IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.2898 OF 2006

With

CIVIL APPEAL NOs.3466 and 3467 of 2006

Tata Power Company Limited ...Appellant

Vs.

Reliance Energy Limited & ors. ...Respondents

J U D G M E N T

Altamas Kabir,J.

1. As these three appeals arise out of a common judgment of the Appellate Tribunal for Electricity, they were taken up for final hearing together.
2. The genesis of these three appeals is a petition filed by M/s BSES Limited on 23.7.2002

before the Maharashtra Electricity Regulatory Commission (hereinafter referred to as 'MERC'), under Section 22(2)(e) and (n) of the Electricity Regulatory Commissions Act, 1998 (hereinafter referred to as 'the ERC Act'), complaining of alleged encroachment by Tata Power Company Limited (hereinafter referred to as 'TPC') within its area of supply. In the said application M/s BSES, inter alia, prayed for the following reliefs:

a) That Tata Power Company Limited be restrained from in any manner selling, supplying and distributing electricity to the consumers situated within the area of supply of BSES in contravention of the terms and conditions of their licenses and the policy of the Government of Maharashtra.

b) That TPC be ordered to pay BSES or to the Government of Maharashtra all profits and gains made from January 1998 until TPC discontinued sale of energy to such consumers, i.e. situated in BSES's licensed area of supply and having energy requirement below 1000 KVA (maximum demand) and/or with lighting consumption exceeding 20 per cent of the total;

c) That, pending the disposal of the petition TPC be restrained in terms of the prayer at (a) above and from offering new

> connections to any entities for sale, supply or distribution of electricity in BSES's licensed area of supply, with energy requirement below 1000 KVA (maximum demand) and/or with lighting consumption exceeding 20 per cent of the total.

3. From the materials on record it appears that the principal question which fell for the decision of MERC was whether TPC was entitled under the licences granted to it to effect distribution of electricity directly to customers within the area of supply indicated in the licences granted to BSES.

4. In order to appreciate the circumstances giving rise to the above dispute, it is necessary to set out some of the facts as also the terms and conditions of the licences granted to the contesting parties for distribution of electricity within Bombay city and its suburbs.

5. At the relevant time TPC was holding four licences for the aforesaid purposes, as described hereinbelow:

i) The 1907 Licence- Commonly known as the Bombay (Hydro-electric) Licence, which was originally granted on 5.3.1907 to Dorabji J. Tata and Ratanji J. Tata;

ii) 1919 Licence - Known as the Andhra Valley (Hydro-electric) Licence, which was issued on 3.4.1919 in favour of the Tata Hydro Electricity Supply Company Ltd.;

iii) The 1921 Licence – Known as Nila Mula Valley Licence, which was issued on 15.11.1921 in favour of Tata Power; and

iv) The 1953 Licence – Known as Trombay Thermal Power Electric Licence which was issued on 19.11.1953 in favour of the Tata (Hydro-Electric) Power Supply Company Limited, the Andhra Valley Power Supply Company and Tata Power.

6. Consequent upon amalgamation of the Tata Hydro-Electric Power Supply Company Limited and the Andhra Valley Power Supply Company Limited with Tata Power, the Government of Maharashtra on 12.7.2001 transferred the said 1907 licence, 1919 licence and the 1953 licence to Tata Power and accordingly on and from 12.7.2001 Tata Power came to hold the aforesaid four licences on the basis of which it had been contended on

behalf of Tata Power that it was entitled to sell, supply and distribute electricity not only to other distributing licensees, such as Reliance Energy Limited and The Bombay Electric Supply and Transport Undertaking (hereinafter referred to as the 'BEST'), but also to direct consumers of electricity.

7. As far as M/s Reliance Energy Limited, hereinafter referred to as "R.E.L.", is concerned it acquired a licence known as the Bombay Suburban Electric Licence which had initially been issued on 29.5.1926 in favour of Killick, Nixon and Company and Callender's Cable & Construction Company Limited. The said licence was assigned to the Bombay Suburban Electric Supply Limited on 13.5.1930. The Bombay Suburban Electric Supply Limited was first renamed as BSES Limited and thereafter as Reliance Energy Limited.

8. Before MERC it was contended on behalf of BSES that TPC was contravening the terms and conditions of the licences which had been

granted to it by the State Government, as also the stated policy of the Government, by poaching consumers within the BSES' area of supply. It was contended before the Commission that supply of electricity by TPC directly to retail consumers was contrary to the provisions of the Indian Electricity Act, 1910 (hereinafter referred to as 'the 1910 Act'). The Electricity (Supply) Act, 1948 (hereinafter referred to as 'the 1948 Act'), and the policy contained in the Schedule to the 1948 Act.

9. It was also contended, without prejudice to the above submission, that TPC could not, in any event, effect any retail supply of electricity to consumers with a maximum demand below 1000 KVA, in terms of the licences held by them. It was submitted that such supply by TPC to direct retail consumers was also contrary to Government policy.

10. It was urged that, in view of the above, the Commission, in exercise of its powers under the ERC Act, should restrain TPC from supplying

electricity to retail consumers within BSES' territory.

11. The aforesaid issue raised on behalf of BSES Limited was considered at length by MERC in relation to the terms and conditions of the licences held by Tata Power and Reliance Energy Limited and in para 81.2 of its judgment and order, the Commission observed as follows:

> "81.2 The starting point of both parties is the provisions of Clause 5 (I),(I) and (III) of TPC's licenses, which are quoted at para 8 of this order. The contesting arguments regarding the interpretation and implications of this Clause have been set out at length above. After considering the arguments put forward and the provisions of the licenses and statutes, the Commission has come to the conclusion that the license to supply energy "for all purposes including supply to other licensees for their own purposes and in bulk", read with the succeeding terms of Clause 5 and other provisions, may give TPC an unfettered right to supply energy directly to all or any consumers in the BSES area of supply but no obligation to supply power, but it militates, in particular, against the provisions of Sec. 22(2)(e) of the Commission's power of regulating and promoting the

> working of licensees in an efficient, economical and equitable manner and, in general, against the provisions of Sec. 22(1)(d) enjoining the Commission to promote competition, efficiency and economy in the activities of the electricity industry."

12. In its aforesaid judgment and order MERC also held:

> "Apart from the claimed entitlement under their licenses as interpreted by them, TPC have urged that this entitlement and their consequent actions are also supported by the mandate given to the Commission under the ERC Act. Indeed, Sec.22 (1)(d) enjoins the Commission to promote competition, efficiency and economy in the activities of the electricity industry to achieve the objects and purposes of the Act. The Electricity Act,2003, which has replaced the ERC Act after hearings in this case were concluded, also specifically refers to the promotion of competition in its Preamble."

13. It was further held that strictly speaking there was nothing in either the 1910 Act or the 1948 Act which bars the grant of licences to more than one party for similar purposes in the

same area, which, in effect, is also the aim and object of the Electricity Act, 2003, which replaced all the earlier enactments.

