demand, without avoiding the operational constraints, in case of a likely contingency such as on line or generation outage/s.

36. Electricity markets are highly complex system that contains a number of interrelated markets in different stages, generation of energy, transmission of energy and providing ancillary services and different time frames, such as real time, hour ahead – day ahead as well.

37. Apparently there is no provison in The Electricity Act 2003 or the earlier enactments repealed by 2003 Act to evaluate the ancillary services and to assess the fair or market value of such ancillary services. The learned counsels appearing on either side are unable to lay their hands to any specific provison in the 2003 Act. This is because hitherto the entire system, be it independent or interconnected were wholly owned and operated by State undertakings or central

undertakings and probably with reciprocal arrangement. Further they were not anxious to provide quality service and outages remained till the very system rectified the outages and outages were very common and usual. The scenario has now changed by unbundling and private participation and the necessity to provide ancillary services of "stand-by" for assured and uninterrupted supply and instantaneous management of outages have arisen. It is for the legislature to undertake suitable legislative measures at the earliest in the interest of emerging competitive market by introducing amendments.

38. There is no doubt that the "stand-by" being provided by the appellant to the first respondent is an "ancillary service". Prima-facie it could be taken and held, on a perusal of the provisons of The Electricity Act 2003, the Act deals with basic services only and nowhere it deals with "ancillary services" as seen from preamble, various definition clauses and parts II to X of the 2003 Act. Section 61 and 62 of the Act do provide for tariff determination :

(i) for supply of electricity by a generating company to distribution licensee.

(ii) For transmission of electricity,

(iii) For wheeling of electricity

(iv) For retail sale of electricity

The above services are basic services. There is no provison in The 2003 Act for determination of tariff for ancillary services nor even the legislature has thought of the same.

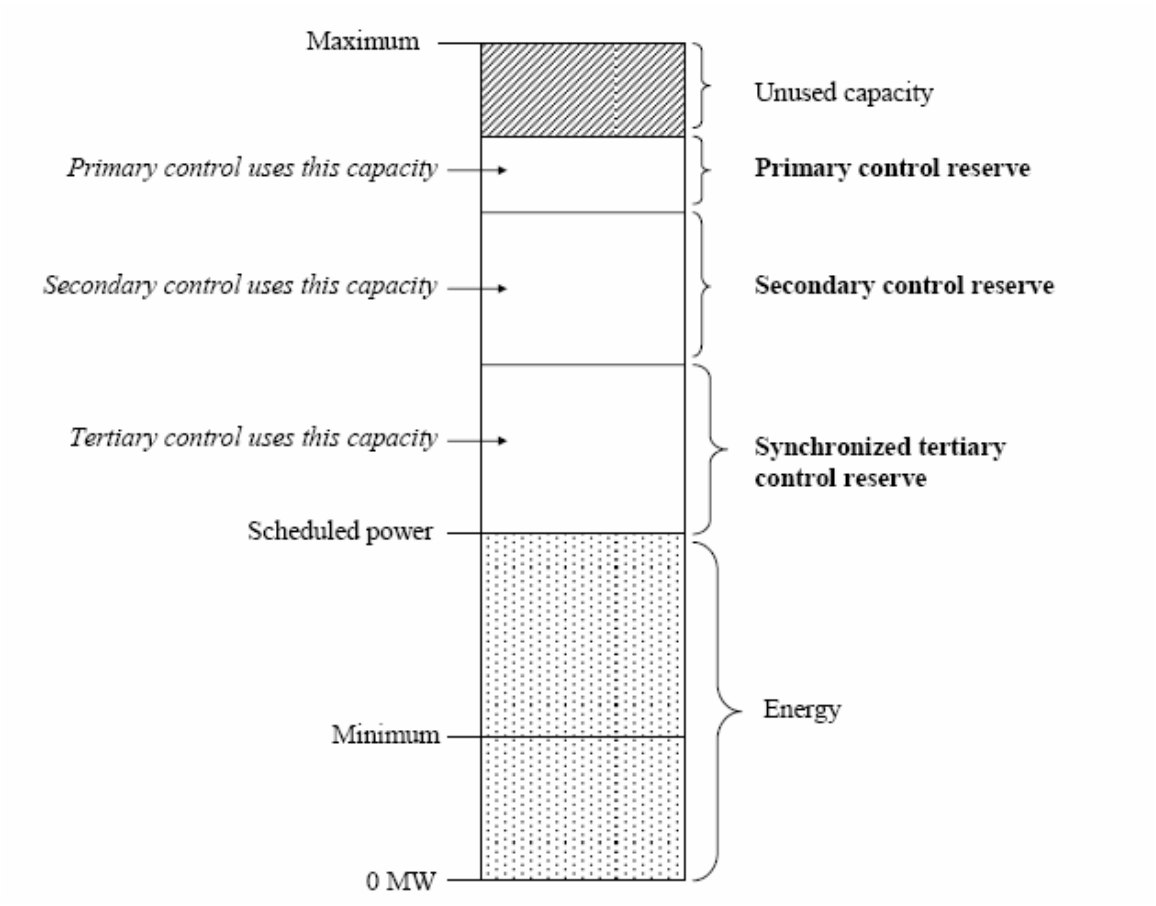
39. There is no enabling provison in the 2003 Act, which provides for evaluation or determination of tariff for such ancillary services such as provison of "stand-by" and alike. The duties of generating companies are spelt out in Section 10 in normal circumstances and Section 11 in extraordinary circumstances or for that matter, no other statutory provison has been introduced providing for ancillary service or for evaluating the said service. But all the provison of the Act do provide for or regulate the basic service of generation, transmission and distribution. The Hon'ble Supreme Court held that fixation of stand-by charges is part of tariff exercise. With due respect, it has to be pointed that the attention of the Hon'ble Supreme Court has not been drawn to the distinction between "Basic" and "Ancillary" service and absence of provisons in this respect for determination of cost/fair value of such "ancillary services" in the statutory enactments which were in force till recently. There is neither a statutory provison nor regulation nor guidelines in the 2003 Act with respect to evaluation of ancillary services or its fair value or determination of cost of providing such ancillary services.

