

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 response to Reliance Infrastructure Limited's submissions dated 05.09.2015

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

1. Reliance Infrastructure Limited ("**R-Infra**") filed its submissions/ objections dated 05.09.2015 with regard to the Network Rollout Plan submitted by TPC raising certain issues, which are dealt with hereunder.

<p>I. Re: Interpretation of Hon'ble Appellate Tribunals Judgment ("Hon'ble Tribunal") dated 28.11.2014 in Appeal No. 246 of 2012 ("Judgment dated 28.11.2014") and the Network Rollout Plan submitted by TPC</p>

I.1 R-Infra Submissions

2. Hon'ble Tribunal's Judgment dated 28.11.2014 lays down following principles:-
 - (a) Where R-Infra's reliable distribution network exists, it is in consumer interest that the changeover consumers must continue to get supply from TPC on R-Infra's network, with liberty to change over back to R-Infra in case R-Infra's tariff becomes attractive. There should be no duplication of network, particularly where there exist a reliable R-Infra's Network and there are physical constraints and high costs involved in such duplication.
 - (b) No undue commercial advantage should be gained by TPC by selectively laying down network to cater to only high end consumers. TPC should avoid any cherry picking of consumers.
 - (c) TPC should be restricted to laying down its network only in areas:-
 - (i) Where laying of parallel network would improve the reliability of supply and benefit the consumers.
 - (ii) To extend supply to new consumers who seek connection from TPC.
 - (iii) Where TPC has made considerable investment in constructing the

distribution system pursuant to this Hon'ble Commission's Order dated 22.08.2012 in Case No. 151 of 2012 and if such distribution system is yet to be commissioned and capitalized. [**Paras 8(d), 8(e) and 41**]

3. The discussion on *ratio decidendi* and *obiter dicta* is neither germane to the issues in the present case nor does it answer the clarifications sought for by this Hon'ble Commission in its daily order. Consideration of *ratio decidendi* and *obiter dicta* is irrelevant where the proceedings are to implement specific directions given by APTEL [**Para 7(a) to 7(e)**]

4. TPC is allowed to capitalize and commission its investment only if:-

- (a) It is a considerable investment. The import of 'considerable' has to be decided by this Hon'ble Commission.
- (b) It is made in constructing a distribution system.
- (c) It is made pursuant to the directions of this Hon'ble Commission.
- (d) It is approved by this Hon'ble Commission after the proposal for commissioning and capitalization is made before it. Such proposal will be approved after hearing all concerned.
- (e) There is no direction which permits TPC to switchover the consumers on assets which are already commissioned and capitalized by it. [**Para 11**]

5. In terms of para 60 of the Judgement dated 28.11.2014, consumers who have already switched over from R-Infra to TPC may opt to remain with TPC. Switchover consumers of TPC can switchover from R-Infra back to TPC but not otherwise. [**Para 12**]

1.2 TPC's Submissions

6. R-Infra's interpretation of the Judgment dated 28.11.2014 is based on the piecemeal and disjointed reading of the said Judgment. Directions of the Hon'ble Tribunal in the Judgment dated 28.11.2014 are in context of issues arising out of this Hon'ble Commission's Order dated 22.11.2012 in Case No. 151 of 2011 wherein this Hon'ble Commission had imposed certain restrictions upon TPC to supply electricity to its consumers. The Hon'ble Tribunal by its Judgment dated 28.11.2014 directed TPC to provide connectivity to all consumers in the licensed area common to R-Infra and laid down certain principles for this Hon'ble Commission to consider while approving TPC's network roll-out plan. There was no remand of any matter to this Hon'ble Commission. The present proceeding is a continuation of Case No. 90 of 2014 [i.e. Licence Application of TPC], wherein this Hon'ble Commission had directed for TPC's revised network roll-out plan to be developed and filed for approval of the

Commission. In this context, the principles laid down in the Judgment dated 28.11.2014, inter-alia, are as under:-

