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Fair Competition
For Greater Good

COMPETITION COMMISSION OF INDIA

14th January 2025

Proceedings against Torrent Power Limited under Section 43A of the Competition Act, 2002

CORAM:

Ms. Ravneet Kaur
Chairperson

Mr. Anil Agrawal
Member

Ms. Sweta Kakkad
Member

Mr. Deepak Anurag
Member

Appearances: Mr. Rajshekhar Rao, Senior Advocate; Mr. Manas K. Chaudhuri, Advocate; Mr. Soham Banerjee, Advocate; Mr. Nilav Banerjee, Advocate; Mr. Pranjal Prateek, Advocate; Ms. Meherunnisa Anand Jaitley, Advocate; Mr. Rahul Shah, Company Secretary, Torrent Power Limited; and Mr. Sudhir Sharma, Manager (Corporate Relations), Torrent Power Limited.

Order under Section 43A of the Competition Act, 2002

A. Background

1. The Competition Commission of India (**Commission**) in its meeting held on 18th May 2023 had noted that as per information available in public domain, Torrent Power Limited (**TPL/Acquirer**) had acquired 51% shareholding of Dadra and Nagar Haveli and Daman and Diu Power Distribution Corporation Limited (**Target**) [TPL and the Target are collectively referred to as **Parties**]. Accordingly, the Commission directed TPL to furnish certain information and documents in relation to the said acquisition under Section 36(4) of the Competition Act, 2002 (**Competition Act**) to assess whether further proceeding is required under Section 20(1) and/or Section 43A of the Competition Act. The directions of the Commission were communicated to TPL *vide* letter dated 24th May 2023.



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2. On 23rd June 2023, TPL submitted its response wherein it was stated that the transaction pertained to the acquisition of 51% shareholding¹ of the Target by TPL for a consideration of INR 555 crore. The remainder of 49% shareholding in the Target was held by the Administrator of the Union Territory (UT) of Dadra and Nagar Haveli and Daman and Diu (DNH-DD) (**Administrator**). Further, it was stated that the Target was incorporated on 8th March 2022 by consolidating: (i) the Electricity Department, engaged in power distribution & retail supply of electricity in Daman & Diu districts of UT (**Electricity Department-DD**), and (ii) DNH Power Distribution Corporation Limited (**DNH PDCL**), by way of the Dadra and Nagar Haveli and Daman and Diu Electricity (Reorganisation and Reforms) Transfer Scheme, 2022 (**Transfer Scheme**)² pursuant to Sections 131, 133 and 134 of the Electricity Act, 2003 (**Electricity Act**).
3. Upon perusal of the response, it was noted that the information provided was incomplete as the audited relevant assets and turnover of the business transferred to the Target was not provided. Therefore, letters dated 12th July 2023 and 10th August 2023 was issued to TPL to submit the complete details regarding value of relevant assets and turnover of the business transferred to it (certified by the statutory auditor), in terms of the Ministry of Corporate Affairs Notification dated 27th March 2017 – S.O. 988(E). The response to same were received on 1st August 2023 and 22nd September 2023, respectively.

B. Submissions of the Acquirer

Description of the Parties

4. **Acquirer:** TPL is a public listed company incorporated in 2004 in Ahmedabad, Gujarat. It is an integrated power sector player in India engaged in the business of power generation, transmission and distribution. It has a thermal power generation capacity of 3092 MW with a mix of coal and gas-based power plants. It also operates in the renewable energy segment with 1068 MW capacity taking the aggregate installed generation capacity to 4160 MW. In relation to power transmission, it is stated that TPL has set up 249 km and 105 km 400 KV double circuit transmission lines for evacuating power generated at its generating plants to various off-take centres. It also has 128 km 220 KV double circuit extra high voltage lines from generating station to its own distribution area. Further, it distributes power as licensee in following states/UT: (i) Gujarat (in the cities of Ahmedabad, Surat, Gandhinagar, Dahej SEZ, Dholera SIR); (ii) UT of DNH-DD; (iii) Maharashtra (in Bhiwandi, Shil, Mumbra) as franchisee and; (iv) Uttar Pradesh (in Agra).

¹ This constitutes 51,000 equity shares of the Target.

² Date of Gazette notification for the Transfer Scheme 9th March 2022.



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5. **Target:** The Target is a 100% subsidiary of UT of DNH-DD. It has been set up to undertake the business of power distribution and retail supply of electricity in UT of DNH-DD.

Sequence of Events

6. By way of a background, it was *inter alia* submitted that:
- a. The Transaction was undertaken as part of the larger structural reforms contemplated by the Government of India in the power sector to privatise the distribution of power.
 - b. Prior to the Transaction, the distribution of electricity in the UT of DNH-DD was undertaken by two distinct entities *viz.*, the Electricity Department-DD and DNH PDCL (a wholly owned entity of the UT of DNH-DD).
 - c. On 8th December 2020, the bid authority initiated a bidding process through the issuance of a Request for Proposal (**RFP**) to consolidate the assets, liabilities, rights, functions, obligations, proceedings, and personnel of the Electricity Department-DD and DNH PDCL to form the Target and subsequently, sell 51% shareholding in the Target to a third party.
 - d. RFP was issued by Executive Engineer, Electricity Department-DD, Daman for selection of bidder for purchase of 51% shares in Target which would be responsible for distribution and retail supply of electricity and having distribution license in UT of DNH-DD.
 - e. Further to the RFP, TPL submitted its bid (comprising technical and financial proposals) on 3rd February 2021 along with a bid security amount of INR 30 crore. On 20th February 2021, bids were opened and TPL emerged as the H1 bidder.
 - f. Subsequently, the bidding process was kept in abeyance owing to a Public Interest Litigation being filed before the Hon'ble Bombay High Court.
 - g. Thereafter, on 7th February 2022, a Letter of Intent (**LOI**) was issued in favour of TPL by the bid authority for TPL's execution within 7 calendar days of issuance of the LOI. The issuance of the LOI allowed TPL to undertake the Transaction.
 - h. *Inter alia*, pursuant to the execution of the LOI, as per clause 6.6.1.(c) of the RFP, TPL was to submit the consideration amount of INR 555 crore to the bid authority within 30 days of the issuance of the LOI and failure to do so would amount to: (i) disqualification of TPL as the successful bidder and (ii) forfeiture of the bid security amount of INR 30 crore. Accordingly, INR 43.65 crore of the consideration amount was paid by TPL on 25th February 2022 and remaining amount of INR 511.35 crore was paid on 26th February 2022.
 - i. Post the execution of the LOI, the Government of the UT of DNH-DD, by way of the Transfer Scheme dated 9th March 2022 merged the Electricity Department-DD and DNH PDCL to create the Target to facilitate the Transaction.