40. Now it is essential to find out what is “Spinning Reserve”. “Spinning reserve” is the ability of an online generator (load) to increase (decrease) its output (consumption) in a short period of time. In the Grid code “Spinning Reserve” has been described as “Part loaded generating capacity with some reserve margin that is synchronized to the system and is ready to provide increased generation at short notice pursuant to dispatch instruction or instantaneously in response to a frequency drop.

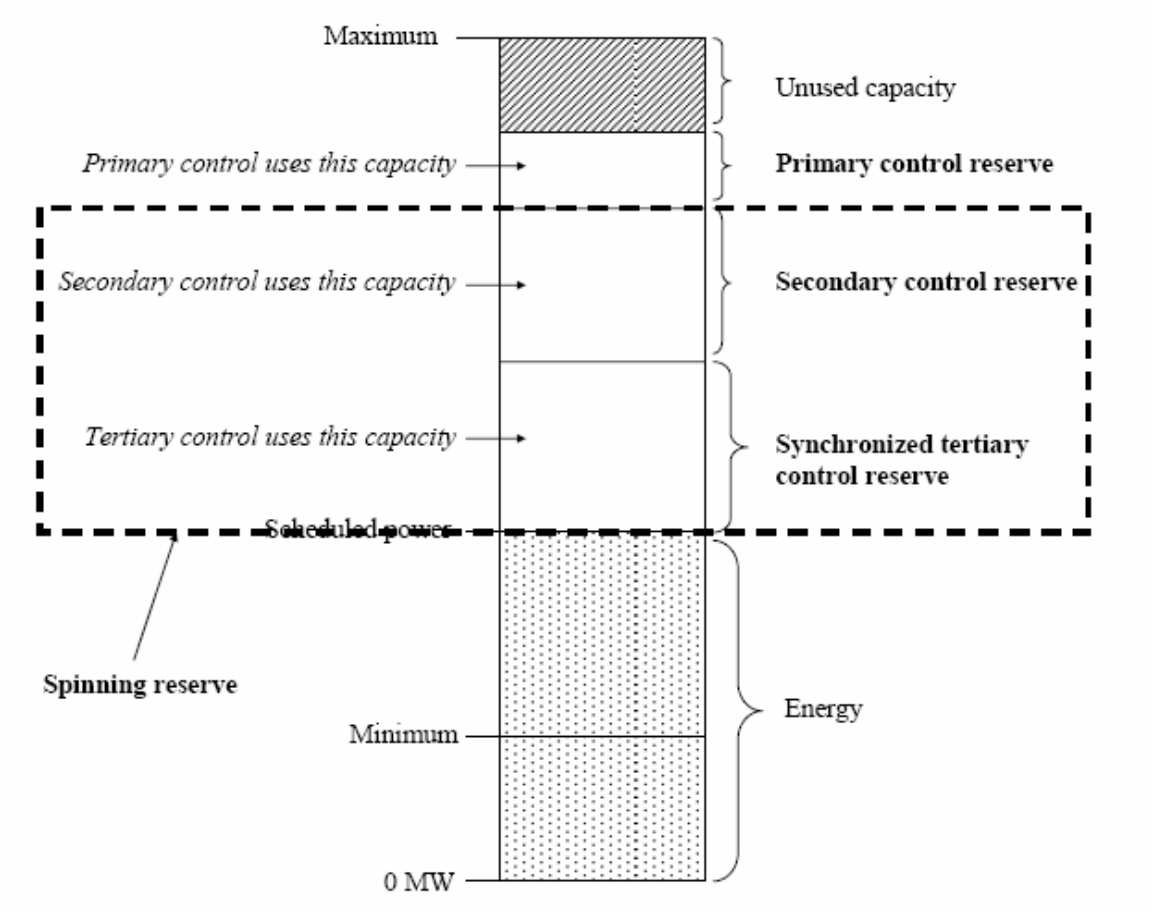
41. YANN REBOURS and DANIEL KIRSCHEN of The University of Manchester in their Release-1 dated 19.9.2005, have analysed, what is Spinning Reserve and has demonstrated the same by their diagrams and in the following lines.

42. **Reserves and Generator Capacity**

In theory, a generating unit could participate in all three levels of control. Figure hereunder illustrates how its capacity would then be divided. In practice, a generating unit might provide only one, two or none of these reserve services. The spinning reserve for a generating unit is represented as under:



43. The above is illustrated further by the next diagram.



43. The said author's definition of Spinning Reserve reads thus: "*the spinning reserve is the unused capacity which can be activated on decision of the system operator and which is provided by devices which are synchronized to the network and able to affect the active power*".

