

**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 28<sup>th</sup> 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,  
13<sup>th</sup> 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. Purna 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, 1<sup>st</sup> Floor,  
Dhirubhai Ambani Knowledge City,  
Navi Mumbai- 400 710

... Appellant

Versus

1. The Maharashtra Electricity Regulatory Commission,  
World Trade Centre No. 1,  
13<sup>th</sup> 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,  
1<sup>st</sup> 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, 2<sup>nd</sup> Floor,  
2<sup>nd</sup> Sonawala Cross Road,  
Goregaon (East), Mumbai-400 063.
10. Mumbai International Airport Pvt. Limited,  
Having its office at Chhatrapati Shivaji  
International Airport, 1<sup>st</sup> 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 licences 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.

- (1) 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 1<sup>st</sup>

Respondent alleged 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 1<sup>st</sup> 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-Infra 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%
<b>Total</b>	<b>8676</b>	<b>100%</b>	<b>6053</b>	<b>100%</b>	<b>6,346</b>	<b>100%</b>	<b>7,225</b>	<b>100%</b>

\*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%
<b>Total</b>	<b>2,41,924</b>	<b>1,822</b>	<b>0.75%</b>	<b>2,40,102</b>	<b>99.25%</b>

- (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%
<b>Total</b>	<b>5991</b>	<b>2453</b>	<b>3538</b>	<b>100%</b>	<b>8713</b>	<b>100%</b>

(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 unintentionally) 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 Commission 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%
<b>Total</b>	<b>8676</b>	<b>100%</b>	<b>2623</b>	<b>100%</b>	<b>6053</b>	<b>100%</b>

Thus, the migration has upset the level playing field between 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

consumption 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 picking 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

Licenseses. 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 RIntra-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 Rlnfra, 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:

<b>Cluster Name</b>	<b>Total no. of consumers</b>	<b>No. of Residential Consumers</b>
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.

40. As per Tata Power, the low end consumers did not want to get converted from Changeover to Switchover primarily due to following two reasons:

- (i) Switchover consumers have to pay Service Connection Charge in addition to Application Charges and Security Deposit. Presently, the Service Connection Charges are in the range of Rs. 2,000 to Rs. 9,000 depending on the load applied. In comparison Application charges are only Rs 50 for single phase and Rs 70 for three phase connection. Security Charges are Rs 70/ kVA of load. For Residential Consumers the payback period to compensate for additional service line charges considering the charges applicable then was up to 43 months. Therefore, many

consumers did not prefer to pay this upfront charge to switchover to Tata Power's network more so in absence of any guarantee that the tariff of the Tata Power would remain lower than that of RInfra in future. In order to avoid paying Service line charges again and again, the low end consumers with large payback period would prefer to changeover from RInfra to Tata Power rather than switchover so that they may changeover again to RInfra in future if the tariff of RInfra becomes more attractive than Tata Power.

- (ii) Switchover Consumers are also required to provide space for meter and related infrastructure which is not required for changeover consumers. In Mumbai, space for

meter is provided by the consumer in his premises. Further, in certain cases Consumer Sub-Station may be required to be installed in consumers' premises. This space is also provided by the consumer. Provision of space for meter and sub-station has been found to be a deterrent in several cases for following reasons:

- Unavailability of space for separate metering panel in case of slums. In case of societies, where installation of Consumer Sub-station may be required, the existing space is already occupied by the existing licensee. Therefore, Tata Power does not get space for sub-station.
- In some residential premises, there is a mix of 0-300 and above 300 residential consumers. In

these cases, the consumers in 0-300 slab are unable to convince the society to allot additional space for fixing of meters within the society premises.

- In many cases, it was also noted that the consumers do not wish to get into the hassle of providing space for meter and prefer to be changeover consumers.

41. Shri Buddy Ranganadhan, learned counsel for the State Commission has submitted as under:

- a) The Commission on the basis of material placed before it including the cluster maps of the network found that Tata Power was laying lines to high end consumers whilst retaining low end consumers on the changeover basis. This is apparent from the cluster map placed

before this Tribunal which would clearly show while Tata Power laid lines to individual high end consumers, it did not extend the network to cover hundreds of changeover consumers adjoining such lines.

- b)* Even if it were assumed that Tata Power had laid lines only to new consumers and not to switchover consumers, even then it is apparent that while laying lines selectively for the new consumers Tata Power has not used the same lines for existing changeover consumers adjoining and abutting the lines laid for the high end consumers. Hence in either view of the matter Tata Power has been selectively laying its network and indulging in cherry picking.