- j. Subsequently, TPL, the Target and the UT Administration of DNH-DD through its Secretary of Power entered into (i) Shareholders Agreement (**SHA**) and (ii) Share Purchase Agreement (**SPA**) on 15th March 2022.

Relevant Assets and Turnover

7. Initially, it was submitted that since the Target was incorporated by the Government of the UT of DNH-DD pursuant to the Transfer Scheme for the purposes of the Transaction in FY 2021-22 as a new entity, it had no operations in previous two years and therefore the financial statements of the Target were not available. Therefore, only the asset and turnover details of TPL (Standalone and Consolidated) for FY ended 31st March 2021 were provided as below:

Asset and Turnover of TPL for FY 2020-21

Name of the Parties	Assets			Turnover		
	In India (INR crore)	Worldwide		In India (INR crore)	Worldwide	
		USD (million)	INR (crore)		USD (million)	INR (crore)
TPL – Acquirer (Enterprise level)	22,778.01	2,759.97	22,778.01	11,776.52	1,426.94	11,776.52
TPL – Acquirer (Group level)	23,538.72	2,852.25	23,538.72	12,172.66	1,475	12,172.66
Target	Target not in existence					

8. Subsequently, in response to query regarding the relevant assets and turnover of the business transferred to the Target pursuant to the Transfer Scheme, TPL submitted that prior to the incorporation of the Target, the Electricity Department of UT of DNH-DD was undertaking the functions of purchase, transmission, distribution, and retail supply of electricity in the Daman and Diu Districts. Further, DNHPDCL was undertaking the functions of purchase, transmission, distribution and retail supply of electricity in Dadra and Nagar Haveli District. However, when the Ministry of Power, Government of India, *vide* letter dated 12th May 2020 advised for the privatisation of the electricity distribution and retail supply functions undertaken by the Electricity Department and DNHPDCL, a new entity *i.e.*, the Target was incorporated on 8th March, 2022. Pursuant to the Transfer Scheme, only assets/liabilities, *etc.* of the distribution and retail supply functions were transferred to the Target, and not the remaining assets/liabilities of the Electricity Department and DNHPDCL. The details of relevant assets and turnover pertaining to business taken over by TPL were provided as below:



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**Asset and Turnover of the business taken over by TPL****(FY 2019-20, FY2020-21 and FY2021-22)**

Name of the Parties	Assets (INR crore)			Turnover (INR crore)		
	FY20	FY21	FY 22	FY20	FY21	FY 22
DNH	586.23	548.83	608.04	3,388.89	2,880.16	3,549.13
DD electricity Department	297.37	N.A.	429.48	1,120.77	1,090.37	1,406.06
Total	883.60	N.A.	1,037.52	4,509.66	3,970.53	4,955.19

C. Issuance of SCN

9. The Commission in its meeting held on 9th January 2024 considered the matter and based on the submissions of TPL, it was noted that TPL had acquired 51% shareholding in the Target pursuant to the LOI issued in its favour by the bid authority on 7th February 2022 which was accepted on 09th February 2022. The consideration for the Transaction was paid by TPL on 25th and 26th February 2022. Post the execution of the LOI, the Government of the UT of DNH-DD merged the Electricity Department-DD and DNH PDCL by way of the Transfer Scheme dated 9th March 2022 to create the Target to facilitate the Transaction. Further, SPA and SHA were executed on 15th March 2022. Given the foregoing sequence of events, FY 2020-21 was considered as the relevant year for determining notifiability of the Transaction under the provisions of the Competition Act. It was noted that the combined assets and turnover of the Parties in FY 2020-21 exceeded the asset and turnover thresholds prescribed under Section 5(a) of the Competition Act at enterprise level. Accordingly, the Commission noted that the Transaction was a combination in terms of the provisions of the Competition Act.
10. Regarding the applicability of *de-minimis* exemption³, the Commission noted from the submissions of TPL that the value of relevant assets being transferred to the Target and the relevant turnover therefrom exceeded the asset and turnover thresholds prescribed in *de-minimis* exemption notification. Accordingly, the benefit of *de-minimis* exemption was not available to TPL. Further, the Transaction also did not benefit from any item of Schedule I of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (**Combination Regulations**).

³ *De minimis* Exemption provided vide Government of India Notification No. S.O. 988(E) dated 27th March 2017 (as amended by Notification No. S.O. 1192 (E) dated 16th March 2023)



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11. Thus, the Commission was of the *prima facie* view that the Transaction ought to have been notified to the Commission prior to its consummation in terms of the provisions of Section 6(2) of the Competition Act read with Regulation 5 of the Combination Regulations. However, as TPL had failed to comply with such requirement, the Commission formed a *prima facie* opinion that TPL had contravened the provisions of Section 6(2) and Section 6(2A) of the Competition Act.
12. Accordingly, the Commission directed to issue a Show Cause Notice (SCN) to TPL under Section 43A of the Competition Act read with Regulation 48 of the Competition Commission of India (General) Regulations, 2009, to explain, in writing, as to why there is no contravention of the provisions of the Competition Act and why penalty should not be imposed upon it in terms of Section 43A of the Competition Act for failure to file notice in terms of Section 6(2) of the Competition Act by consummating the Transaction before the expiry of period specified under Section 6 (2A) of the Competition Act.
13. Pursuant to direction of the Commission the SCN was issued to TPL *vide* letter dated 25th January 2024. TPL, after seeking extension, submitted its response on 2nd March 2024 (SCN Response). In the SCN response, TPL *inter alia* requested the Commission to grant it an opportunity for an oral hearing. The Commission considered the request of the Acquirer and listed the matter for hearing on 19th November 2024.