The above definition, being a definition by expert in the subject, deserves to be preferred in the absence of a statutory definition.

44. In the light of the above discussions this member will now be well founded to answer the reference and also proceed further, assess the value of standby service.

45. At the outset it has to be pointed out that no contract, much less a concluded and binding contract has been pleaded or established for providing the said service between the parties and it is not as if the value of the said service has been agreed to between the contesting parties at any point of time. Though it is an ancillary service, which the appellant provided hitherto and continue to provide to the first respondent, the said service is required to support the basic service of generation. It has to be acknowledged that without standby service, the first respondent as a generator and distributor may not have maintained uninterrupted and quality service all these days. It may be even an impossibility to provide uninterrupted service without "standby" provided by the appellant to the contesting respondent.

46. It has to be highlighted that no scientific method has been placed by either side in this respect except placing reliance on the directions issued by the State of Maharashtra, issued at the initial stage or at the beginning and that again is not by following any scientific method but more as a rule of thumb applied under certain circumstances and in the peculiar back ground. This aspect also has lead to the

divergence of views between the Hon'ble Technical Member and The Hon'ble Chairperson, each of them traced the historical background and assessed the quantum differently, which REL is held liable to pay to TPC, the provider of stand-by ancillary service.

47. The Hon'ble Supreme Court by its judgment, which is inter-parties was pleased to direct this Appellate tribunal to fix the cost / value of the ancillary service of providing stand-by power by the appellant TPC to the respondent REL, and this direction enables this Appellate Tribunal to fix the cost/fair value of the said stand-by service and determine the amount payable by REL to TPC.

48. Both parties submitted arguments to assist this Appellate Tribunal. However, it is to be pointed out that both the parties proceeded on an erroneous assumption that it is a basic service and lost sight of the difference between "basic service" and "ancillary service". Being an ancillary service, a fair cost of such service has to be assessed and evaluated based on first principles. Such fair cost need not necessarily be the market value but it has to be the reimbursement of the expenses or cost incurred and a marginal return for providing the ancillary service by the appellant to the respondent REL. If there are innumerable generators, by now the competition among them would have enabled to agree for the price for such standby.

49. The respondent REL, availed the ancillary service of standby from TPC. It is clear that standby service being provided by TPC, a generator, quo generator to REL and providing such service, in fairness and in equity deserves to be compensated or paid reasonably for such ancillary service. It may not be a just or fair conduct on the part of REL either to avoid or underestimate the value or significance of providing 'stand-by' service by TPC and availed by it.

50. The three points framed by the Two Hon'ble Member Bench, for reference require to be examined, considered and answered in the light of the above background and the historical background which lead to providing standby service by TPC, a generator to REL, another generator or by a generator to quo generator. If REL has not started generation of its own from the particular point of time, dispute might not have arisen. REL became an independent generator and distributor during 1993 and this has lead to the necessity of stand-by being provided by TPC and availed by REL. It is an ancillary service provided by a generator quo generator, who happened to be a distribution licensee as well for its "licensed area" under TPC.

51. The learned senior counsel Mr. Iqbal Chagla appearing for the appellant at the threshold made a statement and asserted the following as factually correct : -

(i) that, answer to points 2 and 3 will determine the first of the points referred for opinion

(ii) the authority to fix/determine the cost of stand-by is conferred by the Hon'ble Supreme Court

(iii) that 550 MVA stand-by provided by MSEB and availed by the appellant TPC and payment being made thereof is not in dispute and it is not the subject matter of any controversy as it is by agreement between them

(iv) that TPC do not require 550 MVA stand-by as it owns a number of generating stations, and its total generating capacity has increased considerably in course of time and it has already taken steps to oust its liability to pay standby charges to MSEB

(v) that 275 MVA stand-by from MSEB is sufficient for the appellant TPC.

52. Having made the above statement, the learned senior counsel referred to orders of MERC, which has since been set aside, and contended that the formula adopted by MERC is unintelligible, violative of principles of natural justice, that the formula of pooling all available MVA has been set aside by the Hon'ble Division Bench of the Bombay High

Court, that the acceptance and adoption of C.E.A.'s Report and formula has also been set aside and that the judgment of the Supreme Court holding 317 MVA surplus should be taken into account with respect to TPC guaranteeing stand-by to REL, and MSEB being the common service provider has to be borne in equal moieties.

53. The learned senior counsel took this Single Member Bench through the two differing judgments and made his submissions. According to the learned senior counsel appearing for the appellant, the views and conclusions of the Hon'ble Technical Member as reflected in his judgment as well as the Chairperson as reflected in his differing judgment do not reflect the correct legal position and the answer in this reference has to be, a third view, which would be just and reasonable. Mr.Chagla, advanced persuasive arguments while referring to various portions of the differing judgments and made his submissions.