- c) Tata Power has sought to argue that it is for the consumers to choose as to whether to receive supply on the wires of RInfra or Tata Power. It is submitted that such contention is contrary to the scheme of the Section 43 (1) and 43(2) of the Electricity Act where it is an obligation of the licensee to provide electrical line and electrical plant in order to give supply to the premises.

42. Learned Senior Counsel for RInfra made the following submissions on this issue:

- a) The contention of Tata Power that it is upto consumer to opt to receive supply from Tata Power, either through network of Tata Power or RInfra, is completely contrary to the provisions of Act, Rules and Regulations made there under and

obligations of the licensee. It is well settled law and as held by this Tribunal in Appeal No 132 and Batch that Tata Power has to meet its USO by supplying through its own distribution network.

- b) It is further contended by Tata Power that residential consumers have not been keen to Switchover as compared to commercial or industrial category consumers, payback period for residential consumers to Switchover is very long. This is the perception of Tata Power and not of the consumers. As per the provisions of the Act, Tata Power has no option but to supply to any consumer in its area of supply through its own network. There are already residential consumers across the entire area who have changed over to Tata Power supply on the network of RInfra. Tata

Power is obligated to connect to all these consumers on its own network without any discussion on economics of switchover as these consumers have already opted for Tata Power supply and are duty bound to pay connection charges independent of their economics.

- c) Tata Power has purportedly placed reliance on paragraph 73 of the impugned Order which, in the submission of RInfra, holds that it can give supply to new consumers through its own network when such consumers have not approached RInfra for receiving supply, since they cannot be considered either as changeover or switch over consumers. It is submitted that the said observation was only in respect of new consumers and not temporary connections. In the

submission of RInfra, the purported belated reliance is only to justify its actions in selectively supplying to high end consumers, when to the knowledge of Tata Power, Tata Power has understood and has challenged the said Order with regard to State Commisison's finding that it has indulged in cherry picking by selectively laying down the network, inter alia, in respect of temporary consumers of RInfra before this Tribunal.

- d) The State Commission has rightly held that Tata Power are selectively laying network to single consumers and not laying network to low end residential consumers. Tata Power during the course of hearing sought to contend that they have supplied to 12,200 residential consumers.

These are high end residential consumers to whom network was laid by Tata Power as a new project. While doing so, Tata Power has conveniently ignored laying the network to existing changeover consumer in and around such projects to which network was selectively laid. Tata Power's submission that it is not possible to find too many single residential houses in a city like Mumbai is clearly fallacious as there are more than 3 lac residential consumers who have changed over to Tata Power supply on wires of RInfra all over suburban Mumbai.

- e) About 50% of the area of Mumbai is covered by unorganized developments commonly known as slums who are essentially low end residential

consumers and even after more than 100 years of being a licensee in the area, the Tata Power doesn't have even a single slum area on its network.

- f) It is denied that RInfra is adopting an obstructive approach despite proactive steps taken by Tata Power to switchover low-end residential consumers on its network. It is submitted that proactive steps suggested by Tata Power are illegal. Tata Power has gone as far as to ask, as a matter of right that instead of developing its own network in compliance with law and terms of its license, RInfra should be directed to transfer its network at book value for slum area to itself thereby making the Tata Power compliant with Universal Service Obligation and RInfra instantly

in breach thereof.

43. We find that while arriving at the conclusion that Tata Power had been indulged in “Cherry Picking” the State Commission has relied on the cluster maps showing HT and EHT network laid down by the Tata Power. The State Commission has also observed that while laying such network selectively for the high end subsidizing consumers, Tata Power has not used the same lines for existing changeover consumers adjoining and abutting the lines laid for the high end consumers. On Tata Power’s contention that it is the choice of the Consumers whether to switchover or changeover, the Commission has referred to the provisions of Section 43(1) and 43(2), which states that it is the duty of the licensee to provide electric line and plant, and has observed that the consumer has no say

in deciding the network from which it will get supply. However, the Commission did not respond to the Tata Power's submission that switchover is not beneficial to low end consumers due to payment of Service Line Charges, the payback period of which could be as high as 43 months. The Commission also did not respond to the practical difficulty in providing space for meter and transformer by the Consumers opting for switchover, in its reply. There is practical problem in switching over in respect of residential consumers having 0-300 units consumption who are located in flats in multi storied building where there are other flats where the consumption is more than 300 Units.