D. Response to SCN:

14. In the SCN Response, TPL has submitted at the outset that the transaction is subject to the exclusive jurisdiction of the appropriate commission under the Electricity Act, 2003 (**Electricity Act**). In this regard, the following submissions have been made:
 - (i) **Relevant Legislative Background**: Under Section 60 of the Electricity Act⁴ any Combination entered into by a licensee⁵ in the electricity sector would be regulated by the “Appropriate Commission”⁶ if the Combination is likely to cause or causes an adverse effect on

⁴ **Section 60 of the Electricity Act**: “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”.

⁵ **Section 2(39) of the Electricity Act**: “licensee” means a person who has been granted a licence under section 14. Further, section 14 of the Electricity Act provides that The Appropriate Commission may, on application made to it under section 15, grant any person licence to any person – (c) to distribute electricity as a distribution licensee. Accordingly, the Acquirer is a licensee under the Electricity Act.

⁶ “**Appropriate Commission**” would include a Joint Commission constituted under **Section 83 of the Electricity Act**. Consequently, the Joint Electricity Regulatory Commission (for the State of Goa and Union Territories)⁶ (**JERC**) which also exercises jurisdiction over the UT of DNH-DD, would be the Appropriate Commission in this regard.



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competition within the electricity industry. A combined reading of Sections 60, 173⁷, 174⁸ and 175⁹ of the Electricity Act demonstrates that the legislative intent was to ensure that in the event of a conflict between the Electricity Act and any other legislation, the Electricity Act would have an overriding effect upon all other legislations, barring the Consumer Protection Act, 1986, the Atomic Energy Act, 1962 and the Railways Act, 1989. The exclusion of the Competition Act under Section 173 of the Electricity Act is a deliberate exclusion by the legislature. The erstwhile Competition Appellate Tribunal (**COMPAT**) in *Anand Prakash Agarwal v. Dakshin Haryana Bijli Vitran Nigam Limited (Anand Prakash Order)*¹⁰ had noted that: “...the Electricity Act, 2003 is admittedly a later special statute and in the event of irreconcilable inconsistency between the Electricity Act and the Competition Act, the former would override even though the Competition Act contained the non-obstante clause in Section 60 of the Competition Act.”. Therefore, as far as the exercise of jurisdiction by an Appropriate Commission under the Electricity Act over such combinations is concerned, the jurisdiction of the JERC constituted under Section 83 of the Electricity Act would prevail over the jurisdiction of the Commission.

(ii) **Previous Findings of the Commission regarding Section 60 of the Electricity Act are inconsistent with findings of the Hon’ble Supreme Court of India and subsequent orders of the Hon’ble Delhi High Court and other sectoral/ specific legislations:**

In this regard, TPL has submitted as follows:

- a) The Commission in its orders passed in relation to the proceedings initiated under Section 43A of the Competition Act against Tata Power Company Limited (**TPCL**) in 2022 (**TPCL Cases**)¹¹, had referred to its orders in *Shri Arun Mishra and State of U.P. & Ors.*¹², and *HPCL-Mittal Pipelines Limited and Gujarat energy Transmission Corporation Limited & Others*¹³ and reiterated that: (i) the ratio of the COMPAT in the Anand Prakash Order pertains solely to matters in respect of electricity tariffs approved

⁷ **Section 173 of the Electricity Act:** Nothing contained in this Act or any rule or regulation made thereunder or any instrument having effect by virtue of this Act, rule or regulation shall have effect in so far as it is inconsistent with any other provisions of the Consumer Protection Act, 1986 or the Atomic Energy Act, 1962 or the Railways Act, 1989.

⁸ **Section 174 of the Electricity Act:** “Save as otherwise provided in section 173, the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act”.

⁹ **Section 175 of the Electricity Act:** “the provisions of this Act are in addition to and not in derogation of any other law for the time being in force.”

¹⁰ Competition Appeal No. 33 of 2016 (Order dated 16th February 2017).

¹¹ Proceedings against Tata Power Company Limited under Section 43A of the Competition Act, 2002 in Combination Registration No. C-2021/03/826, C-2021/03/825 and C-2021/03/824 (Orders dated 17th March 2022)

¹² Case No. 43 of 2017 (Order dated 24th January 2018 passed under Section 26(2) of the Competition Act)

¹³ Case No. 39 of 2017 (Order dated 31st January 2018 passed under Section 26(1) of the Competition Act)



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by the Appropriate Commission and (ii) a harmonious reading of the Competition Act and Section 60 of the Electricity Act requires that general issues pertaining to competition in the market must be dealt with under the Competition Act. In the said orders, the Commission had placed reliance upon the Judgment of the Ld. Single Judge of the Hon'ble Delhi High Court in *Telefonaktiebolaget LM Ericsson (Publ) vs. CCI and others*¹⁴ (**First Ericsson Judgment**), which held as follows: “*there is no irreconcilable repugnancy or conflict between the Competition Act and the Patents Act, and in the absence of any irreconcilable conflict between the two legislations, the jurisdiction of the Commission to entertain complaints for abuse of dominance in respect of patent rights cannot be ousted*”. However, a continued reliance by the Commission on this decision would be misplaced as the order of the Ld. Single Judge of the Hon'ble Delhi High Court passed in context of the Patents Act, 1970 (**Patents Act**) has now been overturned by the Hon'ble Division bench of the Hon'ble Delhi High Court on 13th July 2023¹⁵ (**Second Ericsson Judgment**), which in its order has noted that the Patents Act being a special legislation and chapter XVI of the Patents Act being a subsequent legislation *vis-à-vis* the Competition Act, as well as a complete code, the same would prevail over the Competition Act.

