Before the Appellate Tribunal for Electricity
Appellate Jurisdiction

Appeal No 3 of 2008

Dated: May 12, 2008.

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

IN THE MATTER OF:

Reliance Energy Limited, …Appellant

Versus

Maharashtra Electricity Regulatory Commission & Anr.….Respondents

Counsel for the Appellant(s) : Mr. J.J. Bhat, Sr. Advocate,
Ms. Anjali Chandurkar &
Mr. Syed Naqvi.
Ms. Smieetaa Inna.

Counsel for the Respondent(s): Mr. Darius Khambatta, Sr. Advocate
Mr. Shrikant Doijode,
Mr. Parag Kabadi,
Ms. Ruby Sigh Ahuja ,
Ms. Pragya Baghel &
Mr. Abeer Kumar for Resp. No. 2
Mr. Buddy A. Ranganadhan
for Resp. No. 1

JUDGMENT

Per Hon'ble A.A. Khan, Technical Member

1. The Appellant, Reliance Energy Limited (hereinafter referred to as 'REL' or 'BSEB' as known earlier) has challenged the order of Respondent No. 1, Maharashtra Electricity Regulatory Commission (for brevity referred to as 'MERC'/'The Commission') passed on 12 Dec. 2007 in Case No. 7 of 2002 relating to petition filed by

Respondent No. 2, Tata Power Company Ltd. (for short 'TPC') whereby certain alleged outstanding dues on account of differences in energy rates between R. 2.09 per kwh ad Rs. 1.77 per kwh and shortfall in minimum off-take of energy claimed by 'TPC' from 'REL' (Reliance Energy Ltd. Which was earlier known as BSES) are allowed by the impugned order.

FACTS OF THE CASE

2. TPC has been a licensee to generate and supply electricity in Mumbai area for over eight decades and, inter alia, directly supplies power to railways, refineries, ports, commercial and domestic consumers and is the bulk supplier of power to distribution licensees namely BEST (Brihan Mumbai Electricity Supply and Transport Undertaking), a Public Limited Company and REL a private company in Mumbai region. Till 1995 when REL established a 500 MW power plant at Dahanu, Maharashtra, 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 bulk supply from TPC to REL was being made through a number of 33 KV/22 KV ports. The issues raised in this appeal arise from the Principles of Agreement (POA) reached on 31 Jan. 98 between TPC and REL leading to commencement of standby facility from TPC to REL through interconnection arrangement between their network systems and this Tribunal had an opportunity of examining the facts in detail while deciding an appeal in this regard earlier. In order to better appreciate and interpret the clauses of POA, it is essential to recapitulate events which had occurred prior to signing of POA.

3. The Appellant holds a distribution license since 1926 for supply of electricity to the consumers located in the suburbs of Mumbai. In 1976, the said license was amended to permit it to install a 500 MW power plant at Dahanu, Maharashtra. The said license was further amended in 1992 imposing 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 15th 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 Maharasthra is of the opinion that the Licensee has not duly carried Companies with the approval of the Central Electricity 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. (Emphasis supplied)

4. The Tata Power Company Ltd., Respondent No. 2, had an arrangement with Maharashtra State Electricity Board (MSEB) whereby standby capacity was being provided by MSEB to TPC in case of emergencies in TPC's system. In a meeting held on 29th June 1992 between TPC and REL, one of the terms of agreement in the said meeting was that TPC may provide standby capacity to REL from standby capacity reserved by TPC with MSEB and 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"

5. On 28th June 1996, MSEB gave a notice to TPC, inter-alia, revising its standby charges with effect from 1st October 1996 recoverable from TPC at the rate of Rs. 24.75 crore per month. TPC in turn revised its tariff recoverable from REL with effect from 1st January 1997, which was protested by REL. The standby facility to REL by TPC was to be provided through interconnection of TPC and REL systems. The TPC's revised tariff order was not approved by GOM.

6. Due to dispute on commercial terms between REL and TEC, though technical arrangements for interconnection between TEC and REL (required as part of the terms of amendments to the license in 1992) was completed but could not be established. 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.