- (a) The stated objective of the directions is to protect consumer interest and honour (not constrain) consumer choice while optimizing the cost of network roll-out. The choice of the consumer is to elect its source of supply (choose the distribution licensee from whom he wishes to avail to supply) and mode of supply i.e. whether it wishes to avail supply from a distribution licensee through its own distribution network (Section 43) or from another distribution licensee/ other source from the network of any other distribution licensee (Section 42 of the Electricity Act). In this context, the Hon'ble Tribunal permitted TPC to commission and capitalize even that network, where considerable investment were made by TPC in accordance with Case No. 151 of 2011 to feed the consumers. **[Paras 55 to 59 read with Paras 23, 24, 48, 56, 57, 60, 73 and 80(v) of the Judgment dated 28.11.2014]**
- (b) While deciding the issues at hand, the observations and/ or findings of the Hon'ble Tribunal were returned in the given facts and circumstances, i.e., congestion of Mumbai and difficulties experienced by TPC in physically laying network in Mumbai due to its peculiar topography and growth pattern. The Hon'ble Tribunal neither framed an issue nor decide upon the following:-
 - (i) Scope of Universal Service Obligation in terms of the Electricity Act.
 - (ii) Factual aspects of reliability or lack of reliability in R-Infra's network.
- (c) The Hon'ble Tribunal has left the decision qua development of the network with multiple licensees in the licensed areas for this Hon'ble Commission while approving the Network Rollout Plan of TPC and/ or further development/ augmentation of the R-Infra's network. In this regard, the Hon'ble Tribunal has laid down certain guidelines for the consideration of this Hon'ble Commission while approving TPC's Network Rollout Plan, i.e., Duplication of network should be avoided if:-
 - (i) There is a reliable distribution network of a licensee existing in a particular area; AND
 - (ii) There are physical constraints in laying down of any new network; AND
 - (iii) There is very high cost involved in laying down such parallel network, which is not in consumer interest. **[Para 56 of the Judgment dated 28.11.2014]**

- (d) There is no restriction on laying of parallel network to:-
- (i) Supply to new consumers/ connection;
 - (ii) Cater to the demand made by an existing consumer; or
 - (iii) In consumer interest.
- (e) Should this Hon'ble Commission require, it may amend the licenses of the distribution licensees to give effect to the Judgment dated 28.11.2014. Amendment of licence neither directed for nor made a pre-condition before approving the roll-out plan of TPC. **[Para 58 of the Judgment dated 28.11.2014]**

7. With regard to R-Infra's submission that the discussion on '*ratio-decindi*' and '*obiter-dicta*' is not germane to the issue in the present case, it is submitted that the Affidavit dated 19.08.2015 was filed by TPC in compliance with this Hon'ble Commission's directions dated 12.08.2015. In order to understand the part of the Judgment dated 28.11.2014 which is binding on this Hon'ble Commission, it is important to understand what part of a judicial decision constitutes binding authority, i.e., the '*ratio-decidendi*' of a judicial decision.

8. With regard to R-Infra's interpretation of Para 59 [i.e. capitalization and commissioning of investment made by TPC], it is submitted that the Hon'ble Tribunal's Judgment conclusively directs for removal of difficulties in TPC laying its network to provide connectivity to all consumers in the licensed area common to R-Infra. No restriction has been imposed on TPC to supply electricity on its own network. The Hon'ble Tribunal's Judgment has to be read in light of the facts of the case and issues framed therein. It is noteworthy that, no restriction was imposed by this Hon'ble Commission, in its Order dated 22.08.2011 in Case No. 151 of 2011, on TPC to supply electricity through its existing network. The relevant part of the said Order is extracted below:-

"....i) Switchover of consumers from Rlnfra-D to TPC-D network is allowed for existing changeover consumers and all consumers who have already applied and are eligible for changeover, for all consumer categories, from the date of laying distribution network in the Common Licence Area...."

II. Re: Interpretation of New Consumers/ Connection

II.1 R-Infra Submissions [Para 13, 19, 21, 27 and 42]

9. Definition of new consumer provided by TPC is at variance with this Hon'ble Tribunal's Judgment, which is based on:-

- (a) Practical difficulties in laying network.

- (b) Difficulties in getting approvals from Municipal authorities.
- (c) Extremely high costs of laying network.
- (d) Redundancy of parallel network to the extent of 50% of the total network of R-Infra and TPC and the cost of stranded distribution system being borne by the consumers of Mumbai.

