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BSES LTD.

v.

M/S. TATA POWER CO. LTD. AND ORS.

OCTOBER 17, 2003

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[R.C. LAHOTI AND G.P. MATHUR, JJ.]

- Maharashtra Regulatory Commissions Act, 1998—Sections 22(1) and 29—Electricity (Supply) Act, 1948—Third proviso to Para I of VI Schedule, Sections 57 and 57A—Standby facility of electric supply—*
- C *Provided by State Electricity Board to Bulk licensee—Agreement to provide standby facility to distribution licensee by bulk licensee out of the reserved standby capacity—Notice by State Electricity Board to enhance the charges for the facility—Subsequent notice by bulk licensee under 1948 Act to distribution licensee to enhance the charges—Dispute between the two licensees regarding determination of the amount—Decision by State—*
- D *Powers to adjudicate the dispute, conferred upon Commission due to enactment of 1998 Act—Formula for payment of charges for the facility devised by Commission without following the procedure—High Court remitted back the proceedings for de novo consideration—Adjudication of Commission questioned—On appeal, held: The determination of the charges of standby facility falls within the jurisdiction of the Commission because such determination falls within the purview of Section 22(1) (a) and (c)—Since the notice to enhance the charges was given under 1948 Act, and subsequent to 1998 Act, the notice has no legal effect—Proceedings rightly remitted back to Commission for de novo consideration*
- E *because procedure adopted by Commission was not fair.*
- F

- Respondent company was electricity generating company and bulk licensee. Pursuant to an agreement Maharashtra State Electricity Board (MSEB) provided standby facility of 550 MVA to respondent company. Further the appellant company and the respondent company**
- G **were interconnected with each other and respondent company provided appellant company standby supply of 275 MVA out of the reserved standby capacity, and appellant company was to pay a certain amount to respondent company. MSEB served a notice to respondent company intimating intention to enhance charges for the standby facility.**
- H **Respondent company served notice under third proviso to Para 1 of**

sixth Schedule to Electricity (Supply) Act, 1948 on appellant company A
for enhancement of charges of standby facility of 275 MVA. As a result
dispute arose between the two companies. State Government passed an
order dated 22.3.2000 directing the appellant company to pay respondent
company the standby charges at the rate of 50% of the amount. In the
meantime Maharashtra Electricity Regulatory Commission and B
Government conferred upon the Commission, powers to adjudicate
upon the dispute u/s 22(2)(n) of Electricity Regulatory Commissions
Act, 1998. Government thereafter informed the parties that its decision
dated 22.3.2000 would be put to hold till the decision of the Commission.
The Commission devised a formula for determination of payment of C
charges for standby facility which was to be paid by appellant company
to respondent company. But the formula was worked out only by two
members of the Commission in meetings with the consultants and
without participation of the Chairman of the Commission. Majority of
the Commission decided the petition of the appellant company
determining the amount, while the Chairman gave a dissenting order. D
Appellant as well as respondent companies filed appeals. Both the
appeals were allowed by High Court and the proceedings were
remitted back to the Commission for *de novo* consideration. However,
High Court directed the appellant company to pay 50% of standby
charges for the period during pendency of the proceedings before the E
Commission.

In appeal to this court respondent company contended that the
dispute regarding sharing of standby charge is not an issue of tariff,
but is a dispute relating to sharing of the charges and hence does not
come within the purview of the Commission under section 22(1) of the F
Act; that the dispute had already been decided by the State Government,
hence the date on which the power under section 22(2)(n) was
conferred upon the Commission there was no dispute existing between
the parties, and therefore, the Commission had no jurisdiction to
decide the petition of appellant company; that since respondent G
company was providing half of the standby facility to appellant
company, logically appellant company should pay half of the said
amount; that since the decision of State Government was put on hold
till the decision of the Commission, the same would revive after
decision of the Commission; that appellant company having not H

A challenged the order of State Government, was fully bound by it.

Dismissing the appeals, the Court

B HELD : 1. The charges paid for standby arrangement whereby a fixed quantity of electrical energy was guaranteed to respondent and appellant companies at their desire, is bound to constitute a component of the price which they would be charging from their consumers towards the cost of electrical energy actually consumed by them. The determination or quantification of the amount which is payable for this kind of standby arrangement made in favour of respondent company and appellant company would in reality mean determination of the price or charges for wholesale or bulk supply of electricity. It will, therefore, clearly fall within the expression “determine the tariff for electricity, wholesale, bulk, grid or retail” as used in Section 22(1) (c) and also in the expression “regulate power purchase... including the price at which the power shall be procured from the generating companies...” as used in Section 22(1) (a) of Maharashtra Regulatory Commissions Act, 1998. Therefore, the determination or quantification of the amount which appellant company has to pay to respondent company falls within the jurisdiction of the State Commission under Section 22 of the Act. This legal position is also reflected by Section 29 of the Act which confers an overriding power and clearly lays down that notwithstanding anything contained in any other law the tariff for supply of electricity, wholesale, bulk or retail shall be subject to the provisions of the Act and shall be determined by the State Commission. This clearly ousts the jurisdiction of any other authority to determine the tariff. Therefore, the State Government did not have the authority or jurisdiction on 22.3.2000 to determine or quantify the charges which appellant company had to pay to respondent company under the terms of the license granted to the former as this was subsequent to the formation of the Maharashtra Electricity Regulatory Commission. [949-E-H, 950-A-D]

