BEFORE THE MAHARASHTRA ELECTRICITY REGULATORY COMMISSION

WORLD TRADE CENTRE, CENTRE NO.1, 13th FLOOR, CUFFE PARADE, MUMBAI-400005

CASE NO. 182 OF 2014

IN THE MATTER OF:

The Tata Power Company Limited ... Petitioner

Versus

BEST Undertaking & Ors. ... Respondents

INDEX

The Tata Power Company Limited/ Petitioner

Through:

J. Sagar Associates
Advocates for the Petitioner
Vakils House, 18 Sprott Road,
Ballard Estate, Mumbai 400 001, India

Date: 21/04/2016
Place: Mumbai

BEFORE THE MAHARASHTRA ELECTRICITY REGULATORY COMMISSION

WORLD TRADE CENTRE, CENTRE NO.1, 13th FLOOR, CUFFE PARADE, MUMBAI-400005

CASE NO. 182 OF 2014

IN THE MATTER OF:

The Tata Power Company Limited … Petitioner

Versus

BEST Undertaking & Ors. … Respondents

The Tata Power Company Limited's submissions/ objections to the recommendations of the Committee as set out in its Report dated 28.03.2016

The Tata Power Company Limited ("**Tata Power**") most respectfully submits as under:-

I. Facts leading to the issuance of the Committee Report

1. On 14.08.2014, this Hon'ble Commission passed an Order in Case No. 90 of 2014, to:-

(a) Grant Distribution Licence No. 1 of 2014 to Tata Power, for a period of 25 Years from 16.08.2014 for the specified area of supply.

(b) Direct Tata Power to submit a revised Network Rollout Plan which once approved by this Hon'ble Commission after public hearing would form part of the Specific Conditions of Licence in terms of Section 16 of the Electricity Act, 2003 ("**Electricity Act**").

2. On 26.09.2014 pursuant to this Hon'ble Commission's Order dated 14.08.2014, the present Petition was filed by Tata Power seeking approval of its comprehensive revised Network Rollout Plan. On 09.10.2014, the revised comprehensive Network Rollout Plan was re-submitted by Tata Power.

3. During the pendency of this Petition, on 28.11.2014 the Hon'ble Appellate Tribunal for Electricity ("**Hon'ble Tribunal**") disposed of Appeal No. 246 of 2012 and batch titled as *Tata Power Co. Ltd. Vs. Maharashtra Electricity Regulatory Commission and Ors* by its Judgment ("**APTEL Judgment**"), with findings,

observations and directions regarding laying of new and/or augmentation of existing parallel network in context of the existing situation prevalent in Suburban Area of Mumbai. A copy of the APTEL Judgment is annexed hereto and marked as **Annexure P-1.**

4. From time to time, in light of findings of the superior court judgments and development on the ground, Tata Power submitted a suitably modified revised Network Rollout Plan for the area where Tata Power, BEST and MSEDCL are licensed to supply electricity (i.e. City of Mumbai).

5. On 09.11.2015, after giving notice and opportunity to all concerned to respond to the Network Rollout Plan filings and after detailed hearings, this Hon'ble Commission passed an Interim Order ("**Interim Order**") directing constitution of a Committee to examine the rollout plan and give recommendations to this Hon'ble Commission in context of the Terms of Reference of the Committee. This Hon'ble Commission also laid down the procedure to be adopted before approving Tata Power's Network Rollout Plan. A copy of the Interim Order dated 09.11.2015 passed by this Hon'ble Commission in the present case is annexed hereto and marked as **Annexure P-2**.

6. In terms of the directions passed by this Hon'ble Commission in the Interim Order dated 09.11.2015, a Committee was duly constituted, which held various meetings on the following dates:-

(a) On 18.12.2015, 21.01.2016 and 22.01.2016, one-to-one meetings took place between the Committee Members and the distribution licensees.

(b) On 18.12.2015, 21.01.2016, 22.01.2016, 18.02.2016, 15.03.2016, 16.03.2016 and 28.03.2016, meetings took place amongst the Committee Members.

7. On 07.04.2016, this Hon'ble Commission issued a letter to the distribution licensees of Mumbai [Tata Power, BEST, R-Infra and MSEDCL], authorised consumer representatives and Mr. Harishchandra Govalkar, forwarding a copy of the Committee Report dated 28.03.2016 with recommendations qua rollout of network in Mumbai, for the consideration of this Hon'ble Commission. The Hon'ble Commission has sought comments of all addressees on the said Committee Report within a period of 2 weeks. A copy of this Hon'ble Commission's letter dated 07.04.2016 forwarding the Committee Report dated 28.03.2016 is annexed hereto and marked as **Annexure P-3 (Colly)**.

8. In terms of the said letter dated 07.04.2016 of this Hon'ble Commission, Tata Power is filing its objections to the validity of the Committee Report, which is being placed in two Parts,:-

(a) **Part 1**: Objections to the recommendations qua the area of supply where Tata Power, R-Infra and MSEDCL are licensed to supply electricity (i.e., area of Suburban Area of Mumbai and areas of Mira Bhayandar Municipal Corporation including area covered under Chene and Vesave).

(b) **Part 2**: Objections to the recommendations qua the area of supply where Tata Power, BEST and MSEDCL are licensed to supply electricity (i.e. area comprising of Island City of Mumbai).

II. Provisions of the Statutory Scheme as interpreted by the Hon'ble Supreme Court, Hon'ble Tribunal and this Hon'ble Commission which govern the Committee

9. Before dealing with specific objections to the Committee Recommendations, it is appropriate at this juncture to appreciate the relevant provisions of the Statutory Scheme, including the Electricity Act and the rules and regulations made thereunder and as interpreted in:-

(a) Hon'ble Supreme Court's Judgment dated 08.05.2014, in BEST v. MERC reported as (2015) 2 SCC 438 ("**SC Judgment**");

(b) APTEL Judgment; and

(c) Hon'ble Commission's Interim Order dated 09.11.2015; and

(d) This Hon'ble Commission's Order dated 22.08.2012 in Case No. 151 of 2011 ("**Order dated 22.08.2012**").

Relevant extracts of the Statutory Scheme are reproduced in **Annexure P-4** for ease of reference.

10. The governing principles emerge from the provisions of the Electricity Act, rules and regulations made thereunder and the aforesaid Judgments/Orders which shall serve as the touchstones for the Committee's Report and its validity, are summarized below.

10.1 **Re. Statutory Scheme qua laying of parallel distribution network in the area of supply of R-Infra and MSEDCL**

(a) A fundamental objective of the Electricity Act is to protect consumer interest and promote competition, securing choice of consumers to

elect the distribution licensee from whom it wishes to seek supply of electricity provided that:

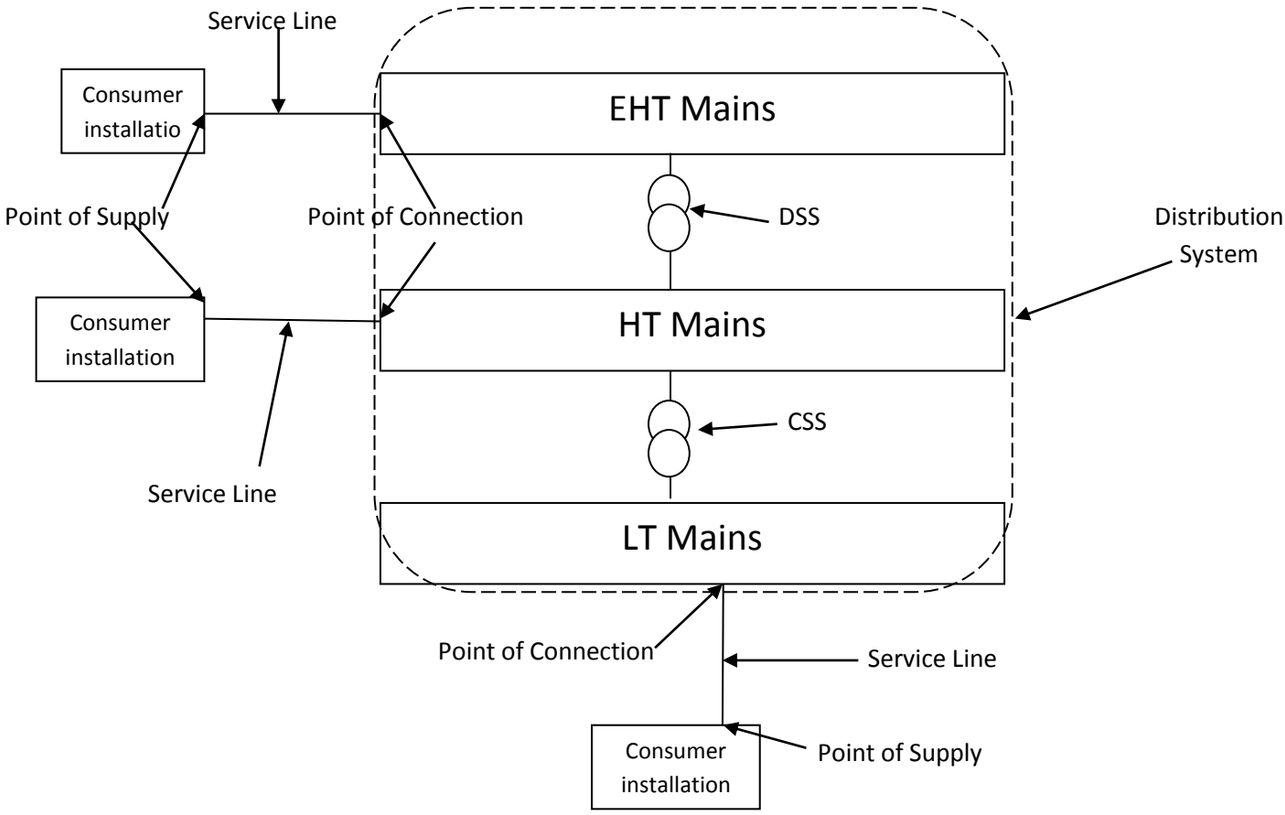
(i) Consumer honours the requirements of applying as statutorily mandated [**Section 43**];

(ii) Consumer pays as per Sections 43 & 46; and

(iii) Safety requirements imposed by CEA are honoured **[Section 48]**.

The Licensee shall act as per time frames stipulated under Section 43 of the Electricity Act. Allowing parallel licensing in an area of supply meets the twin objective of promoting competition and protecting consumer interest. **[Statement of Object and Reason read with Section 14, 43, 46 and 48 of the Electricity Act]**

(b) Section 2(19) of the Electricity Act defines Distribution System as the System of wires starting from Transmission System to ***Point of Connection*** **to** the consumer installation (Point of Supply). It is to be noted that the term used in Section 2(19) is '*Point of Connection*' to the consumer installation. The Electricity Act also defines "*service-line*" as any electric supply line through which electricity is, or is intended to be, supplied. Regulation 2.1(t) of MERC (Standards of Performance of Distribution Licensees, Period for Giving Supply and Determination of Compensation) Regulations, 2014 ("**MERC SOP Regulations 2014**") defines Point of Supply as outgoing terminals of meter etc. at consumer premises. Clearly, Point of Connection to consumer installation and Point of Supply at consumer premises are different. Service line is the electric supply line which is connected with the Distribution System at the Point of Connection and is connected to the consumer installation at the Point of Supply to supply electricity to the consumer. It is basically the link between the Point of connection and the Point of Supply as shown in diagram below.



(c) In terms of the Section 46 of the Electricity Act, a consumer is liable to pay for the service lines. Further, as per Section 163 of the Electricity Act, distribution licensees are required to remove the service lines when a consumer is disconnected or does not require the supply.

(d) A distribution licensee is duty bound to ***develop*** and ***maintain*** an ***efficient, coordinated and economical distribution system*** in his area of supply and to supply electricity in accordance with the Electricity Act. **[Section 42 of the Electricity Act]**

(e) Electricity Act provides choice to the consumer for availing electricity either directly from the distribution licensee on its wires (Section 43); or from any other person through the wires of the distribution licensee to whom such consumer is connected by seeking open access (Section 42). The consumer has the ultimate choice to elect both its ***source of supply*** (choose the distribution licensee from whom he wishes to avail to supply) as well as the ***mode of supply*** (option of open access under Section 42 or avail supply under Section 43 of the Electricity Act). As such, a consumer can choose the supplier and then decide whether it wishes to avail supply from a distribution licensee through its own distribution network (Section 43) or from another

distribution licensee/ another source through Open Access (Section 42). [**Section 42 and 43 of the Electricity Act**]

(f) A distribution licensee is obliged to provide supply to the consumer on request, within the time frame prescribed under the Electricity Act and the Rules and Regulations made therein, viz:-

(i) Within one month from receipt of a complete application with all documents and compliances requiring such supply from an owner or occupier of any premise, give supply of electricity to such premises. [**Section 43(1)**]

(ii) Where such supply requires extension of distribution mains, or commissioning of new substations, the distribution licensee shall supply the electricity to such premises immediately after such extension or commissioning or within such period as may be specified by the Appropriate Commission. **[Proviso 1 to Section 43]**

(g) Evidently, the Electricity Act considers a distribution licensee "USO ready" once it has set up its distribution network upto the distribution mains. The Electricity Act envisages circumstances where giving supply to a consumer on its wires (possibly qua load growth and coverage aspects), the distribution licensee may require extension of distribution mains or setting up of new substations. Section 46 of the Electricity Act read with Regulation 3.3.2 of the MERC (Electricity Supply Code and other Conditions of Supply) Regulations, 2005 ("**MERC Supply Code**"), prescribes that the cost of laying down of Service Lines are to be borne by the consumers as specified under the Schedule of Charges. This is because the service line is meant to connect the Point of Connection on the Distribution Mains to the consumer premises. A distribution licensee is not required to extend service to every potential consumer's premises unless the consumers have sought electricity from such distribution licensee.

(h) This Hon'ble Commission's Order in Case No. 151 of 2012 dated 22.08.2012, directed Tata Power to focus all its energies and capital expenditure, to lay its 'distribution network' in 11 clusters in such a

manner that it is in a position to provide supply through its own 'distribution network' to its existing and prospective consumers, located anywhere within those 11 clusters, within the time frame prescribed under the MERC SOP Regulations (i.e. Tata Power to be USO ready). It cannot possibly be the intent of this Hon'ble Commission to direct Tata Power to lay its network (including service lines) in all 11 clusters for every existing and prospective consumer's upto the point of supply.

(i) APTEL Judgment (in Paras 58 to 61) provides the guiding principles qua laying of network in the Suburban Area of Mumbai (i.e. the area where Tata Power, R-Infra and MSEDCL are licensed to supply electricity). The said directions are issued in light of the peculiar situation of Mumbai, viz., topography of Mumbai and issues regarding the space constrains et al. The directions given in APTEL Judgment are as under:-

(i) Laying of parallel network is allowed if it is:-

(1) In terms of choice exercised by the consumer.

(2) In overall interest of the consumer.

(3) Improves reliability of the existing network.

(4) For supplying electricity to 'new consumers'.

(ii) APTEL Judgment has set aside the order of Hon'ble Commission in Case No. 151 of 2012 while saving the existing investment made by Tata Power. In Para 59, the Hon'ble Tribunal has held that where Tata Power has made considerable investment in constructing distribution system, it should be permitted to ***commission and capitalize the said investment to feed the consumers***. There are no restrictions on Tata Power in connecting to consumers in the area where substantial investment has been made by Tata Power. No additional cost is involved as cost of laying service line is borne by the consumer under Section 46 of the Electricity Act read with MERC Supply Code and such expenditure is not included in ARR of the Licensee. Allowing switchover on the existing network is in consumer interest as the increase in number of consumers on

the distribution network and consequent sale of energy would result in reduction in wheeling charges.