- b) Since Section 60 of the Electricity Act specifically empowers authorities *i.e.*, JERC in this case, to pass any directions/ orders if a licensee enters a combination which is likely to cause or causes an adverse effect on competition in the electricity sector and Section 146 of the Electricity Act provides that failure to comply with such directions or orders issued by the JERC is punishable with imprisonment or fine, the said provisions are *pari materia* to provisions included under the Competition Act. This is indicative of the fact that the two legislations are complete codes, with the Electricity Act being applicable to the electricity sector.
- c) Considering the Electricity Act is a special and a subsequent legislation and has an express provision dealing with the anti-competitive impact of combinations in the electricity sector, the Commission cannot be said to have been vested with the jurisdiction to review the Transaction. The Hon'ble Supreme Court of India in *Gujarat Urja Vikas Nigam Ltd vs. Essar Power Limited (GUVNL Case)*¹⁶, whilst determining

¹⁴ 2016 (66) PTC 58 (Del).

¹⁵ *Telefonaktiebolaget LM Ericsson (Publ) and Ors. vs. CCI & Anr*, LPA 247/2016, LPA 150/2020, LPA 550/2016, LPA 246/2016 and WP(C) 8379/2015, Delhi High Court, dated 13th July 2023.

¹⁶ AIR 2008 SC 1921.



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whether a dispute would be arbitrated under Section 11 of the Arbitration and Conciliation Act, 1996 (**Arbitration Act**) or under Section 86(1)(f) of the Electricity Act, noted that Section 86(1)(f), being a special provision for adjudication of disputes, would prevail over the general law (*i.e.*, the Arbitration Act). The interpretation of Sections 174 and 175 of the Electricity Act in the matter shows that Section 175 of the Electricity Act must be read with Section 174 thereof, and not in isolation. Further, Section 174 of the Electricity Act would prevail over Section 175 of the Electricity Act in matters where there is any conflict, irrespective of whether the inconsistency is express or implied.

- d) Hon'ble Supreme Court of India in *Anwar Hasan Khan vs. Mohammad Shafi and Ors.*¹⁷ (**Anwar Hasan Case**) has observed that “*the well-known principle of harmonious construction is that effect should be given to all the provisions and a construction that reduces one of the provisions to a “dead letter” is not harmonious construction*”. However, if the Competition Act is interpreted to vest the Commission with the jurisdiction to regulate combinations in the electricity sector, then Section 60 of the Electricity Act would be rendered a dead letter.
- e) Hon'ble Supreme Court in *Selvi J. Jayalalithaa and Ors. vs. State of Karnataka and Ors.* (**Selvi Case**)¹⁸ noted that “*there is yet an uncontroverted legal principle that when the statute provides for a particular procedure, the authority has to follow the same and cannot be permitted to act in contravention of the same*”. However, if it is interpreted that the Commission has jurisdiction over combinations in the electricity sector despite Section 60 of the Electricity Act, it will have the effect of holding that Section 173 of the Electricity Act includes within the ambit of the Competition Act and it will: (i) in effect amount to an amendment of Section 173, which cannot be done except by the Parliament and (ii) be contrary to all applicable rules of interpretation.
- f) Real Estate (Regulation and Development) Act, 2016 (**RERA**), a legislation passed after 2002, specifically provides for the jurisdiction of the Commission under Section 38(3)¹⁹ when a concern under the scheme of the Competition Act arises. However, the Electricity

¹⁷ AIR 2001 SC 2984.

¹⁸ (2014) 2 SCC 401.

¹⁹ Section 38(3)- “Where an issue is raised relating to agreement, action, omission, practice or procedure that—

a. has an appreciable prevention, restriction or distortion of competition in connection with the development of a real estate project; or

b. has effect of market power of monopoly situation being abused for affecting interest of allottees adversely, then the Authority, may, suo motu, make reference in respect of such issue to the Competition Commission of India.”



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Act does not contain such a stipulation. This shows that the legislative intent was to not bestow upon the Commission an independent jurisdiction.

g) Thus, the Electricity Act is a self-contained code/ legislation in relation to the Electricity Sector, whose application cannot be limited to merely electricity tariffs, especially when Section 60 of the Electricity Act expressly confers jurisdiction upon the Appropriate Commission in respect of matters relating to combinations in the electricity sector. Further, given that it was enacted after the Competition Act, all matters pertaining to the electricity sector, including combinations squarely fall solely within its jurisdiction.

(iii) **Section 60 of the Competition Act cannot be invoked to vest Commission with the jurisdiction for assessing combinations in the electricity sector:** In the matter of *Maharashtra Tubes Ltd. v. State Industrial and Investment Corpn. of Maharashtra Ltd.*²⁰ (**Maharashtra Tubes Case**), the Hon'ble Supreme Court observed that where there is an inconsistency in the non-obstante clause between two special laws, the non-obstante clause in the subsequent legislation would prevail over the non-obstante clause in the previous enactment, unless the subsequent enactment is a general law and the earlier enactment is the special law. Further, a 2015 Judgment of a three-judge bench of the Apex Court in the case of *KSL & Industries Ltd. v. Arihant Threads Ltd.*²¹ (**KSL Industries Case**) noted that even between two special legislations, the subsequent legislation would prevail “*on the principle that the legislature was aware that it had enacted the earlier Act and yet chose to enact the subsequent Act with a non obstante clause*”. The Hon'ble Supreme Court further held that this principle would be set aside only if the subsequent non obstante clause is subject to non-derogation from identified enactments. Hence, given that the Electricity Act is a special legislation and assuming that the Competition Act is also a special legislation, the former, being the subsequent legislation, would prevail over the latter. Further, considering that Sections 173 and 174 of the Electricity Act were consciously incorporated by the legislature with the knowledge of enactment of the Competition Act, the non-obstante clause of the Electricity Act would supersede the non-obstante clause of the Competition Act. Also, given that Section 173 of the Electricity Act provides for non-derogation only *vis-à-vis* three legislations, *i.e.*, the Consumer Protection Act, 1986 and the Atomic Energy Act, 1962, and the Railways Act, 1989, expressly excluding the Competition Act, the non obstante clause of the Competition Act cannot supersede the non obstante clause included in the Electricity

²⁰ (1993) 2 SCC 144.