14. Despite having held in favour of Tata Power that the terms and conditions of its licences may give it an unfettered right to supply electricity to all or any consumers in the BSES' area of supply without any obligation in that regard, MERC ultimately disposed of the petition filed by BSES with the following directions :

> "(i) TPC and BSES should file the terms of reference for engaging a consultancy firm to study the issues relating to Sections 42 and 14 of the Electricity Act, 2003.
> (ii) Select a consultancy firm/s (if need be, international level firms may be considered for selection, severally or jointly with Indian firms) for the purpose;
> (iii) The cost of the study should be equally shared by both parties;
> (iv) The study report should be widely disseminated among stakeholders in the city;
> (v) Adoption of the report would be decided after a public hearing; and Implementation of the report would be undertaken as per the Commission's Regulations."

15. While disposing of the petition MERC also restrained TPC from offering new connections to new consumers with energy requirement below 1000 KVA on the basis of an agreement purported to have been arrived at between TPC and BSES that they would maintain the status-quo till the disposal of the petition and would not encourage any existing consumer to switch over from one to the other.

16. Two appeals were preferred from the judgment and order of MERC before the Electricity Appellate Tribunal. Appeal No.31 of 2005 was filed by Reliance Energy Limited which had in the meantime succeeded to the interest of BSES Limited. Appeal No.43 of 2005 was filed by the Tata Power Company Limited.

17. In the first appeal, M/s Reliance Energy Limited questioned the findings of MERC that under the licences issued to Tata Power Company it could also undertake retail supply of energy directly to retail consumers and prayed

for a declaration that Tata Power was not entitled to effect direct supply of energy to consumers, except to other licensees and consumers contemplated in clause (xv) of the licences granted to Tata Power, read with clause (VI) of the Schedule to the 1910 Act.

18. In Appeal No.43 of 2005 Tata Power questioned the findings in the order and directions of MERC contained in paragraphs 81.10, 81.11, 81.12 and 81.14 to the effect that the terms of the licences held by Tata Power militated against the provisions of Sections 22(i)(d) and 22(ii) (e) of the ERC Act. TPC also questioned the restraint order passed by MERC restraining TPC from offering new connections to consumers with a maximum demand of less than 1000 KVA and also to stay the directions of MERC directing the parties to engage a consultancy firm to study the issues relating to Section 14 and 14 (2) of the Electricity Act, 2003 and from taking further action in terms of the

directions contained in paragraphs 81.12. and 81.14 of the order passed by MERC.

19. Both the appeals were disposed of by the Appellate Tribunal for Electricity, New Delhi, by a common judgment dated 22.5.2006, inter alia, holding that Tata Power had not been granted licence to undertake retail distribution of electricity in the area within which REL had been distributing power in retail to customers directly. The order and findings recorded by MERC in that regard were set aside. It was also held that Tata Power could undertake only bulk supplies to licensees such as REL under the licenses held by it.

20. In addition to the above, it was also held by the Appellate Tribunal that Tata Power was not undertaking retail distribution of power but was only undertaking distribution of power in bulk to licensees prior to the differences that arose between REL and Tata Power.

21. Although, it was held by the Appellate Tribunal that more than one distribution licence could

be granted in terms of Section 62(1) of the Electricity Act, 2003, it held that since the licences granted to Tata Power did not entitle it to effect retail distribution directly to consumers it was not necessary to restrain Tata Power from effecting such distribution.

22. Accordingly, the appeal preferred by Reliance Energy Limited was allowed and the appeal preferred by Tata Power Company Limited was dismissed.

23. The three appeals before us have been filed by Tata Power Company Limited and M/s MIDC Marol Industries Association, against the said judgment of the Appellate Tribunal. While Civil Appeal No.2989 of 2006 has been filed by Tata Power Company Limited, Civil Appeals No.3466 of 2006 and 3467 of 2006 have been filed by MIDC Marol Industries Association. Though the said appellant in Civil Appeal Nos. 3466 and 3467 of 2006 was not a party before the MERC, it had been allowed to intervene during the hearing of the petition filed by M/s

BSES Limited which was subsequently taken over by Reliance Energy Limited.

24. Appearing for TPC, learned Senior Counsel, Mr. Iqbal Chagla, submitted that of all the distribution licences granted for supply of electricity within the island city of Bombay, the first distribution licence was issued to Bombay Electric Supply and Tramways Company Limited, hereinafter referred to as the "BEST Licence", on 7.7.1905, under the provisions of the Indian Electricity Act, 1903, hereinafter referred to as "the 1903 Act". Subsequently, on 5.3.1907, the Bombay (Hydro-Electric) licence was granted to Dorabji J. Tata and Ratanji J. Tata,which is one of the four licences currently held by TPC. Mr. Chagla submitted that the purpose for which the said licence was granted is contained in clause 6 of the licence which is relevant for arriving at a decision in these appeals. The same is accordingly reproduced hereinbelow:-

"6. Unless herein otherwise expressly provided energy shall be supplied under this licence only –

I. For Power:-

a. To other licensees for their own purposes and in bulk.
b. To Factories within the meaning of the Indian Factories Act 1881 and to any Railways previously approved by the Local Government; provided that the licensees shall not supply any such Factory or Railway as aforesaid unless such Factory or Railway, as the case may be, shall require not less than 5,00,000 units per annum, such amount being the bona fide average computed annual consumption of such Factory or Railway

Provided that in regard to supply under sub-section (a) the licensees shall not be under obligation to supply energy in bulk to other licensees for the purpose of enabling such other licensees for the purpose of enabling such other licensees to supply any consumer requiring more than 5,00,000 units per annum calculated as aforesaid. And provided that no supply by the licensees under the powers contained in sub-section (b) shall be open to question as between the licensees and the Bombay Electric Supply and Tramways Company Limited, if the licensees shall have given previous notice in writing to the

Bombay Electric Supply and Tramways Company Limited of their intention to make such supply and the Bombay Electric Supply and Tramways Company Limited shall not for thirty days after delivery of such notice at their office in Bombay have objected in writing, and provided that the Bombay Electric Supply and Tramways Company Limited, shall not be entitled to take any objection except upon the ground that the consumer intended to be supplied does not fall within the scope or does not fulfil the conditions of sub-section(b).

The energy supplied under this license to any consumer for power may be used by such consumer for lighting his premises, provided that the energy used by such consumer for such lighting purposes shall not in any year exeed twenty per cent of the total amount of energy supplied to such consumer and save as aforesaid, the licensees shall not supply energy for lighting purposes except by agreement with the Bombay Electric Supply and Tramsways Company, Limited.