(iii) There are no restrictions on the distribution licensee to supply electricity to consumers from its existing network, i.e. no restriction on migration/ switchover of consumers.

(iv) Consumers' choice shall decide the mode of supply. The Hon'ble Tribunal has in fact removed/released the restrictions imposed by this Hon'ble Commission (in its Order dated 22.11.2012 in Case No. 151 of 2011), including the restriction on switchover of consumers.

(v) The principles laid down by the APTEL Judgment are equally applicable to both Tata Power and R-Infra.

(j) This Hon'ble Commission in its Interim Order dated 09.11.2015 acted pursuant to the aforementioned principles laid down by the APTEL Judgment and stated as under:-

(i) Tata Power's rollout plan for the area common with R-Infra is to be considered in accordance with the guidelines and directions contained in the APTEL Judgment. **[Para 37]**

(ii) Tata Power should be permitted to lay its network in areas where such parallel network would improve the reliability of supply and benefit the consumers. Therefore, it is necessary to understand the scope and meaning of the expression 'reliability of the existing distribution network', which would entitle either licensee to lay or augment its network, in case such reliability if found to be inadequate in the context in which it has been used in the APTEL Judgment. **[Para 45 (c) & 59]**

(iii) Tata Power can extend supply to new consumers who seek connection from it. **[Para 45 (d)]**

(iv) Parallel licence was granted to Tata Power with the objective to promote competition and give choice to the consumers. The object of granting a parallel licence is the supremacy of

consumer choice coupled with the economics of cost of supply. **[Paras 46-48]**

(v) If R-Infra's submissions were to be accepted, consumer shall be denied choice resulting in creating monopoly for R-Infra such that Tata Power does not have any right to lay its own lines so long as R-Infra is present in the vicinity. This is not the intent of the APTEL Judgment. ***This Hon'ble Commission believes that the mandate actually given by the Hon'ble Tribunal is to be find a via media by which consumer interest is protected, existing network is used to its maximum potential and new lines are only laid when reliability, adequacy, economic viability and consumer demand requires it to be done.*** **[Para 52]**

(vi) At Para 55 of the Interim Order dated 09.11.2015, this Hon'ble Commission has emphasized on the existence of a robust ***distribution network*** of both licensees being available in an area, for the consumer to seek supply of electricity from either of the licensees directly through their own wires. This situation does not restrict the choice of the consumer connected to a network of a distribution licensee and where the other distribution licensee network is available in the vicinity, to seek supply on the wires of the other distribution licensee.

(vii) ***Reliability of network is a factor of technology, factors such as loading and ageing, environmental factors, demographic movement, population change etc. Reliability is therefore a dynamic concept and cannot be ascertained by a single indicator. The reliability has to be looked in content of extending over a long period of time. In context of the APTEL Judgment and the circumstances of Mumbai, the term reliability has to be understood more broadly to mean the adequacy of a network and infrastructure to feed existing and future consumers. Thus, adequacy of existing networks in specific locations or areas is an important consideration in determining the rollout plan, its modalities and the***

methodology in dealing with consumer demand. **[Para 60 and 61]**

(viii) ***Tata Power's right to develop its existing network where it has already made investments for creation of distribution assets is undisputed in terms of the APTEL Judgment.*** **[Para 63]**

10.2 **Re. Statutory Scheme qua laying of parallel distribution network in the area of supply of BEST and MSEDCL**

(a) A fundamental objective of the Electricity Act is to protect consumer interest and promote competition, securing choice of consumers to elect the distribution licensee from whom it wishes to seek supply of electricity provided that:

(i) Consumer honours the requirements of applying as statutorily mandated [**Section 43**];

(ii) Consumer pays as per Sections 43 & 46; and

(iii) Safety requirements imposed by CEA are honoured **[Section 48]**.

The Licensee shall act as per time frames stipulated under Section 43 of the Electricity Act. Allowing parallel licensing in an area of supply meets the twin objective of promoting competition and protecting consumer interest. **[Statement of Object and Reason read with Section 14, 43, 46 and 48 of the Electricity Act]**

(b) Unless BEST permits Open Access on its network (under Section 42 of the Electricity Act), Tata Power will have to supply to its consumers from its own distribution network in terms of Section 43 of the Electricity Act. For this purpose, if Tata Power does not have its network, it will have to comply with its obligation of supply by laying down its own distribution network. **[Section 42, 43 of the Electricity Act read with para 27 of the SC Judgment]**

(c) There is no exemption to Tata Power from complying with Universal Service Obligation under Section 43 of the Electricity Act (i.e. to supply electricity on demand), merely on account of existence of BEST (a local authority) in the area of supply which Tata Power shares with BEST.

Tata Power has an obligation to supply to all consumers on demand in accordance with the provisions of the Electricity Act. **[Para 30 of the SC Judgment]**

Part 1: Objections re. recommendations qua the area of supply where Tata Power, R-Infra and MSEDCL are licensed to supply electricity

III. Tata Power's objections to the Committee Report

11. It is pertinent to note that the Committee was constituted by this Hon'ble Commission for assisting it carrying out/ implementing the directives set out in the APTEL Judgment. It is a settled position of law that:-

(a) Statutory authorities including Appropriate Commission being creatures of Statute are creatures of specific jurisdiction who must act strictly in accordance with the letter and spirit of the parent Statute. They do not exercise powers *"ex-debito justitiae"* unlike writ courts.

(b) Delegates and ad-hoc agencies like the Committee must always act strictly within the four corners of their terms of reference while bearing in mind and complying with all applicable laws.

The scope of reference to the Committee as set out in Para 52-57 and 67 of the Interim Order dated 09.11.2015 is to be read in this context.

12. Evidently, the recommendations of the Committee cannot be contrary to or beyond the scope of the aforesaid Statutory Scheme. However, the recommendations of the Committee are:-

(a) Anti-competitive, curtails the choice of the consumers, promotes monopoly and prejudices the functioning of Tata Power, as a parallel distribution licensee. These are contrary to and violative of the Statutory Scheme.

(b) Beyond its terms of reference as set out by this Hon'ble Commission in its Interim Order dated 09.11.2015.

13. It is further submitted that the Committee Report deserves to be summarily rejected since it is ultra vires and violative of the governing Statutory Scheme (as set out in Para 10.1 and 10.2 above) as also beyond its Terms of Reference. The Statutory Scheme and Terms of Reference are touchstones on which the Committee report fails primarily with respect to the following recommendations [detailed below]:-

(a) ***Meaning of the term 'completely covered'. The Committee's recommendation shall, in effect:-***

(i) ***Permanently injuncted migration of existing consumers on the wires of the other distribution licensee despite other licensee's distribution mains being present in the vicinity of the existing consumer.***

(ii) ***Make the distribution licenses consumer-specific rather than area-specific.***

(iii) ***Contrary to the Statutory Scheme, deprive consumers of their statutory right to choose their source and mode of supply.***

(iv) ***Contrary to specific directions of APTEL Judgment at Para 59. Render redundant investment of approximately Rs. 1200 Crores made by Tata Power pursuant to this Hon'ble Commission's Order dated 22.08.2012 for developing its network in clusters.***

(b) ***Restricted the meaning of the term 'new consumer' to exclude the consumers which are 'Permanently Disconnected', thereby curtailing the statutory choice of such consumers.***

(c) ***Contrary to the Statutory Scheme and the APTEL Judgment, curb the laying of parallel network for supplying to 'new consumer' has been restricted:-***

(i) ***To situations only when single parameter of absolute cost of required network development is minimum;***

(ii) ***To situation where laying of parallel network is minimal amongst the licensees; and***

(iii) ***By following the prescribed protocol and institutional mechanism.***

(d) ***The Committee has failed and/or refused and/or neglected to discharge its fundamental mandate to assess the reliability of the existing network before addressing the issues on Network Rollout. Contrary to the Statutory Scheme, where parallel network can be laid to improve reliability of the existing network, the Committee has recommended complete avoidance of laying parallel network on account of the cost of laying such network or alternating it with augmentation of existing network, thereby denying the supreme choice of the consumer.***

A. Re. Meaning assigned to "completely covered" and "presence".

14. The Committee was required to give workable recommendations to facilitate migration of consumers in terms of scenarios provided in Para 53 of the Interim

Order dated 09.11.2015. Instead, the Committee has defined the term 'completely covered' and 'presence' in a manner which has rendered the entire purpose of constitution of Committee, nugatory curbing/constraining consumer choice, besides creating economic barriers. The Committee has recommended as under:

(a) The term 'completely covered' by the Distribution Licensee, as per Para 53(a) means that the distribution system upto the 'point of supply' also exists, i.e., including the service connection. **[Para 9A(1)]**

(b) The best method for assessing 'completely covered' would be to tag each existing consumer/premises based on the present distribution system to whom he is connected to, and the Distribution Licensee to whom such existing consumer is connected to would be categorised as 'completely covering' such licence area specific to that consumer. **[Para 9A(2)]**

(c) If only distribution mains are present, and service connection is absent, then such area has to be classified as the Licensee being 'present' in the area/ location/ Ward, as categorised by the Commission under Para 53(d). **[Para 9A(2)]**

(d) Meaning of the term 'present', under Para 53(d) of the Interim Order dated 09.11.2015, to cover the areas where distribution mains are present and service connection is absent. [**Para 9(A)(3)**]

(e) On the basis of the definition of 'completely covered' and 'presence', switchover is only permitted in Scenario 53(b) and no switchover can be permitted in Scenario 53(a), 53(c) and 53(d). **[Para 9D(1),(2), (4) and (5)]**

15. To support the above conclusions, the Committee has given the following reasons (each of which is untenable in fact and law):-

(a) Para 60 of the APTEL Judgment and Para 53 and 54 of the Interim Order dated 09.11.2015 clearly indicates that there should not be any duplication of network. Therefore, term 'completely covered' means that the distribution system should be ready upto the 'point of supply'. Further, accepting Tata Power's submissions that 'completely covered' should be understood as presence of LT or HT distribution mains cannot be accepted as the same would result in unnecessary duplication of distribution system.**[Para 4.1.4 @page 20-21]**

(b) Since, the Committee had come to the conclusion that 'completely covered' means that the distribution system should be ready upto the 'point of supply', the Committee decided that the term 'presence' under Para 53 (a) would include the areas where distribution mains is present but service connection has not been provided. **[Para 4.1.4 @page 20-21]**

(c) This Hon'ble Commission has in its Interim Order dated 09.11.2015 held that no further distribution system should be set up and existing distribution system should be utilised for scenarios mentioned in Para 53(a) and 53(b).**[Para 4.1.4 @ page 20]**

(d) The Committee recommended for assessing areas which are 'completely covered' by tagging each existing consumer/premises on the distribution system of the licensee to whom such consumer/ premise is connected to. This was done as it would be difficult to map the 'completely covered' area on the basis on municipal ward and/ locality et al. **[Para 4.1.4 @ page 23]**

16. It is submitted that, accepting the aforesaid Committee Recommendations would in effect result in:-

(a) Existing consumers of a distribution licensee shall be prevented from migrating on the wires of the other distribution licensee, even if there is an existing network of the other distribution licensee, upto its distribution mains, present in the vicinity. This is contrary to the Statutory Scheme.

(b) Network laid down by Tata Power in terms of this Hon'ble Commission's Order dated 22.08.2012 would not be optimally utilized. This is contrary to the findings in Para 59 of APTEL Judgment. Infact, Tata Power's existing network shall be rendered stranded if the recommendations of the Committee are accepted.

(c) If this definition of 'completely covered' is taken to be correct, then no area/city/street of the country can be considered as completely covered by any licensee.

(d) Certain consumers are privileged and/ or categorised, whereby their right to choose their source and mode of supply is maintained, while the same is done away with for the other set of consumers. Such classification is not permissible in law. In effect, the Committee Report would make the distribution licence consumer specific and not area specific.

17. In this regard, it is submitted that the aforesaid recommendations of the Committee are without any basis and contrary to the Statutory Scheme set out hereinabove. As a result of these recommendations, the Committee has sought to permanently injunct migration of existing consumers on the wires of the other distribution licensee, even in cases where the distribution mains of the other licensee are present is in the consumer's vicinity. The Committee Recommendation is beyond the Terms of Reference and does not facilitate migration of consumers. It is noteworthy that the APTEL Judgment:-

(a) Does not restrict connecting to/ supplying electricity to consumers where the network of the distribution licensee already exists in the vicinity and as sought by the consumer. In fact, Para 59 of APTEL Judgment has stated that where Tata Power has already made considerable investment in constructing its distribution system, pursuant to this Hon'ble Commission's Order dated 22.08.2012, such system shall be allowed to be commissioned and capitalised ***to feed the consumers***. Clearly the term distribution system as used by the Hon'ble Tribunal, in Para 59, cannot include 'service line' since cost of service line is borne by the consumer (as per Section 46 of the Electricity Act read with MERC Supply Code) and hence is not reflected in distribution licensees in their ARR. Therefore, there is no of question of capitalizing the same. If the interpretation of the Committee is accepted, no R-Infra consumer opting to get supply from Tata Power will be allowed to switch over to Tata Power's network even though Tata Power network has been installed up to distribution main in compliance of the directions of this Hon'ble Commission's Order dated 22.08.2012. It would result in non-utilization and/or idling of Tata Power's existing distribution network.

(b) Does not interdict parallel licensing in an area of supply to meet the twin objective of promoting competition and protecting consumer interest. The consumer has a choice whether it wishes to avail supply from a distribution licensee through its own distribution network or from any other source through Open Access.

(c) Has merely directed that Tata Power should not be allowed to lay down its distribution network selectively in the areas where the reliable network of R-Infra already exits and vice versa. However, where the distribution network of Tata Power is already existing, the consumer should not be denied the right

to exercise its choice for economic advantage. It is not the intent of the APTEL Judgment to deny switchover to an existing consumer where the distribution network (distribution mains) of the other licensee is available in the vicinity.

(d) Emphasized that wherever a reliable network of first distribution licensee exists and the network of the second distribution licensee does not exists, then such second distribution licensee need not unnecessarily invest in developing a parallel network. In such a scenario, the second distribution licensee should utilize the existing distribution network of first licensee. Further, where the distribution system of the second licensee is existing, the second licensee is permitted to extend supply from its own network by laying a service line upto the premises of the consumer who has elected to take supply from such second licensee.

18. It is noteworthy that, Section 43 of the Electricity Act considers a distribution licensee 'USO ready' once it has set up its distribution network upto the distribution mains. The Electricity Act envisages circumstances where for giving supply to a consumer on its wires (possibly qua load growth and coverage aspects), the distribution licensee may require extension of distribution mains or setting up of new substation(s). Therefore, any restriction to the contrary cannot be enforced. In light of the above, it cannot be said that this Hon'ble Commission intended and/ or inferred the term 'completely covered' to mean presence of a distribution network of the licensee upto the point of supply. As a result the term 'completely covered' ought to mean the presence of the distribution system of a distribution licensee upto its distribution mains and not otherwise. Where distribution mains of the second licensee is existing for extending supply to a consumer which is taking supply from the first distribution licensee, but wants to take supply from the second distribution licensee, switchover should be permitted as it would not amount to duplication of distribution network and would only require laying of service line at the cost of consumer, which does not form part of the second licensees ARR.