10. As regards the interpretation of the term 'New Consumer/ Connection', R-Infra has submitted as under:-

- (a) The definition of new consumer should include a person who has never been connected to the distribution system of any licensee and is seeking connection for the first time.
- (b) The term 'New Consumer/ Connection' has to be interpreted in context of Para 58 to 61 of the Hon'ble Tribunal's Judgment dated 28.11.2014. TPC can only lay down a network and supply to new consumers if it would improve reliability of R-Infra network and benefit such consumer.
- (c) New connection is to be supplied by the licensee whose marginal cost of supply is lower (laying of new network vis-à-vis augmentation).
- (d) The definition of new consumer proposed by TPC makes it clear that it wants to pick and choose and lay network selectively, in complete disregard of an existing reliable network in the area.
- (e) Redevelopment cannot be termed as new consumer as there is already existing network and such additional load can be served by augmentation of existing network instead of creating parallel network as it is more cost effective.

2.2 TPC's Submissions

11. As stated in Para 6(d) above, the Hon'ble Tribunal has not laid down any guidelines/ restrictions in laying of a parallel network for supplying electricity to 'new connections'/ 'new consumers'. The term 'new connection/ consumer' has neither been defined nor elaborated upon by the Hon'ble Tribunal in its Judgment dated 28.11.2015. Thus, while giving meaning to the term 'new connection/new consumer', the observations of the Hon'ble Tribunal have to be read in context of the existing statutory and regulatory regime and the specific circumstances of Mumbai.

12. In context of network rollout, the duty of distribution licensee is to:-

- (a) Give supply of electricity to the premises on an application being made by the owner or occupier of the said premises.

(b) Develop and maintain an efficient coordinated and economical distribution system in its area of supply.

(c) Provide, if required, electric plant or line for giving electric supply to a premises.

13. Supply in this context would mean sale of electricity to a consumer. The definition of consumer, as defined under the Electricity Act, also includes any person whose premises are for the time being connected with the works of the licensee for the purpose of receiving electricity. In other words network rollout has been contemplated to meet the distribution licensee's Universal Service Obligation so as to provide supply to a premises on request. It is also pertinent to note that the definition of the term consumer also inherently contemplates that the premises of such a person is for the time being connected for the purpose of receiving electricity with works of a licensee.

14. Thus, TPC's interpretation of the term 'new connection/ consumer' requires satisfying two basic elements, being:-

(a) Any person who has made an application for supply of power; and

(b) Not permanently connected, for the time being, to the works of the licensee for the purpose of receiving supply of electricity.

15. The case of redevelopment of a premises/ structure falls within the definition of a 'new connection/ consumer' as the existing premises or structure is demolished and a new structure or premises are erected. In effect there is a change in premises. Further, the owners or occupiers of such new premises become 'new consumer'/ 'new connection' since:-

(a) They have applied for supply of power; and

(b) The said new premises, for which they have applied for power supply, is not permanently connected, for the time being, to the works of the licensee for the purpose of receiving supply of electricity.

16. With regard to R-Infra's submission that TPC wants to engage in cherry-picking and intends to lay network selectively, it is submitted that this plea of R-Infra is devised to perpetuate its monopoly and deny choice to the consumer on one pretext or the other. In any event, network development is predicated upon the choice being exercised by a consumer and approval of this Hon'ble Commission.

III. Miscellaneous

III.1 R-Infra Submissions

17. TPC under the garb of approval of network rollout, is switching over existing consumers of R-Infra, which under the Judgment dated 28.11.2014 is prohibited. TPC is increasing loading of its network by seeking switchover thereby making R-Infra's network redundant [**Para 47.4 and 48.1**]

III.2 TPC's Submissions

18. R-Infra's submissions are erroneous. TPC has allowed switchover of consumers in line with the directions of the Hon'ble Tribunal in the Judgment dated 28.11.2014. In any case, this issue is not a part of the present proceedings. Further, during the hearing dated 12.08.2015, this Hon'ble Commission had directed R-Infra to file a separate petition in case there is non-compliance/ violation of the Hon'ble Tribunal's Judgment dated 28.11.2014 by TPC.