54. Per contra, Mr.J.J.Bhatt, senior counsel appearing for the first respondent REL contended that the contentions advanced on behalf of the appellant is unsustainable, that the Hon'ble Supreme Court has neither laid down the principle nor had laid down the method of sharing as contended by the appellant, that the view taken by the Hon'ble Chairperson in directing the division of sharing at the ratio of 2:1 is not correct nor it is acceptable to the

respondent, that the view taken by the Hon'ble Technical Member being fair and reasonable, deserves to be followed, that it is reasonable to concur with the view of Hon'ble Technical Member whose view also goes along with the view of MERC, and that the reference may be answered by concurring with the conclusions and view of the Hon'ble Technical Member. The learned senior counsel for the first respondent also referred to various portions of the differing judgment and made his submissions in detail.

55. With respect to factual matrix as narrated in the two separate judgments there is no controversy so also with respect to earlier proceedings before the Maharashtra Electricity Regulatory Commission, and adjudication by Hon'ble Bombay High Court, as well as their orders / judgments.

56. The present appeal has been preferred by appellant M/s.TPC seeking to set aside the proceedings in Case No. 7 of 2000 dated 31st May, 2004 on the file of the MERC and for directions directing REL to pay stand-by charges in the same ratio as charged by the 2nd respondent MSEB in relation to stand-by facility of 550 MVA provided by the said second respondent to the appellant TPC. The appellant has also prayed for consequential directions directing the 1st respondent to pay Rs. 80.65 Crores with interest and DPC

and in all an aggregating to pay Rs. 289 Crores and for other consequential directions.

57. There is no dispute as to the details of arrangement/agreement entered between appellant and MSEB. Admittedly the inter connection was effected on 29.06.1992 and the 1st respondent confirmed that it will evacuate power from its Dahanu generating station by its own 220 KV transmission line, at the inter-connection with TPC via 220 KV line of the appellant and receiving standby power. Thereafter the appellant approached MSEB for review of stand-by facility and cost thereof on 02.01.1995. The various material dates and events as extracted by the Hon'ble Technical Member in pages 8 to 25 of his Judgment are also not in dispute. The details of licence of the appellant as well as 1st respondent as extracted by Technical Member are also not in dispute. It is the stand of the appellant that the appellant do not require 550 MVA stand-by and if at all it only requires 275 MVA standby for its generating system. The appellant herein has chosen to withdraw an appeal preferred in this behalf with respect to its claim of being relieved of standby by MSEB.

58. The learned senior counsel appearing for the appellant referred to Para 18 of the Judgment of Hon'ble Supreme Court in Civil Appeal No. 8360, 8361, 8362 & 8363 of 2003 dated 17th October 2003 and contended that the quantum

of stand-by charges which the appellant is entitled to recover from the 1st respondent stands concluded and that this Appellate Tribunal has to innocently follow the same. The material portion of the Supreme Court Judgment which the said learned senior counsel relied upon reads thus :

"18. 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 alternate 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 drawal of electricity energy. The same is the case with BSE 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."

59. The contention advanced on behalf of the appellant, while placing reliance upon the above passage of the Hon'ble Supreme Court Judgment, with respect to the learned senior counsel, deserves to be rejected on a cursory reading of the above said judgment and it cannot be countenanced. If that is so simple, as sought to be contended, then the

Hon'ble Supreme Court would have resolved the dispute by passing final orders and there is no reason to remit the dispute for adjudication. The construction placed on the above passage on behalf of the appellant is a misconception and cannot be sustained.

60. In fact, in Para 20 of the Judgment the Hon'ble Supreme Court posed the question as under :

" In substance, the dispute is what should be paid by BSES to TPC for the stand-by facility provided by it ?"

This is the subject matter of the dispute between the parties, which has been directed to be decided in the order as directed and the appeal thereof before by this Appellate Tribunal.

61. The learned senior counsel for the appellant contended that the view expressed by Technical Member in Para 82, 86, 87 of his Judgment do not reflect the correct legal position and therefore deserves to be differed. With respect to Para 87, the learned counsel pointed out omission of the last line in the said Para of the Judgment and it was contended that the entire premises on which the Technical Member has proceeded runs counter to the pronouncement of the Hon'ble Supreme Court in particular to Para 18 of the Judgment of Hon'ble Supreme Court. Such a contention

advanced, on behalf of the appellant cannot be countenanced and the Hon'ble Technical Member has not proceeded contra to Hon'ble Supreme Court Judgment, as sought to be made out.

62. The learned senior counsel appearing for the first respondent rightly pointed out the fallacies in the arguments advanced by the learned counsel for the appellant. The contention advanced by Mr.J.J.Bhatt, in this respect deserves to be sustained. The learned counsel for the appellant also referred to other paragraphs of the Judgment of the Hon'ble Technical Member and sought to reiterate that the view of the Technical Member runs counter to the Judgment of the Hon'ble Supreme Court. This contention deserves to be rejected as neither in substance nor in reality there is anything counter which could be pointed in the Judgment of Hon'ble Technical Member in this behalf. Every presiding officer has his style of expressing himself in the judgment and it would not be appropriate to read a sentence here and there, torn out of context and advance such a contention. I am not able to persuade myself to sustain such an argument advanced on behalf of the appellant and I do not find anything contra to the pronouncement of Hon'ble Supreme Court in the Judgment of the Hon'ble Technical Member, as sought to be suggested by the appellant.

63. Nextly, Para 16 of the Judgment of the Hon'ble Technical Member was referred and commented. In Para 16 it has been recorded thus :

"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.i. 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."