19. The Interim Order dated 09.11.2015, at para 53(a) and 53(b) has used the term 'completely covered' while setting out the scenarios for network rollout in Mumbai suburban area. In this regard, it is pertinent to note that this Hon'ble Commission has only used the term 'completely covered' and not 'completely covered by the distribution system'. The term can be read as 'completely covered by the distribution network' or 'completely covered by the distribution system'. It is

also noteworthy that while setting out its observations/findings and directions, the Hon'ble Commission has not used the term 'distribution system' anywhere in its Interim Order. In fact in para 55 of the Interim Order, which relates to para 53(b), the Hon'ble Commission has used the term 'robust network' as regards assessing the availability of a network in an area. Therefore, the intention of this Hon'ble Commission is to read 'completely covered' as 'completely covered by the distribution network' and not 'completely covered by the distribution system'. However, contrary to the above, the Committee has narrowed the meaning of 'completely covered' to mean 'completely covered by the distribution system' alone.

20. APTEL Judgment held that duplication of network is to be avoided in the event it is not in consumer interest, does not improve reliability or does not involve supply to 'new consumers'. As is evident from the Committee Report, the Committee has understood distribution network as the distribution system and these terminologies have been used interchangeably, without appreciating the difference between distribution network and distribution system. It is pertinent to note that, this Hon'ble Commission's Order dated 22.08.2012 had directed Tata Power to focus all its energies and capital expenditure, to lay its 'distribution network' in 11 clusters in such a manner that it is in a position to provide supply through its own 'distribution network' to its existing and prospective consumers, located anywhere within those 11 clusters, within the time frame prescribed under the SOP regulations (i.e. Tata Power to be USO ready) [**Para 97, 98(a) and 98(d)**]. In this context, the understanding of the Committee that service line forms part of the distribution network is incorrect as it cannot be the intent of this Hon'ble Commission to direct Tata Power to lay its network (including service lines) in all 11 clusters for every existing and prospective consumer's upto the point of supply.

21. The Committee has erred in deciding the method for assessing 'Completely Covered' to tag each existing consumer/ premises based on the present distribution system to which he is connected. If that is accepted then no area/ city/ state of the country can be said to be completely covered by any licensee. The correct interpretation of 'completely covered' would be availability of distribution mains of the distribution licensee from which a consumer/premises is connected or can be fed by laying service lines within timelines specified in the Hon'ble Commission's Regulations. In other words, the Committee has recommended that the area of supply of a licensee be curtailed and be made consumer specific rather than area

specific. This is not the intent of the Statutory Scheme. If recommendations of the Committee are accepted, then the same would curtail the rights of a specific class of consumers, which is contrary to the Electricity Act and the APTEL Judgment.

22. Even otherwise, the Committee has also failed to carry out one of its essential responsibilities, being, recommending a practicable, operational criteria and methodology which may be used for assessing the adequacy/ reliability of the existing network. In this regard, it is pertinent to note that the aspect of assessing the reliability of existing network is quintessential for permitting laying of parallel network in terms of the APTEL Judgment and this Hon'ble Commission's Interim Order dated 09.11.2015. This important aspect of assessing reliability has been done away with by the Committee thereby rendering the entire exercise meaningless. In order to truly implement the Statutory Scheme, the assessment of reliability of existing network ought to be conducted. By restricting itself to the absolute cost of network being the only criteria for laying of parallel network, the Committee has contravened the Statutory Scheme, which is legally not permissible.

23. As regards the findings of the Committee, it is further submitted that:-

(a) The Committee has recommended laying of parallel network only on a single criteria of absolute cost of laying of new network and/ or augmenting existing network. The Committee has failed to assess and factor in the aspect of reliability of existing network, availability of technical spare capacity or laying of network to improve the reliability of existing network. While giving its recommendations, the Committee has failed to consider other relevant factors in laying of parallel network, inter-alia, wheeling cost, honouring the consumer choice and protecting consumer interest (which also includes quality of supply and consumer service).

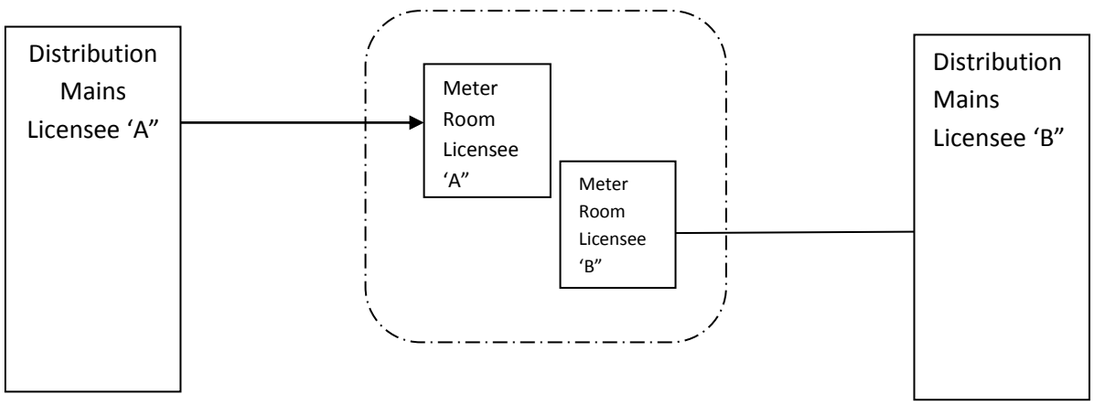
(b) The Committee has failed to consider that, as per Section 46 of the Electricity Act read with MERC Supply Code, the cost of service line is borne by the consumer and has no impact on the ARR of a licensee. The Committee has failed to appreciate that in case of 'Permanent Disconnection', the licensee is required to remove the service line leading to that particular consumer. [**Section 163 of the Electricity Act**]

(c) As per the Committee Report, for an existing consumer of a distribution licensee to migrate on the wires of the other distribution licensee, the

consumer is required to be connected to both the licensees. Technically and practically such a situation cannot exist. In this regard, it is pertinent to note that supply from both licensees emanates from a distinct distribution system which cannot operate in parallel due to inherent divergence in technical parameters such as phase-angle difference, vector-group, magnitude of voltage, etc. Under such circumstances, the consumer can never be connected to both the licensees. This factual position had also been narrated by the Hon'ble Tribunal in Para 85 of its Judgment dated 21.12.2012 in Appeal No. 132 of 2011 and batch, wherein the Hon'ble Tribunal has held that:-

> "*85. However, in distribution, the distribution system of one licensee works in the standalone basis. It cannot run in parallel with a distribution system of another licensee. The reason for this standalone requirement is the presence of Delta/Star transformers in the distribution system. Therefore, the Act mandates the distribution licensee to carry out all the activities relating to the distribution i.e. from planning to lay down to operate and maintain the distribution network."*

(d) In this regard, it is also pertinent to note that in the premises where both the licensee are serving the consumers on their own network, the metering rooms of each of the licensee are separate. Service line(s) of licensee 'A' starts from its distribution mains and terminates at its metering room. Likewise service line(s) of licensee 'B' emanates from its own distribution mains and terminates at its metering room as pictorially shown below:-



Thus, the recommendations of the Committee to the effect that consumers such as MIAL, HDFC, Karina Synthetics and 5000-6000 consumers ***are connected*** to both the networks is factually incorrect. In other words, service connection of both utilities cannot exist for a single consumer and the

consumer can be connected only to one distribution licensee at a time, unlike the assertion by the Committee that consumers can be connected to both distribution licensees at a given point in time. The moment a consumer decides to get Permanently Disconnected from a licensee, the licensee is required to remove the service line and the metering arrangement from the consumer premises. Thus, duplication of network cannot mean duplication of service line. In fact when an existing consumer of 'A' licensee asks for supply from 'B' licensee, 'A' licensee has to remove its service line.

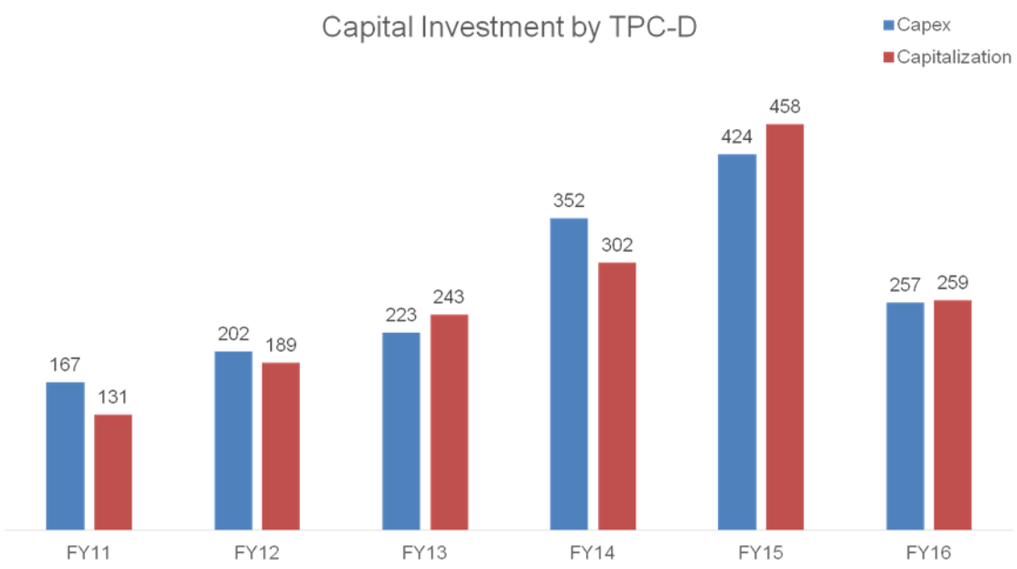
(e) The Committee has further recommended that a list of existing consumers, who are entitled to switchover, be frozen for all times to come. Accepting these recommendations of the Committee would mean that, there cannot be a situation wherein the switchover options can be extended to consumers, beyond the list frozen by the Committee/ this Hon'ble Commission at this point in time. This would not only curb the choice of other consumers to select a distribution licensee of its choice but the same would also result in creating a classification which is not warranted in terms of the Electricity Act.

(f) As per the Committee Report, a distribution licensee would be able to connect to consumers only if it has laid service lines and the other distribution licensee would not be able to lay any network, including the service lines, to connect to consumers in terms of the choice exercised by the consumers. In other words, if one Licensee A, supplying electricity at cheaper tariff, is present just outside the consumers premises (but does not have service line inside the premises) and the other Licensee B, supplying electricity at a higher tariff, is having service lines/ CSS inside the premises, then the consumer would not be able to exercise its choice to elect supply of electricity from Licensee A even though no network development is required and electricity can be supply by merely extending service line.

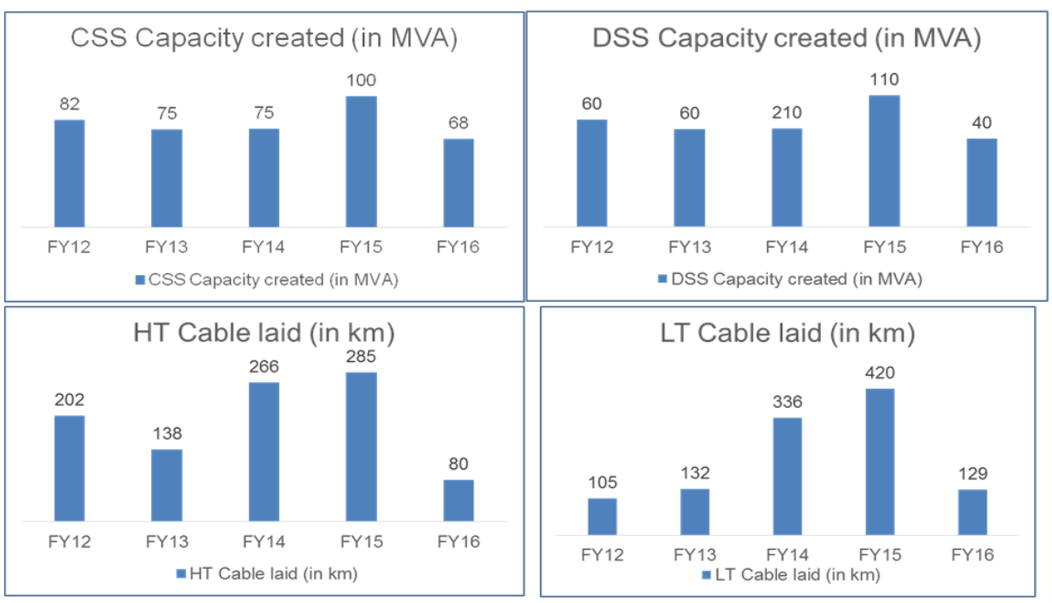
(g) As per the Committee Report, there is no opportunity for utilisation of the existing network where considerable investment has already been made by Tata Power, in terms of the direction passed in this Hon'ble Commission's Order dated 22.08.2012. In such a scenario, the existing network of Tata Power would become stranded and the entire cost would be borne by the Tata Power's direct consumers. With virtually no addition of new consumers on Tata Power's existing network, the wheeling charges for Tata Power's

direct consumers would have an upward spiralling effect leading to unsustainable tariffs. The details of the capital expenditure incurred and capitalised by Tata Power, in light of the aforesaid Orders and the impact of the Committee Recommendations on the wheeling charges and tariff of Tata Power's direct consumers is demonstrated in terms of the table/diagrams provided herein below:

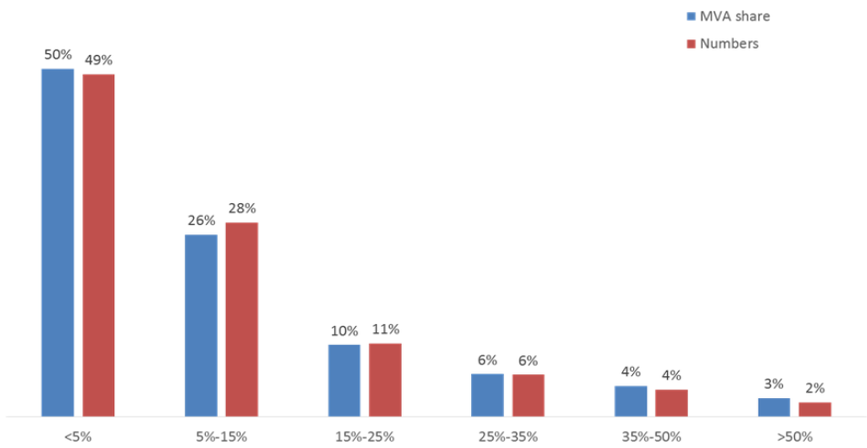
Details of Capex incurred & Capitalised by Tata Power



Details of Physical assets created by Tata Power



Details of underloaded stranded assets causing undue burden on consumers



Impact of significant increase in Capex cost per unit due to stranded assets

DPR Name	Approved Amt	Projected Avg. Mus in DPR	Projected Capex cost in DPR Rs/Unit	Average actual Mus realised	Difference in actual MUs realised	Actual Capex cost Rs/Unit
Consumer Schemes in Central Mumbai Area	Rs. 31.48 Cr	65.00	0.81	18.62	-46.38	2.82
Consumer Schemes in North Mumbai Area List-A	Rs. 90.67 Cr	28.20	4.59	26.23	-1.97	4.94
Consumer Schemes in South Mumbai Area (Part B)	Rs. 49.37 Cr	11.10	7.41	9.25	-1.85	8.89

Spiralling upward impact of Committee Recommendations on wheeling cost of Tata Power's direct consumers:

Year		Submitted WC	With impact of committee recommendation	% increase of WC
		Rs/kWh	Rs/kWh	%
FY 2016-17	HT	**1.01**	**1.02**	
	LT	**2.05**	**2.23**	**9%**
FY 2017-18	HT	**1.09**	**1.10**	
	LT	**2.13**	**2.38**	**12%**
FY 2018-19	HT	**1.09**	**1.09**	
	LT	**2.05**	**2.33**	**14%**
FY 2019-20	HT	**1.02**	**1.13**	
	LT	**1.96**	**2.56**	**31%**

(h) The crucial aspect of reliability has been totally ignored by the Committee. In this regard, it is noteworthy that R-Infra has spent Rs. 861.31 Crores (between 2005 to 2016) towards improvement of Reliability of its network as shown in table below. This could have been avoided if under-loaded network of Tata Power was duly utilized to serve the consumers.