44. We find some force in the Tata Power's contention that low end consumers did not opt to switchover as it involved payment of service line charges and high

payback period thereof and also due to uncertainty in economics of future tariff of Tata Power vs. RInfra. Low end consumers may apprehend that in case they switchover to Tata Power's network by paying service line charges and in near future the tariff of Tata Power becomes higher than RInfra's tariff before the payback, switching over would not be beneficial to them. If they wish to go back to RInfra's network, they will have to pay Service line Charges to RInfra again for switching over from TPC to RInfra. However, if they opt for changeover, they do not have to pay service line charges. Low end subsidized consumers do not pay cross subsidy surcharge and, therefore, they do not have any appreciable advantage to switch over from RInfra to Tata's network. The difference in wheeling charges, if any, may also be balanced by increase in wheeling charges of Tata Power due to high cost of the

new network being laid in the common licensed area. The changeover gives low end consumers flexibility to choose supplier depending on the tariff decided by the State Commission from time to time without going into the hassle of change of service line.

45. The Commission has ruled that Tata Power has indulged in “Cherry Picking” in laying down network selectively on the basis of cluster maps submitted by Tata Power showing large number of changeover consumers around the network laid down by the Tata Power. Tata Power has submitted that the locations shown in the Maps are not names of any Single Consumers but are the names of Distribution Substations and the Tata Power has extended supply from such substations to many residential consumers with in 250 Mts. from these substations and the

Commission did not ask for any explanation on this. In its reply the Commission has submitted that the Tata Power has for the first time mentioned that names shown in the cluster maps were not single consumers but were the names of substations. On a specific query it was informed that the cluster maps have shown only HT/EHT network laid down by the Tata Power. It may not, therefore, be correct to presume that the Tata Power had not laid any LT network emanating from the substations shown in the maps without examining the actual information in details. It is true that the maps shows large number of changeover consumers around these substations, but it would not be correct to conclude on that basis alone that the Tata Power had not laid network to supply to LT consumers around the substations it had established.

46. Learned Counsel for the Commission has argued that Section 43(2) requires the licensee to provide for electric line and plant to give supply to the consumers under section 43(1). The Tata Power is, therefore, duty bound to provide supply through its own network to the changeover consumers. The Act did not envisage that it is for the consumers to opt for the wires of the Tata Power or of the RInfra.

47. While relying on Section 43 of the Act, the Commission has not considered the provision of Section 46 of the Act which authorizes the licensee to recover the expenditure incurred in providing such line or plant. Let us quote Section 43 and Section 46 of the Act:

***“43. Duty to supply on request.—(1) Save as otherwise provided in this Act, every distribution licensee, shall, on an application by the owner or***

*occupier of any premises, give supply of electricity to such premises, within one month after receipt of the application requiring such supply:*

*Provided ...:*

*Provided ....*

*Explanation.—For the purposes of this sub-section, “application” means the application complete in all respects in the appropriate form, as required by the distribution licensee, along with documents **showing payment of necessary charges** and other compliances:*

*(2) It shall be the duty of every distribution licensee to provide, if required, electric plant or electric line for giving electric supply to the premises specified in sub-section (1):*

*...*

*(3) If a distribution licensee fails to supply the electricity within the period specified in sub-section (1), he shall be liable to a penalty which*

*may extend to one thousand rupees for each day of default”.*

**“46. Power to recover expenditure.—***The State Commission may, by regulations, authorise a distribution licensee to charge from a person requiring a supply of electricity in pursuance of section 43 any expenses reasonably incurred in providing any electric line or electrical plant used for the purpose of giving that supply”.*

48. Conjoint reading of the above two sections would reveal that the applicant has to deposit the required charges along with the application itself. Charges required to be deposit along with the application include the service line charges. Therefore, if a consumer desires to switchover, he would be required to deposit service line charges, only then his application would be considered to be complete for switch over. If a consumer submits application without

required service line charges then it could be presumed that the consumer has opted for changeover only. Moreover, the Commission has itself devised a changeover protocol to enable consumers connected to the network of one licensee to changeover to another licensee by paying wheeling charges and other compensatory charges including cross subsidy surcharge. If a consumer is satisfied with the changeover arrangement, we feel the consumer cannot be forced to switchover.

49. Merely because Tata Power has not switched over the subsidized residential changeover consumers in the vicinity of its network, does not establish that Tata Power is selectively laying its LT network as these consumers have not chosen to switch over to Tata Power's system.

50. In the light of above discussions we feel that it is not established conclusively that Tata Power in laying network selectively for high end subsidizing consumers. However, such possibility is also not completely ruled out. Tata Power has made submissions regarding difficulties in laying down the distribution network due to space constraints and problem in getting permission from the Municipal Authorities for digging for laying cables. Difficulties in laying service line, installing transformers in the premises of the consumers and space constraints for metering arrangements are also brought to our notice.