²¹ (2015) 1 SCC 166.



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Act. Hence, the JERC is vested with exclusive jurisdiction over the Transaction under the Electricity Act.

15. In addition to the above, it is also submitted that:

- (i) **The bid timelines reaffirm that TPL did not require a prior approval from the Commission:** The extremely short and stringent timelines to pay the consideration and execute the relevant documents show that the exclusive jurisdiction to review the Combination lied under the Electricity Act.
- (ii) **The bid document did not require TPL to specifically obtain the approval of the Commission in respect of the Transaction:** Unlike TPCL Cases, TPL did not receive any instruction or direction throughout the bid process to specifically obtain the Commission's approval in respect of the Transaction. Also, the Transaction Documents did not contain any such stipulation. Hence, TPL was under a genuine and *bona fide* belief that the Transaction fell within the sole jurisdiction of the Electricity Act and did not require to be notified before the Commission.
- (iii) **The transaction has not caused any appreciable adverse effect on competition (AAEC):** The Transaction has been undertaken as part of larger structural reforms contemplated by the Government of India in the power sector. Prior to the Transaction, the UT Administration of DNH-DD, through the Electricity Department and DNHPDCL, exclusively undertook the distribution and retail supply of power. Pursuant to the Transaction, the distributor of electricity has changed from being completely controlled by the UT Government to being privatised to the extent of 51%. As on date, 49% is still held by the UT Administrator, and it is the JERC that continues to determine the tariff for power supply, not TPL. Thus, the entry of TPL into the market does not affect the competition in any manner whatsoever given the highly regulated nature of the sector. Further, the Transaction does not entail the exit of any player and has in fact resulted in the addition of a new partner to co-manage the distribution of electricity (in the capacity of a distribution licensee), which cannot cause AAEC in the market.
- (iv) **Bid participants should not be penalised for effectively complying with the bid processes:** The urgency imposed through the bidding framework on the winning bidder to conclude the process, and the said bidder's compliance thereof, ought not to be faulted or penalised. At the time of issuance of the LOI, or the mandatory payment of the consideration for the Transaction, or at the stage of execution of the Transaction



Documents, TPL did not have access to the relevant financial information of the Target, which was necessary to have enabled it to undertake the assessment in respect of whether or not the said Transaction was notifiable. In view of the aforesaid, to hold the winning bidder accountable for not notifying the Transaction to the Commission would be grossly unjust.

16. Finally, TPL has prayed for lenient treatment by the Commission in light of the structural issues inherent to the bidding process, TPL's consistent cooperation with the Commission's investigation and *bona fide* behaviour. TPL has prayed that even if the Commission concludes that there has been a violation under Section 43A of the Competition Act, the Commission should afford lenient treatment to TPL and impose either no penalty and/or nominal penalty upon it on account of the fact that it was clearly not intentional and was based on the circumstances and belief set out below:
- i. TPL, at the time of consummating the Transaction was under the genuine and *bona fide* belief that it was not required to notify the Transaction to the Commission and the Transaction was solely subject to the jurisdiction of the Electricity Act;
 - ii. The mandatory timelines stipulated by the Bid Authority were stringent;
 - iii. At the time when TPL entered into the Transaction, there was no contrary guidance available from the Commission (*e.g.*, TPCL Cases). The TPCL Cases were passed by the Commission on 17th March 2022, whereas TPL had already paid the consideration by 26th February 2022 and executed the Transaction Documents by 15th March 2022;
 - iv. Unlike TPCL, which had the benefit of being directed to notify its acquisition to the Commission, TPL did not benefit from any such guidance and the bid documents were silent in respect of obtaining any such regulatory approval as a condition precedent;
 - v. TPL has extended full cooperation in respect of the ongoing proceedings by furnishing in a timely manner, all the requisitioned information truthfully and completely, to the best of its ability; and
 - vi. TPL is a much smaller player when compared to TPCL. Given the difference of status between TPL and TPCL in terms of financial wherewithal and scope of operations, the imposition of a similar or greater penalty on TPL, as compared to TPCL would be contrary to the principles of proportionality, equality and fair play.
17. Further, in view of the submissions made, TPL has prayed that: (a) no finding of contravention by TPL of Section 43A of the Competition Act is arrived at; (b) if a finding that TPL has contravened Section 43A of the Competition Act is arrived at, then without prejudice to the



interests of TPL, no penalty be imposed upon TPL; and (c) any other order, as the Commission may deem fit on facts, merit, international best practices and law, may be passed for the ends of justice.

E. Observations of the Commission

18. The Commission has considered the material on record and heard the arguments of the learned counsel in the matter on 19th November 2024. It is noted that the primary contention of TPL in the matter is that the transaction is subject to the exclusive jurisdiction of the appropriate commission under the Electricity Act, *i.e.*, JERC in this case. Given the submissions made in response to the SCN and arguments presented before the Commission by the learned counsel, the observations of the Commission on the issue of jurisdiction, contravention of the provisions of the Competition Act, and imposition of penalty in the matter are set forth in the ensuing paras.