	Till FY-11 (Cumulative)	**FY-12**	**FY-13**	**FY-14**	**FY-15**	**FY-16**	**Total in Rs Cr**
Capex Rs Cr.	**430.04**	63.16	53.69	91.29	98.38	124.75	**861.31**
Capitalization Rs Cr.	**376.36**	73.82	50.4	71.77	98.08	144.09	**814.52**

B. Re. Laying of Parallel Network in Chene and Vesave.

24. As regards laying of network in Chene and Vesave, the Committee has recommended as under:-

(a) As R-Infra has the distribution network in Vesave village, the same shall be classified as an area completely covered by R-Infra. [**Para 9(A)(5)**]

(b) As MSEDCL has the distribution network in Chene, the same shall be classified as an area completely covered by MSEDCL and no duplication of network by R-Infra and/ or by Tata Power can be allowed in this area. [**Para 9(A)(6)**]

25. These recommendations are alleged to have been made on the basis that the APTEL Judgment provides that there should not be any duplication of distribution network. [**Para 4.3 @ page 25**]

26. It is submitted that, the aforementioned recommendation qua laying of network in Chene and Vesave is incorrect and beyond the scope of reference given to the Committee. Accepting the recommendation would tantamount to:-

(a) Denying choice to consumer, which is contrary to the Statutory Scheme. The choice of the consumer is not limited to the source of supply but the same is also extended to mode of supply.

(b) Review/ modification of Ld. Maharashtra Commission's Order dated 14.08.2014 in Case No. 90 of 2014, whereby distribution licence was granted to Tata Power. Tata Power has been authorised to distribute and supply electricity for more than 108 years by way of various licenses granted to its

predecessors, prior to the enactment of the Electricity Act. The erstwhile licenses issued to Tata Power were valid upto 15.08.2014. The area of Chene and Vesave were not part of the erstwhile licenses granted to Tata Power and the same were added to its area of supply by this Hon'ble Commission's Order dated 14.08.2014. Accepting the Committee's recommendations would amount to review/ modification of the said order as Tata Power would be restricted in laying any network in the said areas. While granting the said licence the Hon'ble Commission was aware of the existing network in Chene and Vesave and has thereafter included the said areas in Tata Power's Distribution Licence No. 1 of 2014. Yet the Committee has not considered the Network Rollout Plan submitted by Tata Power for the areas of Chene and Vesave.

27. As is evident from above, the Committee has failed to appreciate the context and the findings of the APTEL Judgment, viz.:-

(a) The Judgment was passed in light of the difficulties in laying network in the city of Mumbai. However, while restricting Tata Power to lay any network in Chene and Vesave the Committee has not assessed the facts whether there are any issues/ difficulties in laying of network in these areas. As set out above, Tata Power license at relevant time did not include the areas of Chene and Vesave. Thus, APTEL Judgment does not pertain to Chene and Vesave. It is a settled position of that, a decision is only an authority for what it actually decides. What is of the essence in a decision is its 'ratio-decidendi' and not every observation found therein nor what logically follows from the various observations made in the judgment. Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there is not intended to be exposition of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. It is, therefore, not profitable to extract a sentence here and there from the judgment and to build upon it because the essence of the decision is its 'ratio-decidendi' and not every observation found therein.

(b) Even otherwise, the said Judgment was passed in light of the peculiar situation where difficulties were being faced by distribution licensees in laying of distribution network. The Committee has not carried out any such

analysis and therefore the directions given in the said Judgment cannot be applied to Chene and Vesave blindly.

(c) Without prejudice to the above, it is submitted that even if the principles set out in the APTEL Judgment are to be made applicable, the said Judgment does not impose any blanket restrictions in laying of any parallel network. In fact, laying of parallel network is permitted if such laying of parallel network:-

(i) Is in terms of choice exercised by the consumer.

(ii) Is in overall interest of the consumer.

(iii) Improves reliability of the existing network.

(iv) Is for supplying to 'new consumers'.

28. The Committee ought to have considered the aforesaid factors before injunction of Tata Power from laying any network in the areas of Chene and Vesave. Such injunction is violative of the Statutory Scheme set out above and there Committee Recommendations ought to be rejected.

C. Re. Meaning of the term and supply to 'New Consumer'.

29. The Committee has proceeded to impose restrictions on the laying of network for supplying electricity to the 'new consumers', viz.:-

(a) New consumers are those applicants, who were not consumers earlier nor are they presently consumers of either Distribution Licensee, by virtue of neither being connected to nor receiving supply from either Distribution Licensee. **[Para 9(B)(1)]**

(b) In addition to the above, the following persons shall also qualify to be categorized as 'new consumer':

(i) Change from Temporary Connection to Permanent Connection

(ii) All Redevelopment cases [**Para 9(B) (2)**]

(c) Permanently Disconnected consumers do not qualify as a new consumer. [**Para 9(B) (4)**]

(d) Even for cases related to 'new consumer', the second Licensee cannot simply lay the distribution system. Even for such cases the protocol recommended by the Committee for permitting either distribution licensee to set up/ extend/ augment the distribution system would have to be applied, and the

distribution licensee who can undertake the same in the most optimum manner would be permitted to do so. [**Para 9(B) (3)**]

(e) The cost of setting up the required distribution system for providing supply to the premises of the applicant is the only criterion that needs to be considered for optimising the cost. The absolute cost in Rs. lakh/Rs. crore rather than cost per unit may be considered. [**Para 9(E) (10)**]

(f) The ease of giving supply should be evaluated first in terms of network configuration required to connect the new consumer under Scenario 53(d), and the cost optimisation should be evaluated subsequently. [**Para 9(E) (11)**]

(g) The ease for setting up the distribution system shall be evaluated in the following Levels of priority, which also reflects the time and cost effectiveness for releasing new connection by both the Distribution Licensees:

(i) **Level 1**:- The LT consumer connection is possible by extending service line from the existing distribution mains without any augmentation in the distribution mains.

(ii) **Level 2**:- The LT consumer connection is possible only after augmentation of nearest distribution mains/laying new LT distribution mains from which the service line is required to be extended.

(iii) **Level 3**:- The LT consumer connection is possible only after providing new CSS or augmentation of CSS.

(iv) **Level 4**:- The HT consumer connection is possible only after laying/augmentation of HT cable/mains and associated switchgear.

(v) **Level 5**:- The HT consumer connection is possible only after commissioning of new/augmentation of existing Distribution Sub-Station (DSS)/Receiving Station in the vicinity/area. [**Para 9(E) (12)**]

(h) The capex requirement up to the first two Levels above, i.e., (a) Level 1 - extension of LT service connection, and (b) Level 2- augmentation/creation of LT distribution mains, will not be significant, and it will affect the time to give supply in case such cases are required to be taken up before the Institutional Mechanism. Hence, in these 2 cases, there shall be no requirement to approach the Institutional Mechanism, and the connection can be released by the Distribution Licensee to whom the Application has been submitted. [**Para**

9(E) (13)]

30. These recommendations have been made on the basis of analysis of the definition of consumer. On the basis of the said analysis, the Committee has come to the conclusion that the terms 'premises' and 'for the time being connected to with the works of the licensee' are the basis for classifying new consumers. Accordingly, 'temporary connection' and 'redevelopment' cases would fall within the definition of the term 'new consumer'. The Committee also recognises that the case of 'Permanent Disconnection' would fall within the definition of 'new consumer'. However, the same should not be considered as new consumers as it would defeat the purpose of the APTEL Judgment which provides that there should not be any duplication of network. If cases of 'Permanent Disconnection' are accepted as 'new consumer', then all existing consumer would fall within the definition of 'new consumer' and licensees would have right to lay network at every nook and corner of Mumbai.

31. It is submitted that, the Committee has rightly defined the term 'new consumer' in its Report dated 28.03.2016. It is further stated that the Committee has also rightly concluded that cases of 'temporary connection' and 'redevelopment' would qualify as 'new consumer'. As regards the case of 'Permanent Disconnection', after having appreciated that the same falls within the definition of 'new consumer', the Committee has wrongly held that permanently disconnected consumers would not qualify as 'new consumer' as it would mean that there is no difference between existing consumers and new consumers.

32. In this regard, it is submitted that there is no basis for the Committee's apprehension that allowing 'Permanent Disconnection' cases as 'new consumer' would amount to laying of duplicate network even for existing consumers. There is a difference between existing consumers and 'new consumer'. A 'new consumer' means a person who has made an application for supply of power and whose premises are for the time being not permanently connected to the works of a distribution licensee. On the other hand, an existing consumer of a distribution licensee may make an application to another distribution licensee while he is still connected to the network of the distribution licensee and switchover may only be done as permitted under the Statutory Scheme set out above.

33. If the recommendations of the Committee, as regards 'Permanent

Disconnection', are upheld, the same would result in denying the consumer a choice to elect another distribution licensee, in the event, the consumer is not satisfied by the services of its existing distribution licensee. Even otherwise, the consumer interest cannot be equated only in terms of absolute cost of laying/ augmenting the network. The consumer interest is also taken care of by providing reliable electricity, good services et al.

34. The Committee has also imposed restriction on laying of network for 'new consumer', which is in teeth of the APTEL Judgment. This is evident from Illustration no. 11 relating to new supply under Scenario 53(d) given in Chapter 8 of the Committee Report. The said illustration wrongly links the 'new consumers' to Scenario mentioned 53(a) on the basis of existence of CSS in the vicinity.

35. Further, the Committee has also recommended that even for cases related to new consumer, second licensee cannot simply lay its distribution system. Even for such cases relating to new consumers, the protocol recommended by the Committee for permitting either distribution licensee to set up/ extend/ augment the distribution system would have to be applied and the distribution licensee who can undertake the same in the most optimum manner would be permitted to do so. The absolute cost of laying/ augmenting the network is not the only criterion to be considered for optimizing the cost. These recommendations of the Committee are in teeth of the APTEL Judgment in so far as:-

(a) APTEL Judgment does not impose any restriction on laying of network for supplying to 'new consumers'.

(b) Even otherwise and without prejudice to the above, it is submitted that laying of parallel network is permitted if laying of such network:-

  (i) Is in terms of choice exercised by the consumer.

  (ii) Is in overall interest of the consumer.

  (iii) Improves reliability of the existing network.

  (iv) Is for supplying to 'new consumers'.

36. In light of the above, there are no restrictions in laying of parallel network for supplying to new consumers. Even otherwise, the absolute cost of setting up the required distribution system cannot be the only criteria to be considered for laying of parallel network. A mechanism to consider the impact of number of parameters

like Wheeling Charges, availability of spare capacity without incurring additional capital expenditure, improving the reliability of network etc must be considered before approving laying of parallel network.

37. In view of the above, the recommendations of the Committee as regards:-

(a) Permanently disconnected consumers not qualifying as new consumers; and

(b) Restrictions imposed qua laying of network for connecting new consumers,

are unfounded and ought to be rejected.

D. Re. Protocol for migration under Scenario 53 (b), Protocol and Procedure for processing Applications and the Institutional Mechanism under Scenario 53(d).

38. The Committee has provided a detailed:-

(a) Protocol qua migration of consumers under Scenario 53(b) in Section 5.1 of the Committee Report; and

(b) Protocol and Procedure for processing Applications under Scenario 53(d), in Section 5.2 of the Committee Report.

39. In this regard, it is submitted that, the protocol and institutional mechanism devised by the Committee would lead to high level of micro-management by this Hon'ble Commission to resolve day-to-day and consumer by consumer issues involved in migration of consumers, which would ultimately mean that the distribution licensees would not be able to supply electricity within the timelines prescribed under the MERC SOP Regulations, 2014. Further, the concept of 'Ease of Doing Business' as envisaged by the Government of India and Government of Maharashtra, would be difficult to implement.

40. Without prejudice to the fact that the recommended protocol and Institutional Mechanism operates in a sphere contrary to the Statutory Scheme, Tata Power makes the following objections to the said recommendations:-

(a) Item 19 of 'Process of Switchover' **[at page 58 of the Committee Report]** does not elaborate on the physical changes to be done at the Point of supply for effecting Switchover. This is due to the fact that the definition of completely covered and eligibility of switchover consumers means that such consumers are connected to both the distribution licensees, which as stated above is not physically possible.

(b) The 'Process of Switchover' does not mention the changes to be effected in the metering arrangement. The said procedure only mentions the final meter reading.

(c) With regard to supply of electricity to new consumer under point 5 of Section 5.2, it is submitted that a distribution licensee may not be able to supply electricity within the time period stipulated under the MERC SOP Regulations, 2014. Therefore, necessary amendments would be required to be carried out to the MERC SOP Regulations, 2014.

(d) With regard to supply of electricity to new consumer under point 5 of Section 5.2, it is submitted that there are no checks on any distribution licensee so that to ensure that correctly declare a consumer 'falling in the categories' mentioned in the Committee Report. Further, necessary applications may not be provided where consumers falls in Level 3 and above.

(e) The cost analysis, as provided in Point 18 and 19 of Chapter 5.2 **[at page 62 of the Committee Report]** may not be the correct yardstick to judge the decision qua laying of network as cost estimates would be submitted based on the Prudent Network Planning and Engineering Practices followed by the utilities. In this regard, it is noteworthy that, the level of distribution submitted by the utilities for the same consumer may vary depending on the distribution voltage level of the utility. R-Infra and BEST have predominantly 11 kV HT distribution level, whereas Tata Power has both 11 kV and 22 kV HT distribution system and at places also 6.6 kV HT Distribution. With the advancement in technology, today a 33 kV Distribution system is also possible. Consequently, there would always be a variance in the estimates submitted by the utilities and disqualifying one over the other by overlooking these factors would be unfair.

(f) The basis for considering 10% variance in the estimates as acceptable is unclear.

(g) Point 20 of section 5.2 **[at page 62 of the Committee Report]** and other aspects mentioned in Section 5.2 does not provide any timelines for the Committee to give its decision. This may lead to delays of extending supply to the consumer.

(h) The Committee has not exempted the requirements in Chapters 5 and 6 in

case of temporary supply to either HT or LT in the case of temporary supply all the charges of network extension are allowed to be recovered from the consumer.

(i) The protocol does not give any weightage to the reliability of supply, quality of supply in evaluating proposals by either utility. This may eventually lead to unreliable and poor quality of supply to the consumer. A particular utility in order to acquire the consumer may disregard the reliability and quality of power and end up suppling the consumer. It may happen that Licensee A may prefer to give supply to a consumer in Level 2 even though extending of supply may mean laying of longer LT length of cable and affecting the voltage regulation at the consumer's end. However, Licensee B which follows prudent planning and engineering practices may opt for supplying by establishing CSS and eventually losing out to the consumer on economic grounds.