In the event of any dispute arising between the licensees and the Bombay Electric Supply and Tramways Company, Limited, by reason of any objection by the latter to any supply by the licensees under sub-section (1) (b) of this clause, or in regard to the interpretation of the

> terms of this clause, such dispute shall be referred to an Arbitrator appointed by the Local Government, whose decision shall be final."

Mr. Chagla submitted that though TPC did not start generating power till 1915, it purchased electricity from BEST to sell and distribute the same to Pearl Mills Limited and Simplex Mills Limited during 1914 and 1915. In 1915 Tata Hydro started generating electricity and between 1917 and 1930, it began to supply electricity directly to a number of consumers within the city of Bombay and to Swadeshi Mills Ltd. and Coorla Mills Ltd. in the suburbs and also to B.B.& C.I. Railway (now known as Western Railway).

25. Mr. Chagla then referred to the Andhra Valley (Hydro-Electric) Licence which was issued in favour of Tata Hydro Electric Supply Co. Ltd. on 3.4.1919. He submitted that the said licence contained clause 5 which was similar to clause 6 of the 1907 licence reproduced

hereinabove, but with two significant changes. He pointed out that while clause 6 of the 1907 licence entitled Tata Power to supply energy for power "to other licences for their own purposes and in bulk", clause 5(II) of the 1919 Licence entitled Tata Power to supply energy for lighting and general purposes other than power, including the supply of energy in bulk to other licensees for distribution by them. Furthermore, Tata Power's area of supply was extended beyond the island city of Bombay to the suburbs and included areas which from 1926 would also form part of R.E.L's area of supply.

26. Mr. Chagla submitted that the Nila Mula Valley (Hydro-Electric) Licence was issued to Tata Power on 15.11.1921 and it too contained clause 5 which was similar to clauses 6 and 5 of the 1907 and the 1919 licences referred to hereinabove. Mr. Chagla submitted that under the 1921 Licence Tata Power was empowered without any restriction to supply electricity

directly to consumers, except in the island city of Bombay where an agreement with BEST was required to be arrived at for making such supply.

27. Mr.Chagla submitted that subsequently on 29.5.1926 the BSES Licence was granted in favour of Killick Nixon and Company and Callender's Cable and Construction Company Ltd. and the area of supply under the said licence included suburban areas which were covered by the 1919 and 1921 licences granted in favour of Tata Power. The said BSES Licence was ultimately assigned to Reliance Energy Limited.

28. Mr.Chagla contended that between 1930 and 1980 TPC continued to supply electricity to consumers directly, and to the distributing licensees, in all parts of Bombay, including the suburbs. Furthermore, by a Gazette Notification dated 10.3.1934, the First

Annexures to the 1907, 1919 and 1921 Licences held by TPC were amended to include:-

i. The island of Salsette, a portion of which falls within BSES' area of supply; and

ii. An area within a circle of 8 miles radius around Tata Power's sub-station at Kalyan.

A proviso was, however, added whereby Tata Power was required to obtain the written consent of the Government to supply to any consumer other than licensees or permit holders and the Government was required to consult the existing licensees and permit holders before granting such consent.

29. The inclusion of the island of Salsette and an area within a circle of 8 miles in radius around Tata Power Sub-station at Kalyan necessitated a change of the First Annexures to the licenses held by Tata Power. Such change was effected on 26.2.1942 by the substitution of the First Annexure to the Tata Power

Licences of 1907, 1919 and 1921 on 26.2.1942 to redefine the area of supply, namely –

> "(1) The area contained within the limits of the City of Bombay, as defined by section 3(10) of the Bombay General Clauses Act, 1904.
>
> (2) The whole of that portion of the island of Salsette, as is bounded on the South by the Town and island of Bombay, and on the North by the Bassein and Thane Creeks
>
> (3) The area contained within a circle of eight miles radius round the Tata Power Company's Sub-station near Kalyan.
>
> (4) The area contained within the Municipal limits of Matheran in the Kolaba District.
>
> (5) The area contained within the limits of the Municipal Borough of Lonavla in the Poona District.
>
> (6) The area contained within the Municipal limits of Panvel in the Kolaba District.
>
> (7) The area contained within a circle of ten miles radius round the head-quarters of the Collector of Poona in the Poona City.
>
> Provided however that in the case of area of supply mentioned in items (2), (3) and (7) above the licensees shall not, except with the written consent

> of Government, given after consulting the other licensees, be entitled to supply energy to any consumer other than such licensees within their respective areas of supply."

30. It was submitted that thereafter on 19.11.1953 the Trombay Thermal Power Electric Licence was granted to the Tata Valley Power Supply Company Limited and Tata Power. The said licence contained provisions which were similar to those of the earlier 3 licences held by TPC, together with a similar restriction as provided by the 1942 amendment by the addition of the proviso to the First Annexure.
31. On 23.10.64 the restrictions imposed on TPC on 10.3.34 were removed by further amendments to the several licences held by TPC.
32. In 1965 Tata Power constructed a further 150 MW unit which was commissioned at Trombay.
33. On 7.12.78 an amendment was effected to the several licences held by TPC by which it was indicated that with effect from 1.7.80 the distributing rights in respect of several areas

would stand transferred from TPC to the Maharashtra State Electricity Board. Even thereafter, TPC continued to supply electricity to various consumers in different parts of Bombay and the suburbs. According to Mr.Chagla a meeting was held between REL and TPC on 27.1.94 in which suggestions were made that the parties should avoid the practice of winning away consumers from one another. Ultimately, however, no such agreement could be arrived at between the parties.

34. Mr. Chagla submitted that in September 1995 REL started supplying power to consumers in the suburbs of Bombay city from the power generated at Dahanu. Mr. Chagla contended that as on 1.1.1998 the TPC had approximately 114 direct consumers in the city of Bombay, of whom 51 consumers were common to REL's area of supply, within which 14 had a sanctioned maximum demand of less than 1000 KVA.

35. Mr.Chagla urged that in September 1998 TPC submitted a proposed tariff for domestic

consumers to be effective from December 1998 which was opposed by REL. He also urged that prior to the submission of such tariff for domestic consumers REL had never objected to the distribution of electricity directly to consumers by TPC in the area of supply contained in the licences granted to TPC. It was only after TPC submitted the tariff for domestic consumers that the predecessor-in-interest of REL, M/s BSES Ltd., filed the petition before MERC under Section 22(2) (e) and (n) of the ERC Act 1998 on 23.7.2002 and the same was registered as Case No.14 of 2002. Mr. Chagla submitted that in its said petition BSES Ltd. prayed for the following reliefs:

> "(a) That Tata Power be restrained from in any manner selling, supplying and distributing electricity to consumers situated within the area of supply of BSES in contravention of the terms and conditions of their licences and the policy of the Government of Maharashtra;
> b) That Tata Power be ordered to pay to BSES or to the Government of Maharashtra all profits and gains made from January 1998 until Tata Power discontinues sale of energy to such consumers i.e. situated in BSES'

> licensed area of supply and having energy requirement below 1000 KVA (maximum demand) and/or with lighting consumption exceeding 20% of the total;
> c) That pending disposal of the petition Tata Power be restrained in terms of the prayer at (a) above and from offering new connections to any entities for sale supply or distribution of electricity in BSES' licensed area of supply, with energy requirement below 1000 KVA(maximum demand) and/or with lighting consumption exceeding 20% of the total".