G 2. Notice to enhance the charges given by respondent company, which was subsequent to the enforcement of the Act, can have no legal effect. Notice by respondent company to enhance the charges of standby facility provided to appellant company having been given under Sixth Schedule (paragraph 1, 3rd proviso) of Electricity (Supply)

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Act, 1948, the enhanced charges become effective and operative after expiry of 60 days of notice. In view of Section 29 Electricity Regulatory Commissions Act, 1998, the tariff for intra-State transmission of electricity and tariff for supply of electricity in wholesale, bulk or retail has to be determined by the Electricity Regulatory Commissions of the State and a licensee cannot by its unilateral action enhance the charges. The provisions of the Act have an overriding effect by virtue of Section 29 of the Act and, therefore, any provisions of Electricity (Supply) Act, 1948, which are inconsistent with the Act would cease to apply and consequently the provisions of Sixth Schedule of the said Act can have no application now. The Sixth Schedule has been made by virtue of Section 57 and 57A of the Electricity (Supply) Act, 1948 and Section 57A contemplates constitution of a Rating Committee by the State Government to examine licensee's charges for the supply of electricity. Section 29(6) of the Act specifically lays down that notwithstanding anything contained in Section 57A and 57B of the Electricity (supply) Act, 1948, no Rating Committee shall be constituted after the date of the commencement of the Act. The effect of Section 29 and the Regulations framed thereunder is that it is no longer open to a licensee or utility to unilaterally increase the tariff. The tariff can be enhanced only after approval of the Commission and charging of an enhanced tariff which has not been approved by the Commission will amount to commission of an offence. [950-D-H, 951-A-B]

3. In substance, the dispute is as to what should be paid by appellant company to respondent company for the standby facility provided by it. The strict and narrow interpretation sought that since sharing of standby charges between respondent and appellant companies is not a matter relating to determination of tariff, so as to oust the jurisdiction of the Commission cannot be accepted as it will defeat the very object of enacting the Electricity Regulatory Commissions Act. [951-F-G]

4. If it is accepted that in view of the language used in the order dated 5.12.2000, the Governments earlier order dated 22.3.2000 stood revived after the decision of the Commission, it would lead to queer results as after the decision of the Commission two conflicting and contrary orders viz., the order of the State Government dated 22.3.2000 and the order of the Commission would come into force. This can never

A be the intention of the State Government. The effect of the order dated 5.12.2000 was that the earlier order dated 22.3.2000 would no longer be operative and the decision of the Commission would govern the situation. Even otherwise, after the enforcement of the Act it is the Commission which has the jurisdiction to decide the controversy and not the State Government. [953-B-D]

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5. The procedure adopted by the Commission was not fair and proper inasmuch as the Chairman did not participate in the meetings which other two members had with the Consultants, whereunder a formula was devised. Under Regulation 21 of Central Electricity Regulatory Commission, the quorum for proceedings before the Commission shall be three. In these circumstances, the High Court was perfectly justified in remitting the matter to the Commission for *de novo* consideration and no exception can be taken to such a course of action. [954-D-F]

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6. An interim arrangement is normally made on a prima facie consideration of the matter and on broad principles without examining the matter in depth. Regulation 101 of the Central Electricity Regulatory Commission provides that the Commission may normally dispose of the petitions finally within six months of admission. Since the order of High Court is only by way of interim arrangement and the Commission is expected to decide the dispute finally within a short period, it is not proper to interfere with the order made by the High Court in this regard. After the decision of the Commission, the equities can be adjusted and the excess amount paid by any party can be refunded to it along with appropriate interest or can be adjusted in future bills. [955-G-H, 956-A-C]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 8360-8361 of 2003.

G From the Judgment and Order dated 3.6.2003 of the Bombay High Court in M.E.R.C.A. Nos. 1. and 2/2002 in M.E.R.C. Case No. 7 of 2000.

WITH

H C.A. Nos. 8362-8363 of 2003.

Altaf Ahmed and Mukul Rohtagi, Additional Solicitor Generals, A
Kapil Sibal, J.J. Bhat, Dr. F.S. Nariman, P. Chidambaram, Iqbal Chagla,
T.R.Andhiyarujina, Thushad Cooper, D.J. Kakalia, Ms. Anjali Chandurkar,
Syed Naqvi, Ms. Manali Singhal, Ms. Aziza Abdul Latif Khatri, Darius
Khambatta, Shrikant Daijode, Prateek Jalan, R.N. Karnajawala, Subhash
Sharma, Ms. Ruby Singh Ahuja, Ms. Meghna Sati, Ms. Pragya Baghel, Ms. B
Manik Karanjawala, Ms. Ramni Taneja, Rajiv Nanda, Ms. Alpana Dhake,
P.H. Parekh, E.R. Kumar, Ms. V. Satni, Sanand Ramakrishnan for the
appearing parties.

The Judgment of the Court was delivered by

G.P. MATHUR, J. : Leave granted.

These appeals, by special leave, have been preferred against the
judgment and order dated 3.6.2003 of Bombay High Court in MERC
Appeal No.1 of 2002 (*The Tata Power Company v. BSES Ltd. & Ors.*) and D
*MERC Appeal No.2 of 2002 (BSES Ltd. & Ors. v. The Tata Power
Company)* which had been preferred under Section 27 of the Electricity
Regulatory Commissions Act, 1998 (hereinafter called "the Act") challenging
the order dated 7.12.2001 of Maharashtra Electricity Regulatory Commission
(for short 'the Commission').