(j) The treatment of cases requiring conversion from Single Phase to Three Phase, LT to HT at a later point and involving augmentation and upgradation of network is not covered. Many times a consumers, in order to avoid giving space for installation of CSS, applies for a lower load that may qualify under Level 1 or 2 and later apply for load enhancement that may fall in Level 3 onwards. This situation has not been duly covered.

(k) In Para 4.5.1 ,the Committee is of the view that the Licensee undertakes the capital expenditure for connecting to a new consumer even though other licensee is existing and such duplication of distribution system would not benefit the consumers at large as unnecessary capital expenditure is being incurred. In saying so the Committee has totally disregarded the provisions in Supply Code (5.5) wherein it is mentioned that the cost of extension and upgradation of the system for meeting demand of new consumers may be recovered from new consumers as per regulation 4.3 to 4.9 of the Supply Code.

Part 2: Objections re. recommendations qua the area of supply where Tata Power, BEST and MSEDCL are licensed to supply electricity

41. At the outset, it is submitted that the principles laid down in the APTEL Judgment are not applicable in the area where Tata Power and BEST are licensed to supply electricity. This is owning to:-

(a) A special privilege bestowed upon BEST being a 'local authority' in terms of Section 42(3) of the Electricity Act (A local authority cannot be compelled to grant open access on its system).

(b) BEST having denied access to Tata Power to its network for supplying power to consumers through open access.

IV. Tata Power's objections to the Committee Report

42. From the perusal of the Statutory Scheme, the following is noteworthy:-

(a) Unless BEST permits Open Access on its network (under Section 42 of the Electricity Act), Tata Power will have to supply to its consumers from its own distribution network in terms of Section 43 of the Electricity Act. For this purpose, if Tata Power does not have its network, it will have to comply with its obligation of supply by laying down its own distribution network. **[Section 42, 43 of the Electricity Act read with para 27 of the SC Judgment]**

(b) There is no exemption to Tata Power from complying with Universal Service Obligation under Section 43 of the Electricity Act (i.e. to supply electricity on demand), merely on account of existence of BEST (a local authority) in the area of supply which Tata Power shares with BEST. Tata Power has an obligation to supply to all consumers on demand in accordance with the provisions of the Electricity Act. **[Para 30 of the SC Judgment]**

43. With regard to laying of network in the area where both Tata Power and BEST are licensed to supply electricity, the Committee has given the following recommendations:-

(a) Duplication of network by Tata Power is inevitable in area where by Tata Power and BEST are licensed to supply electricity, unless the Electricity Act is amended or unless BEST agrees to permit Tata Power to use its network under a commercial arrangement. [**Para 9(I) (1)**]

(b) It is practical that the Distribution Licensee will have to be given some time for setting up the distribution system in a phased manner, and hence, the need for a Rollout Plan. [**Para 9(I) (2)**]

(c) The Committee is of the view that Tata Power's Network Rollout Plan for BEST area should be such that it ensures against selective targeting of consumers, as both Licensees have Universal Service Obligation in the licence area. [**Para 9(I) (3)**]

(d) The feasible solution could be for Tata Power to first develop its distribution system to lower voltage levels in areas where the backbone distribution system in the form of DSS and/or CSS are already available, and then take up areas where DSS and/or CSS are yet to be set up. [**Para 9(I) (4)**]

(e) Based on study of the map of the distribution system submitted by Tata Power, it is seen that areas such as Dharavi, Carnac, Parel, Lower Parel, Elphinstone, Mahalaxmi, Haji Ali, etc., already have the DSS/CSS in place and can be targeted first, such that Tata Power is able to supply electricity to all consumers, including LT consumers, in that area. [**Para 9(I) (5)**]

(f) Tata Power may target to set up the LT distribution system in areas where the DSS/CSS already exist, in a specified period of time, say 2 years. [**Para 9(I) (6)**]

(g) Tata Power may be directed to re-submit its Network Roll-out Plan for the licence area overlapping with BEST, based on the above considerations. [**Para 9(I) (7)**]

(h) The Commission may consider incorporating necessary safeguards while approving the Network Roll-out Plan of Tata Power for the licence area overlapping with BEST, keeping in view the above issues. [**Para 9(I) (8)**]

(i) Tata Power shall not refuse to give supply to any consumer in the areas specified by this Hon'ble Commission in the Rollout Plan approved by this Hon'ble Commission. [**Para 9(I) (9)]**

(j) The Protocol and Procedure for processing Switchover Applications in Tata Power licence area overlapping with BEST is provided in Section 7.4. [**Para 9(I) (J)**]

44. Tata Power's submissions qua the recommendations of the Committee are as under:-

(a) Tata Power is obliged to lay down its Network in the entire area common with BEST and MSEDCL (i.e. Island City of Mumbai) to meet its USO. Such network can be rolled out in phases.

(b) Tata Power cannot be restricted to supply either to a particular class of consumer or in any particular area of the licence.

(c) Tata Power cannot refuse to supply to any consumer by laying its network and within the timelines prescribed by this Hon'ble Commission in its Regulations read with Section 43 of the Electricity Act.

45. The Network Rollout Plan dated 19.08.2015 submitted by Tata Power does not require any further modifications and the recommendations made by the Committee in this regard, be rejected. It is also most respectfully prayed that this Hon'ble Commission approve the Network Rollout Plan as submitted by Tata Power on 19.08.2015.

V. Conclusion

46. On the basis of aforesaid objections, Tata Power most respectfully prays that this Hon'ble Commission may:-

(a) Summarily reject/ dismiss the Committee report and the recommendations made thereunder; and

(b) Consider Tata Power's objections/ submissions as set out hereinabove and as submitted in the pleadings filed in Case No. 182 of 2014 and apply the same while approving Tata Power's revised Network Rollout Plans.

The Tata Power Company Limited/
Petitioner

Through:

J. Sagar Associates
Advocates for the Petitioner
Vakils House, 18 Sprott Road,
Ballard Estate, Mumbai 400 001, India

Date: 21.04.2016
Place: Mumbai

BEFORE THE MAHARASHTRA ELECTRICITY REGULATORY COMMISSION

WORLD TRADE CENTRE, CENTRE NO.1, 13th FLOOR,

CUFFE PARADE, MUMBAI 400005

NOTARY Aruna S. Srivastava MUMBAI MAHARASHTRA REGD. NO. 5013 GOVERNMENT OF INDIA

CASE NO. 182 OF 2014

IN THE MATTER OF:

The Tata Power Company Limited ... Petitioner

Versus

BEST Undertaking & Ors. ... Respondents

AFFIDAVIT

I, Mr. Bhaskar Sarkar, son of Mr. Arup Kumar Sarkar, aged 50 years, Head Business & Regulations (Mumbai Operation) of The Tata Power Company Limited (**"Petitioner/ Tata Power"**), having my office at Dharavi Receiving Station, Near Shalimar Industrial Estate, Matunga, Mumbai 400 019, Maharashtra, India, do hereby state on solemn affirmation as under:-

1. I state that I am the authorized signatory of Tata Power, the Petitioner, in the present Petition and as such I am fully conversant with the facts and circumstances of the present case and I am duly authorized and competent on behalf of Tata Power to swear and affirm this Affidavit.

2. I state that I have read and understood the accompanying Submissions in the captioned Petition and the same has been drafted under my instructions and after carefully going through the same, I state that the content of the same are true and correct to my knowledge and belief and it is stated that no part of it is false and nothing material has been concealed there from.

3. I state that the annexures along with the accompanying Submissions, if any, are true copies of their respective originals.

DEPONENT

VERIFICATION

I, the deponent above named, do hereby verify that the contents of my above Affidavit are true and correct, no part of it is false and nothing material has been concealed therefrom.

Verified at Mumbai on this _____ day of April, 2016.

DEPONENT

ARUNA S. SRIVASTAVA * GOVT OF INDIA * NOTARY

NOTARIAL

BEFORE ME

ARUNA S. SRIVASTAVA
ADVOCATE NOTARY (GOVT. OF INDIA)
45/5 Railway Staff Colony, Premier Colony
Vardachar (E) M.S. [illegible]

21 APR 2016

ANNEXURE P-1

Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 246 of 2012 &
IA Nos. 401 & 402 of 2012 and 71, 245, 439 & 442 of 2013
& IA No. 139 of 2014
AND
Appeal no. 229 of 2012 &
IA No. 368 of 2012

Dated 28th November, 2014

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

Appeal No. 246 of 2012 &
IA Nos. 401 & 402 of 2012 and 71, 245, 439 & 442 of 2013
& IA No. 139 of 2014

In the matter of:

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

Versus

1. The Maharashtra Electricity Regulatory Commission,
World Trade Centre No. 1,
13th Floor, Cuffe Parade, Colaba,
Mumbai-400 005.
(Through Secretary)

2. Reliance Infrastructure Limited,
Reliance Energy Centre,
Santacruz (East),
Mumbai- 400 055
(Through Company Secretary) ... Respondents

Counsel for Appellant : Mr. C.S. Vaidyanathan, Sr. Adv.
Mr. Ramji Srinivasan, Sr. Adv.
Mr. Sanjay Sen, Sr. Adv.
Ms. Sakya Singha Chaudhuri,
Ms. Prerna Priyadarshini
Ms. Kanika Chug
Ms. Poonam Varma
Mr. Vishal Anand
Mr. Rahul Kinra
Mr. Jafar Alam, Mr. Akshat

Counsel for the Respondents: Dr. Abhishek Manu Singhvi, Sr. Adv.
Mr. J.J. Bhatt, Sr. Adv.
Ms. Anjali Chandurkar
Mr. Hasan Murtaza for RIL

Mr. Buddy A. Ranganadhan for R-1
Mr. L.N.R. Sharma for R-2

Appeal no. 229 of 2012 &
IA No. 368 of 2012

In the matter of:
Reliance Infrastructure Limited,
"H" Block, 1st Floor,
Dhirubhai Ambani Knowledge City,
Navi Mumbai- 400 710 ... Appellant

Versus

1. The Maharashtra Electricity Regulatory Commission,
World Trade Centre No. 1,
13th Floor, Cuffe Parade, Colaba,
Mumbai-400 001

2. Tata Power Company Limited,
Having its office at Bombay House,
Fort, Mumbai-400 001.

3. Mumbai Grahak Panchayat,
Grahak Bhavan, Sant Dynaneshwar Marg,
Vile Parle (W),
Mumbai-400 056.

4. Prayas,
C/o Amrita Clinic,
Athawale Corner,
Deccan Gymkhana, Karve Road, Pune-411 004

5. Thane Belapur Industries Association,
Plot No. P-14, MIDC,
Rabale Village,
Post: Ghansoli, Navi Mumbai-400 071.

6. Vidarbha Industries Association,
1st Floor, Udyog Bhavan,
Civil Lines, Nagpur-400 041

7. Shri N Ponrathnam,
25, Majithia Industrial Estate,
Waman Tukaram Patil Marg,
Deonar, Mumbai-400 088

8. Shri Sandeep N. Ohri,
A-74, Tirupati Tower, Thakur Complex,
Kandivali (East), Mumbai-400 101.

9. Shri Rakshpal Abrol,
Bhartiya Udhami Avam Upbhokta Sangh,
Madhu Compound, 2nd Floor,
2nd Sonawala Cross Road,
Goregaon (East), Mumbai-400 063.

10. Mumbai International Airport Pvt. Limited,
Having its office at Chhatrapati Shivaji
International Airport, 1st Floor, Terminal 1B,
Santacruz (East), Mumbai-400 099 ...Respondent(s)

Counsel for Appellant : Mr. J.J. Bhatt, Sr. Adv.
Ms. Anjali Chandurkar
Mr. Hasan Murtaza for RIL

Counsel for the Respondents: Mr. C.S. Vaidyanathan, Sr. Adv.
Mr. Ramji Srinivasan, Sr. Adv.
Ms. Sakya Singha Chaudhuri,
Ms. Prerna Priyadarshini
Ms. Kanika Chug
Ms. Kanika Chug
Ms. Poonam Varma
Mr. Vishal Anand
Mr. Jafar Alam,

Mr. Buddy A. Ranganadhan for R-1
Mr. Akshat for R-2

JUDGMENT

MR. RAKESH NATH, TEHNICAL MEMBER

Appeal No. 246 of 2012 has been filed by the Tata Power Company Ltd. ("Tata Power") challenging the legality and validity of the impugned order dated 22.8.2012 passed by the Maharashtra Electricity Regulatory Commission ("State Commission") in Case 151 of 2011 imposing certain restrictions on Tata Power with respect to the category of consumers to

which the Tata Power can supply power utilizing RInfra's Network and also in respect of areas wherein Tata Power is required to lay down complete network to meet its Universal Service Obligation.

2. Appeal No. 229 of 2012 has been filed by Reliance Infrastructure Ltd. ("RInfra") against the same impugned order to the limited extent that Tata Power should have been restrained for further utilizing RInfra's distribution network for supplying electricity to the consumers who have migrated or changed over to Tata Power utilizing the wires of RInfra, permitted by the State Commission by an interim arrangement by order dated 15.10.2009.

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

(a) Historically since 1907, the conditions of Licences of Tata Power allowed supply to be

provided only to other Licensees and bulk consumers of Factories and Railways whose annual consumption was not less than 500,000 units (which were generally HT consumers), and also supply to such consumers for lighting provided the lighting consumption did not exceed 20% of the total annual consumption only by agreement with existing licensees.

(b) In 1934 the Licenses were amended to incorporate further restriction that Tata's cannot supply energy to any consumer other than the licensees within their respective areas except with the written consent of Government which is to be given after consulting the existing licensees.

(c) In 1964, the restrictions imposed on Tata Power in 1934, were removed by further amendments to the licneces held by Tata Power which directed Tata Power to supply to high end consumers only (more than 1000 kVA in Mumbai suburban area) and to other licensees in bulk and the other licensees were obliged to supply in retail.

(d) RInfra has a licence for distribution of energy in the suburban area of Mumbai. This licence was initially issued on 13.5.1930 to the BSES Limited which was subsequently renamed as Reliance Energy Limited and is now known as Reliance Infrastructure Limited (RInfra).

(e) Thus, the Mumbai suburban area is an area common in the licenced area of supply of both Tata Power and R-Infra.

(f) The genesis of the present dispute dates back to the year 2002 when RInfra filed a Petition in case No.14 of 2002 before the State Commission under Section 22 of the Electricity Regulatory Commission's Act 1998 for restraining Tata Power from supplying electricity to the consumers having contracted demand less than 1000 kVA in the area of supply of RInfra.

(g) On 03.07.2003, the State Commission passed an Order in Case No. 14 of 2002 filed by RInfra, in the matter of interpretation of erstwhile Tata Power Licenses, observed that

in terms of clause 5 of the licence Tata Power is entitled to supply energy "for all purposes including supply to other licensees for their own purposes and in bulk". However, in its order the State Commission restrained Tata Power from offering new connection to any consumers with energy requirement below 1000 kVA.

(h) As against this order dated 3.7.2003, both the parties filed separate Appeals before this Tribunal. The RInfra filed Appeal No.31 of 2005 and Tata Power filed Appeal No.43 of 2005.

(i) The Tribunal by the judgment dated 22.5.2006 disposed of both these Appeals setting aside the order of the State

Commission dated 3.7.2003 holding that the Tata Power under its license was entitled to supply energy only in bulk to other licensees and it was not entitled to supply in retail to the consumers irrespective of their demand.

(j) Against this judgment of the Tribunal, the Appeals were filed by Tata Power and others before the Hon'ble Supreme Court.