51. While directing Tata Power to lay down duplicate network in the licensed area where RInfra's network is existing and changeover consumers are availing supply through RInfra's network, it would be

necessary to examine the practical difficulties in a congested metropolitan city where a reliable distribution system of RInfra is already existing. In the congested areas there are problems in laying down distribution network and installing switch gear, transformers and metering arrangement at consumers premises where the switchgear, transformer and metering arrangement of one licensee are already existing. In Multi storied buildings, there may be different types of consumers and mix of consumers (commercial and residential) having high or low energy consumption. Some of the consumers may find it beneficial to take supply from the other licensee. However, it may not be practically possible to switch over the selective consumers due to non-availability of space for putting a second transformer, associated cables, switches and meters by the other licensee.

52. Laying down of parallel network in a congested metropolitan city like Mumbai poses many physical constrains. Even if it is to be done by using entire underground cables/sub-stations digging of areas will pose numerous difficulties including getting approvals from the municipal authorities. Even if the parallel distribution network is laid in and around a cluster, it will be at an extremely high cost, which will be ultimately borne by the consumers. The cost of laying a distribution network in a congested metropolitan city will be much more than the normal cost. In view of the difficulties in laying the LT network, there will always issues regarding selective laying down of network by Tata Power and cherry picking the subsidizing consumers and not providing connectivity to the low end consumers. Laying down of network in

the slums will extremely difficult. It may not be possible to lay down network and service line, etc. for the second licensee in certain areas. Therefore, some consumers particularly the low end consumers, even if they want to switch over to Tata Power will not be able to do so due to physical constraints.

53. We notice that the State Commission vide order dated 15.6.2009 in case No. 113 of 2008 itself did not approve the investment proposal of Network Rollout Plan and suggested to Tata Power for “exploring” the use of wires of other distribution licensees.

54. The relevant extract of the Tariff order dated 15.06.2009 is extracted herein below:

*“Moreover, incurring heavy capital expenditure for the network roll-out is not the only option available to TPC-D in its efforts to supply*

*electricity to different consumers in its licence area, and the provisions of the EA 2003 relating to Open Access and the provisions of the MERC (General Conditions of Distribution Licence) Regulations, 2006 relating to use of the distribution network of another distribution licensee, need to be explored by TPC-D, so that the cost is optimised. The Honourable Supreme Court also, in its Judgment on the matter of TPC's distribution licence, observed that TPC could supply to consumers in its licence area, by utilising the distribution network of the other distribution licensee already present in the area.*

*Hence, incurrence of capex cannot be a condition for meeting the Licensee's obligations to all the consumers. In fact, the capital costs should be incurred only when there is no better optimal solution."*

55. Let us examine a situation where the parallel network is laid by Tata Power also in all the cluster including, where a reliable system of RInfra is already existing. In that case, 50% of the total network of RInfra and Tata Power will remain redundant, the cost of stranded distribution system will be borne by the consumers of Mumbai. If some of the consumers who have migrated to Tata Power using the RInfra's network (changeover consumers), switch over to Tata Power, the RInfra's network will become redundant for which it was earlier getting wheeling charges from the changeover consumer. The fixed charges of the redundant system of RInfra which was earlier earning revenue will then be borne by the consumers of RInfra.

56. Therefore, in the circumstances of the present case where a reliable distribution system of RInfra is

already existing and physical constraints in laying down of network by Tata Power and very high cost involved in the same, it is in the overall interest of consumers of Tata Power and RInfra that the changeover consumers continue to get supply from Tata Power on the RInfra's network. It will also be convenient and economical for the consumer to changeover back to RInfra in case RInfra's tariff becomes more attractive in future.

57. Consumer interest is one of the main features of the Electricity Act, 2003. It is also to be ensured that no undue commercial advantage is gained by Tata Power by selectively laying down network to cater to only high end consumers. The interest of RInfra has to be safeguarded to avert any cherry picking by Tata Power for switchover consumers.

58. Laying down of parallel network in a congested metropolitan city like Mumbai where a reliable distribution network is already existing is to be viewed differently from situation in other areas in the country where there are deficiencies in the existing distribution network resulting in constraints in maintaining a reliable supply to the existing consumers and extending supply to new consumers. Practical difficulties in laying down the network and extending the 11/0.4 kV network all around the congested areas in multi-storeyed buildings and narrow lanes of slums and the extremely high cost involved in making an unnecessary expenditure has to be considered. In some areas it may be practically impossible to lay down the parallel network by Tata Power due to space constraints. Tata Power itself has stated that it is

facing practical difficulties to lay down the distribution network. Tata Power at the same time cannot maintain its right to lay down distribution network selectively even in areas where a reliable network of RInfra is existing. Tata Power should therefore, be restricted to lay down its network only in areas where laying down of parallel network would improve the reliability of supply and benefit the consumer and also for extending supply to new consumers who seek connection from Tata Power. Tata Power's Rollout Plan should therefore, be restricted to only such areas. This may also require amendment in the licence condition of Tata Power, after following due process as per law. The Rollout Plan shall be approved by the State Commission only after hearing RInfra and the consumers. In the meantime, Tata Power should be

restrained to lay down distribution network in the distribution area common to RInfra.