2. The Tata Power Company Ltd. (for short 'TPC') is a generating
company within the meaning of Sub-section 4A of Section 2 and a bulk
licensee within the meaning of Sub-section (3) of Section 2 of the
Electricity (Supply) Act, 1948. An agreement was arrived at between
Maharashtra State Electricity Board (for short 'MSEB') and TPC in or F
about March, 1985, whereby TPC was provided 300 MVA standby facility
from MSEB and it was further agreed that in view of the growing
requirement of the city of Bombay, the said standby facility would stand
enhanced by a quantum of 50 MVA per year. This standby facility
increased to 550 MVA by the year 1990 and payment for the same was G
to be made irrespective of the fact whether electricity was drawn or not
and if electricity was drawn, actual payment for the same was to be made
over and above the standby charges. In the year 1990, it was agreed that
the annual increase in the standby facility would no longer be operational
and henceforth TPC would be entitled to avail of and pay for the standby H

A facility of only 550 MVA. This agreement was reduced in writing by way of letter dated 6.7.1990 addressed by MSEB to TPC.

3. The Bombay Suburban Electric Supply Company (for short 'BSES') had been granted a distribution licence in the year 1926 which was amended in the year 1976 to enable it to become a generator of electricity in order to take care of enhanced demand in the city of Bombay. The licence was further amended on 30.5.1992 and it contained a clause requiring BSES to execute suitable interconnection with the system of TPC with the approval of Central Electricity Authority, New Delhi. A meeting was held between TPC and BSES on 29.6.1992 regarding technical/commercial aspect of said interconnection. It was agreed that as TPC already had an arrangement with MSEB whereby standby facility was provided to it, similar standby facility may be provided to BSES from the standby capacity reserved by TPC with MSEB and appropriate sharing of charges could be worked out. The power plant established by BSES at Dahanu became operational in 1995 and with effect from August 1995 it started supplying power to the city of Bombay as per the conditions of the licence.

4. Due to dispute on commercial terms between TPC and BSES the interconnection was not established for a long time though technical arrangements had been made. The Maharashtra Government appointed a Committee under the chairmanship of Principal Secretary, Energy, of which representatives of MSEB, TPC and BSES were members. After taking into account the recommendation of the Committee the Government of Maharashtra on 19.1.1998 directed TPC and BSES to interconnect with one another and further directed TPC to provide to BSES standby supply of 275 MVA. It was further directed that BSES would pay Rs.3.5 crores per month to TPC for such standby facility. It was also mentioned in the order that standby charges were based upon existing tariffs of TPC and BSES and the same may be reviewed during tariff revision in future. An agreement in that regard was thereafter executed between TPC and BSES on 31.1.1998 and the interconnection between the two systems was established on 14.2.1998.

5. The MSEB was charging an amount of Rs.24.75 crores per month from TPC for providing the standby facility of 550 MVA. On 31.8.1998

MSEB served a notice on TPC intimating its intention to enhance the charges for this standby facility from Rs.24.75 crores to Rs.30 crores per month with effect from 1.12.1998. The TPC then gave a notice dated 30.9.1998 to BSES of its intention to enhance the charges for the standby facility of 275 MVA provided by it from Rs.3.5 crores per month to Rs.15.125 crores per month with effect from 1.12.1998. The notices were given under the third proviso to para 1 of Sixth Schedule to Electricity (Supply) Act, 1948, which lays down that licensee shall not enhance the charges for the supply of electricity until after the expiry of a notice in writing of not less than sixty clear days of its intention to so enhance the charges. On account of the notice given by TPC for increasing charges of standby supply of 275 MVA, a dispute arose and a meeting was convened on 4.3.1999, wherein the Deputy Chief Minister, Government of Maharashtra and representatives of both the sides were present. The Deputy Chief Minister though advised both the parties to settle the issue amicably between themselves without referring to the Government but at the same time issued certain directions, namely, BSES should share Rs.9 crores out of Rs.22 crores additional standby charges levied by MSEB upon TPC for the period 1.12.1998 to 31.3.1999 and the issue regarding sharing of standby charges for the period 1.4.1999 onwards be referred to a Committee to be constituted by the State Government. The Government of Maharashtra thereafter constituted a Committee on 27.5.1999 to study certain issues including that of standby charges to be paid by BSES to TPC and to submit a report. Shortly, thereafter a notification was issued on 5.8.1999 constituting the Maharashtra Electricity Regulatory Commission (for short 'the Commission'). The Committee constituted by the Government of Maharashtra on 27.5.1999 in its meeting held on 2.5.2000 resolved that in view of constitution of the Commission the question of payment of standby charges could only be determined by the Commission and accordingly resolved that the said issue be referred to the Commission for determination. An intimation in this regard was also sent to the respective parties. However, the Government of Maharashtra passed an order on 22.3.2000 whereby BSES was directed to pay standby charges to TPC at the rate of 50 per cent of the amount of standby charges payable by TPC to MSEB. This was done on the basis that MSEB was providing standby facility of 550 MVA to TPC and as TPC was providing standby facility of 275 MVA to BSES, it should pay half of the said amount. The order further provided that for the period 1.12.1998 to 31.3.1999 BSES should

A pay Rs.9 crores as standby charges to TPC. BSES was not satisfied with the aforesaid order of the Government and made repeated requests for review of the same and lastly on 6.10.2000, it sent a detailed letter to the Government requesting for reconsideration of the matter.