36. Mr. Chagla submitted that after the aforesaid case was admitted by MERC on 10.10.2002 REL filed a petition for interim relief in the said proceedings on 14.10.2002. The petition was contested by Tata Power, and, ultimately, on 31.10.2002 the parties agreed before MERC that till the next date of hearing they would not lure away any existing consumers of either party.

37. Ultimately, no interim relief as prayed for by BSES was granted in its favour but the agreement arrived at between the parties remained in force pending disposal of the Case.

Mr. Chagla submitted that on 3.7.2003 MERC disposed of the aforesaid case upon holding, inter alia, that TPC's licences to supply energy for all purposes, including supply to other licensees for their own purposes and in bulk, read with the terms of clause 5 of the licences and other provisions, might give TPC an unfettered right to supply energy directly to all or any consumer in the BSES' area of supply without any obligation to supply such power. Despite holding as above, MERC also was of the view that such provisions of the licence militates in particular against the provisions of Section 22(2)(e) of the ERC Act, 1998, which empowers the State Government by notification in the Official Gazette to confer upon the State Commission the function of regulating the work of the licensees and other persons authorized or permitted to engage in the electricity industry in the State and to promote their working in an efficient, economical and equitable manner.

38. Mr.Chagla submitted that MERC also observed in its judgment and order that there is nothing in the 1910 or the 1948 Act or the terms of the Tata Power's licences to support BSES' primary contention that Tata Power could not supply energy directly to any consumer apart from those to whom they were supplying energy in accordance with their licenced entitlement prior to the amendments of 1964, subject to a minimum demand stipulation. It was further observed that clause 5 and the other licence terms do not envisage that Tata Power could supply energy only to a distributing licensee for onward supply to direct consumers.

39. Mr.Chagla pointed out that although BSES had denied such submission it had itself put forth a possible alternative, namely, that in addition to supply to the distributing licensees Tata Power is also entitled to effect such supply directly to parties in the area of supply common to BSES whose maximum demand exceeds 1000 KVA and whose consumption for

light is less than 20% of their total consumption.

40. Mr. Chagla submitted that MERC also recorded the fact that BSES has not only a right but an obligation to supply energy to a large number and category of consumers on demand. On the other hand, Tata Power has an obligation to supply energy to BSES to enable them to serve certain categories of consumers, but its claim that it also has the unfettered right, but no obligation, to provide power to consumers, to whom BSES has an obligation to supply, militates against the requirement of a level playing field for promoting competition.

41. It was pointed out that after proposing to engage a consultancy firm to enable it to determine how competition in sale of electricity in each licensed area could be introduced, MERC while finally disposing of the petition without assigning any reason and contrary to its own findings restrained TPC from offering new connections to any consumer

with energy requirement below 1000 KVA (maximum demand). According to MERC this direction was required to be made as part of the process of introducing competition and choice.

42. Mr.Chagla then submitted that both TPC as well as REL filed MERC appeals before the High Court, but the same were dismissed as not maintainable in view of the coming into force of the Electricity Act, 2003. However, since the Appellate Tribunal for Electricity contemplated under the Act had not been set up separate writ petitions were filed, which were also withdrawn when it was brought to the notice of the High Court that the Appellate Tribunal for Electricity had since become operational. Mr. Chagla submitted that thereafter Tata Power filed Appeal No.43 of 2005 before the Appellate Tribunal challenging MERC's order and REL filed Appeal No.31 of 2005 against the same order. It was stated that on 22.5.2006 the order impugned in these present appeals was passed by the Appellate Tribunal

allowing Appeal No.31 of 2005 filed by REL and dismissing Appeal NO.43 of 2005 filed by Tata Power, upon holding that:

> "(i) Tata Power has not been granted licence to undertake retail distribution of electricity in the area within which REL has been distributing power in retail to customers directly.
> ii) Tata Power has licences only to undertake bulk supply to licensees like REL.
> iii) Tata Power was not undertaking retail distribution of power but only undertaking distribution of power in bulk to licensees prior to the differences that arose between REL and Tata Power."

43. Mr. Chagla submitted that immediately after the pronouncement of the impugned order, an oral application was made on behalf of Tata Power for stay of operation of the order for a period of eight weeks. On the statement made by REL's counsel that it would not seek implementation of the impugned order for a period of eight weeks and upon Tata Power representing that it would maintain status quo with regard to the

retail supply to consumers and would not supply in retail to any further consumers, no interim order of stay was passed, but both the statements made on behalf of the respective parties were recorded by the Appellate Tribunal by a separate order.

44. Mr. Chagla submitted that thereafter these three appeals have been filed before this Court, including the two filed by MIDC, Marol Industries Association, being Civil Appeal Nos.3466 and 3467 of 2006.

45. Mr. Chagla submitted that while holding in favour of TPC that the terms of its licences did not expressly bar TPC from supplying electricity directly to consumers, MERC, erroneously decided to introduce the concept of a level playing field purportedly for introducing competition in the electricity trade. Mr.Chagla submitted that MERC had also erroneously held that apart from its obligation to supply energy to BSES, Tata Power had also the unfettered right, but no obligation, to

provide power to consumers to whom BSES had an obligation to supply but that the same militated against the requirement of a level playing field for the purpose of promoting competition. Mr. Chagla submitted that only on the said ground, which was without any substance having regard to the terms and conditions of the licences held by TPC, which were duly recognized by MERC, it not only directed that a consultancy firm be engaged to enable it to determine how competition in sale of electricity in each licensed area could be introduced, but it also restrained Tata Power from offering new connections to any consumer with energy requirement below 1000 KVA (maximum demand. Mr. Chagla submitted that such direction of MERC was based on the supposition that Tata Power could supply electricity directly only to consumers whose demand was above 1000 KVA (maximum demand) but was contrary to its own finding in its judgment that under the licences granted to it, Tata

Power was entitled to supply electricity to all consumers directly.