(k) On 08.07.2008, the Hon'ble Supreme Court delivered its judgment in the case of The Tata Power Company Limited v. Reliance Energy Limited & Ors. reported as (2008) 10 SCC 321. The Hon'ble Supreme Court held that there is nothing in the erstwhile TPC licenses which restricts the supply of electricity to consumers whose maximum demand is less

than 1000 KVA and Tata Power is entitled to supply electricity directly to consumers whose maximum demand is less than 1000 KVA apart from its entitlement of supplying electricity to other licensees for their own purpose and in bulk.

(l) Subsequently, as per the Hon'ble Supreme Court's judgment as well as the Capital Investment approval guidelines, 2005 laid down by the Maharashtra Commission, Tata Power submitted a Network Rollout Plan of Rs. 1062 Crores to the State Commission, in which it proposed a network roll out for the period FY 2009-10 to FY 2011-12 based on the load growth in the ward, land availability, spare capacity and outlet availability from the

corresponding 220 kV Receiving Sub Stations.

(m) The State Commission in its Order dated 15.06.2009 in Case No. 113 of 2008 did not approve the investment proposal of Network Rollout Plan and directed Tata Power for "exploring" the use of the wires of other distribution licensees.

(n) In pursuance of this order, Tata Power made a request to RInfra for permission for use of its network under open access to supply power to consumers who sought power from Tata Power. RInfra through its letter dated 30.7.2009 offered no objection to the Tata Power for use of its distribution system to

supply electricity to the consumers in the common licence area.

(o) On the strength of the judgment of the Hon'ble Supreme Court and the letter of no objection sent by Rinfra referred to above, the Tata Power on 31.8.2009 filed a Petition in Case no.50 of 2009 before the State Commission requesting it to lay down the operating procedure for the consumers who wanted to receive supply from the Tata Power while being connected to the distribution network of the RInfra.

(p) The State Commission, after considering the pleas of both the parties, while disposing of the Petition in Case no.50 of 2009 passed an order dated 15.10.2009 providing for an

interim arrangement finalising the procedure for consumers opting for changeover of supply from one licensee to other licensee through the network of the existing licensee.

(q) In this order, the State Commission, *interalia,* held that the changeover consumers shall be the consumers of the Tata Power from whom it is receiving supply for all purposes under the law. The State Commission further held that such consumers would be liable to pay wheeling charges for RInfra as determined by the Commission and shall not be liable to wheeling charges for Tata Power's distribution network. Tata Power was directed to collect wheeling charges from the changeover consumers and pass it on to

RInfra for allowing it to use its network and for being the carrier of its electricity. As regards the proposal made by the RInfra for recovery of its regulatory assets and cross subsidy charges from the changeover consumers, the State Commission held that since the issues like cross subsidy surcharge would require more examination, the same would be considered separately later in the appropriate proceedings. However, the State Commission mentioned that the interim arrangement as above, shall stay in effect until formulation of the final scheme in the form of regulations or otherwise dealing with all the relevant aspects of changeover are issued by the State Commission. This order was not challenged by any party.

(r) On 21.10.2011, the RInfra filed a petition before the State Commission being case No.151 of 2011 seeking relief on account of certain issues affecting RInfra and its financial viability. In this petition, RInfra alleged that Tata Power is indulging in cherry picking in case of changeover consumers i.e. permitting changeover only to subsidizing consumers and also selective laying network to connect large subsidizing consumers. This has lead to a skewed consumers mix for RInfra. In case Tata Power is permitted to carry on the cherry picking, RInfra will be left out only with subsidized consumers whose tariff would be bound to increase and ultimately the subsidized consumers would also no longer remain with RInfra. The 1st

Respondent allged that the RInfra had permitted Tata Power to use its network in the overall interest of consumers. However, the Tata Power's game plan is to push RInfra out of business and attain monopoly in distribution in Mumbai. RInfra prayed for the following in this petition:

"a) that this Hon'ble Commission may be pleased to modify and/or clarify the Order dated 15th October 2009, by holding and/or providing that the said Order dated 15th October 2009, and the protocol contained therein shall operate and be applicable on the condition that TPC-D does not connect its own network to any existing consumers of RInfra-D or any new consumers in RInfra's area of supply till TPC-D complies with its Universal Service Obligation by laying its network within TPC-D's licensed area of

supply that coincides with RInfra's licensed area of supply.

b) *In the alternative to the aforesaid and in the event of the modification/clarification prayed for in prayer (a) above not being granted, this Hon'ble Commission may be pleased to withdraw and/or cancel the non-adversarial Order dated 15th October 2009;*

c) *Pending the hearing and final disposal of the Petition/Case, TPC-D may be restrained by an order and injunction of this Hon'ble Commission:*

   i. *from connecting on its own network any existing consumer of RInfra-D; or*

   ii. *from connecting on its own network any new consumer in RInfra's licensed area of supply;*

   in the alternative to prayer (c)(i) and (ii) above the operation of the Order dated 15th October 2009 be stayed;"

(s) This Petition was disposed of by the State Commission by the impugned order dated 22.8.2012 in Case 151 of 2011, directing Tata Power to focus all its energy in developing network in 11 clusters identified by the Commission and within 1 year Tata Power shall develop a network such that it would be in a position to connect to any consumer within a period of 1 month. Further, the State Commission granted relief to RInfra by imposing following restrictions on Tata Power:

(i) From the date of the order changeover will be allowed from RInfra to Tata Power only for the residential consumers having an average consumption less than 300 units per month for next 12 months and after that the

Commission will review the position and decide for future.

(ii) Tata Power can switchover existing changeover consumers and only residential consumers having an average consumption less than 300 units per month in the subsequent 12 months, in the identified 11 clusters.

(t) Aggrieved by the impugned order dated 22.8.2012, both Tata Power and RInfra have filed Appeal No. 246 of 2012 and 229 of 2012 respectively.

4. On the above issues, we have heard Shri Vaidyanathan and Shri Ramji Srinivasan, Sr. Advocates for Tata Power, Dr. Abhishek Manu Singhvi and Shri J.J. Bhatt, Sr. Advocates for RInfra

and Shri Buddy Ranganadhan, learned counsel for the State Commission.

5. Keeping in view the rival contentions of the rival parties, the following issues arise for our consideration:

i) **Whether Tata Power has indulged in "Cherry Picking" of changeover consumers supplied electricity on RInfra's network?**

ii) **Whether Tata Power has laid down network selectively to serve high end subsidizing consumers ignoring low end consumers in the proximity?**

iii) **Whether the State Commission had power to issue the impugned directions to the Appellant under Section 23 of the Act?**

iv) **Whether the State Commission has erred in continuing the interim arrangement for supplying electricity to changeover consumers using RInfra's network permitted by the Commission by order dated 15.10.2009?**

6. Let us consider the above issues one by one.

7. **The first issue is regarding "Cherry Picking " of the changeover consumers.**

8. Let us examine the findings of the State Commission with regard to "Cherry Picking". The relevant paragraphs of the impugned order are reproduced below:

> *"71. In order to assess whether there is any substance in the above-referred allegations made by RInfra-D, the Commission had directed both, RInfra-D and TPC-D to submit the relevant*

information regarding the process of accepting Changeover Applications, and the consumer categories that have shifted from RInfra-D to TPC-D based on the Changeover Protocol laid down under the interim Order dated October 15, 2009 in Case No. 50 of 2009, as summarised earlier in the Order. The Commission has analysed the submissions made by the Parties in this regard, the findings of which are given below:

a) TPC-D has submitted the Internal Audit Report on the process being adopted by TPC-D for changeover, the findings of which have been summarised in the earlier paragraphs of this Order, which confirm that certain requirements such as PAN Card, Mobile Telephone Number, and Cheque Details are mandatorily required to be submitted, for an Application to be accepted by TPC-D's system. In reply to a query by the Commission in this regard, TPC-D submitted that there appears to be an error in the Audit Report, and that other documents are also being accepted

towards address proof, and submission of PAN Card is not compulsory. As regards mobile number, TPC-D submitted that even landline telephone number is accepted, and such contact details are required for easier communication with the consumers. As regards need for submission of cheque details, TPC-D has submitted that payment of cheque is not compulsory, and many changeover consumers have paid the requisite amounts in cash. However, the Commission is of the view that TPC-D cannot make such a subsequent denial of the findings of the Internal Audit Report, since, the same has been submitted by TPC-D itself, without any caveats or comments regarding the findings of the Internal Audit Report.

b) TPC-D's Power Supply Application Form, which is a common Application Form for changeover applications as well as new connections, also confirms that submission of PAN Number/TAN Number is a compulsory requirement under a separate head, in addition to PAN Card being

accepted as one of documentary evidence for identity proof. TPC-D has attempted to justify this requirement by saying that PAN details are required for deducting the correct amount of Income Tax (TDS) while paying interest on Consumers' Security Deposit to the consumers, since in case of consumers having Sanctioned Load above 20 kW, the amount of interest may exceed Rs. 5000, requiring TPC-D to deduct tax at source. However, the Commission is of the view that TPC-D's justification has no merit, since this data is being sought from all consumers and not only from consumers having Sanctioned Load above 20 kW. Further, similar complaints have also been received during the Public Hearing on the ARR and Tariff Petitions filed by TPC-D over the last two years.

c) As regards the documents to be submitted along with the application for supply, Regulation 4 of the MERC (Electricity Supply Code and Other Conditions of Supply) Regulations, 2005, specifies as under:

"4. Application for Supply

4.1 The applicant shall provide the following information / particulars/ documents to the Distribution Licensee while making an application for supply or for additional load, shifting of service, extension of service or restoration of supply:

.....

d) From the above, it can be observed that PAN Card is not a mandatory requirement at the time of making application for supply. It is also evident that the Regulations envisaged requirement of details such as telephone number that too only of the Licensed Electrical Contractor and not of the applicants. Therefore, the requirement to provide the above-said data along with the Power Supply Application Form, is not in accordance with the MERC Supply Code, and hence, indicate that TPC-D has been attempting to filter the consumers who are changing over from RInfra-D to TPC-D, rather than accepting all complete Applications from all

eligible consumers, in accordance with its mandate as a Distribution Licensee under the law.

e) The Commission had directed TPC-D to submit the data regarding the category-wise number of changeover Applications rejected at the Application stage itself, since, this data was not brought out by the Internal Audit Report submitted by TPC-D. However, TPC-D has been unable to submit this data, which would have revealed whether cherry-picking is happening in the changeover process. TPC-D has submitted that since, there is no benefit in maintaining this data, such data has not been maintained till March 2012, and hence, the same cannot be provided. However, TPC-D's submission in this regard does not have merit, since; TPC-D has admitted that it is maintaining this data from April 1, 2012. Further, the Internal Audit Report submitted by TPC-D itself confirms that even among registered Applications, out of around 1272 applications rejected due to submission of incomplete documents, in 72 sample cases (i.e., 100% of the selected sample), all the required

documents have been ticked in the system as being actually available. TPC-D's explanation in this regard that maybe the consumers did not submit the latest electricity bill of RInfra-D does not appear reasonable.

f) The above analysis show that genuine applications from low-end consumers are likely to have been rejected, which points towards cherry-picking being done by TPC-D in the changeover process, since the addition of only high-end subsidising consumers to TPC-D's consumer base is being allowed.

72. The above analysis shows that in terms of sales, the proportion of changeover of subsidising sales is far higher than that of subsidised sales and comprises 90% of the sales that has migrated to TPC-D, and even in terms of changeover of consumers, the proportion of subsidising category is very high at 39% of the total changeover consumers. Accordingly, the Commission has arrived at the conclusion that a very high number

of subsidizing consumers (with high energy consumption) are changing over to take supply from TPC-D. The Commission is of the view that whether this is because of any intentional action or omission of TPC-D behind this trend is not as much important as the trend itself, because this trend is upsetting the level playing field and hence, is not conducive to a competitive environment in electricity distribution by two Distribution Licensees having a common area of supply".

9. Thus, the State Commission came to the conclusion regarding cherry picking in changeover process on the basis of the following:

(i) Internal Audit Report of Tata Power which confirms that certain requirements such as PAN card, Mobile telephone number and cheque details are mandatorily required to be submitted for an application to be accepted by Tata Power System.

(ii) Tata Power's Power Supply Application Form common for changeover and new consumers confirms that PAN/TAN no. is a compulsory requirement. In addition PAN card is being accepted for Identity Proof.

(iii) As per the Supply Code, PAN card is not a mandatory requirement at the time of submitting the application. Telephone number of the consumers is also not required to be given. Thus, Tata Power has been attempting to filter the changeover consumers.

(iv) Tata Power has submitted that it is maintaining the data for rejection of application only from 1st April 2012 and data prior to that is not available.

(v) In the audit report in 72 sample cases out of total 1272 applications, all the requirements have been ticked in the system as available.

10. The State Commission came to conclusion that very high number of subsidizing consumers with high energy consumption were changingover to Tata Power and this trend was upsetting the level playing field and not conducive to the competitive environment in the common area of supply of both the distribution licensees.

11. Learned Senior counsel for Tata Power on Cherry Picking in Changeover submitted that the findings of the State Commission in the Impugned Order are factually incorrect and are based on arbitrary reasoning which is evident from the following facts:-

(a) Tata Power never resorted to any '*cherry picking*' of high end consumers. The movement of consumers from RInfra to Tata Power was on account of tariff differential between both the

parties. At the relevant time, consumers chose to migrate from RInfra to Tata Power on account of the fact that the tariff of Tata Power was significantly lower than the tariff of RInfra. Subsequently, when the tariff for RInfra has become lower than Tata Power, there is reverse migration of consumers. Therefore, evidently it is the tariff fixed by the State Commission which is ultimately deciding the trend of movement of consumers and in no way can be termed as '*cherry picking*' by Tata Power.

(b) The State Commission in its Press Note dated 22.08.2013 in respect of the multi-year tariff order (for the period FY 2012-13 to FY 2015-16) of R-Infra has acknowledged the fact that it is the difference in tariffs between that of R-lnfra and

Tata Power that drives consumers to changeover from one licensee to another.

(c) The State Commission completely ignored the fact that the real rationale in changeover was the difference in tariff for R-Infra and Tata Power (namely issues of *"tariff design"*). As such due to advantage in Tariff for commercial and industrial categories in R-Infra, there is substantial migration of high-end consumers from Tata Power to R-Infra, which is evident from the chart below:-

	Before Migration		**Case 151 Submission**		**FY 2012-13**		**July, 2014***	
	MUs	**%**	**MUs**	**%**	**MUs**	**%**	**MUs**	**%**
Subsidising Sales	4849	56%	2475	41%	2,967	47%	4,280	59%
Subsidised Sales	3827	44%	3578	59%	3,379	53%	2,945	41%
Total	**8676**	**100%**	**6053**	**100%**	**6,346**	**100%**	**7,225**	**100%**

*****Annualised Sales*

- *Based on Assumption calculated on consumer migrated from Tata Power-D to RInfra*

12. Learned Sr. counsel for Tata Power further argued that the State Commission has itself observed that it is the tariff design and the corresponding economic benefit, which drives the changeover. The State Commission acknowledges that the pattern of changeover would depend upon the difference in tariffs, and it is the category of consumers who find it more beneficial that would changeover. Accordingly, based on the tariffs designed by the State Commission for Tata Power and RInfra in their respective MYT orders, the State Commission has stated in the Press Note, that some consumers would find it beneficial to changeover, whereas most of the other consumer categories would not. Having acknowledged that it is the economic benefit which drives changeover, it is clear that there is no rationale for the directions issued by the State Commission in the Impugned Order

restricting changeover and switchover to '*calibrate*' the migration of consumers. Hence, the directions given in the Impugned Order are unwarranted and unjustifiable. Even otherwise, the findings of the State Commission which led to the Impugned Order are incorrect and are contrary to the facts of the present case which is evident from the following facts:

(a) The State Commission ignored the fact that in FY 2012 Tata Power has given connection to around 1,97,277 consumers in the residential category out of which 1,41,505 number of consumers fall within the 0-300 units consumption category.