B 6. The Government of Maharashtra issued a notification on 27.10.2000 conferring upon the Commission powers to adjudicate upon the disputes and differences between licensees and utilities and to refer the matter for arbitration as provided in clause (n) of Sub-section (2) of Section 22 of the Electricity Regulatory Commissions Act, 1998. The Government wrote a letter to TPC on 30.10.2000 informing that in view of conferment of power under Section 22(2)(n) of the Act upon the Commission the dispute regarding the standby charges between TPC and BSES has to be submitted to the said Commission. Thereafter, BSES filed a petition before the Commission for resolution of dispute regarding the charges for standby facility of 275 MVA provided to it by TPC and the petition was registered as Case No.7 of 2000. On 5.12.2000, the Government of Maharashtra informed TPC and BSES that its earlier order dated 22.3.2000 is being put on hold till the decision of the Commission is given.

E 7. After considering the submissions made by the representatives for the parties, the Commission decided the petition filed by BSES by the order dated 7.12.2001. The main part of the order was written by two Members of the Commission who directed as under :

- F 1. BSES shall make payment of Rs.77.06 crores together with interest thereon at the rate then applicable with effect from 1.4.2000 to TPC within four weeks from the date of the order for the year 1999-2000. While making payments due credit shall be made for the amounts paid by them.
- G 2. The TPC shall, in turn, pay the balance amount remaining out of Rs.363 crores due as standby charges together with interest due thereon at the rate then applicable to MSEB for the year 1999-2000 within a week thereafter and close the matter so far as the year 1999-2000 is concerned.
- H 3. Based on the principles outlined in the order, calculations for the year 2000-2001 should also be made and payments

effected suitably by BSES and TPC so that the dues to the MSEB in respect of standby charges are settled for the past period within three months from the date of the order. A

4. For the current financial year 2001-2002 such calculations will not be possible till the close of the year, whereafter only the cost and other relevant accounting details will become available. In terms of the minutes of the order passed by Bombay High Court on 19.3.2001 in Writ Petition No.31 of 2001 filed by TPC against BSES, it had undertaken to deposit Rs.8.25 crores per month with the Commission on the 15th day of each month until the Commission disposed of the petition finally and subject to such adjustments, as may be necessary, as a result thereof. On the same analogy for the year 2001-2002, BSES should pay to TPC Rs.10 crores per month (Rs.119.06 crores divided by 12) as their share of standby charges till such time the calculations are made and consequential adjustment is made. B C D

8. The Chairman of the Commission gave a separate and dissenting order and he arrived at a different amount.

9. Both BSES and TPC were not satisfied with the order passed by the Commission and accordingly preferred separate appeals before the Bombay High Court which have been decided by a common judgment and order dated 3.6.2003 which is the subject matter of challenge in the present appeals. The High Court allowed both the appeals and set aside the orders passed by the Commission and the proceedings have been remitted back to the Commission for de novo consideration and decision in accordance with law in the light of the observations made in the order. It has been directed that during the pendency of the proceedings before the Commission for the period from 1.7.2003, BSES shall pay to TPC 50 per cent of the standby charges that are payable by TPC to MSEB for the standby facility provided to it. It has also been directed that TPC shall pay to MSEB 50 per cent of the standby charges payable by it to MSEB for standby facility of 550 MVA and shall also promptly make over to MSEB the amount paid to it by BSES pursuant to the order. So far as the arrears of standby charges are concerned, it has been directed that 80 per cent of the said E F G H

A amount shall be paid by BSES to TPC and the TPC shall immediately pay that amount to MSEB. The remaining 20 per cent of amount of arrears shall be paid by TPC to MSEB. The question of interest on the amount of arrears has been left open to be considered by the Commission.

B 10. The TPC in its appeal has assailed the order of the High Court in remitting the matter back to the Commission for de novo consideration. Shri F.S. Nariman, learned senior counsel for TPC has submitted that the dispute regarding sharing of standby charges for providing 275 MVA standby facility to BSES by TPC is not an issue of tariff, but is a dispute relating to sharing or apportionment of the charges being paid by TPC to MSEB for providing the former with a standby facility of 550 MVA and, therefore, it does not come within the purview of the Commission under sub-section (1) of Section 22 of the Act. It has been urged that under the terms of the licence granted by the Government to BSES and as amended in 1992, the Government continues to have the jurisdiction to decide any
C kind of dispute. The Maharashtra Government had decided the dispute
D vide order dated 22.3.2000 and when the powers under Section 22(2)(n) of the Act were conferred upon the Commission on 27.10.2000, there was no existing dispute between the parties regarding the share of the parties as the same had already been decided and consequently, the Commission
E had no jurisdiction to entertain the petition filed by BSES. It has further been contended that the standby facility is essential for every generator of electricity and since TPC was providing standby facility of 275 MVA to BSES out of the standby facility of 550 MVA being provided by MSEB to TPC, then logically BSES should pay half of the said amount. Lastly,
F it has been urged that the order passed by the State Government on 5.12.2000, whereby it was communicated to the parties that the order of the Government dated 22.3.2000 is being put on hold till the Commission's decision is given, would cease to be operative after the decision of the Commission and consequently the order dated 22.3.2000 would revive and would bind the parties. It has also been urged that the BSES having not
G challenged the order of the State Government dated 22.3.2000 by taking appropriate proceedings, it was fully bound by it and consequently it should pay standby charges to TPC on the same rate on which TPC pays standby charges to MSEB for 550 MVA standby facility to it.