46. Mr. Chagla submitted that the arguments advanced before MERC should have been confined only to the question of whether TPC was entitled under the licences granted to it to supply electricity directly to consumers within its area of supply, which, in certain cases, overlapped the area of supply included in REL's licence. He submitted that even if there may have been some doubt with regard to the wordings of clause 6 of the 1907 licence, such doubts were removed by the wordings of clause 5 in the subsequent licences where the purpose of supply was worded in a manner which entitled Tata Power to supply energy for lighting and general purposes, other than power, including the supply of energy in bulk to other licensees for distribution by them. Mr. Chagla reiterated that even the area of supply was amended and extended beyond the island city of Bombay to the suburbs and included areas which from 1926

onwards also formed part of REL's area of supply. The learned counsel urged that the right of TPC to supply directly to consumers was included in the licences of 1919, 1921 and 1953 with the condition that energy supplied to any consumer for power could be used by such a consumer for lighting his premises, but the energy used for such lighting purposes should not in any year exceed 20% of the total amount of energy supplied to him.

47. A separate restriction was incorporated in the licence to the extent that TPC would not supply energy for lighting purposes except by agreement with the Bombay Electric Supply and Tramways Company Limited.

48. Mr. Chagla referred to a resolution adopted by the Industries and Labour Department of the Government of Maharashtra on 4.6.1962 in exercise of the powers conferred by Section 21 (2) of the 1910 Act sanctioning the form of agreement with High Tension consumers. As an example, Mr.Chagla referred to an agreement

entered into by Tata Power with Model Woollen Mills on 1.4.1965 agreeing to supply 780 KVA (maximum demand) for operation of its factory. From the said agreement, Mr. Chagla pointed out that in the said case the maximum demand was below 1000 KVA and the Appellate Tribunal had erred on the materials before it in holding in para 50(C) of its judgment that TPC was not supplying electricity/power to the consumers having a maximum demand of less than 1000 KVA.

49. In this regard, Mr.Chagla referred to the definition of the expression 'consumer' as indicated in Section 2(c) of the 1910 Act and provides as follows:

> "2(c) 'Consumer' means any person who is supplied with energy by a licensee or the Government or by any other person not only in the absence of supplying energy to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving energy with the works of a licensee, the Government or such other person as the case may be."

Mr.Chagla submitted that any person who was being supplied with energy would, therefore, be recognized as a consumer for the purposes of the Act.

50. Urging that the incorporation of the modification in clause 6 of the 1907 Licence in clause 5 of the licences, common to all the three licences granted to Tata Power after 1907, clearly spelt out the Government's intention of permitting TPC to supply electricity to all types of consumers within its area of supply, though with certain restrictions, which if removed in individual cases, would enable TPC to effect supply to such consumers who were covered by such restrictions. Mr. Chagla pointed out that right from the 1903 Act it had always been the intention of the Government to introduce competition in the electricity trade and the same was explicitly mentioned not only in the Preamble to the Electricity Act, 2003, but also in the Sixth proviso to Section 14

thereof, which deals with grant of licence, indicating that the appropriate Commission could grant a licence to two or more persons for distribution of electricity through their distribution systems within the same area. Mr. Chagla submitted that after the enactment of the Electricity Act 2003, it would not have been necessary to pursue these appeals having regard to the specific provision that two or more licences could be granted within a common area of supply, but that in view of the observations made by the Electricity Appellate Tribunal that its licences did not entitle it to supply electricity directly to retail consumers it had become necessary to press these appeals to correct the erroneous finding of the said Tribunal.

51. Mr. Chagla submitted that while MERC had correctly interpreted the provisions of the licences granted to TPC regarding supply of electricity to consumers in general, apart from bulk supply to a consumer whose requirement was

above 1000 KVA, it had gone off at a tangent in directing that a consultancy firm be appointed to study the issues relating to Sections 42 and 14 of the Electricity Act, 2003, for the purpose of introducing a level playing field. Mr. Chagla urged that on account of such directions given by MERC, which were *de hors* the reliefs prayed for by BSES in its petition under Section 22(2)(e) and (n) of the ERC Act, that TPC had to prefer an appeal before the Electricity Appellate Tribunal, which came to the perverse finding referred to above which necessitated the filing of the appeal by T.P.C.

52. Mr. Chagla submitted that the error in the reasoning of the High Court was required to be corrected so that TPC could continue to supply its current and future consumers in accordance with the provisions of the 2003 Act.

53. Appearing on behalf of the MIDC, Marol Industries Association, the appellant in Civil Appeal Nos.3466 and 3467 of 2006, Mr. J. Savla, learned advocate, submitted that although the

appellant had not been made a party before the Tribunal, it was permitted to intervene in the proceedings by MERC through the Bombay Small Scale Industries Association which was the parent body. Mr. Savla submitted that since the appellant would be one of the parties who would be affected by the outcome of these proceedings it had been permitted to file the aforesaid two appeals by order dated 7.8.2006.

54. While supporting the submissions made on behalf of TPC, Mr. Savla also referred to the Preamble and the provisions of Section 14 of the 2003 Act in support of the contention that the Act encouraged competition so as to give a choice to a consumer to opt for any of the distributing licensees supplying electricity directly to the consumers. He urged that many of the members of the aforesaid Association receive supply of energy from TPC and they would also be adversely affected if the orders passed by the Commission and the Tribunal were allowed to stand. He also referred to Section

79(2)(ii) of the 2003 Act which provides as follows:

> "79(2)(ii) The Central Commission shall advise the Central Government on all or any of the following matters, namely:-
>
> (i) ……..
>
> (ii) promotion of competition, efficiency and economy in activities of the electricity industry;
>
> (iii) …….
>
> (iv) ……."

55. Mr. Savla ended on the note that notwithstanding the clarity of the provisions of the licences granted in favour of Tata Power for the purpose of distribution of electricity to all types of consumers, even if two interpretations were possible, the view which was favourable to the consumers should be accepted by the Court.

56. Appearing for REL, Mr. K.K.Venugopal, learned senior counsel, echoed Mr. Chagla's contention

that in order to arrive at a decision in these appeals it would be necessary to apply the provisions of the different enactments to the licences granted in favour of Tata Power in order to identify the purposes for which such licences had been granted. Referring to the Indian Electricity Act, 1903, Mr. Venugopal firstly referred to Section 2(f) which defines "distributing main" to mean the portion of any main which is used for transmitting energy to the service lines for the purpose of general supply. He then referred to Section 2(j) which defines "general supply" to mean the general supply of energy to ordinary consumers and includes in the absence of a special agreement to the contrary with the Government or with a local authority, the general supply of electricity for public lamps but does not include the supply of energy to particular consumers under special agreement. Reference was then made to Section 2(o) which defines 'service line' to mean any electric supply line through which energy may be supplied, or is

intended to be supplied, by a licensee to a consumer either from a main or directly from the licensee's premises. Having regard to the aforesaid definitions, Mr. Venugopal submitted that the 1903 Act contemplated 3 types of supply, i.e. (i) General supply to ordinary consumers, (ii) supply to public lamps; and (iii) supply to consumers under special agreement. Referring to Section 4 (1)(d),(e) and (f) of the 1903 Act Mr. Venugopal submitted that a licence issued under the said Act could prescribe such terms and conditions as to the limits within which and the conditions under which the supply of energy was to be compulsory or permissive and as to the limits of the price to be charged in respect of the supply of energy and that a grant of a licence under the said enactment for any purpose would not in any way hinder or restrict the grant of another licence to another person within the same area of supply for a like purpose. However, as far as TPC is concerned, restrictions had been imposed on its power of general supply to consumers, which

supply could only be effected under a special agreement after due sanction from the Government. It brought such agreements within the purview of the licences granted to TPC.