7. With a view to address the dispute between REL and TPC, the Government of Maharashtra (GoM) appointed a Committee under the Chairmanship of Principal Secretary (Energy) of which the representatives of MSEB, TPC and REL were members. The representatives of TPC and REL, however, later disassociated from the committee. The said Committee in its report dated 01 Sep 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"*

8. 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."

9. 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.

10. 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."*

11. As per consensus arrived at before the then Dy. Chief Minister of Maharasthra, 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.

12. The Committee report also contained the following:

"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**"*

(iv) BSES has agreed to purchase 2875 MU and 6900 MVA demand from TEC on yearly basis. Less purchases by BSES will affect TPC commercially. The minimum offtake of power and energy by BSES should be properly regulated and recorded into power purchase agreement with BSES." (Emphasis supplied)

13. Thus, the cost of Standby Charges payable by REL to TPC worked out to be at the rate of Rs. 3.5 crores per moth (Rs. 42 crores per annum) was fixed for 1997-98 to ensure that both TPC and REL could achieve the reasonable return for the said year without change in tariff rate. The Committee's recommendations also included that the standby charge rate of TPC to REL should be lesser than MSEB's rate for standby to TPC as the later was based on zero exchange of energy whereas in the former REL had agreed to purchase 2875 MUs from TPC with maximum demand of 6900 MVA per annum and minimum guaranteed off-take through 22 KV/33 KV ports. It is observed that the energy rate to other licensee namely BEST was fixed at Ra. 1.77 per kwh during the relevant period

14. Taking into consideration the Committee's report, the GoM on 19th January 1998 ordered, inter-alia, that:

'5. TEC may charge stand by charges for 275 MVA supply to BSES

…

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 crore every month for stand by supply. On this basis, rate per KVA should be fixed and commercial agreement finalized.*

8. *Above standby charges are based on TEC's and BSES' electricity supply tariffs. The standby charges may be reviewed during tariff revisions in future.'* (Emphasis supplied)

15. On 31st January 1998, TPC and REL entered into a Principles of Agreement (POA) to achieve the interconnection at Borivali as per the GOM order dated 19th January 1998. Relevant terms of the POA are reproduced below:

"(2) BSES shall pay to TEC for the 220 KV interconnection at Borivali Rs. 3.5 crore per month as stand-by charges for 275 MVA as per Government orders.

(3) BSES off-take of energy at 220 KV Boravli (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 charge is based on an estimated annual flow of 250 million units of energy through Borivali interconnection.

(4) BSES agrees at take or pay to TEC in each financial year "(a) overall minimum guaranteed aggregate energy off-take and (b) minimum aggregate maximum demand at 22 KV/33 KV points".

For the year 1997-98 "(a)" and "(b)" off-takes are set at 2875 M.Us. and 6900 MVA respectively. BSES will submit their realistic projection for the year 1998-99 and 1999-2000 for minimum guaranteed aggregate energy

off-take and maximum demand by first week of March 1998. TEC agrees to supply minimum guaranteed energy as well as power demand."

16. REL has submitted that standby charge of Rs. 3.5 crore per month was designed to ensure annual recovery of Rs. 42 crore per annum together with Rs. 8 crore as additional energy charges (on account of additional Rs.0.32 per kWh at estimated supply of 250 million units per annum), which resulted in an additional estimated revenue of nearly Rs. 50 crore for TPC to earn reasonable return. REL further submitted that it agreed to pay Rs. 2.09 per kWh plus fuel charge adjustments (FCA) under POA for energy off-take at interconnection point although at the relevant time the energy charges payable by REL to TPC was Rs. 1.77 per kwh. As TPC was not willing to sign the agreement despite the said GOM directions, REL agreed to pay amount of Rs. 50 crore per annum towards standby charges. This additional energy charge of Rs. 0.32 per kWh, gave an additional Rs. 8 crore to TPC. Though, the GOM order dated 19th January 1998 ordered for payment of stand by charges of Rs. 3.5 crore per month (i.e. Rs. 42 crore annually). Thus REL feels that the standby charge of Rs. 3.5 crore per month and the energy charge of Rs. 2.09 per kWh were part of one composite package.