64. Though a half hearted comment was sought to be leveled on behalf of the appellant with respect to the above passage, in my view the Hon'ble Technical Member has recorded the facts as they were placed on record and on the admitted facts, as represented before him. There is no challenge or dispute to the said facts as recorded by Hon'ble Technical Member. Hence, the comment sought to be advanced with respect to the above passage on behalf of the appellant is uncharitable and deserves to be rejected as devoid of substance.

65. The learned counsel also referred to Para 50 of the Order of MERC, where MERC on the basis of materials placed before it calculated the stand-by charges payable. With reference to above, it is sought to be contended by the appellant that assuming for the purpose of arguments that the cost of stand-by provided by the appellant to the 1st respondent, which cost the appellant has already collected from its consumers and therefore consequently the benefit of the same should go to consumers of TPC and it shall not be asked to give up standby charge for 275 MVA. This contention also deserves to be repelled as such a contention proceeds on a misconception. It was pointed out that the entire cost of generation including standby for 550 MV paid to MSEB has been realized by the appellant TPC by it being allowed to pass thru. This is fairly accepted by appellant as a fact.

66. The learned counsel for the appellant nextly referred to Para 72 of the Judgment of the Hon'ble Chairperson and made his submissions. Para 72 of the Judgment of the Hon'ble Chairperson reads thus :

"*50. xxx. It can be seen from the working at (i) above that the Fixed Cost of TPC for generation for 1999-2000 is Rs. 63,544 lakhs and TPC's total capacity available in Greater Mumbai is 1823 MVA. Therefore, the Fixed Cost per MVA for 1999-2000 works out to Rs. 35 lakhs and the Fixed Cost per KVA per month is Rs. 290.*

Next, since TPC's total capacity in the city is 1823 MVA and the Maximum Demand catered to by it is 1507 MVA; TPC's Reserve capacity for meeting the Standby requirements works out to 317 MVA (rounded off). At the rate of Rs.35 lakhs per MVA per annum, the cost of TPC's Reserve capacity is Rs.11033 lakhs. The cost of MSEB's standby capacity of 550 MVA is Rs. 36300 lakhs. Therefore, the total Standby Charges for Greater Mumbai amount to Rs. 47333 lakhs."

67. Even in respect of the ratio of 2:1, the appellant's stand is that it is not acceptable and that the 1st respondent should be directed to share 50% of the stand-by charges, which the appellant is paying to MSEB and any other view taken is untenable, unjust and is not acceptable to the appellant. These aspects require to be considered.

68. Mr. J. J. Bhatt, the learned counsel appearing for the 1st respondent, REL contended that the appellant will not at all be justified in seeking one half or 50% of the stand-by charges, which the appellant is paying to MSEB, since the consideration, which weighed with appellant, when MSEB dictated the terms and rates were totally alien to a fair rate or value payable for such ancillary service of providing stand-by facility. MSEB has unilaterally fixed stand-by charges, and the appellant without any demur and for reasons of its own, accepted and paid the standby charges as fixed by MSEB.

69. It has to be pointed out that there is no legal nor a fair basis with respect to the quantum of stand-by charges payable by the appellant to MSEB and the 1st respondent shall not be burdened with such a rate, which it has been resisting from the beginning. The entire amount of stand-by charges paid by appellant to MSEB has already been factored in its tariff, which the appellant has recovered from its consumers as well as bulk purchasers including REL so also fixed cost has been realized by appellant. In terms of Section 62, it is pointed out that the TPC has to earn a reasonable return and not to enrich itself unduly or unjustly. It is contended by the learned counsel for the 1st respondent that the stand-by charges has to be estimated on a fair scale and it shall not be of the same basis or rate at which MSEB has been extracting from the appellant for stand provided by it.

70. It is also contended by Mr. J.J.Bhatt, the learned senior counsel appearing for REL, while referring to portions of the Supreme Court Judgment, the Hon'ble Supreme Court has not laid down any principle based on which the quantum of standby charges payable by the 1st respondent REL to the appellant could be arrived at. The learned counsel for the 1st respondent referred to the Order of the MERC and contended that the 1st respondent accepts the amount of stand-by charges either as arrived by MERC or as arrived at by Hon'ble Technical Member. There is merit in this submission. It is further contended that the Hon'ble

Chairperson has proceeded as if the 1st respondent is liable to share the stand-by charges at the rate or ratio of 1:1 merely because the stand-by provided by the appellant TPC to REL is one half of the quantum of stand-by provided by MSEB to the appellant. Mr.J.J.Bhatt learned senior counsel for REL also contended that the view taken by Hon'ble Chairperson is not correct and in particular the concept of 'spinning reserve' rejected by the Hon'ble Chairperson is not sustainable in law nor it is acceptable.

71. It is rightly pointed out that the stand-by charges being paid by appellant to the MSEB is not based on any criteria or based upon any principle or fixed by following one of the standard parameters nor it is scientifically assessed by evaluating the cost of stand-by service rendered by MSEB to TPC. It is rightly pointed out that the quantum of stand-by charges which TPC has been directed to pay, which TPC has been paying without any demur to MSEB is on a fortiori consideration and reasons and not based on any principle or evaluation of cost of such service by any well tested or approved method or formula. The appellant having chosen to pay as demanded by MSEB for obvious reasons of its own business promotion cannot compel the 1st respondent REL also to share or contribute.