57. Mr. Venugopal submitted that clause 2 of the 1907 Licence granted in favour of Tata Power is an interpretation clause where the expression "the licensees" used in the Act was to mean and include Dorabji J. Tata and Ratanji J. Tata and subsequently TPC, while the expression "other licensees" was meant to cover any person or persons, other than the licensees, who on the date of the grant of licence was duly authorized to supply energy to the public within the area of supply or to a licensee who may subsequently be authorized by a licence to generate and supply electricity for sections of the Tramways of the Bombay Electric Supply Company and Tramways Company Limited. Mr. Venugopal urged that clause (6) of the licence limits the supply by TPC to bulk supply only and that sub-clause (II) relates only to a consumer of such bulk supply and not

ordinary consumers. He also urged that the exclusion of clauses VIII, IX, X and XIII of the Schedule to the Act disentitled TPC from making supply to public lamps. In comparison, Mr. Venugopal referred to REL's licence where the purpose of supply has been indicated in clause 6 and provides that it would be entitled during the continuance of licence to supply energy for all purposes within the area of supply.

58. Referring to the Statement of Objects and Reasons of the 1910 Act, Mr. Venugopal submitted that it had been indicated therein that various difficulties had arisen in the working of the 1903 Act which were referred by the Government of India to a Committee on which technical and financial interests were represented. The result was the Act of 1910 which came into effect on 1.1.1911 and was altogether a new Act which repealed the 1903 Act. Accordingly, the 1907 licence could not be a consideration for interpreting the provisions of the 1919 licence and the licences granted

thereafter. Referring to the definition of 'consumer' in section 2(c) of the 1910 Act, Mr. Venugopal contended that a consumer would mean any person who is supplied by a licensee, by the Government, or by any other person engaged in the business of supplying energy to the public under the said Act or any other law for the time being in force, and includes any person whose premises are for the time being connected, for the purpose of receiving energy, with the works of a licensee, the Government or such other person, as the case may be. In other words, according to Mr. Venugopal, only a person whose premises were connected for the purpose of receiving energy could be said to be a consumer and not any person who was yet to receive such supply. He then referred to the definition of "Public lamp" in Section 2(k) meaning an electric lamp used for the lighting of any street. Mr. Venugopal reiterated that in terms of clause XV of the 1919 licence granted to Tata Power, the requirement of clauses IV,

V, VI of Schedule II of the 1910 Act for supply to public lamps had been omitted, which indicated that Tata Power could supply energy only in bulk and not directly to consumers whose maximum demand was less than 1000 KVA. Mr. Venugopal also submitted that sub-clause (2) of Clause 5 of the 1919 Licence and those granted thereafter would be rendered tautologous if an attempt was made to read the same in a manner independent of sub-clause (1), since, if Tata Power was allowed to supply for general purposes no restrictions would have been placed on the supply of power to factories. Mr. Venugopal would have us believe that notwithstanding the provisions of Sub-clause(1) of clause (5), Sub-clause (2) would have to be read independent of Sub-clause(1) in relation to supply of power for general purposes.

59. Mr. Venugopal submitted that, on the other hand, in accordance with the provisions of its licence, REL was under compulsion to supply to

public lamps at rates which were lower than those charged by Tata Power from its consumers, which gave Tata Power an unfair advantage over REL whose profits were thereby adversely affected. Mr. Venugopal submitted that it was in such context that the concept of level playing field arose in the proceedings on the basis whereof MERC disposed of its petition under the ERC Act.

60. Mr. Venugopal then referred to the Notification dated 10.3.1934 published by the Public Works Department informing the public that areas of supply under the licences granted to Tata Power had been extended as indicated hereinbefore so as to include the whole of that portion of the island of Salsette as bounded on the South by the town and island of Bombay and on the north by the Bassein and Thana creeks and the area contained within a circle of 8 miles radius around the Tata Power company's sub-station near Kalyan, subject, however, to the proviso that notwithstanding

such extended powers Tata Power would not, except with the written consent of the Government given after consulting the existing licences or permit holders, be entitled to supply energy to any consumer other than such licensee or permit holder within their respective areas. It was urged that by such amendment Tata Power could not supply energy directly to consumers, even if it wanted to do so, except with the written consent of the Government in the manner indicated hereinabove. It was urged that such a bar prevented Tata Power from supplying energy directly to consumers whose capacity of consumption was less than 1000 KVA (maximum demand) and such bar continued till the year 1964. In this regard, Mr. Venugopal referred to the amendment effected by the Government of Maharashtra to the 1921 licence held by Tata Power wherein in amended clause 5 it was provided that although Tata Power could supply energy under the licence for all purposes,

including supply to other agencies for their own purposes, and in bulk, it would not be under any obligation to supply energy in bulk to other licensees such as REL, for the purpose of enabling such other licensees to supply any consumer with power where the demand exceeded 250 KVA, except for Thana Electric Supply Company Limited for whom the maximum limit would be 300 KVA; for any consumer in the area of supply of REL whose maximum demand would be 1000 KVA and 5000 KVA for a customer of the Maharashtra State Electricity Board.

61. Mr. Venugopal also referred to the Order passed by the Industries Energy and Labour Department of the Government of Maharashtra on 7.12.1978 making further alterations in the 1907 Licence held by Tata Power whereby from 1.7.1980 Tata Power would transfer to the Maharashtra State Electricity Board its distribution rights and assets pertaining thereto as set out in Part II of the said annexure to the said licence. By virtue of such arrangement clause 6 relating to

the 'purpose of supply' was amended to bring it in parity with the amendment to the First Annexure to the 1921 Licence. Reference was also made to the commencement of discussion with the Maharashtra State Electricity Board for delimitation of the area of supply and distribution. In other words, under the licence in respect of the licensees' area of supply covered by the licence granted in favour of BSES the guiding principle would be that Tata Power would be allowed to retain such distribution rights and loads in the said area as would be warranted by the surplus generating capacity of Tata Power after meeting the requirements in the area served by BEST as well as the bulk supplied to the Maharashtra State Electricity Board at various points. According to Mr. Venugopal, such discussion was only with the object of allowing Tata Power to utilise its surplus generating capacity on account of the transfer of its customers to the Maharashtra State Electricity Board.