17. REL has submitted that in the end of 1997 onwards, TPC started a sustained campaign in REL's licensed area to lure away REL's larger consumers, whose tariff was higher than the average cost of supply of REL. This in effect meant that there was decrease in REL's subsidizing consumers. REL through its letter dated 10th March 1998 wrote to TPC, inter-alia, giving the projections for 1998-99 and 1999-2000 in terms of energy units and power demand. Extracts from the letter are as under:

As per the Principles of Agreement reached on 31st January 1998, we give below our projection for 1998-99 and 1999-2000 for energy Off take and Maximum Demand:

	1998-99	*1999-2000*
Units (MU)	*2500*	*2700*
Demand (MVA)	*5000*	*5500*

The above is subject to TEC not supplying energy to our existing consumers'.

18. As there was no response from TPC to the above, REL contends, that TPC unconditionally accepted the aforesaid condition/stipulation put by REL that the estimates given for 1998-99 and 1999-2000 were subject to TPC not taking away REL's existing consumers.

19. On 31st August 1998, MSEB gave a notice to TPC, inter-alia, revising its standby charges with effect from 1st December 1998 from TPC to Rs. 30.25 crore from Rs. 24.75 crore per month. TPC in turn served a notice on REL to revise the standby charges from Rs. 3.50 crore to Rs. 15.125 crore per month i.e. Rs. 181.50 crore annually. Again dispute arose between REL and TPC. GOM passed an order for an ad hoc payment of an additional Rs. 2.25 crore per month by REL to TPC for the period from December 1998 to March 1999 (i.e. Rs. 9 crore for four months). Hon'ble Supreme Court subsequently nullified the aforesaid order as after Electricity Regulatory Commission Act, 1998 coming into effect, no Authority except state Regulatory Commission was empowered to determine tariff of the utilities in the state. Thereafter REL filed a petition (No. 7 of 2000) before the Maharashtra Electricity Regulatory Commission (MERC, the Respondent no. 1 here), which have an interim order in the matter on 18th December 2000 directing REL to deposit with MERC amounts calculated as under:

(a) Rs. 9 crore with MERC for the period between December 1998 to March 1999;
(b) 50% of Rs. 181.50 crore with MERC after adjusting for amounts already paid by REL, for the period from between April 1999 to March 2000;
(c) 50% of the amounts as per TEC demand for the subsequent period, till a decision in this case is given.

20. The above was challenged by TPC in the High Court of Mumbai through Writ Petition no. 31 of 2001. REL has submitted that TPC withdrew the said petition in terms of the Minutes of Order dated 19th March 2001, which, inter-alia, directed as under:

(a) On or before 28 March 2001 deposit Rs. 26 crore with MERC
(b) On or before 15 April 2001 deposit a further sum of Rs. 26 crore with MERC;

(c) Deposit Rs. 8.25 crore per month (including Rs. 3.5 crore in terms of the POA) with MERC until the petition filed by BSES before MERC is finally decided by the MERC.

21. Thereafter, REL started paying for energy drawl from 220 KV interconnection at Borivali @ Rs. 1.77 per kWh as in REL's view increase in standby charges from Rs. 3.50 crore per month to Rs. 8.25 crore per month covered the difference of Rs. 0.32 per kWh also. Thus, a dispute arose between REL and TPC about the applicable rate of energy; TPC was billing at Rs. 2.09 per kWh whereas REL was paying at Rs. 1.77 kWh. TPC started levying interest @24% per annum on the default amount.

22. In the meantime, TPC vide its letter dated 15th February 2001 asked for estimate of annual off-take of maximum demand and energy for the years 2001-02 to 2003-04. In response, REL while giving estimated annual off-take for these years, stated:

> *'However, it may be noted that the figures indicated above are the projected, based on the actual growth rate in the recent past and are given for the purpose of planning. No commitment for the off-take should be read into this since the actual off take would vary depending upon several factors including the direct sale affected by TPC in our area of supply and BSES generation.*
>
> *In this context, we refer to the correspondence resting with you regarding issues related to additional outlets from your various supply points. You are requested to expedite the matter to enable us to meet the additional load.'*

23. As REL's actual off-take at 22KV/33KV during 1998-99 and 1999-2000 being 2397 MUs and 2272 MUs respectively was lower than the one communicated by REL to TPC, TPC raised additional charges on 'take or pay' basis on REL. REL disputed these bills. REL also contended that the overall off-take contained in the letter dated 10 March 1998 includes drawl at 220 KV point of interconnection.