H 11. Shri Kapil Sibal, learned senior counsel for BSES, has submitted

that the dispute between the parties was essentially relating to determination of tariff which squarely falls within the jurisdiction of the Commission under Section 22 of the Act. The Electricity Regulatory Commissions Act had come into force on 25.4.1998 and Maharashtra Regulatory Commission had been constituted on 5.8.1999 and after constitution of the Commission, it was the said body alone which had the jurisdiction to decide the dispute and the State Government had no authority to pass the order dated 22.3.2000 and, therefore, said order was wholly without jurisdiction and was not binding upon BSES. Learned counsel has also submitted that the order dated 5.12.2000 passed by the State Government by which its earlier order dated 22.3.2000 was put on hold till the decision of the Commission, cannot be interpreted to mean that the said order will stand revived and become operative after the dispute had been decided by the Commission as it will lead to a very queer situation. Learned counsel has also urged that in the facts and circumstances of the case, the order passed by the High Court in so far as it has remitted the proceedings back to the Commission for de novo consideration is perfectly justified and calls for no interference.

12. In order to appreciate the contention raised by the learned counsel for the parties, it is necessary to briefly examine the provisions of the Act. The rapidly growing demand for energy brought about by economic liberalization has created enormous problems. To overcome these problems and other issues facing the power sector, the Government of India organized two Conferences of Chief Ministers to discuss the whole gamut of issues in the power sector and the outcome of these meetings was the adoption of the Common Minimum National Action Plan for Power. Under this action plan it was considered necessary to create a Regulatory Commission as a step to arrest deteriorating condition of the State Electricity Boards and to make plans for the future developments. The Administrative Staff College, Hyderabad to whom the Ministry of Power assigned the task of studying the restructuring needs of the system, strongly recommended the creation of independent Electricity Commissions, both at the Centre and the States to give effect to the aforesaid recommendations. The Electricity Regulatory Commissions Bill was thereafter introduced in the Parliament. The Objects and Reasons of the Act show that the main function of the State Electricity Regulatory Commission shall be (i) to determine the tariff for electricity, wholesale, bulk, grid and retail; (ii) to

- A determine the tariff payable for use of the transmission facilities; and (iii) to regulate power purchase and procurement process of the transmission utilities, etc. The changed scenario may give rise to problems of highly complex and technical nature between the generator, supplier and distributor of energy, which can be better resolved by technically qualified people who may constitute the aforesaid Regulatory Commission. They will have the additional advantage of taking assistance from consultants, experts and professional persons. Therefore, it will be proper to interpret the Act in a broad manner and not in a narrow or restrictive sense in so far as the jurisdiction of the Commission is concerned, so that the purpose for which the Act has been enacted may be achieved.

C Chapter V of the Act deals with Powers And Functions of the State Commission and Sub-section (1) of Section 22 therein reads as under :

D Section 22. *Functions of State Commission*

(1) Subject to the provisions of Chapter III, the State Commission shall discharge the following functions, namely:-

E (a) to determine the tariff for electricity, wholesale, bulk, grid or retail, as the case may be, in the manner provided in Section 29;

(b) to determine the tariff payable for the use of the transmission facilities in the manner provided in Section 29;

F (c) to regulate power purchase and procurement process of the transmission utilities and distribution utilities including the price at which the power shall be procured from the generating companies, generating stations or from other sources for transmission, sale, distribution and supply in the State;

G (d) to promote competition, efficiency and economy in the activities of the electricity industry to achieve the objects and purposes of this Act."

H Sub-sections (1) and (2) of Section 29 read as under :

Section 29 *Determination of tariff by State Commission*

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(1) Notwithstanding anything contained in any other law, the tariff for intra-State transmission of electricity and the tariff for supply of electricity, grid, wholesale, bulk or retail, as the case may be, in a State (hereinafter referred to as the tariff), shall be subject to the provisions of this Act and the tariff shall be determined by the State Commission of that State in accordance with the provisions of this Act.

B

[Provided that in State or Union territories where Joint Electricity Regulatory Commission has been constituted, such Joint Electricity Regulatory Commission shall determine different tariff for each of the participating States or Union territories.]

C

(2) The State Commission shall determine by regulations the terms and conditions for the fixation to tariff, and in doing so, shall be guided by the following, namely:-

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(a) the principles and their applications provided in sections 46, 57 and 57A of the Electricity (Supply) Act, 1948 (54 of 1948) and the Sixth Schedule thereto;

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(b) in the case of the Board or its successor entities, the principles under section 59 of the Electricity (Supply) Act, 1948 (54 of 1948);

(c) that the tariff progressively reflects the cost of supply of electricity at an adequate and improving level of efficiency;

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(d) the factors which would encourage efficiency, economical use of the resources, good performance, optimum investments, and other matters which the State Commission considers appropriate for the purpose of this Act;

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(e) the interests of the consumers are safeguarded and at the same time, the consumers pay for the use of electricity in a reasonable manner based on the average cost of supply of energy;

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A (f) the electricity generation, transmission, distribution and supply are conducted on commercial principles;

(g) national power plans formulated by the Central Government.

B 13. Sub-section (2) of Section 22 empowers the State Government to confer by notification in the Official Gazette various functions upon the State Commission which are enumerated from clauses (a) to (p) in the said sub-section. One of the function which can be conferred under clause (n) is to adjudicate upon the dispute and differences between the licensees and utilities and to refer the matter for arbitration.

C 14. Section 58 of the Act empowers the State Commission to make Regulations consistent with the Act and the Rules made thereunder to carry out the purposes of the Act. Clause (d) of Sub-section (2) of this Section lays down that Regulation may provide the manner in which charges for electricity may be determined under Sub-section (2) of Section 29.