72. It is also rightly pointed out by Mr.J.J.Bhatt, the learned senior counsel, that whatever charge the appellant has paid

to MSEB has been factored into its tariff and the entire amount so paid as stand-by charge, be it legal or be it excessive or highly excessive, had already been realized by the appellant from its consumers directly and from consumers of the appellant, where the appellant, operates as a bulk purchaser and engages in retail distribution of the power generated by TPC. The entire fixed cost of generation has also been realized by appellant. Any further amount earned by appellant from first Respondent will be an additional return, which it may not be normally entitled or atleast a portion of it. Therefore, it is rightly contended that the appellant is not liable to pay 50% contribution as claimed by the appellant or at the rate at which the appellant pays to MSEB and in proportion to standby availed. There is not only substance but also merit in the said contention advanced by Mr.J.J.Bhatt.

73. It is contended that the Hon'ble Chairperson has fixed the liability at ratio 2:1 presumably on the basis of quantum of standby availed is exactly one half of the stand-by availed by the TPC from MSEB and on historical background it is sought to be justified by appellant, which has found favour with the Hon'ble Chairperson. Such an approach, with respect it is to be pointed out is not to be countenanced as it is factually not correct and such a view will be against the basic principle and would enable the appellant to recover what it is not entitled to as a provider of standby and as it

may also result in unjust enrichment. The contrary view of the Hon'ble Chairperson, in the considered view of this member is not at all acceptable.

74. At the risk of repetition, it is to be pointed out that the appellant M/s Tata Power contended that the computation by the Hon'ble Technical Member as well as Hon'ble Chairperson are incorrect, while according to the respondent the computation by the Hon'ble Technical Member is correct and the computation made by the Hon'ble Chairperson also ought not to be accepted.

75. It is to be pointed out, that Hon'ble Chairperson has proceeded on the assumption or basis that standby support is linked to the size of the single largest generating unit, while placing reliance on the judgment of the Hon'ble Supreme Court in the case between the same parties, for his computation. The learned counsel for the first respondent rightly pointed out that there is nothing in the judgment of the Hon'ble Supreme Court which support the said view of Hon'ble Chairperson. There is not only force but also merit in the said submission of Mr. J.J. Bhatt, the learned counsel appearing for the first respondent.

76. Conceedingly, the appellant needs a standby support of 550 MVA from MSEB. The respondent also requires standby support of 275 MVA from TPC. It is rightly highlighted that

if standby support is required simultaneously both by TPC and REL, then the total standby to be provided would be of the order of 825 MVA and not either 550 MVA or 275 MVA. If such situation arises then it may be that TPC may decline or it may not be possible to provide standby support to REL, much less in excess of 1/3rd of 550 MVA viz. 183 MVA approximately, as the appellant has to necessarily use the balance as a standby support for itself. It is self before service of standby. Hence with due respect this member begs to differ and hold that there is no basis for adopting the ratio of 2:1 as concluded by the Hon'ble Chairperson. If at all a simplistic ratio is to be adopted, it should be in relation to total generating capacity of TPC and REL respectively.

77. There is no dispute that the total generating capacity of TPC is in the order of 1777 MW while that of REL is 500 (250 MW each of two generators) and the ratio would be 78:22%. It has to be pointed out that the said percentage is close to the proportion adopted by MERC as well as by the Hon'ble Technical Member, with whose view this member respectfully concur and accept as the correct view.

78. It has to be pointed out that TPC, even according to its own stand, can very well provide standby support to REL from its spinning reserves. In other words TPC is not obliged to provide standby to REL out of the standby arrangement

provided for by MSEB to TPC and at times it is an impossibility as well. Such a contingency is a rarity but it cannot be ruled out. The view that standby is to be exclusively provided by TPC to REL out of the standby support of 550 MVA provided by MSEB, as concluded by the Hon'ble Chairperson, with respect, this member beg to differ and it is not acceptable on the facts of the case.

79. In the considered view of this Member, the fixation of standby charges payable by REL is a matter of reimbursement of cost of stand by service availed by REL to TPC, is the relevant question and not a determination of ratio or proportion of the standby charges which is being paid or payable by TPC to MSEB.

80. There is nothing to show on record that the initial determination of Rs. 3.5 crores is based on a proportion of sharing. That apart as rightly made out by REL and admitted by TPC right-through, TPC has been providing standby support to REL from its spinning reserve and therefore the question of fixing of ratio of sharing between TPC and REL does not arise at all by all standards. Admittedly TPC claims, that it has valuable spinning reserve and it is the actual and factual sources of standby for REL from TPC. The standby provided by MSEB to TPC and TPC to REL are entirely from two different sources with different economic consideration, and the standby paid by TPC has

been factored into the tariff of TPC. To hold that the charges of standby payable by TPC to MSEB or REL to TPC shall be on equal footing and in that proportion cannot be countenanced, as conceedingly providing standby in both the cases on most occasions are from different source and actual cost for such providing service, and source and provision are different and distinct and not even comparable. In this respect, there could be no second opinion nor there is material to take a different view from the view taken by the Hon'ble Technical Member.