24. In the meantime, MERC started hearing in respect of petition no. 7 of 2000 filed by REL before MERC. During the course of proceedings, TPC, inter-alia, sought MERC's directions to REL to pay for energy supplied at Borivali 220 KV interconnection point @ Rs. 2.09 per kWh as against Rs. 1.77 per kWh which REL was paying from March 2001 and also that REL to honour its commitment to off-take at 22 KV/33KV points of supply on 'take or pay' basis. MERC through its order dated 7 December 2001 gave its decision in respect of standby charges.

25. On 27th March 2002, TPC filed petition no. 7 of 2002 before the MERC seeking following relief:

> *"(a) BSES be ordered and directed to pay to Tata Power for energy supplied at 220 KV interconnection at the rate of Rs. 2.09 per kWh in accordance with the said Principles of Agreement dated 31st January 1998;*
>
> *(b) BSES be ordered and directed to pay to Tata Power a sum of Rs. 8,95,18,160/- as per the particulars of claim together with further interest @ 24% per annum;*
>
> *(c) BSES be ordered and directed to pay to Tata Power a sum of Rs. 116,10,69,201 as per the particulars of claim together with further interest @ 24% per annum on the principal sum of Rs. 94,39,50,000 till payment or realization."*

26. The MERC finally passed the order dated 12th December 2007 in respect of the above petition no. 7 of 2002, whereby MERC allowed TPC's claim. By a letter dated 31st December 2007 to REL, TPC preferred its claim to REL stating that in terms of the MERC's order dated 12th December 2007, REL is bound and liable to pay to TPC an aggregate sum of Rs. 323,86,55,343 as per details given in the letter.

27. Aggrieved by the above order dated 12th December 2007 of MERC, REL has preferred the present appeal. REL has submitted that amount claimed by TPC falls under following two broad heads:

(a) Claim for the period from March 2001 to February 2002 for difference in the energy billed by TPC at Rs. 2.09 per kWh against Rs. 1.77 per kWh paid by REL; and

(b) Claim for the years 1998-99 and 1999-2000 towards minimum off-take of energy.

Discussions and Decision with Reasons

28. We have heard the arguments advanced by the learned counsel for the Appellant and the respondent stretched over number of sittings and provided them opportunity to make their counter submissions on the following two items. We will deal with each of the disputes separately.

(a) Claim of TPC for additional 32 paise/kwh in the energy bill i.e. Rs. 2.09-Rs. 1.77/kwhr from March 2001 to Feb 2002.

(b) Claim of TPC towards minimum off-take of energy for FY 1998-99 and FY 1999-2000.

Claim for difference in the energy billed by TPC at Rs. 2.09 per kWh against Rs. 1.77 per kWh paid by REL.

29. REL has contended that TPC was not entitled to claim of Rs. 2.09 per kWh for energy charge under clause 3 of the POA in view of the fact that TPC had claimed a higher amount of stand by charges as against the stand by charges of Rs. 3.50 crore per month payable under clause 2 of the POA. It is REL's case that the increase of Rs. 0.32 per kWh, aggregating to Rs. 8 crore considering estimated energy flow of 250 million units, agreed to by REL with TPC was in a way towards the additional stand by charges and since subsequently there was an increase in the standby charges, the energy charge should be restored to its previous level of Rs. 1.77 per kWh.

30. REL has submitted that energy charge for drawl at higher voltage such as at 220 KV is generally lower than energy drawl at a lesser voltage such as at 22/33 KV. When the POA was entered into, the tariff prevailing for energy supply at 22/33KV was 177 paise per kWh.

31. TPC has submitted that the rate of Rs. 2.09 per kWh has its genesis in a tariff notice dated 30th July 1996 issued by TPC upon REL, with a weighted average of energy charge for 25% monthly off-take at 129 paise per kWh and 75% monthly off-take at 236 paise per kWh, at 33KV/22KV. Even at that time, TPC has submitted, the tariff for energy drawl at 220 KV standby interconnection was at 288 paise per kWh, which was higher than the energy charges at 33KV/22KV points. Subsequently, discussions and mutual agreements ultimately culminated into clause 3 of the POA.