62. Mr. Venugopal contended that in order to interpret a licence for distribution of energy, what is important is not the terminology included in such licence but the purpose of supply for which such licence had been granted. It was submitted that under the Electricity Act, 2003, a 'distribution licensee' was defined in Section 2(17) to mean a licensee authorized to operate and maintain distribution system for supplying electricity to consumers in his area of supply. Mr. Venugopal urged that Tata Power had not even set up such a distribution system and was not, therefore, in a position to supply energy to any customer on demand as required under Section 43 of the said Act. Tata Power, could not, therefore, be described as a distributing licensee within the meaning of the aforesaid definition. With regard to the definition of 'consumers' in Section 2(15), Mr. Venugopal reiterated his earlier submission that only such person could be said to be a consumer who was being supplied

with electricity or was for the time being connected for the said purpose with the works of a licensee, the Government or any other person engaged in the supply of electricity to the public. According to Mr. Venugopal in the absence of any distribution system within REL's area of supply, TPC could not have any consumer within REL's area of supply. Reference was also made in this regard to the definition of 'service line' in Section 2(61) to drive home his point.

63. Mr. Venugopal lastly referred to Section 42 of the 2003 Act dealing with distribution of electricity, the duties of a distribution licensee and open access. He pointed out that sub-section(2) of Section 42 empowers the State Commission to introduce a system of open access in such phases and subject to such conditions, including Trust subsidies and other operational constraints as may be specified, within one year of the appointed date fixed by it, and in specifying the extent of open access in

successive phases and in determining the charges for wheeling having due regard to all the relevant factors.

64. Mr. Venugopal submitted that by amendment of the proviso on 15.6.2007 it was provided that such open access was to be allowed on payment of a surcharge in addition to the charges for wheeling as might be determined by the State Commission.

65. Referring to the Maharashtra Electricity Regulatory Commission (Distribution, open access), Regulation, 2005, Mr. Venugopal referred to Regulation 3 indicating the right of a consumer of a distribution licensee to seek open access to the distribution system of such distribution licensee for obtaining supply of electricity from a generating company or from a licensee other than such distribution licensee. Mr. Venugopal then referred to the various restrictions relating to the contract demand of the consumer which made it quite clear that the distribution licensee could not

of its own accord supply electricity to any consumer, without conforming to the eligibility conditions. Mr. Venugopal submitted that the right to such open access was available to the consumer and not to the distribution licensee which had to cater to the demand made by the consumer. In support of the directions given by MERC in its Order disposing of BSES' application, Mr. Venugopal in conclusion referred to Section 60 of the 2003 Act which reads as follows:

> "60. **Market domination.** – The appropriate Commission may issue such directions as it considers appropriate to a licensee or a generating company if such licensee or generating company enters into any agreement or abuses its dominant position or enters into a combination which is likely to cause or causes an adverse effect on competition in electricity industry."

66. Mr. Venugopal submitted that the concept of level playing field as reflected in the order passed by MERC was in exercise of the powers vested in MERC to prevent monopolisation and

to encourage competition and the Appellate Tribunal had chosen not to interfere with such finding but had, on the other hand, dismissed the appeal filed by the appellant on the ground that under the licences held by it the appellant was not entitled to supply energy to any consumer, except in bulk.

67. Mr. Venugopal urged that no interference was called for either with the judgment and order of MERC or that of the Appellate Tribunal and the appeal filed by the Tata Power was liable to be dismissed along with the appeals filed by MIDC, Marol Industries Association.

68. Replying to Mr. Venugopal's submissions, Mr. Chagla submitted that the 2003 Act was a customer- friendly enactment and competition was accordingly one of its objects. He also submitted that no appeal had been filed either by BSES or BEST against the orders of the Appellate Tribunal. He added that the submissions made on behalf of REL supporting the order of MERC on the ground of a level

playing field was wholly erroneous since in ground RRR of the appeals filed by TPC in this Court it has been specifically stated that the Appellate Tribunal had failed to take note of the fact that if the root cause of the dispute was the difference in tariffs, that purportedly made REL's tariff less competitive than that of Tata Power, then such dispute had been duly addressed in the Tariff Order dated 11.6.2004 wherein it had been stated in paragraph 10 as follows:

> "The Commission had determined the tariffs in such a way that the Bulk Supply Tariffs (BST) applicable to BSES and BEST are significantly lower than the tariffs applicable to TPCs retail HTLT consumers. The Commission has admitted to rationalize the bulk and retail tariff supply so that they are in consonance with the principles that the BST should be lower than the retail tariffs. This will also facilitate healthy competition between different licensees on a more even footing."

69. Mr.Chagla submitted that the aforesaid order of the Commission put at rest the bogey of a level playing field raised by MERC, which

otherwise had completely supported the appellant's case on interpretation of the licences held by it.

70. Mr. Chagla also submitted that the chart submitted on behalf of TPC would clearly show that the Appellate Tribunal had committed an error in coming to a finding that TPC was not engaged in making retail supply directly to consumers, on which basis it had dismissed the appeals filed by TPC.

71. In the opening paragraphs of this judgment we have indicated that the principal question which fell for the decision of MERC was whether Tata Power was entitled under the licences granted to it to effect distribution of electricity directly to consumers within BSES' (Now REL's) area of supply. While MERC answered the said question in favour of Tata Power upon holding that there was nothing in the licences granted to Tata Power to prevent it from doing so and that it could effect supply of electricity to any consumer, it also

held that the terms and conditions in the said licences gave it an advantage over BSES in regard to fixation and charge of tariff which necessitated the establishment of a level playing field in order to encourage competition. Apparently, while dealing with the grievances projected by BSES, MERC lost sight of the reliefs prayed for BSES which was based on the contention that according to the terms and conditions of the licences granted to it Tata Power was not entitled to supply energy in retail to domestic customers, at least not to consumers whose demand was less than a maximum demand of 1000 KVA. Having once held on the principal issue that Tata Power was entitled to supply electrical energy to all consumers under the licences granted to it, MERC should have restrained itself from unilaterally making out a third case regarding the establishment of a level playing field when such a case had neither been made out nor any

relief in that regard had been prayed for by BSES.

72. MERC also appears to have lost sight of the fact that the first three licences had been granted to Tata Power long before a separate licence was granted in favour of BSES. There is sufficient material on record to establish that Tata Power had been supplying energy to domestic consumers on retail basis within areas which subsequently came to be included in BSES' (and subsequently REL's) area of supply and no objection was raised in that regard till TPC submitted its proposed tariff for domestic retail consumers for approval in September, 1998. MERC appears to have confused the two issues while dealing with BSES' petition under section 22(2)(e) and (n) of the Electricity Regulatory Commissions Act, 1998. In fact, it appears that based on the third case made out by it, MERC restrained Tata Power from supplying electrical energy to consumers whose demand was less than 1000 KVA (maximum demand)

despite holding that under the licences granted to it Tata Power was entitled to do so.