D 15. Maharashtra Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 framed under the aforesaid provision also have a bearing on the controversy in dispute and Regulations 72, 73, 78, 79, 80, 82 and 83 which are relevant are being reproduced below :

E 72. (1) No generating Company, except that which has entered into or otherwise has a composite scheme for generation and sale of electricity in more than one State, shall charge their customers any tariff for supply of electricity without the general or specific approval of such tariff by the Commission.

F (2) No utility shall fix any tariff for intra-state transmission, distribution or supply of electricity and terms and conditions for the supply of electricity, without the general or specific approval of the Commission:

G Provided that the existing tariff being charged by generating companies shall continue to be charged after the date of effect of these regulations for such period as may be specified by a notification, without prejudice to the powers of the Commission

H to take up any matter relating to tariff falling within the scope of

Section 22 of the Act.

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73. Any generating company proposing to enter into any agreement for supply of electricity between the generating company and any buying party shall get the approval of the Commission for the tariff before entering into such contracts.

B

78. Utilities, who are required to get their tariff approved by the Commission, shall evolve tariff proposals based on the terms and conditions as may be notified by the Commission and shall submit the same for approval, in accordance with the procedure prescribed by the Commission.

C

79. All petitions for approval of tariff (generation, transmission, distribution and supply) and terms and conditions of supply shall be made strictly in accordance with regulations and procedures as may be prescribed by the Commission and shall also be in conformity with the requirements relating to petitions as prescribed in Chapter II of these Regulations.

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80. The Commission may approve the proposed tariff on such stipulations as may be considered appropriate and as may be specified in the Order.

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82. The utilities concerned shall publish the tariff as approved by the Commission in the manner as may be prescribed. The tariff so published shall be in force from the date specified in the said publication not being earlier than the date of such publication and shall be in force until any amendment is approved by the Commission and published.

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83. Any utility found to be charging a tariff different from the one approved by the Commission shall be deemed to have not complied with the directions of the Commission and shall be liable to penalties under Section 45 of the Act, without prejudice to any other penalty to which it may be liable under any other Act. Any excess charge of tariff by any utility in any year shall be dealt with as per the directions of the Commission.

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A 16. The word “tariff” has not been defined in the Act. “Tariff” is a
cartel of commerce and normally it is a book of rates. It will mean a
schedule of standard prices or charges provided to the category or
categories of customers specified in the tariff. Sub-section (1) of Section
22 clearly lays down that the State Commission shall determine the tariff
B for electricity (wholesale, bulk, grid or retail) and also for use of
transmission facilities. It has also the power to regulate power purchase of
the distribution utilities including the price at which the power shall be
procured from the generating companies for transmission, sale, distribution
and supply in the State. ‘Utility’ has been defined in Section 2(1) of the
C Act and it means any person or entity engaged in the generation,
transmission, sale, distribution or supply, as the case may be, of energy.
Section 29 lays down that the tariff for intra-State transmission of
electricity and tariff for supply of electricity, wholesale, bulk or retail in
a State shall be subject to the provisions of the Act and the tariff shall be
determined by the State Commission. Sub-section (2) of Section 29 shows
D that terms and conditions for fixation of tariff shall be determined by
Regulations and while doing so, the Commission shall be guided by the
factors enumerated in clauses (a) to (g) thereof. The Regulations referred
to earlier show that generating companies and utilities have to first
approach the Commission for approval of their tariff whether for generation,
E transmission, distribution or supply and also for terms and conditions of
supply. They can charge from their customers only such tariff which has
been approved by the Commission. Charging of a tariff which has not been
approved by the Commission is an offence which is punishable under
Section 45 of the Act. The provisions of the Act and Regulations show
F that the Commission has the exclusive power to determine the tariff. The
tariff approved by the Commission is final and binding and it is not
permissible for the licensee, utility or any one else to charge a different
tariff.

G 17. There is a sound logic for conferment of such a power on the
Electricity Regulatory Commission. Hitherto the supply of electricity was
being made by only one body, namely, State Electricity Boards which
being an instrumentality of the State and functioning under the control of
the State Government were not likely to enhance the tariff in an exorbitant
or arbitrary manner. In fact, Electricity Boards of many States in the
H country were running on huge losses. The Electricity Regulatory

Commissions Act, 1998 has been enacted to enhance the generation of electricity and improve efficiency by bringing in private operators. If a licensee (who may be private operator) after getting the licence for supply of electricity in a particular area increases the tariff arbitrarily, the consumers will have no option but to pay the same. In order to guard against such an eventuality, provision has been made that while granting a licence conditions may be imposed and further no tariff can be implemented unless the same has been approved by the Commission.

18. Electricity is not a commodity which may be stored or kept in reserve. It has to be continuously generated and it is so continuously generated electricity which is made available to consumers. Any generator of electricity has to have some alternate arrangement to fall back upon in the event of its generating machinery coming to a halt. The standby arrangement for 550 MVA made by TPC was for the purpose that in the event its generation fell short for any reason, it will be able to immediately draw the aforesaid quantity of power from MSEB. Similarly, the arrangement entered into by BSES with TPC ensured the former of immediate availability of 275 MVA power in the event of any breakdown or stoppage of generation in its Dahanu generation facility. Heavy investment is required for generation of power. For this kind of a guarantee and availability of power, TPC had to pay charges for the same to MSEB. This payment was in addition to the charges or price which the TPC had to pay to MSEB for the actual drawal of electrical energy. The same is the case with BSES qua TPC. The charges paid for this kind of an arrangement whereby a fixed quantity of electrical energy was guaranteed to TPC and BSES at their desire, is bound to constitute a component of the price which they (BSES and TPC) would be charging from their consumers towards the cost of the electrical energy actually consumed by them. The determination or quantification of the amount which is payable for this kind of standby arrangement made in favour of TPC and BSES would in reality mean determination of the price or charges for wholesale or bulk supply of electricity. It will, therefore, clearly fall within the expression "determine the tariff for electricity, wholesale, bulk, grid or retail" as used in sub-clause (a) of Sub-section (1) of Section 22 and also in the expression "regulate power purchase including the price at which the power shall be procured from the generating companies....." as used in sub-clause (c) of sub-section (1) of Section 22. Therefore, the determination or