(b) The State Commission failed to take into consideration the fact that residential sales grew from 3% in FY 2008-09 to 15% in FY 2011-12 due to changeover and the share of residential consumption out of the total changeover sales

increased from 7% in FY 2009-10 to 26% in FY 2011-12. The aforesaid facts and figures were tendered before State Commission by Tata Power in the presentation dated 13.04.2012.

(c) The total rejection is only 0.7% of the total applications received by Tata Power from the residential consumers. Apart from that, Tata Power has also rejected applications in other categories, such as industrial and commercial. It is submitted that State Commission has only considered the applications rejected by Tata Power and ignored the fact that 99.3% of applications of residential consumers were accepted and allowed with supply by Tata Power,

as detailed below:

Consumers	Total Applications	Total Rejection		Total Accepted & forwarded to RInfra	
		Number	% to Total Applications	Number	% to Total Applications
Residential	2,02,859	1,401	0.69%	2,01,458	99.31%
Commercial	33,364	324	0.97%	33,040	99.03%
Industrial	5,487	36	0.66%	5,451	99.34%
Advertising	18	5	27.78%	13	72.22%
Crematorium	5	1	20.00%	4	80.00%
Temporary	110	-	0.00%	110	100.00%
Blank (No Category)	81	55	67.90%	26	32.10%
Total	**2,41,924**	**1,822**	**0.75%**	**2,40,102**	**99.25%**

(d) Further, the State Commission failed to take into consideration that till date, not a single consumer has approached the State Commission or any other fora alleging the rejection of application by Tata Power.

(e) The State Commission has ignored the number of consumers who have migrated from R-Infra to

Tata Power and has decided the issue on the basis of sales to a consumer category which is erroneous. The comparison of sales between domestic consumer and commercial/ industrial consumers is not possible. A single large/bulk consumer such as the Mumbai International Airport Ltd. ("***MIAL***") consumes about 162 MUs annually while a domestic consumer having consumption of 0-300 units can have a maximum consumption of 3600 units in a year. Therefore the comparison drawn by State Commission on the basis of sales is erroneous and liable to be ignored.

(f) In this context it is necessary to point out that the Tata Power is historically having bulk consumers. State Commission failed to take into consideration

that if the legacy consumers are taken out, the share of consumption by Residential Consumer is much more than share of consumption by high end consumers, as detailed below:-

Consumer Category	**Estimated as per TPC MYT FY 15 less estimated Reverse Sales**				**Rinfra MYT Order**	
	Overall Consumption	**Consumption by Legacy consumers**	**Net Consumption less Legacy Sales**	**Share of total (less Legacy)**	**Consumption**	**Share of Total**
	(MUs)	*(MUs)*	*(MUs)*	*(%)*	*(MUs)*	*(%)*
Residential	1789	86	1702	48%	4600	53%
Commercial	1683	610	1072	30%	3314	38%
Industrial	2520	1757	763	22%	799	9%
Total	**5991**	**2453**	**3538**	**100%**	**8713**	**100%**

(g) The State Commission while observing that PAN Card is a mandatory condition for applying for supply of power to Tata Power ignored the submissions of Tata Power that no application was rejected by Tata Power only on the ground that PAN Card details were not submitted. The entire finding of State Commission is based on

the presumption that Tata Power must have rejected the applications in the absence of PAN Card details. In fact Tata Power in its submissions/presentations demonstrated that PAN Card is not a mandatory requirement for the submission of applications. Factually, nearly 31% of the applications were accepted by Tata Power in the residential category between 0 - 300 units, where identity proof other than PAN Number was tendered by consumers such as passport, driving license, photo pass, voters ID, senior citizen identity card, etc.

(h) PAN Card is not a mandatory requirement for applying for supply of power from Tata Power – it was only an option/alternative to other address proof documents. As an analogy, it is submitted

that whilst booking railway tickets under the tatkal scheme, PAN Card is only one of the alternatives for booking the ticket – it does not imply that the ticket would not be booked unless the PAN Card details are provided. Further, even while depositing money in a bank account, PAN Card Number is an optional requirement and not a mandatory requirement – money can still be deposited in a bank account without the PAN Card Number. It is thus incorrect on the part of State Commission to hold that Tata Power has been *'cherry-picking'* consumers by making PAN Card details as a mandatory condition.

(i) It is also pertinent to note that the State Commission has not referred to any complaints having been received from any consumers of

having applied to Tata Power for changeover and having been refused supply. In the absence of such finding, the allegation of cherry picking is without any merit.

13. Shri Buddy Ranganadhan, Learned counsel for the State Commission made detailed submission in support of the findings of the State Commission which are summarized as under:

(a)The Commission has found, inter alia, on the basis of the materials available before it that the systems of Tata Power are geared towards acceptance of changeover applications from relatively high end consumers and conversely are geared (intentionally or untentionally) towards not accepting applications from low end changeover consumers.

(b) The Audit report submitted by Tata Power itself has proved the rejection of application forms of low end consumers.

(c) It is worthwhile to note that as found by the Commission in the impugned order what is important is the level of consumption of high end connections changed over and not the number of high end consumer having changed over. There is virtually no argument raised by the Tata Power that the findings in the impugned order is, in any way, wrong on facts.

(d) It is eminently clear that whilst the explanation given by the Tata Power pertains to its application form, the Audit Report referred to the system and process of Tata Power. Hence the clarification given by Tata Power does not, in fact, answer the

findings of the Audit Report that the system and process of Tata Power were responsible for the trend of cherry picking in changeover consumers.

14. Dr. Abhishek Singhvi and Shri J.J. Bhatt also made elaborate submissions which are summarized as under:

(a) The findings of the State Commission in respect of cherry picking on changeover process is not based merely on the internal audit report of the Tata Power but is on an independent examination of the actions of Tata Power by the State Commission, Tata Power having been given adequate and ample opportunity to explain the said actions as is clear from the order itself.

(b) The State Commission has clearly found independently that on examination of application

forms, requirement of mentioning PAN/TAN No. is compulsory in addition to the optional production of PAN Card as being one of the accepted documentary evidence. While the production of PAN Card may be optional, the requirements of mentioning PAN/TAN No. is compulsory and non-mentioning of such compulsory requirement has enabled Tata Power to filter out the applications of low end consumers who may not have a PAN number but may be able to produce other documentary proof of residence. This is precisely what the audit report says.

(c) Tata Power were given an opportunity to explain the internal audit report and the alleged error therein. Tata Power purported to give some sort of an explanation which has been rejected by the

State Commission. The State Commission after consideration of all the material has come to the conclusion that genuine applications from low end consumers were likely to have been rejected and addition of only high end subsidizing consumers to Tata Power consumer base was allowed.

(d) In regard to the allegation that the changeover was more as a result of disparity in tariff rather than any cherry picking action on the part of Tata Power, RInfra submitted that as set out in the impugned order there was deliberate cherry picking in as much as low end consumers desirous of shifting to supply from Tata Power were filtered out. Thus, the said issue was not a tariff issue as is being contended by Tata Power.

(e) Tata Power's contention that no complaints were received as regards unjustified filtering out of low end consumers is concerned, the State Commission has clearly found that continuously in various tariff proceedings of Tata Power, the State Commisison received complaints during public hearings.

(f) As a result of migration of subsidizing consumers, the subsidizing sales of RInfra have reduced as under:

	Before Migration		Migrated break up		After Migration	
Subsidising Sales (MU)	4849	56%	2374	90%	2475	41%
Subsidised Sales (MU)	3827	44%	249	10%	3578	59%
Total	**8676**	**100%**	**2623**	**100%**	**6053**	**100%**

Thus, the migration has upset the level playing field beteween them. Tata Power has produced data

for period subsequent to the impugned order which is not permissible.

(g) The contention of Tata Power that connection was given to 1,97,297 consumers in residential categories out of which 1,41,505 fall in 0-300 units category has been ignored is also fallacious. The said numbers if translated in terms of energy show that the proportion of subsidizing changeover sales is 84% as against 16% of subsidised sales.

(h) The restrictions were necessitated by reason of conduct of Tata Power and the State Commission has rightly calibrated the process of changeover and switchover.

(i) In order to create a level playing field for the competition it is necessary to bring the per capita

consumsption of the two licensees at par by regulating Tata Power so that it connects only low end consumers till the per capital consumption on its network is equal to that of RInfra.

15. We find that the conclusion of the State Commission that Tata Power has been indulging in "Cherry Picking" in changeover consumers is mainly based on the findings that:

(a) Tata Power's application form for power supply has mandatory requirement of PAN number.

(b) The Regulation 4 of the State Commission's Supply Code, 2005 do not specify the requirement of PAN Card in the application form for supply.

(c) The level of consumption of high end connections changed over and not the number of high end consumer having changed over is important. The

consumption of high end consumers changed over to the Tata Power is very high as compared to the consumption of low end consumers during the relevant period. This consumption pattern of high end consumers vis-à-vis low end consumers would it self point out that the Tata Power had been indulged in Cherry Picking.

16. We find that the State Commission has considered the report of M/s. Aneja Associates, the internal auditors of Tata Power in the impugned order. The report indicated that about 2,41,924 applications for changeover were received between October 15, 2009 to December 31, 2011, of which about 1822 were rejected by Tata Power primarily due to non-availability of adequate documents from the consumers. Of the balance 2,40,102 applications,

3626 applications were rejected by RInfra due to various reasons such as arrears, vigilance, etc; whereas 7508 applications were awaiting initial feed back from RInfra as on December 31, 2011. Consequently, 2,29,164 changeover consumers were given supply during the period. Thus, out of 2,30,790 eligible consumers (total applications less those rejected and awaiting initial feed back from RInfra) 2,29,164 were given supply by changeover to Tata Power, i.e. 99.3%. The Auditors also noted that the processes have evolved and matured since October 2009 and as far as possible, system support is used especially for monitoring the applications and adherence to these processes was satisfactory. However, the report has indicated that data fields relating to PAN, cheque details and Mobile number, etc., are mandatory for creation of report.

17. We have also examined the Application form for power supply which is a common form for new connection as well as changeover consumers, for all categories. The first page of the Application Form which is to be filled up by the consumer has field for PAN No. and Phone/Mobile no. The second page bottom portion of the form is for office use only. It clearly indicates that for ownership/ occupation proof, any one of the ration card, voter ID card, passport, owner's NOC with agreement, etc. is required. For identity proof, any one of the voter's ID card, passport, PAN card, driving license, photo pass, etc., is required. Complete reading of the two page form would show that PAN card and Mobile no. are not mandatory.

18. However, the Auditors' report indicates that data filed relating to PAN card no. and mobile no. were mandatory, though it is denied by Tata Power. We do not want to go into the controversy as the total rejection as per the Auditor's report was only 0.7% of total applications after deducting the applications rejected or awaiting no objection from RInfra. Tata Power has also given data regarding category wise applications received and rejection which also indicates rejection of 0.69% in residential category, 1,41,505 connections given to consumers falling within consumption of 0-300 units and progressive rise of sales in residential category and increase in residential sales out of total changeover sales from 2008-09 to 2011-12. Tata Power has also made changes in Application Form as per the directions of

the State Commission and is also maintaining the record of the rejection of application from 1.4.2012.

19. Section 43(1) of the Electricity Act, 2003 provides for the distribution licensee on an application by the owner or occupier of any premises shall give supply of electricity within one month after receipt of the application requiring such supply. The explanation u/s 43(1) inserted by Act 26 of 2007 on 15.6.2007 provided that for the purpose of this sub-section "application" means the application complete in all respects in the appropriate form as required by the distribution licensee. Accordingly, Tata Power devised on Application Form for new connection and for changeover consumers. In this form there are fields relating to certain additional information like PAN and mobile number/telephone no. which are not stipulated

in the Supply Code Regulations, 2005. We do not think that the inclusion of the above fields in the Application form should lead the State Commission to come to the conclusion that Tata Power was cherry pricking the changeover consumers. The facts about number of residential consumers allowed changeover, a large number of which were in 0-300 units sub-category do not indicate so. In any case, Tata Power has taken corrective action and revised the Application Form on the directions of the State Commission and has also been maintaining the record of the rejected applications which are rejected since April, 2012. Further improvement was possible by giving directions for giving public notice that giving PAN no. is not a mandatory requirement for changeover.

20. The State Commission has seen that proportion of subsidizing category in changeover consumers is 39% of total changeover consumers. The State Commission is of the view, as indicated in the paragraph 72 of the impugned order, that whether the increasing energy consumption of subsidizing consumers is because of any intentional action or omission of Tata Power is not so much important as the trend itself, because the trend is upsetting the level playing field and, therefore, not conducive to a competitive environment in electricity distribution.

21. As indicated by Tata Power out of 2,40,102 consumer applications accepted for changeover (84%) were residential and about 16% were commercial and industrial. Again out of 1,97,277 consumers in residential category who were given connections

1,41,505 (71.7%) were within the 0-300 Units category. Thus, the subsidized consumers who were given connection were 71.7% in terms of number of consumers. It is an accepted fact that the load of commercial and industrial consumer is much more than a residential subsidized consumer. For example, a subsidized residential consumer may have a load of 2 KW and a commercial consumer 1000 KW i.e. 500 times the subsidized consumer.

22. The Commission has also based its findings citing the trend in the changeover. It observed that the annual consumption of high end consumers is much higher than the consumption the low end consumers. While doing so the Commission has ignored the fact that the Tata Power was distribution licensee since 1907. During the period between 1907 to 2002 Tata

Power was supplying power to other licensee as well as consumers having demand exceeding 1000 kW. Such consumers which were being supplied by the Tata Power before the order dated 15.6.2009 have been termed by the Tata Power as legacy consumers in its submission. The data submitted by Tata Power from their estimates for FY 2015 show that if the consumption of legacy consumers is deducted, then out of the balance consumption of 3538 MU, the share of residential consumers is about 1702 MU which is 48%.

23. The provision for a second distribution licensee in the Act has been given to promote competition the benefit of which should go to the consumers. The proviso to Section 62 also provides that in case of distribution of electricity in the same area by two or

more distribution licensees, the Appropriate Commission may, for promoting competition among distribution licensees fix only maximum ceiling of tariff for retail sale of electricity. Thereafter, the distribution licensees depending on their own economics, offer competitive tariffs to attract the consumers. In this case the State Commission has not determined the ceiling tariff but fixed different retail supply tariffs for Tata Power and RInfra. The consumer has to ultimately decide the distribution licensee from whom he wants to take the supply. The consumer would normally choose the licensee primarily on the basis of tariff and reliability of supply. For changeover consumer the reliability of supply is the same irrespective of whether the supply is from RInfra or Tata Power. Therefore, the tariff alone is the criteria for the consumer to decide the changeover.

24. The concept of level playing field is that the players in the market get an equal opportunity of competing with each other without any bias and are subjected to same rules of the competition. The competitors should be able to offer the price at which they want to supply power and let the market forces determine the rest. In this case the State Commission has determined the tariff for different categories of consumer for both the licensees following the same Regulations. It is for the consumer to decide the choice of its supplier. However, the State Commission has to ensure that no licensee is putting road blocks in the consumer making his own choice of supplier. In this case it is not established conclusively that Tata Power was intentionally trying to create a road block to avert changeover of certain categories of consumers and indulging in Cherry picking of changeover

consumers. By putting restriction on some categories of consumers to changeover to Tata Power, the State Commission has denied choice to certain categories of consumers to avail supply at cheaper tariff to which they are entitled as per the scheme of the 2003 Act and also as per the changeover protocol devised by the State Commission. Rather than putting restriction on changeover, the State Commission should have taken measures to ensure that adequate publicity is given to the effect that PAN no., etc. were not necessary for applying for changeover and ensured that the internal systems of Tata Power are also functioning accordingly.