59. However, where Tata Power has already made considerable investment in constructing the distribution system in pursuance of the directions of the State Commission, it should be allowed to be commissioned and capitalized, to feed the consumers as decided by the State Commission. Tata Power may submit a proposal to State Commission in this regard which the State Commission shall consider and decide after hearing the concerned parties including RInfra. .

60. Where Tata Power has already laid down its network and some consumers have switched over from RInfra to Tata Power, these consumers can remain with Tata Power. However, they can choose to switch over to RInfra in future on RInfra's existing network as

per the switch over protocol to be decided by the State Commission.

61. In view of above, Tata Power is directed to submit its Roll Out Plan as indicated above for approval of the State Commission. In the meantime, Tata Power is restrained to lay down its distribution network in the area common to RInfra till further orders of the State Commission on its Rollout Plan as per the directions given in this judgment. However, Tata Power can supply power to the existing consumers of RInfra irrespective of category of consumer on the request of the consumers only through RInfra's network by paying the necessary wheeling charges as well as the other compensatory charges including the cross subsidy charges to RInfra. However, there shall be no restriction on Tata Power or RInfra to lay network

for supply to new connections. The State Commission shall consider to give approval for laying down of network by Tata Power only in areas where there are distribution constraints and laying down of a parallel network by Tata Power will improve reliability of supply and benefit the consumers, only after hearing RInfra and the consumers. Similarly, RInfra shall not lay network in any area where only Tata Power's network is existing and use Tata Power network for changeover of consumers, if any, till further orders by the State Commission, except for extending supply to new connections. The State Commission is directed to devise a suitable protocol in this regard after following due procedure. This may require change in licence condition of the licensees which the State Commission shall decide after following due procedure as per law.

**62. The third issue is whether the Respondent Commission had power to issue the impugned directions to the Appellant under Section 23 of the Act?**

63. We find that the State Commission's order is completely silent of the issue. In fact the State Commission in its order did not refer to any of the section of the Act which conferred it the powers to issue the impugned directions. The Commission has referred to Section 23 of the Act only in its counter affidavit. The learned Counsel for the State Commission vehemently, with the support of large number of authorities, contended that if the Statute has given powers to an Authority, such Authority can exercise the powers even without mentioning the

Section under which the Authority has gathered powers in the order. He also very forcefully argued that the Commission has plenary powers, including powers to issue the impugned directions under this section. The learned Senior Counsel for the RInfra supported the contentions of the Commission and submitted that the Commission has powers under Section 23 of the Act to issue the impugned directions.

64. The learned Senior Counsel for the Tata Power opposed the contentions of the Respondents and submitted that the provisions of section 23 of the 2003 Act are similar to the Provisions of Section 22B of the 1910 Act which was used only for the purpose of load shedding in the event of shortages. He also argued that the directions given by the Commission in fact amounts to amendment of licence conditions which

can only be done under Section 18 of the Act after following due process prescribed in the Section itself. The Commission did not follow the procedure for amendment of licence conditions laid down in Section 18 of the Act and the directions issued by the Commission are, therefore, illegal and ultra virus. The Commission in its written submissions did not address this important issue raised by the Tata Power. RInfra in its written submission has tried to address this issue by submitting that if the contention of the Tata Power is accepted then even the load shedding protocol would amount to amendment to license conditions.

65. In order to determine the issue in detail let us examine the impugned directions issued by the Commission as given below:

*“96. Based on all the analysis of all the above issues, the Commission has come to the conclusion that there is a need to intervene in the manner of changeover and switchover of consumers, as being undertaken by the Parties, and there is a need to calibrate the migration of consumers from one Licensee to another, in order to ensure a level playing field and also to protect the interests of low-end consumers being supplied electricity in the Common Area of supply between RInfra-D and TPC-D. Accordingly, the Commission hereby modifies the interim Order in Case No. 50 of 2009, under Section 94(2) of the EA 2003, as under:*

*a) Prospectively, from the date of this Order, consumer changeover will be allowed from RInfra-D to TPC-D only for the residential category of consumers and that too only for the consumers who consume electricity upto 300 units a month.*

*b) For the purpose of identifying the target segment for consumer changeover, only those residential category consumers whose 'average' monthly consumption over the previous 12 months (as on date of submitting the application and as captured in the last paid monthly bill of RInfra-D) is upto and including 300 units per month, shall be eligible to changeover from RInfra-D to TPC-D.*

...