A quantification of the amount which BSES has to pay to TPC falls within the jurisdiction of the State Commission under Section 22 of the Act. This legal position is also reflected by Section 29 of the Act which confers an overriding power and clearly lays down that notwithstanding anything contained in any other law the tariff for supply of electricity, wholesale, bulk or retail shall be subject to the provisions of the Act and shall be determined by the State Commission. This clearly ousts the jurisdiction of any other authority to determine the tariff. It may be noted here that the Act came into force on 25.4.1998 and Maharashtra Electricity Regulatory Commission was formed on 5.8.1999. Therefore, it is not possible to accept the contention of Shri Nariman that the State Government had the authority or jurisdiction on 22.3.2000 to determine or quantify the charges which BSES had to pay to TPC under the terms of the license granted to the former as this was subsequent to the formation of the Maharashtra Electricity Regulatory Commission.

D 19. Shri Nariman has submitted that TPC gave a notice on 30.9.1998 of their intention to enhance the charges of standby facility provided to BSES from Rs.3.5 crores to Rs.15.125 crores per month and this notice having been given under Sixth Schedule (paragraph 1, 3rd proviso) of the Electricity (Supply) Act, 1948, the enhanced charges became effective and operative after expiry of 60 days of notice i.e. with effect from 1.2.1998. The submission is that by operation of law the charges for standby facility stood revised and enhanced with effect from 1.12.1998. In our opinion, the contention raised has no substance. The legal position has undergone a complete change with the enforcement of the Electricity Regulatory Commissions Act, 1998. In view of Section 29 of the Act, the tariff for intra-State transmission of electricity and tariff for supply of electricity in wholesale, bulk or retail has to be determined by the Electricity Regulatory Commission of the State and a licensee cannot by its unilateral action enhance the charges. The provisions of the Act have an overriding effect by virtue of Section 52 of the Act and, therefore, any provisions of Electricity (Supply) Act, 1948, which are inconsistent with the Act would cease to apply and consequently the provisions of Sixth Schedule of the said Act can have no application now. The Sixth Schedule has been made by virtue of Section 57 and 57A of the Electricity (Supply) Act, 1948 and Section 57A contemplates constitution of a Rating Committee by the State Government to examine licensee's charges for the supply of electricity.

Section 29 (6) of the Act specifically lays down that notwithstanding anything contained in Section 57A and 57B of the Electricity (Supply) Act, 1948, no Rating Committee shall be constituted after the date of the commencement of the Act. The effect of Section 29 and the Regulations framed thereunder is that it is no longer open to a licensee or utility to unilaterally increase the tariff. The tariff can be enhanced only after approval of the Commission and charging of an enhanced tariff which has not been approved by the Commission will amount to commission of an offence. Therefore, the notice to enhance the charges given by TPC, which was subsequent to the enforcement of the Act, can have no legal effect.

20. Shri Nariman has also submitted that even assuming that the standby charges are a matter relating to tariff as the same are passed on to the consumers, but the sharing of standby charges between TPC and BSES is not a matter relating to determination of tariff and, therefore, the Commission can have no jurisdiction to enter into such an exercise under Section 22 of the Act. The submission proceeds on an assumption that the dispute relates to sharing of standby charges. In fact, the whole case of BSES is that they are under no obligation to share the charges which are being paid by TPC to MSEB for providing them with standby facility. It may be noted that the standby facility of 300 MVA was provided to TPC in the year 1985 which gradually rose to 550 MVA in the year 1990. The licence of BSES was amended in 1992 whereunder for the first time it was provided that they should interlink with the system of TPC and ultimately their systems were interlinked on 14.2.1998 in pursuance of the order passed by the Government of Maharashtra on 19.1.1998. The question of payment of standby charges by BSES to TPC has, therefore, arisen for the first time in 1998 which is almost 13 years after TPC started paying standby charges to MSEB. In substance, the dispute is what should be paid by BSES to TPC for the standby facility provided by it. The strict and narrow interpretation sought to be placed by the learned counsel so as to oust the jurisdiction of the Commission cannot be accepted as it will defeat the very object of enacting the Electricity Regulatory Commissions Act.

21. It may be mentioned here that both TPC and MSEB always treated the charges for standby facility as a matter relating to tariff. TPC gave a notice to Government of Maharashtra and MSEB on 30.7.1996 for

A revision of tariff, where they themselves described the enhancement of demand charges made by MSEB for standby facility as “revision of tariff”. The charges for standby facility given by them to BSES were also described as “tariff”. MSEB gave a notice to TPC on 31.8.1998 where the demand charges for 550 MVA were described as “tariff for bulk supply”. Again the notice given by TPC on 30.8.1998 of their intention to increase the charges for standby facility given to BSES from Rs.3.5 crores to Rs.15.125 crores was described by them as “revision of tariffs”. In the correspondence exchanged amongst TPC, MSEB and BSES the charges for standby facility have been described as a matter relating to “tariff”. TPC filed a petition before the Commission on 18.10.1999 regarding their dispute of standby charges with BSES and the subject of application/petition was described as “Revision in Tariff”. The relevant part thereof is being extracted below :

D “.....We are advised that the matter be submitted to Maharashtra Electricity Regulatory Commission (MERC) since the tariff and inter-connected issue of quantum of standby and charges is now to be determined by the MERC. We are accordingly, referring this matter to you by submitting a copy of the notice of Tariff Revision.