32. REL has also submitted that TPC has submitted that POA is a binding contractual agreement whereby REL agreed to pay standby charges at Rs. 3.5 crore per month and energy charges of Rs. 2.09 per kWh plus FCA at 220 KV interconnection point at Borivali. It has further stated that the POA has not been superseded by any other document but remain a binding document albeit subject to the provisions of the Electricity Act, 2003.

33. As regards 'package deal', TPC has submitted that the plain language of the POA belies existence of any package deal and that there is no co-relation between standby charges of Rs. 3.5 crore per month and energy charge of Rs. 2.09 per kWh. According to TPC, that energy consumption of 250 million units was merely an estimate of the annual consumption. The GOM fixed ordered for the standby charges to be Rs. 3.5 crore and there was no order as regards charges for energy consumption in per unit terms. Also that the standby charges are akin to a premium for the guaranteed availability of power in the event of emergency and energy charges are for actual electrical energy consumed. Hence, it is TPC's case that there was no package deal.

34. In order to appreciate the question, it will be necessary to set out clauses 2 and 3 of the POA, these clauses read as under:-

> *'(2) BSES shall pay to TEC for the 220 KV interconnection at Borivali Rs. 3.5 crore per month as stand-by charges for 275 MVA as per Government orders.*
>
> *(3) BSES off-take of energy at 220 KV Boravli (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 charge is based on an estimated annual flow of 250 million units of energy through Borivali interconnection.*

35. The language of clauses 2 and 3 is clear. While clause 2 deals with standby charges, clause 3 provides for rate at which REL's off-take of energy at 220 KV interconnection at Borivali is to be billed. The nature and scope of the two clauses is different and they deal with different subjects. In BSES Limited Vs. Tata Power Co. Ltd, (2004) 1 SCC 195, which was a dispute between the same parties, the concept of standby arrangements entered into by REL &TPC, was explained by the Supreme Court. In this regard, the Supreme Court observed as follows:

"*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 generated 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 immediate availability of 275 MVA power in the*

event of nay breakdown or stoppage of generation in its Dahanu generation facility. Heavy investment is required for generation of power. For this kind of 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 TPC had to pay to MSEB for the actual drawal of electrical energy. The same is the case with BSES qua TPC."…

36. Thus, according to the Supreme Court the arrangement entered into by REL and TPC ensured REL of immediate supply of power by TPC in the event of break down or stoppage of generation in the plant of the former. For this guaranteed availability of power REL is required to pay charges to the TPC. From the judgment of the Supreme Court it is clear that this payment is in addition to the charges or price which REL has to pay to TPC for actual drawal of power. The payment for actual drawal of power is envisaged by clause 3 of the principles of agreement. Clause 2 & 3 are independent of each other. There are two separate charges conceived by these clauses of principles of agreement. Clauses 2 & 3 do not suffer from any ambiguity. The language of these clauses is crystal clear. An Ambiguity is sought to be created by the appellant by referring to material outside the contract.

37. It is well settled that when an agreement carries no ambiguity, it is not permissible to refer to surrounding and attending circumstances leading to the agreement, to spell out an agreement different from the one which has actually been entered into by the parties.

38. In State Bank of India & Anr Versus Mula Sahakari Sakhar Karkhana Ltd, (2006) 6 SCC 293, it was held that reference to surroundings/attending circumstances are not

relevant for construing the agreement when no ambiguity exists in the terms of agreement. In this regard, it was observed as follows:

> "*The document in question is a commercial document. It does not on its face contain any ambiguity. The High Court itself said that ex facie the document appears to be a contract of indemnity. Surrounding circumstances are relevant for construction of a document only if any ambiguity exists therein and not otherwise.*"

39. The learned senior counsel for the appellant submitted that the rate of Rs. 2.09 per kwh for the energy drawn at 220 kv interconnection is higher than the rate of Rs. 1.77 per kwh which is payable by the appellant at 22/33 KV supply points and extra 0.32(2.09-1.77) paise per unit which was to be paid as a result of clause 3 was part of the standby charges and was a sweetener so that the figure of Rs. 3.5 crores per month was acceptable to TEC. According to the learned senior counsel it was part of a package deal. He pointed out that the standby charges have been enchanced to Rs. 8.25 Crores by the Bombay High Court by its order dated March 19, 2001, therefore the REL is justified in paying Rs. 1.77 per kwh to the TPC for the energy drawn at 220 kv interconnection at Borivali, which is the rate payable to TPC for energy drawn at 22/33 KV inter-connections. It was further submitted that REL was not liable to pay extra .32 paise per kwh for the sweetner in respect of energy drawn to 220 kv interconnection.