I. Issue of Jurisdiction

19. To begin with, TPL has argued that pursuant to Section 60 of the Electricity Act, JERC has exclusive jurisdiction to regulate combinations in the electricity sector and that the operation of Competition Act is overridden by the non-obstante provision in the Electricity Act. Further, TPL has *inter alia* relied upon the decision of COMPAT in Anand Prakash Case, the Second Ericsson Judgment passed by the Hon'ble Division Bench of the Delhi High Court, and the principles espoused by the Hon'ble Supreme Court of India in various cases to buttress the argument of exclusive and overriding effect of provisions of Electricity Act over that of Competition Act in respect of matters relating to combinations in the electricity sector.
20. TPL has referred to the orders passed by the Commission in TPCL Cases under Section 43A of the Competition Act and argued that continued reliance by the Commission on its decision in TPCL Cases after the Second Ericsson Judgment would be misplaced. But interestingly, at the same time it has also prayed for lenient treatment on the ground that the guidance in form of TPCL Cases was not available to TPL at the time it had consummated the Transaction.
21. Be that as it may, before proceeding further, the Commission finds it appropriate to first deliberate upon its orders passed in the TPCL Cases wherein the issue of conflict or overlap in the two statutes, namely, the Competition Act and the Electricity Act was considered. In the TPCL Cases, the Commission had referred to its own observations in certain orders passed under Section 26(1) of the Competition Act, most of which continue to remain relevant to the present matter as well. Summarily, the Commission in these orders had observed that:



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- (a) Though the Electricity Act is a special legislation governing, *inter-alia*, matters pertaining to generation, transmission and supply of electricity, it cannot be said that all matters arising in the electricity industry will be governed exclusively by the said statute. Various provisions of Electricity Act and the policies made thereunder unequivocally express the intention of the legislature to promote competition. It is unconceivable that by inserting Sections 174 and 175, the legislature had intended to oust the jurisdiction of the Commission.
- (b) The latin maxim '*generalia specialibus non derogant*' suggests that where a general statute and a special statute relating to the same subject matter cannot be reconciled, the special statute ordinarily will prevail. And in case where a subject matter is covered by two statutes, both of which are special, the one enforced on a later date ordinarily prevails. However, these rules of statutory construction are not absolute in nature; rather an attempt should be aimed at, in case of conflicting provisions, to give effect to both the provisions to avoid redundancy. This position has been reiterated by Hon'ble Supreme Court in *Ashoka Marketing Limited v. Punjab National Bank*²² wherein it was held:
- "The principle which emerges from these decisions is that in the case of inconsistency between the provisions of two enactments, both of which can be regarded as special in nature, the conflict has to be resolved by reference to the purpose and policy underlying the two enactments and the clear intendment conveyed by the language of the relevant provisions therein. We propose to consider this matter in the light of this principle."* [Emphasis supplied]
- (c) Both the statutes under consideration, *i.e.*, the Electricity Act and the Competition Act, are special statutes with designated spheres of operation. The former aims at regulating activities in the electricity industry and the latter aims at promoting competition in every sphere and sector of the economy. The jurisdiction of the Competition Act extends to all sectors of the economy and sectors regulated by sector specific laws such as telecommunication, electricity, petroleum, insurance *etc.* are also included within the ambit of the Competition Act for competition related matters/issues. To this extent, there is no conflict as both these statutes have their respective and mutually exclusive regulatory regime.
- (d) Though Electricity Act is a special statute for the purposes of dealing with electricity matters, the Competition Act is a special statute for regulating competition in the market. For any

²² (1990) 4 SCC 406



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competition related matter, the Competition Act is a special statute, mandated to promote and regulate competition in the market. The mandate of the Commission is to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers, and ensure freedom of trade carried on by other participants in markets in India. Sectoral regulators focus on the dynamics of specific sectors, whereas the Commission focuses on functioning of the markets by way of increasing efficiency through competition. Thus, there is no issue of conflict of jurisdiction which cannot be reconciled by adopting harmonious construction between the provisions of the Electricity Act and the provisions of the Competition Act.

(e) Keeping in view the object and purpose underlying both the enactments viz., the Electricity Act and the Competition Act, it does not appear that the provisions of the Competition Act are in any way superseded by the Electricity Act, in the context of the facts and allegations under consideration. The mandate of the Competition Act is vast and its jurisdiction cannot be perceived to be ousted by the Electricity Act.

22. Further, with respect to the order of the erstwhile COMPAT in the Anand Prakash Case, which had been relied upon by TPCL and is also relied upon by TPL in the present case to argue that the Commission does not have jurisdiction in the matter concerning electricity sector, it was noted that:

“40. ... there does not seem to be real or ostensible discrepancy in the view taken by the Commission and opinion expressed by the hon’ble erstwhile COMPAT in Anand Prakash Agarwal v Dakshin Haryana Bijli Vitran Nigam Limited case. The Hon’ble erstwhile COMPAT reiterated the stand taken by the Commission while giving its conclusion on the issue of jurisdiction as is clear from the ratio of the said order, reproduced below:

*18.11 We are of the view that, there is an **implied immunity** from the Competition law **in matters of electricity tariff** approved by the Appropriate Commission in terms of the Electricity Act, 2003 and therefore, the Appellant cannot seek any relief under the Competition Act.”*

*41. The aforesaid ratio of the hon’ble erstwhile COMPAT clearly indicates that **the said judgment was only with respect to matters pertaining to electricity tariff** approved by the Appropriate Commission under the Electricity Act.”* [Emphasis supplied]

23. Further, the Commission had also noted in the TPCL Cases that the position that the State Electricity Regulatory Commission (or the JERC in the instant case) do not have exclusive jurisdiction under the Electricity Act is also supported by the case of *Shri Neeraj Malhotra*,



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*Advocate vs. North Delhi Power Ltd. & Ors.*²³, wherein the distribution companies alleged before the Commission that only the Delhi Electricity Regulatory Commission (DERC) under the Electricity Act had jurisdiction to deal with the issues relating to anti-competitive behaviour of electricity distribution companies. The Commission in this case had referred the matter to the DERC and the DERC had categorically opined that “*matters relating to electricity tariff have to be decided as per the provisions of the Electricity Act, 2003 and DERC Regulations. Accordingly, CCI may not be appropriate forum to deal with such issue. However, specific issues alluded to by the petitioner accusing the Discoms of abuse of their dominant position may be looked into by the CCI in terms of the Competition Act, 2002*”. Thus, it was amply clear that there is no overlap between the DERC and the Commission in terms of the jurisdiction of the matter.