25. The movement of consumers from one licensee to other licensee in the same area of supply would be on account of tariff differential between both the

Licensees. Tata Power has claimed that at the relevant time, consumers chose to migrate from R-Infra to Tata Power on account of the fact that the tariff of Tata Power was significantly lower than the tariff of R-Infra. Subsequently, when the tariff for R-Infra has become lower than Tata Power, there is reverse migration of consumers.

26. Therefore, evidently it is the tariff fixed by the State Commission which is ultimately deciding the trend of movement of consumers and in no way can be termed as '*cherry picking*' by Tata Power.

27. Another important aspect on the issue is that Tata Power has claimed that there had been no consumer's complaint regarding refusal of changeover. The Commission, however, has recorded in para 71(b) of the Impugned Order that the Commission had

received similar complaints during Public hearings on the ARR and the Tariff Petitions of the TPC-D during last two years. We fail to understand as to why the State Commission did not conduct enquiry on the complaints and directed Tata Power for corrective action, if any.

28. The State Commission in its written submission has relied on the Judgment of the Hon'ble Supreme Court in the case of Maharashtra Electricity Regulatory Commission Vs Reliance Energy Ltd and Others (2007) 8 SCC 381 and has quoted the portions of this judgment in its Written Submissions in support that the Commission has powers to direct Tata Power under the Electricity Act. While relying heavily on this judgment, the Commission has ignored the ratio of the judgment wherein the Hon'able Supreme Court

has ruled that the Commission, upon receipt of complaints from the consumers inflated bills raised by the licensee, had power to conduct investigations under Section 128 and take appropriate action following the procedure laid down by Section 128. The Relevant extract of the Hon'ble Supreme Court's Judgment is reproduced below:

17. In exercise of this general power notice dated 3.8.2004 was issued when mass scale supplementary/amended bills were issued to the consumers. ***When these consumers approached the Commission, the Commission directed its licensees to immediately review their billing policies and bring the same in conformity with the statutory provisions of the Act. The Commission did not get an investigation made under Section 128(1) which it could have done, and without that, and without getting a report under Section 128(5) it passed an order directing refund of the amounts collected by***

the licensees/distribution companies, which in our opinion was not permissible, since such a direction could, if at all, be given after getting a report of the investigation agency. The Commission could have made an investigation and got a report from the investigation agency and on that basis directions could have been given. However, that was not done. *In these circumstances, in our opinion, the view taken by the Appellate Authority in the impugned order to that extent is correct that the individual consumers should have approached the appropriate forum under Section 42(5) of the Act.*

29. Section 128 of the Electricity Act, 2003 is reproduced below:

> "***128. Investigation of certain matters.***—*(1) The Appropriate Commission may, on being satisfied that a licensee has failed to comply with any of the conditions of licence or a generating company or a licensee has failed to comply with any of the provisions of this Act or the rules or regulations made*

thereunder, at any time, by order in writing, direct any person (hereafter in this section referred to as "Investigating Authority") specified in the order to investigate the affairs of any generating company or licensee and to report to that Commission on any investigation made by such Investigating Authority:

.....

(6) On receipt of any report under sub-section (1) or sub-section (5), the Appropriate Commission may, after giving such opportunity to the licensee or generating company, as the case may be, to make a representation in connection with the report as in the opinion of the Appropriate Commission seems reasonable, by order in writing—

(a) require the licensee or the generating company to take such action in respect of any matter arising out of the report as the Appropriate Commission may think fit; or

(b) cancel the licence; or.....".

30. The ratio of the above mentioned judgment of the Hon'ble Supreme Court squarely applies in to the facts of the present case. Here, if the Commission had received complaints about refusal of Tata Power to changeover from low end consumers, it should have conducted an investigation under Section 128 of the Act and upon receipt of the investigation report, it could have taken corrective action or action against Tata Power, after following the procedure laid down under Section 128.

31. In the light of above discussions this issue is decided in favor of Tata Power. However, Tata Power is directed to keep record of the category wise applications received for changeover (0-300 Units residential may be a separate category), applications rejected with reason for rejection (category-wise),

category wise changeover allowed and post the same on its website quarterly. Tata Power is also directed to give a public notice regarding documents required for changeover application clearly indicating that PAN no. is not mandatory.

32. The second Issue is whether Tata Power has laid down network selectively to serve high end subsidizing consumers ignoring low end consumers in the proximity?

33. The findings of the State Commission on this issue are as under:

> *"73. .....The Commission is of the view that if TPC-D has given supply to new consumers in the Licence area common to TPC-D and RInfra-D through its own network, and such consumers have not approached RInfra-D for receiving supply, then this cannot be considered as either*

changeover or switchover, and hence, cannot be attributed with the so-called practice of cherry-picking. However, from the documents submitted by the Parties and analysed by the Commission under Para 81 of the Order, it is seen that though TPC-D has rightfully laid the network for supplying electricity to these new consumers, it has not laid the network for supplying electricity to the consumers in the areas adjoining the new connections and has preferred to rely on RInfra-D network for supplying to such consumers. Seen in this light, even this activity compromises with the level-playing field.

.....

"a) TPC-D has admitted that as a Distribution Licensee it is free to roll out its network in the manner that suits its business. TPC-D has contended that it is not required to put up its distribution network in every nook and corner of the licensed area even before there is a demand for connection from a consumer. If this rationale were to be accepted, then TPC-D can continue to lay its

network in a selective manner, and continue to provide supply to consumers using RInfra-D's network, and lay its own network only where it finds expedient to do so. While no one expects TPC-D to set up the distribution network in the entire Licence area overnight, the time-frame for the same cannot be expected to be several years, depending on TPC-D's business interests. It is already over four years since the Hon'ble Supreme Court upheld the Distribution Licence of TPC-D, and the Commission notified the MERC (Specific Conditions of Distribution License for The Tata Power Company Limited) Regulations, 2008. However, TPC-D is yet to lay down its network in the Licence area.

76. TPC-D has contended that TPC-D has always been ready and willing to connect and supply to all and any consumer who wishes to receive supply from it, and that TPC-D is duty bound to release new connections and supply to any consumer who seeks connection and supply from TPC-D. TPC-D

has further submitted that the Changeover Scheme and interim Order dated October 15, 2009 does not impede TPC-D's obligation to lay down its network for releasing such new connections to consumers in its licensed area, and it is up to the consumer situated in the Common Area of Supply to decide as to whether he wants to receive supply from TPC-D or RInfra-D, and through whose Wires, because the cost implications are different in both cases. TPC-D has further added that the changeover consumer can be on existing Distribution Licensee's wires till the time he wishes to stay.

77. In this regard, the Commission does not find merit in TPC-D's contentions, for the following reasons:

a) The consumer merely applies for supply to the Distribution Licensee of his area of supply, and is not expected to indicate that he wants the supply through a certain distribution network. Since, TPC-D does not have the distribution network, it is making use of the existing distribution network of

RInfra-D for providing the supply, under the Changeover Protocol approved by the Commission in its interim Order dated October 15, 2009 in Case No. 50 of 2009.

b) TPC-D's premise that the changeover consumer can continue on existing Distribution Licensee's network till the time he wishes to stay are contrary to the Commission's decision in the Order dated 15th October 2009. As a matter of fact, the Order dated 15th October 2009 being interim in nature, which is pale without doubt in terms of the express language contained therein, and having received the request for supply from so many changeover consumers, TPC-D was required to lay the distribution network accordingly, in accordance with its own submission that TPC-D has always been ready to connect and supply to all consumers who seek connection and supply from TPC-D.

78. ..... The Commission is of the view that if TPC-D lays the distribution network for giving supply to all the consumers in its Licence area,

which is one of the mandates of a Distribution Licensee under the EA 2003 and incidentally, also one of the prayers of RInfra-D, then the utilisation of RInfra-D's network, especially the last mile connectivity part, is likely to be significantly reduced. However, under no circumstances should the network creation be allowed on a selective basis.

.....

80. TPC-D was also asked to furnish details of new consumers taking supply from TPC-D through TPC-D's distribution network in the Licence Area common to TPC-D and RInfra-D subsequent to the interim Order dated October 15, 2009 (Ward-wise, Zone-wise, consumer category-wise). In response, TPC-D provided the number of consumers added to its network subsequent to the interim Order dated October 15, 2009 for five Zones covering its suburban Licence area.

81. It is clarified that for analysis purposes, the Commission has considered details submitted by

the Parties only the period after October 15, 2009. Though, there was asymmetry of information provided by both the Licensees, the Commission has perused through the details of consumers and projects on the maps and tried to reconcile the same with the details of capital expenditure scheme available with it. Ward-wise details of following consumers are tabulated below:

A- Temporary supply by RInfra-D and permanent supply taken from TPC-D

B- Existing REL/RInfra-D consumer connected by TPC (Network Duplication)

C- Consumers directly connected on TPC-D network without approaching RInfra-D"

Thus, from the above analysis, the following conclusions can be drawn:

- *Ward-wise cherry picking by TPC-D is evident, especially for single consumers*
- *Such single consumers are primarily from categories other than residential category*

- *Though there are changeover consumers in the surrounding area, TPC-D has laid its network only for the single consume without laying the network for remaining changeover consumers in the surrounding area*
- *Selective network laying is evident from the following cluster maps: Malad BMC Lagoon, BMC Pumping station.*

82. Hence, appropriate directions need to be given to TPC-D to ensure that TPC-D is unable to indulge in such cherry-picking under the switchover process. The Commission has given such directions in this Order, while discussing a subsequent issue".

34. The State Commission has held that Tata Power has selectively laid down its network to some consumers and has indulged in cherry picking in the switchover process and hence, appropriate directions

need to be given so that Tata Power is unable to indulge in cherry picking in the switchover process. The State Commission has held that while Tata Power has laid down its network for single consumers it has not laid down the network to supply to several changeover consumers in the surrounding area.

35. According to the learned Senior counsel for Tata Power, the premise for drawing an adverse inference with regard to the selective network laying and switchover is flawed. The State Commission has erroneously relied upon Table A, B & C of the Impugned Order to observe that Tata Power has selectively laid down its network to '*cherry pick*' high end consumers. The aforesaid finding of the State Commission is factually incorrect for the following reasons:-

(a) Table A refers to only temporary consumers who were availing supply from R-Infra and subsequently taken permanent connection from Tata Power. It is submitted that reliance placed by The State Commission on the said data is irrelevant since temporary connection cannot be compared with permanent connection and therefore this cannot be a case of switchover. In fact the same was also the understanding of The State Commission at Para 73 of the Impugned Order wherein the The State Commission observed, as under:

"73....*The Commission is of the view that if TPC-D has given supply to new consumers in the Licence area common to TPC-D and RInfra-D through its own network, and such consumers have not approached RInfra-D for receiving supply, then this cannot be considered as either changeover or*

switchover, and hence, cannot be attributed with the so-called practice of cherry-picking...."

(b) Table B relied upon by the State Commission is entirely incorrect. Except for MIAL, none of the other consumers shown in the table is a case of switchover which is evident from the chart below:-

#	Name of Consumer	Tata Power's Submissions
1.	MSSES Enterprises	MSSES Enterprises continues to be connected to RInfra, and it is not a case of switchover at all.
2.	Karina Synthetics and Litchika International	These are cases where connection was given by Tata Power based on applications made prior to 15.10.2009.
3.	Aegis Logistics	Existing consumer of R-Infra, who receives supply from R-Infra through the network of R-Infra as a switchover consumer.
4.	HDFC, Chandivali	HDFC was a temporary consumer of Rlnfra. When Tata Power provides permanent supply to a temporary consumer of R-Infra, it is not a case of switchover.
5.	Universal Oil Seals Mfg.	As held by The Maharashtra Commission, direct supply to new consumers is neither changeover nor switchover

36. Learned Senior Counsel for Tata Power further submitted that some of the bulk consumers of Tata Power such as Hindustan Petroleum Corporation Ltd. and Rashtriya Chemicals & Fertilizers Ltd. have recently been exploring other options to procure

supply of electricity from sources other than Tata Power. This clearly indicates that the consumers will choose the supplier based on the tariffs of the distribution licensee and not by any such '*cherry picking*' by a distribution licensee.

37. According to Tata Power, it is only when the consumer gets a real commercial benefit, in terms of significant lower monthly power bills, that the consumer would switchover to Tata Power. The fact that Tata Power has set up a network that "snakes through" the area of supply without connecting to changeover consumers in the surrounding areas is not attributable to cherry picking by Tata Power, but the fact that only those consumers chose to switchover to Tata Power for whom the benefit accruing from switchover was commensurate to the additional costs

and practical difficulties in obtaining the physical connection from Tata Power.

38. Tata Power has submitted that the State Commission has relied upon the various cluster maps submitted by them particularly the cluster maps for Malad BMC Lagoon and BMC Pumping Station to contend that the network of Tata Power in the said clusters has been laid down to cater to only about 4 to 6 high end consumers, without connecting to the changeover consumers in the surrounding area. In this regard, it is submitted as follows:

(a) The arguments made on behalf of the State Commission are completely erroneous inasmuch as Tata Power caters to a total of 45 consumers in the BMC pumping station cluster, 19 of which are residential consumers. Again in the Malad BMC

Lagoon area, the network laid down by Tata Power caters to 1065 consumers out of which 998 are residential. The relevant details are tabulated below:

Cluster Name	**Total no. of consumers**	**No. of Residential Consumers**
BMC Pumping Bandra West	45	19
Malad BMC Lagoon	1,065	998

(b) The names contained in the map that have been referred to by the State Commission as being the consumers of Tata Power are in fact, the names of the substations which have been set up by Tata Power. This shows that the State Commission has completely misread the maps provided by Tata Power as a part of the proceedings in case 151 of 2011, while drawing a conclusion on an important aspect of the case.

(c) Further, during the period October 2009 to June 2012, the load added to Tata Power's network is nearly 0.03 MVA in the BMC pumping station area and 1.49 MVA in the Malad BMC Lagoon. The relevant details in this regard are as follows:

Cluster Name	Number of consumers	Load Addition (MVA)
BMC Pumping Bandra West	7	0.03
Malad BMC Lagoon	8	1.49

39. According to Tata Power, the State Commission has wrongly relied on maps without seeking for the above explanations. The State Commission never sought any explanation on the map from Tata Power and presumed wrongly which has resulted in passing an incorrect order. Such additional load on the network of Tata Power is very small to arrive at a conclusion that Tata Power has engaged in selective network laying. This is especially so, because if Tata Power had an intention to selectively lay down

network, it would have switched over several commercial and industrial consumers in these clusters, who are presently changeover consumers to whom Tata Power is already supplying electricity through the distribution network of RInfra. There are number of such high-end commercial and industrial changeover consumers within a 250 m radius of each of the sub-stations of Tata Power in the two clusters The fact that despite there being several high-end changeover consumers within a 250 m radius of the network laid down by Tata Power, Tata Power has only connected about 7 to 8 consumers in the above-mentioned clusters from October, 2009 to June, 2012 clearly shows that Tata Power has not indulged in cherry picking in the network laying process.