*i) Switchover of consumers from RInfra-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. This has been explained in greater detail in the subsequent paragraphs.*

...

*98. Accordingly, the Commission hereby issues the following directions to TPC-D regarding the network roll out plan and capital expenditure to be undertaken over the next one year from the date of this Order:*

*a) TPC-D will have to focus all its energies and capital expenditure and ensure that by the end of one year from the date of this Order, TPC-D has rolled out its entire distribution network in the 11 Clusters identified above (to be redrawn into a Municipal Ward-wise Plan by TPC-D) in such a manner that it is in a position to provide supply through its own distribution network to existing and prospective consumers located anywhere within these Clusters, within the minimum time period of one month specified under the MERC SOP Regulations.*

*b) TPC-D has to ensure that all capital expenditure schemes submitted to the Commission for approval are part of the overall Network Rollout Plan prepared in such a manner that the above objective is achieved. The Commission clarifies that it shall not accord its in-principle approval for any capital expenditure scheme proposed by TPC-D to be undertaken over the next one year, unless it complies with this overarching direction. Further, TPC-D should ensure that the necessary space for sub-station/Distribution Transformer, etc., is obtained by relying on the help of the State Government and other appropriate Authorities, since, TPC-D cannot link the compliance to conditions such as space availability, etc.*

*c) Further, the Commission has already granted in-principle approval to capital expenditure schemes to be undertaken over*

*the next 2-3 years. In view of the above direction to redraw the Cluster based Plan into a Ward-wise Plan, such that the 11 Clusters identified by the Commission are covered in the first Phase, TPC-D has to re-arrange the Plan such that the schemes covering the 6 Clusters overlapping between TPC-D's proposed Plan and those identified by the Commission (Mira Road, Dahisar, Kurla LBS, Saki, Mindspace, Trombay, Mankhurd Chembur, Vrindavan, Arogyanidhi, Vasantotsav, and Malad BMC Lagoon) are covered, and the balance schemes are designed for the remaining Clusters.*

*d) Further, TPC-D should ensure that wide publicity is given to reach the consumers in these identified 11 Clusters, to the effect that TPC-D is in a position to provide supply using its own network to all consumers interested in taking power supply from TPC-*

*D, within the timelines specified in the MERC SOP Regulations”.*

66. The directions given by the Commission are summarized below:

- (a) Not to commence supply to any existing consumer of R-Infra with an average monthly consumption in excess of 300 units of electricity either on its own network (i.e., by “*switchover*”) or on R-Infra's network (i.e., by “*changeover*”) whether in the 11 clusters or elsewhere in Tata Power's distribution area.
- (b) To roll out its distribution network for a period of one year only in 11 clusters selected on the basis that these clusters consisted primarily of low-end residential consumers while restricting Tata Power

from laying its network in any other areas and while doing so the TPC-D should ensure that the necessary space for sub-station/Distribution Transformer, etc., is obtained by relying on the help of the State Government and other appropriate Authorities, since, TPC-D cannot link the compliance to conditions such as space availability, etc.;

- (c) To roll out its network within its entire distribution area in the medium term within a time frame of two to three years so that Tata Power would be in a position to supply any consumer in its area within a minimum period of one month allegedly as required under Section 43(1) of the Electricity Act.

67. Let us now examine as to whether these directions infringe upon the license conditions of Tata Power. The Commission under Section 16 of the Act has notified Regulations specifying specific conditions of license. Under Regulation 4.2 the Distribution licensee is authorized to supply electricity to the public for all purposes in accordance with the provisions of the Act. The above conditions imposed by the State Commission impose restrictions on geographical area and category of consumers to which Tata Power is entitled to supply power within its area of supply. This direction in our considered opinion, amounts to amendment of licence condition of Tata Power.

68. The relevant portion of Section 18 regarding amendment of licence is reproduced below:

**“18. Amendment of licence.—***(1) Where in its opinion the public interest so permits, the Appropriate Commission, may, on the application of the licensee or otherwise, make such alterations and amendments in the terms and conditions of his licence as it thinks fit:*

*Provided that no such alterations or amendments shall be made except with the consent of the licensee unless such consent has, in the opinion of the Appropriate Commission, been unreasonably withheld.*

*(2) Before any alterations or amendments in the licence are made under this section, the following provisions shall have effect, namely:—*

*(a) where the licensee has made an application under sub-section (1) proposing any alteration or modifications in his licence, the licensee shall publish a notice of such application*