40. We have considered the submissions of the learned senior counsel for the parties. The order dated March 19, 2001 was passed by the Bombay High Court with the consent of parties.

Clause 1 (c) of the consent order passed by the Bombay High Court in Writ Petition No. 31/2001 reads as follows:-

1 (c) deposit Rs. 8.25 crores per month with MERC on the 15th day of each month (the first such deposit to be made on or before 15th April, 2001) until the Petition/Application filed by BSES on 4th December 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 Agreement dated 31.1.1998".

41. From the above order, it is obvious that the sum of Rs. 8.25 crores includes sum of Rs. 3.5 crores payable by the appellant to the respondent, pursuant to the order of the Government of Maharashtra read with Agreement dated January 31, 1998 POA. Clause 3 of the agreement has not been changed or varied by the Bombay High Court. Clause 3 which fixed Rs. 2.09 Kwh for the energy supplied at 220 kv interconnection, is not linked with clause 2 of the POA. The order of the Bombay High Court was passed on the basis of an ad hoc arrangement arrived at between the parties. The so-called sweetener element of clause 3 was not varied. If clause 3 was linked with clause 2, surely REL would have insisted before the Bombay High Court for variation of clause 3 on the basis of alleged package deal theory. But the consent term do not speak of any linkage between clause 2 and clause 3. It is noteworthy that MERC by its order dated June 11, 2004 has fixed the tariff payable by REL to TPC for the consumption at 220 KV interconnection at weighted average of Rs. 1.77 kwh for 25% of the units and Rs. 1.90 for 75% of the units w.e.f. June 1, 2004. The charges earlier to June 1, 2004 have not been altered. Since the rate of Rs. 2.09 per kwh plus full cost for the consumption of energy at

220 KV interconnection point is a clear term of clause 3, there is no escape for REL from paying for the consumption charges at that rate up to May 30, 2004.

Claim for the years 1998-99 and 1999-2000 towards minimum off-take of energy

42. It was submitted by REL that in its letter dated March 10, 1998 to TPC, it was specifically pointed out that the quantum of minimum off-take for the years 1998-99 and 1999-2000 were subject to TPC not supplying energy to its existing consumers.

43. REL has submitted that as TPC did not reply to REL's letter dated 10th March 1998, TPC is deemed to have accepted the aforesaid condition and that the projected load was based on REL's existing consumers' base and not on the basis that TPC would lure away REL's consumers. TPC's supply of energy directly to REL's consumers also disturbed the level playing field.

44. REL has also submitted that by supplying energy to its consumers from its own generation which is cheaper than TPC's generation would endure benefits to the consumers for which REL cannot be penalized.

45. For proper appreciation of the contention of the parties, we need to refer to clause-4 of the POA. Clause 4 reads as follows:

> *"(4) BSES agrees at take or pay to TEL in each financial year '(a) overall minimum guarantee aggregate energy off-take and (b) minimum aggregate maximum demand at 22 kv/33 kv points".*

Reading of the clause 4 of POA shows that the quantum of minimum off-take for 1998-99 and 1999-2000 was not fixed. REL was required to furnish projections for the year 1998-99 and 1999-2000 for minimum guaranteed aggregate energy off-take and maximum demand by first week of March 1998. This projection was given to the TPC through the letter of the REL dated March 10, 1998. The relevant part of the letter reads as follows:-

"As per the Principles of Agreement reached on 31st January 1998, we give below our projection for 1998-99 and 1999-2000 for energy Off-take and Maximum Demand:

	1998-99	*1999-2000*
Units (MU)	*2500*	*2700*
Demand (MVA)	*5000*	*5500*

The above is subject to TEC not supplying energy to our existing consumers'.