81. It is to be pointed that the total availability of standby arrangement by MSEB is only 550 MVA and therefore it may not be possible for providing standby support of 550 MVA to TPC and TPC providing 275 MVA to REL. REL obviously refused to subscribe itself to standby support to the extent of 275 MVA. The requirement of standby for the appellant and the first respondent are of different quantities and such requirement may arise either simultaneously or at different timings depending upon outages in the generating plant that may occur. Such occurrence of outage is neither man-made nor it is possible to control. If without considering the availability of spinning reserve the ratio of 2:1 is to be adopted, then the appellant TPC would be entitled to restrict the standby to REL to the extent of 183.33 MVA since TPC on its own shall be required to utilize standby support of MSEB to the extent of 366.67 MVA (being 550 X

2/3). Since TPC may decline standby support to REL to the extent of 275 MVA, as rightly pointed out by the learned counsel for the first respondent, the ratio of 2:1 fixed by the Hon'ble Chairperson, is not acceptable to this Member in any view of the matter and this member respectfully beg to disagree with the said conclusion and finding.

82. It is also to be pointed out that much reliance has been placed on minutes of the meeting held by Government of Maharashtra on 29.6.1992, which was convened to establish linkage to REL with that of MSEBs' support to the TPC. It was also argued and it had also found favour with the Hon'ble Chairperson that the said meeting would mean, REL shall share the standby capacity reserved by TPC from MSEB in equal proportion. However, it has to be pointed out that the principles of agreement recorded between parties, no where mentions the so called standby to REL. The REL had objected and avoided the arrangement very rightly from inception. Further the orders of the Government of Maharashtra merely mentions that REL to take 275 MVA and not that 550 MVA to be divided between the two.

83. In other words, it is not for sharing of 550 MVA between TPC and REL as sought to be made out. Moreover the conduct of TPC in providing standby support from February 1998 to October 2000 to REL wherein nearly 70% of the

total demand of REL was factually met out of the TPC's spinning reserve contradicts the aforesaid stand and contention. This deserves to be highlighted. Therefore the inference drawn in this respect with respect is not acceptable to this member nor it could be countenanced. Right from the inception, REL has taken a different stand and has declined to subscribe itself to any agreement, nor it has accepted that it shall be contributing for one half of the standby which MSEB provides or bear one half of the cost. Such being the factual position, with respect, the view taken by the Hon'ble Chairperson in fixing the ratio at 2:1, do not command acceptance either on fact or on law in the considered view of this Member. With due respect to the Hon'ble Chairperson, this Member is not able to persuade himself to agree with the conclusions of the Hon'ble Chairperson.

84. The next question that may arise being, what should be fair and reasonable cost or payment, which the REL is liable to pay to TPC for the standby being provided by TPC to REL. As already pointed out excepting discussions by MERC in the earlier order, not much intelligible criteria or basis has been placed before me or before the forum below or before first Bench right through in this respect. The Hon'ble Technical Member while analyzing the value, such as cost of standby, has rightly and for valid reasons based the cost of standby provided from spinning reserve. In other words,

the Hon'ble Technical Member had taken a view that it was not acceptable to TPC to provide standby from its own spinning reserves, but factually also the same was provided from TPC's spinning reserve only instead of sourcing it from MSEB.

85. The assurance to achieve a targeted degree of reliability is not equitable in case of TPC generating system and REL generating system, as TPC is having a larger consumer load and more generating capacity apart from operating a number of generating units, when compared to REL. Hence TPC is placed at a much advantageous position in so far as sharing of cost of standby facility per MVA or per million unit of energy supplied is concerned.

86. As already pointed out there is no binding commercial arrangement between TPC and REL to provide standby support to REL or as to cost of such provison. Looking at from another angle also it is to be pointed out that once TPC has been entrusted to provide standby support to REL, naturally TPC has the flexibility to decide about the source of support to REL i.e. it can be out of MSEB support or from TPC's own reserves or a combination of these. The aggregate standby support available for REL is a combination of support that can be drawn from MSEB (as part of the standby support given to TPC) and reserve available with TPC from its own generation facilities. Out of

the option of TPC providing standby support from MSEB source, REL is entitled to a maximum support upto 275 MVA only and not beyond that.

87. It is a fact that during the period between February 1998 and May 2004, nearly 70% of the total standby support availed by REL from TPC was met out of TPC's spinning reserve. This fact is admitted by TPC. Secondly, that apart on many occasions the quantum of support required by REL was more than 275 MVA, going upto 503 MVA. It was therefore appropriate to account 317 MVA spinning reserve as part of the standby support available to REL, as seen from the order passed by MERC, it is seen that TPC had a spinning reserve of 317 MVA. This is how TPC was in a factually admitted position to extend support at times upto 592 MVA to REL. Therefore aggregate standby support of 592 MVA i.e.275 from MSEB and 317 from TPC's own spinning reserve was made or is available to REL.

88. It is admitted that, the standby support is an insurance to provide enhanced reliability to the generation facilities of generators. Therefore, the standby facility supports more than 1700 MW of generating capacity, consequently more million units of energy of TPC and 500 MW generating capacity therefore lesser million units of REL. Allocating the standby cost in the ratio of the generating capacity may be more just, appropriate and very reasonable than the ratio of

2:1 as the ratio of generating capacity will capture and balance the relative degree of cost of reliability extended to both generating systems.