24. The Commission had noted in the TPCL Cases that OERC, in its Letter to TPCL, had noted the provisions contained in Section 60 of the Electricity Act and expressly directed TPCL that, “*...notwithstanding the confirmation regarding conformity with relevant Indian Laws & Regulations already provided in the covering letter forming part of your bid, TPCL is required to comply with the requirements of Competition Act, 2002 and furnish a certificate on such compliances to OERC.*” Thus, even OERC had recognized the jurisdiction of the Commission and directed TPCL to comply with the provisions of the Competition Act.
25. Now, in the present matter, TPL has argued that it would not be appropriate to continue to rely upon order in TPCL Cases in the instant matter, as orders in those cases placed reliance upon the First Ericsson Judgement which now stands overturned by the Second Ericsson Judgement. In this regard, it is noted that in the TPCL Cases reliance was placed not only on First Ericsson Order but also other factors quoted in those orders, as brought out in above paras, which continue to remain relevant to the present case despite the Second Ericsson Judgement.
26. Moreover, the Hon’ble Division Bench of the Delhi High court in the Second Ericsson Judgement, has observed that:

“20. Both the Patents Act and the Competition Act are special laws in their respective fields, i.e., patents, and competition respectively.

21. Chapter XVI of the Patents Act, which was introduced by way of an amendment in 2003 after the Competition Act was enacted, is a subsequent enactment, and the contention of the patentees that by application of the maxim “lex posterior derogat

²³ Case No. 6/2009 (Order dated 11th May 2011)



priori”, the Patents Act must override the Competition Act appears attractive at first blush.

22. However, the Court would be mindful of the law that has evolved on **how perceived repugnancy between two statutes ought to be resolved when both laws appear to be special law**, and both laws are made by the same legislature. The locus classicus on this subject, is the Constitution Bench dicta of the Supreme Court in **Ashoka Marketing Ltd & Anr. v. PNB & Ors., (1990) 4 SCC 406,**

23. There is also extensive law on the question of ascertaining when a law can be considered as a special law. While discussing the question of the test of whether a statute is general or special, the Supreme Court held in *Gobind Sugar Mills Ltd. v. State of Bihar, (1999) 7 SCC 76* that:

“... 10. While determining the question whether a statute is a general or a special one, focus must be on the principal subject-matter coupled with a **particular perspective with reference to the intendment of the Act....”**

24. Citing the above, the Supreme Court, in *CTO, Rajasthan v. Binani Cements Ltd & Anr, (2014) 8 SCC 319* observed:

“47. ...the Rule of statutory construction that the specific governs the general is not an absolute rule but is merely a strong indication of statutory meaning that can be overcome by textual indications that point in the other direction. This rule is particularly applicable where the legislature has enacted comprehensive scheme and has deliberately targeted specific problems with specific solutions. **A subject specific provision relating to a specific, defined and describable subject is regarded as an exception to and would prevail over a general provision relating to a broad subject.**

25. The indication, clearly, is that the Court **must not automatically uphold the subsequent law as overriding the earlier law when two statutes are special.** So too must the Court not hasten to declare laws as special merely because they deal, overall, with a specific issue/subject.

26. What must be considered is: (i) the subject matter in question, (ii) the intendment of the statutes in respect thereof, as well as (iii) whether the scheme and relevant provisions of the two statutes have any indication apropos which, the legislature felt must override the other, especially when both statutes have a non-obstante clause.”

[Emphasis supplied]



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27. The Hon'ble High Court also examined the scheme of both Acts and observed that: “*the Patents Act must prevail over the Competition Act on the issue of exercise of rights by a patentee under the Patents Act.*” The Court has further observed that the Patents Act is a complete code on all issues pertaining to unreasonable conditions in agreements of licensing of patents, abuse of status as a patentee.
28. Thus, from the order of the Hon'ble Division Bench of the Delhi High Court in the Second Ericsson Judgement, it is evident that mere fact that one enactment is subsequent to another does not suffice to resolve repugnancy between provisions of the two enactments where both are special laws. What must also be considered is the subject matter in question and the intendment of the statutes in respect thereof. Further, in that judgement the Hon'ble High Court has looked at the provisions of the Patents Act and specifically to the issue of exercise of rights by a patentee under the Patents Act. The same cannot *mutatis mutandis* be applied to the instant case.
29. Given the observation of the Hon'ble Division Bench of the Delhi High Court in the Second Ericsson judgement, it is also pertinent to examine the provisions of Electricity Act and the Competition Act to understand the intendment of the statutes and ascertain whether either or both are a complete code for regulation of combinations.
30. TPL has argued that Electricity Act is a complete code like Competition Act for regulation of combinations in Electricity Sector because of the provisions contained in Section 60 of Electricity Act read with the provisions of Section 146 of the Electricity Act. However, when the provisions of the Competition Act in relation to regulation of combinations are considered, it is evident that the same are far more comprehensive and fleshed out. The Electricity Act, unlike Competition Act, does not contain any specific provision which defines what constitutes a combination, the procedure for assessment of combinations, factors for delineation of relevant markets, factors for ascertaining adverse effect on competition, and remedial orders that can be passed in case a combination is found to be likely to cause or causes adverse effect on competition. Hence, when the subject matter is a combination notifiable for assessment for its effects on the competition in the relevant market(s), the Competition Act is enacted as a special statute and complete code by the legislature providing specific mechanism for such assessment. On the contrary, the assessment of the combination for adverse effects on competition neither appears to be the subject matter or the intendment of the Electricity Act let alone it being a complete code for regulation of combinations. Simply because Electricity Act contains a general provision enabling the authority under the Electricity Act to impose penalty in case of non-compliance of (any) directions, cannot be interpreted to state that it is a complete code for regulation of combinations.