*with such particulars and in such manner as may be specified;*

*(b) in the case of an application proposing alterations or modifications in the area of supply comprising the whole or any part of any cantonment, aerodrome, fortress, arsenal, dockyard or camp or any building or place in the occupation of the Government for defence purposes, the Appropriate Commission shall not make any alterations or modifications except with the consent of the Central Government;*

*(c) where any alterations or modifications in a licence are proposed to be made otherwise than on the application of the licensee, the Appropriate Commission shall publish the proposed alterations or modifications with such particulars and in such manner as may be specified;*

*(d) the Appropriate Commission shall not make any alterations or modifications unless all suggestions or objections received within thirty*

*days from the date of the first publication of the notice have been considered”.*

69. Section 128 of the Electricity Act, 2003 provides for investigation of certain matters. Under this Section, the Appropriate Commission may, on being satisfied that a licensee has failed to comply with any of the conditions of licence or a licensee has failed to comply with any of the provisions of this Act, or the rules or regulations made thereunder, then it can by order direct a person (“Investigating Authority”) to investigate the affairs of the licensee and to report to the Commission on investigation made. The Investigating Authority can also be directed to make inspection. Based on the report of the Investigation Authority, the State Commission after giving opportunity to the licensee to make representation on

the report can pass an order as laid down under subsection (6) of Section 128. No such investigations have been made by the State Commission u/s 128.

70. Section 23 provides as under:

**“23. Directions to licensees.**—*If the Appropriate Commission is of the opinion that it is necessary or expedient so to do for maintaining the efficient supply, securing the equitable distribution of electricity and promoting competition, it may, by order, provide for regulating supply, distribution, consumption or use thereof”.*

71. At this moment we are not inclined to examine as to whether the Commission has powers to issue specific directions under Section 23 or not. However, we do not propose to observe that the Commission did not have powers to issue such directions. If Tata Power indulges in laying down the network selectively to

switchover the high end consumers ignoring the low end consumers to the detriment of RInfra, the State Commission has powers to issue such directions after following the procedure laid down in law. Section 18 of the Act is specific provision dealing with the amendment to license. Similarly, Section 128 is a specific provision for investigation if the licensee has failed to comply with any condition of license. Section 23 is general provision giving powers to the Commission to issue directions to licensee to do or not to do certain things under certain conditions. It is established law that specific provision of the statute shall prevail over general provision. Accordingly, we hold that the Commission could have issued the impugned directions under Section 18 or Section 128 of the Act only after following the procedure laid down in these Sections.

72. The contention of the Respondents that if the argument of the Tata Power is accepted that the impugned directions amount to amendment to license conditions, then even the load shedding would amount to amendment in license conditions and should be dealt accordingly. The contention is misplaced and is liable to be rejected for the reason that load shedding is purely a temporary phenomenon carried out for few hours only during emergent conditions of power shortages and under these conditions it may be necessary to secure equitable distribution of electricity. It is not a restriction imposed by the Commission on the licensee but the Commission only approves the load shedding protocol proposed by the licensee to meet the emergent conditions due to gap between demand and availability of power. On the other hand the restrictions imposed by the

Commission in the impugned order are restrictions on the licensee on not to supply electricity to all category of consumers, who wish to take supply from the Tata Power other than residential consumers having monthly consumption of less than 300 units.

73. In fact, such a restriction has denied other consumers from exercising their choice of supplier guaranteed by the Act. One of such consumer viz., Mumbai International Airport Limited (MIAL) has filed I.A. No. 395 and 396 of 2014 seeking impleadment and directions in the present Appeal and has submitted that the directions given by the State Commission takes away the choice given to MIAL as a consumer under Section 43 of the Electricity Act to take supply from either of the licensees.

74. The Act has mandated the State Commission to protect the interests of the consumers. The State Commission, while giving any direction to the licensee is bound to ensure that such direction is in the interests of the consumer. Tata Power has expressed difficulties in laying down parallel network in the common licence area with RInfra. Laying of parallel network in every nook and corner of the city irrespective of the requirement and cost and where a reliable distribution system of RInfra is already existing would not be in the interest of the consumers of both Tata Power and RInfra as the existing network can be used for changeover. Wheeling charges of the Tata Power would increase due to un-necessary CAPEX and wheeling charges of RInfra would also increase due depletion of the consumer base. In changeover, RInfra recovers wheeling charges from

changed over consumers and its consumer base, for evaluating wheeling charges, would remain intact.

75. In this regard we are of the view that the approach adopted by the State Commission in case number 113 of 2008 dated 15.6.2009, ruling that incurring heavy capital expenditure for the network roll-out is not the only option available to Tata Power in its efforts to supply electricity to different consumers in its licence area, and the provisions of the EA 2003 relating to Open Access and the provisions of the MERC (General Conditions of Distribution Licence) Regulations, 2006 relating to use of the distribution network of another distribution licensee, need to be explored by Tata Power, so that the cost is optimised, was the correct approach.