89. Prices of electricity depend, inter-alia, upon the source of the supply. This is so because the cost of facility differs from one generator to another generator and also the pool of sources available in a given case or situation. In the case on hand, the cost of standby support made available to REL is bound to differ from the cost of standby support available to TPC, as the sources for the two are different and their cost is also not comparable. For TPC the source being MSEB, the cost would depend upon the cost demanded by MSEB, whereas in the case of REL source being TPC which is having pool of sources comprising its own spinning reserves as well supply from MSEB, cost would depend upon the cost of all those sources. The TPC had not even availed standby once from MSEB, yet it continues to pay as dictated by MSEB. In a regulated regime, while working out the cost of standby support for REL, it will be well justified in excluding the cost which has already been allowed to be recovered through tariff.

90. During the period from February 1998 to May 2004, the total standby support availed by REL from TPC was admittedly met out of TPC's spinning reserve or atleast 70%. Also, on more than 50% occasions the quantum of support

required by REL was more than 275 MVA, going up to 503 MVA. It was therefore appropriate to account 317 MVA spinning reserve as part of the standby support available to REL. From the facts as well from the order passed by MERC it is clear that TPC had a spinning reserve of 317 MVA. This is an admitted fact, which TPC cannot dispute as admittedly TPC provided standby to REL from its spinning reserve.

91. The cost of spinning reserves is fixed in nature and is independent of actual drawl of energy and such a cost had already been allowed to be recovered through the other component of tariff of TPC. Hence, its fixed cost is necessarily to be taken as zero. In the instant case taking a practical view and if at all, aggregate cost of standby facility made available by TPC to REL is therefore, 50% of the cost payable by TPC to MSEB for an aggregate standby facility of 592 MVA. This itself is an extra income or amount payable to TPC and it is definitely not lesser by all standards.

92. The TPC's services rendered as a generator, quo-generator to REL is an ancillary service and not a basic service. On fact standby is an ancillary service. Such an ancillary service has to be paid reasonably and cannot be the same cost as the cost of supply of power by a generator to a distributor or transmitter on par with basic service.

93. Conceedingly TPC has recovered through its tariff the entire cost of generation including fixed charges, fuel surcharge including the standby charges as they have all been factored into its tariff and it has realized the same. If at all, whatever that could be realized, by the provision of standby facility, as an ancillary service, it can be only an additional income or profit which the spinning reserve of the TPC may earn. In other words for the standby power which is provided out of spinning reserve, the value cannot be the same as supply of power. The approach of the Hon'ble Technical Member in this respect is acceptable and deserves to be preferred as against the view of the Hon'ble Chairperson.

94. At the same time it has to be pointed out that every endeavor should have been undertaken to work out the cost of providing standby by TPC to REL from its spinning reserve. But the appellant has miserably failed. It may be that including the spinning reserve, the cost has been realized by TPC through tariff including fixed cost and the standby which was provided by MSEB has already been factored into its tariff as well.

95. In the absence of any other scientific method, or acceptable basis or an acceptable formula, in the considered view of this member the view taken by the Hon'ble Technical Member in assessing the cost of standby payable by REL to TPC has to be taken as the fair and reasonable cost. We are

not in a position to find out nor it is clear nor anyone could spell out a formula as to how the standby charges payable by TPC to MSEB has been arrived at.

96. It is to be pointed out that the cost of standby paid by TPC to MSEB has been fixed by the rule of thumb and it is for a fortiori consideration that the said figure has been arrived at and the appellant, TPC has been demitting it without demur. It is not as if the charges payable for the said standby provided for by MSEB to TPC or the fair value of it or cost of it, has been assessed scientifically or by adopting any other formula or basic standard formula. That being the factual position in fairness, the appellant cannot seek the respondent to bear 50% of its liability, which it had accepted for a fortiori consideration. For reasons best known the TPC has chosen to withdraw the appeal, where it challenged the direction to continue standby of 550 MVA from MSEB and cost payable by it.

97. In the absence of any justification or reasonableness or fairness the appellant TPC will not at all be justified in seeking reimbursement of 50% of the standby charges, which the appellant is paying to MSEB. For the above reasons and in his considered view this member respectfully disagree with the view and judgment of the Hon'ble Chairperson and to concur with a view taken by the Hon'ble Technical Member.

98. The ancillary services are to be valued differently from the basic service of supplying power. What is an ancillary service, has been referred to supra and the standby being ancillary service, the appellant's claim at the rate at which the tariff has been fixed for its basic service of supply of electric energy cannot at all be sustained.

99. As already pointed out the Party who requires standby has to negotiate and arrive at consensus with the Provider of standby, which would be the best course for either side, as the provisions of The Electricity Act 2003 is wanting in this respect.

100. In the result the reference is answered holding that the view of the Hon'ble Technical Member is accepted as correct, fair and reasonable and with respect this member begs to differ with the view of the Hon'ble Chairperson and all the three points referred will stand answered accordingly. The third point is answered affirmatively in favour of Respondent REL and the remaining points 1 and 2 also are answered accordingly against the appellant TPC and in favour of the Respondent REL.

Post the matter before the first Bench for further passing further orders.

Pronounced in open court on this 13th day of December 2006.

(MR. JUSTICE E. PADMANABHAN)
JUDICIAL MEMBER

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