73. In dealing with the appeals filed both by REL and Tata Power, the Appellate Tribunal for Electricity misinterpreted the provisions of the licences granted to TPC for supply and distribution of electrical energy. The arguments advanced on behalf of REL before the learned Tribunal, which were also advanced before us by Mr. Venugopal, found favour with the Tribunal which arrived at the conclusion that the terms and conditions of the licences granted to TPC did not entitle it to supply electrical energy directly to consumers whose demand was below 1000 KVA (maximum). In reaching such conclusion the Tribunal not only ignored the situation prior to 1926 when BSES was granted its licence, but also the subsequent amendments to the licences held by TPC whereby clause 5 of the 1919 and 1921 licences were altered to permit Tata Power to supply electrical energy for lighting and

general purposes, other than power and including the supply of energy in bulk to other licensees for distribution by them. The Appellate Tribunal also overlooked the order passed by the Industries Energy and Labour Department of the Government of Maharashtra on 7.12.1978, whereby from 1.7.1980 Tata Power was required to transfer to the Maharashtra State Electricity Board its distribution rights under the 1907 licence and assets pertaining thereto as set out in part 2 of the Annexure to the said licence. The Tribunal also overlooked the fact that by virtue of the aforesaid arrangements, clause 6 of the 1907 licence relating to "purpose of supply" was also amended to bring it in parity with the amendments to the First Annexure to the 1919 and 1921 licences. Although, Mr. Venugopal tried to convince us that the changes effected in clause 6 of the 1907 licence and clause 5 of the remaining three licences held by TPC was only to compensate TPC for giving up its rights

to supply in favour of the Maharashtra State Electricity Board and to help it to utilise its surplus generation of power, we are unable to accept Mr. Venugopal's contentions, since from the materials on record it stands amply proved that Tata Power had all along been supplying electrical energy directly even to retail customers whose maximum demand was less than 1000 KVA and no objection thereof was raised by either BSES or REL till the year 1998 when Tata Power submitted its proposal for domestic tariff for approval to the Board. It was only thereafter that REL raised its objection in the form of its petition to MERC under Section 22 (2)(e) and (n) of the ERC Act 1998. The list of consumers to whom retail supply was being effected by TPC in the island city of Bombay and its suburbs, discloses that at least 51 such consumers were within REL's area of supply. In fact, Mr. Venugopal by way of an alternative submission also indicated that Tata Power under the terms and conditions of the

licences held by it, could supply energy to any consumer whose demand was above 1000 KVA within the area of supply covered by the said licences.

74. We are also unable to accept Mr. Venugopal's interpretation of clause 6 of the 1907 licences and clause 5 of the other licences to the effect that Sub-clause (II) thereof would be rendered tautologous, if the same was read independently of Sub-clause (I). His submission that if Sub-clause (II) is to be read in a manner which allowed Tata Power to supply energy for general purposes to all consumers, no restrictions would have been placed on the supply of power to factories and the Railways, appears to us to be without substance.

Clause 5 of the 1919, 1921 and 1953 Licences held by Tata Power indicates the purpose of supply and is divided into two parts – (i) for power and (ii) for lighting and general purposes, other than power. Simply stated, Sub-clause (I) deals with

supply to licensees for their own purposes and in bulk. The restriction indicated by Mr. Venugopal is in respect of such bulk supply where the consumer required less than 5,00,000 units per annum which was also stipulated to be the bona fide average computed annual consumption of a Factory or Railway. On the other hand, Sub-clause (II) provides for supply of electricity for lighting and general purposes, other than power, including the supply of energy in bulk to other licensees for distribution by them. Sub-clause (II) is followed by an Explanation to both Sub-clause (I) and Sub-clause (II) of Clause 5. It has been clarified that the energy supply to any consumer for power, that is under Sub-clause (I), could be used by such consumer for lighting his premises to a maximum amount of 20% of the total energy supplied to such consumer, and it has also been stipulated that Tata Power would not supply energy for lighting purposes referred to in Sub-clause (II) except by agreement with Bombay Electric Supply and Tramways Company Limited.

75. Regarding Mr. Venugopal's other submission relating to Section 42 of the 2003 Act, we are unable to appreciate how the same is relevant for interpreting the provisions of the licences held by TPC. It is no doubt true that Section 42 empowers the State Commission to introduce a system of open access within one year of the appointed date fixed by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling having due regard to the relevant factors, but the introduction of the very concept of wheeling is against Mr. Venugopal's submission that not having a distribution line in place, disentitles T.P.C. to supply electricity in retail directly to consumers even if their maximum demand was below 1000 KVA. The concept of wheeling has been introduced in the 2003 Act to enable distribution licensees who are yet to instal their distribution line to supply electricity directly to retail consumers, subject to payment of surcharge in addition to

the charges for wheeling as the State Commission may determine. We, therefore, see no substance in the said submissions advanced by Mr. Venugopal.

76. Mr. Venugopal's last submission relating to market domination has to be considered by the appropriate Commission separately in terms of Section 60 of the 2003 Act and cannot be pressed into service for interpreting the terms and conditions of the licences held by TPC.

On the other hand, in our view, the provisions of both the 1903 and 1910 Electricity Acts encourage competition in the electricity trade and the same is also incorporated in the licences issued in favour of the distribution licensees, which also include licencees generating power for supply. The element of competition has been included in the Preamble to the 2003 Act and permeates the same in its various provisions. As submitted by Mr. Chagla, the Act is meant to be consumer-friendly and one of the objectives it sets out to achieve is to give the consumer an

option to choose the distribution licensee from whom it wishes to receive supply of electrical energy. The intervention of MIDC, Marol Industries Association and the appeals filed by it, has obviously been made in that context.

77. Having regard to the above and the terms and conditions of the licences held by Tata Power, we have no hesitation in holding that the Appellate Tribunal for Electricity erred in coming to a finding that under its licences Tata Power was entitled to supply energy only in bulk and not for general purposes and in retail to all consumers, irrespective of their demand, except for those consumers indicated in Sub-clause (I) of clause 5 of the several licenses held by Tata Power.

78. Having earlier held that MERC had overstepped its jurisdiction in making out a third case which had not been made out by BSES and had on the basis thereof issued orders which had not even been prayed for by BSES, we quash the orders passed both by MERC and the Appellate

Tribunal for Electricity and allow all these three appeals upon holding that under the terms and conditions of the licences held by it, Tata Power Company Ltd. is entitled to effect supply of electrical energy in retail directly to consumers, whose maximum demand is less than 1000 KVA, apart from its entitlement to supply energy to other licensees for their own purposes and in bulk, within its area of supply as stipulated in its licences and also subject to the constraints indicated in relation to Sub-Clause (I) of Clause 5 in relation to factories and the Railways.

79. The parties shall bear their own costs.

……**J.**
(ASHOK BHAN)

……**J.**
(ALTAMAS KABIR)

New Delhi
Dated: July 8, 2008