76. The Commission should have continued to follow the same approach in its subsequent orders too. We have already given directions in regard to laying down of network by Tata Power in the preceding paragraphs while deciding the second issue.

77. As regards the fourth issue raised by RInfra in Appeal No. 229 of 2012, we feel it is perfectly legal for the consumers to changeover from one licensee to another using the network of one of the licensees and, therefore, there is no illegality in continuation of the directions of the State Commission in the order dated 15.9.2009 regarding changeover to Tata Power using RInfra's network. However, RInfra is entitled to charge from changeover consumers wheeling charges and other compensatory charges including the cross subsidy charges as decided by the State Commission

from time to time as per law. The State Commission is also directed to lay down a detailed changeover protocol after hearing the concerned parties.

78. Before parting, we wish to state that we have given the above findings in view of the circumstances of the case where difficulties are being experienced in laying distribution network by the parallel licensee namely, Tata Power, to provide connectivity to all consumers in the licensed area common to RInfra and in the ultimate interest of the consumers.

79. As regards IA 395 and 396 of 2014 filed by Mumbai International Airport, we do not want to give any specific finding and we direct Mumbai International Airport to file a petition before the State Commission and the State Commission will decide the

issue as per law, keeping in view the findings given in this order.

## **80. Summary of our findings**

**(i) 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. If the State Commission had received complaints about refusal of the 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. Tata Power has since revised its application form for**

**changeover/new connection. 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.**

**(ii) It is correct that the Tata Power has not laid down LT network to switch over the residential consumers who were availing supply from Tata Power on the network of RInfra and who were in the vicinity of the network laid down by Tata**

**Power. This in our opinion cannot be cherry picking as it has been done in the interest of the consumers and is also in line with the decision of the State Commission in its order dated 15.6.2009 in case No. 113 of 2008. Therefore, it is in the interest of consumers of Tata Power and RInfra that the changeover consumers of Tata Power continue to get supply from Tata Power on the RInfra, even if a 33/22 kV sub-station of Tata Power is available in the vicinity. It will also be convenient and economical for the consumer to changeover back to RInfra in case RInfra's tariff becomes more attractive in future.**

**(iii) In view of the practical difficulties in laying down parallel network in Mumbai as pointed out by Tata Power we have given some directions**

**under paragraphs 58 to 61 regarding restricting the Roll out Plan of the Tata Power only to the areas where laying down of parallel network will improve the reliability of supply and benefit the consumers and directions for continuation of changeover arrangement irrespective of category or consumption of consumers, commissioning of network where a substantial expenditure has been incurred by Tata Power in laying down new network on the directions of the State Commission, consumers who had already switched over to Tata Power, laying down network for providing new connection, changeover and switch over protocol, change in licence conditions of the licensees, etc. However, there shall be no restriction on any licensee to lay network for supply to new connections. The State Commission**

**is also directed to decide the detailed protocol for switchover and changeover after hearing all concerned.**

**(iv) The State Commission has powers to give directions if it comes to its notice that a licensee is laying down network selectively to connect the high end consumers ignoring the low end consumers and violating the terms and conditions of the licence. However, such directions have to be given after following the procedures as per law.**

**(v) Directions given to Tata Power by the State Commission in the impugned order are set aside.**

**(vi) It is perfectly legal for the consumers to changeover from one licensee to another using the network of one of the licensees and, therefore,**

**there is no illegality in continuation of the directions of the State Commission in the order dated 15.9.2009 regarding changeover to Tata Power using RInfra's network. However, RInfra is entitled to charge from changeover consumers wheeling charges and other compensatory charges including the cross subsidy charges as decided by the State Commission from time to time as per law. The State Commission is also directed to lay down a detailed changeover protocol after hearing the concerned parties.**

**(vii) We have given the above findings in view of the circumstances of the case where difficulties are being experienced in laying distribution network by the parallel licensee namely, Tata Power to provide connectivity to all consumers in**

**the licensed area common to RInfra and in the ultimate interest of the consumers.**

81. In view of above, Appeal No. 246 of 2012 is allowed with certain directions. Appeal No. 229 of 2012 is disposed of but with certain directions to the State Commission for formation of procedure for changeover of consumers. No order as to costs.

82. Pronounced in the open court on this **28<sup>th</sup> day of November, 2014.**

**( Rakesh Nath)**  
**Technical Member**

**(Justice M. Karpaga Vinayagam)**  
**Chairperson**

√  
**REPORTABLE / ~~NON-REPORTABLE~~**

Vs