46. While giving the projections, the REL clarified that the projection was subject to TPC not supplying energy to the existing consumers of REL. This letter was not replied to by TPC. It was argued by learned senior counsel for the TPC that REL by stating in the letter to the effect that the projection was subject to TPC not supplying energy to the existing consumers of REL, cannot be given effect to as REL cannot unilaterally change the terms of the agreement. Learned senior counsel relied upon the decision of the Supreme Court in City Bank N.A. Vs. Standard Chartered Bank & Ors., (2004) 1 SCC 12 to urge that novation, rescission or alteration of a contract under Section 62 of the Indian Contract Act, 1872 can only be done with the agreement of both the parties to the contract. Both the parties have to agree to substitute the original contract with the new contract or rescind or alter the same. Based on this decision it was submitted by learned senior counsel for the respondent that the condition in the letter that the projections are subject to TPC not supplying energy to the existing consumers of REL cannot be attached any significance as the TPC never agreed to such a condition. The mere fact that TPC did not reply to the letter is not good enough to imply that TPC consented to the condition and thereby agreed to alter the original clause 4. The submission of learned senior counsel for the respondent that novation, rescission or alteration of a contract under Section 62 of the Indian Contract Act, 1872 can only be done with the agreement

of both the parties to a contract and one party cannot unilaterally alter the term thereof is unassailable .

47. It appears to us that the projections are based on estimates which in turn are grounded on several relevant factors. Two important factors which to a large extent go to make the projections are :

(1) past actual consumption and:

(2) compounded actual growth in the sector

48. The second factor is an estimate which inter alia depends on the number of existing or new consumers and the extent of drawal of power by them. In case the customers of REL are weaned away by TPC, the projection would stand disturbed and it will not be fair to expect REL to pay for the off-take of energy on the basis of the projection earlier communicated to TPC. It also seems to us that since projections are based on factors, mention of a factor expressly, which can ultimately affect the projection, will not tantamount to changing terms of the agreement.

49. Therefore, REL has not in any manner changed, any term of clause-4 of the POA. It is not clear from the record as to how many consumers of the REL have been supplied energy by TPC and the extent of supply to them. This is a matter which will have to be gone into by the Commission.

50. Further, it is also clear from the POA that for availing standby facility at inter-connection point, 'standby charges' (and not maximum demand) is leviable in addition to payment for actual drawl of energy, whereas in case of off-take of energy through 22 kv/33 kv ports, the 'minimum aggregate maximum demand charges' and the cost of

actual energy drawl are recoverable. We observe that the clause 4 (a) signifies an all inclusive statement of 'overall minimum guaranteed aggregate energy off-take' and is independent of clause 4 (b) which is confined only to specific ports of 22/33 kv. Clause 4 (a), therefore, seems to represent the overall consumption of energy by REL aggregating the off-takes from all ports of 22/33 kv including 220 kv inter-connection point. It is the total off-take which makes a significant impact on Reasonable Return of TPC. Hence, the REL's contention that the overall off-take contained in the letter dated 10.03.1998 includes drawl at 220 kv point of inter-connection, can not be ruled out. The Commission ought to have decided the 'overall aggregate energy off-take' considering the aforesaid perspective.

51. In the circumstances, therefore, we pass the following order:-

i) TPC is entitled to recovery of energy supplied to REL at the rate of Rs. 2.09/-. The balance which remains unpaid by REL to TPC shall be released by REL within four weeks alongwith delayed payment charges at the prevailing SBI Prime lending Rate for short borrowing and not at the rate of 24% per annum as directed by the Commission;

ii) The issue relating to 'take or pay' shall be examined afresh after giving opportunity to the parties of hearing and after decision of the Supreme Court in Civil Appeal No.2898 of 2006 and 3101 of 2006 relating to the issues, as to whether or not TPC is a distribution licensee and whether or not REL's offer of rebate to its consumers to prevent them from moving away from it is tenable in law. Subject to the decision of the Hon'ble Supreme Court, our observations on these issues shall be kept in view by the Commission.

52. The appeal is allowed to the extent indicated above.

(A.A. Khan)
Technical Member

(Anil Dev Singh)
Chairperson

Dated: May 12, 2008.

Reportable / Non-reportable