E The 60 days Notice of tariff revision commences from 1st October 1999 and ends on 30th November, 1999. The new tariff is applicable only for 4 months in the current financial year, i.e. from 1st December 1999 to 30th March 2000. Hence, is the urgency to obtain a timely decision to ensure that the Companies earn reasonable return for the current year.

.....

G The tariff has been formulated after considering available date on necessary expenses listed in the Sixth Schedule to earn Reasonable Return by the Licensee. A major item of this expenditure pertains to the quantum of standby required by TEC and the connected

H

charges payable to MSEB. The issue of standby charges is vitally inter-connected with the tariff revision process. Hence, making such realistic assumptions as possible, the proposal for tariff revision has been worked out.”

22. The contention of Shri Nariman that in view of the language used in the order dated 5.12.2000, the Government’s earlier order dated 22.3.2000 stood revived after the decision of the Commission, has hardly any merit. If such a contention is accepted, it would lead to queer results as after the decision of the Commission two conflicting and contrary orders viz., the order of the State Government dated 22.3.2000 and the order of the Commission would come into force. This can never be the intention of the State Government. The effect of the order dated 5.12.2000 was that the earlier order dated 22.3.2000 would no longer be operative and the decision of the Commission would govern the situation. Even otherwise as discussed earlier, after the enforcement of the Act it is the Commission which has the jurisdiction to decide the controversy and not the State Government.

23. Several reasons have been given by the High Court for remitting the matter to the Commission for a de novo consideration. The Commission devised a formula for determination of the charges for standby facility which was to be paid by BSES to TPC. Both the sides complained before the High Court that before adopting the formula they were not given an opportunity to place their point of view before the Commission for arriving at a just formula and they were not informed about the exact nature of the formula which was being adopted. The order of the Commission shows that for working out the formula it had appointed consultants. Two members of the Commission had several meetings with the consultants and thereafter the formula was worked out. But the Chairman of the Commission was not present in these meetings. In his dissenting order the Chairman has recorded as under :

Para 60. I have had the opportunity to peruse in detail the draft of an order approved and circulated by my colleagues in the Commission, and I am appending a separate dissenting note, in view of my disagreement with them in regard to their calculations.

was Rs. 24.75 crores per month. This shows that the State Government did not apportion the liability of BSES as half of that of TPC. He has also submitted that TPC sells 35 per cent of the power generated by it to BSES and consequently a portion of this burden of Rs. 24,75 crores which TPC is liable to pay to MSEB is passed on by it to the consumers of BSES. Therefore, BSES cannot be saddled with liability to pay half of the amount only on the ground that it has been provided with a standby facility of 275 MVA which is half of the standby facility provided by MSEB to TPC. Learned counsel has also submitted that at best there can be some kind of a sharing on the amount which TPC has to pay to MSEB over and above Rs. 24.75 crores but up to the extent of the aforesaid amount the liability of BSES cannot exceed Rs. 3.5 crores. Shri Sibal has also assailed the order of the High Court on the ground that while making the interim arrangement for equal sharing of standby charges, reliance has been placed on the order of the State Government dated 22.3.2000, though the High Court itself has, in the earlier part of the judgment, held the said order to be without jurisdiction. Shri Chidambaram, learned senior counsel appearing for TPC, has, on the other hand, submitted that the order passed by the State Government on 19.1.1998, whereby BSES was directed to pay Rs. 3.5 crores out of the liability of Rs. 24.75 crores of TPC towards MSEB, was only a pro tem arrangement, as the order itself mentioned that this was subject to revision in tariff. Therefore, the said order has no legal sanctity and cannot bind TPC in any manner. He has also submitted that with effect from 1.4.1999 TPC has only paid half of the standby charges to MSEB and, therefore, the burden of the entire amount has not been passed on to the consumers. Shri Altaf Ahmad, Addl. Solicitor General, appearing for MSEB has submitted that the TPC owes a huge amount to MSEB and the interim arrangement made by the High Court should not be changed or altered in a manner which may prejudicially affect the interest of MSEB.

26. An interim arrangement is normally made on a *prima facie* consideration of the matter and on broad principles without examining the matter in depth. The matter has been remitted to the Commission by the High Court by the judgment and order dated 3.6.2003 and a period of nearly three and a half months has already elapsed. Regulation 101 of the Central Electricity Regulatory Commission provides that the Commission may normally dispose of the petitions finally within six months of

- A** admission. The State Commissions are also expected to follow this time limit for disposal of petitions. Since the order made by the High Court is only by way of interim arrangement and the Commission is expected to decide the disputes finally within a short period, we do not consider it proper to interfere with the order made by the High Court in this regard.
- B** After the decision of the Commission, the equities can be adjusted and the excess amount paid by any party can be refunded to it along with appropriate interest or can be adjusted in future bills.

- C** 27. The Appeals are accordingly dismissed with costs. The Maharashtra Electricity Regulatory Commission is directed to decide the dispute expeditiously, preferably within three months of presentation of a certified copy of this order before it. While passing the final order, the Commission will also make a direction regarding the liability of the parties keeping in view the deposits made by them as a result of the interim arrangement made by the High Court.

- D** K.K.T.

Appeals dismissed.