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31. TPL, having contended that the First Ericsson Judgement has been overturned by the Second Ericsson Judgement and hence continued reliance thereupon would be misplaced, has argued that the findings of the Hon'ble COMPAT regarding the scope of Section 60 of the Electricity Act read with its Sections 173, 174 and 175 would be applicable to the instant case. However, COMPAT in the Anand Prakash Case itself observed that:

“...to argue that in all matters in the electricity industry EA03 would prevail over the provisions of the Act, because of the presence of a sectoral regulator, would go against the spirit of the said statute as well as against the purpose for which the Act was enforced....”.

[Emphasis supplied]

32. Upon a bare perusal of the two statutes, it is apparent that the Competition Act *inter alia* provides the Commission with the necessary powers and jurisdiction to deal with the regulation of combinations for their overall effects on competition, including in electricity sector; except certain matters like tariff related issues for which the provisions are specifically contained in the Electricity Act. Therefore, the legislative intent is clear from the legal provisions of the two special Acts which show that there is no issue of conflict of jurisdiction that cannot be reconciled by adopting a harmonious construction between the two statutes.

33. Further, the apprehensions of TPL based on observation of the Hon'ble Supreme Court in certain cases that if the Competition Act is interpreted to vest the Commission with the jurisdiction to regulate combinations in the electricity sector, then Section 60 of the Electricity Act would be rendered a dead letter and if the Commission has jurisdiction over combinations in the electricity sector such an interpretation will in effect amount to an amendment of Section 173 of the Electricity Act, appear to be unfounded.

34. As stated earlier, the issue of conflict of jurisdiction amongst the two statutes is not such that cannot be reconciled by adopting a harmonious construction amongst them. Moreover, the provisions of the Electricity Act do not depict a legislative intent to oust the jurisdiction of the Commission in regulation of combinations in the Electricity sector. Rather section 175 of the Act provides that *'the provisions of this Act are in addition to and not in derogation of any other law for the time being in force'*.

35. Thus, the Competition Act vests the Commission with the jurisdiction to regulate combinations for the purposes of eliminating practices having adverse effect on competition, promoting and sustaining competition, and ensuring freedom of trade in markets in India, including electricity



markets, and the Electricity Act vests the appropriate commission under that Act with the jurisdiction to regulate other matters in which the sectoral regulator has necessary expertise such as determining access, maintaining standards and determining tariffs. Therefore, the two Acts can be harmoniously constructed without any law being rendered a dead letter.

36. Conclusively, with regard to the objection raised against the Commission's jurisdiction, it is noted that while Electricity Act is a special statute for the purposes of dealing with electricity matters with focus on the dynamics of the specific sector, the Competition Act is a special statute for regulating competition in the market having a holistic approach focusing on functioning of the markets by increasing efficiency through competition. To this extent, there is no conflict as both these statutes have their respective and mutually exclusive regulatory regimes. The attempt should therefore be to give effect to the provisions of both the Acts by adopting harmonious construction between the provisions of the two special statutes. Accordingly, in view the foregoing, the Commission is of the considered opinion that it has jurisdiction in the matter and JERC cannot be said to have exclusive jurisdiction in the matter.

II. Contravention of the provisions of the Competition Act

37. The merger control regime in India is mandatory and suspensory in nature. This means that combinations are notifiable unless they can avail any exemptions and cannot be consummated, either entirely or in part, before an approval from the CCI has been obtained. Section 5 of the Competition Act provides the assets and turnover criteria for acquisitions of control, shares, voting rights or assets as well as mergers and amalgamations that amount to a combination. Section 6(2) of the Competition Act requires/ mandates parties to give notice in respect of their proposed combination. In case of acquisitions, the trigger for notifying the transaction to CCI is the execution of binding transaction documents or any other binding document that indicates an agreement to acquire control, shares, voting rights or assets. Section 6(2A) of the Competition Act provides that a combination notified to the Commission shall not come into effect for a period of 210 days [reduced to 150 days by the Competition (Amendment) Act, 2023] from the date of notification or approval by the Commission, whichever is earlier.
38. It is clear from the submission of TPL that the transaction was a notifiable transaction and was neither exempted by any Government of India notification nor covered under Schedule I of Combination Regulations. Also, it is clearly provided in the Competition Act that irrespective of whether there is any appreciable adverse effect in India or not, there exists a mandatory regime for notifying a combination to the Commission.



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39. Thus, it was incumbent upon the TPL to be in conformity with all relevant Indian Laws and Regulations including the Competition Act. This obligation of the TPL to notify the proposed combination to the Commission as per the provisions of the Competition Act and take approval of the Commission prior to consummation of the transaction was not subject to JERC giving directions to TPL or the requirement being mentioned in the bid documents.
40. When TPL was announced as winning bidder by JERC, TPL was required to notify the transaction to the Commission and such notification ought to have been made before consummation of the transaction *i.e.*, TPL should have filed the notice with the Commission under the provisions of the Competition Act immediately after issue of LOI, but before payment of consideration. However, TPL failed to file notice with the Commission.
41. In view of the foregoing, the Commission is of the view that there is a contravention of the provisions of Section 6(2) and Section 6(2A) of the Competition Act as TPL has failed to notify the Transaction to the Commission within stipulated time and also consummated the same.

III. Penalty

42. Failure to give notice in accordance with sub-section (2) of Section 6 of the Competition Act attracts penalty under Section 43A of the Competition Act. Section 43A of the Competition Act states:
- “Power to impose penalty for non-furnishing of information on combinations 43A. If any person or enterprise who fails to give notice to the Commission under sub- section (2) of section 6, the Commission shall impose on such person or enterprise a penalty which may extend to one percent, of the total turnover or the assets, whichever is higher, of such a combination.”*
43. It may be noted that the *Hon’ble Supreme Court in Competition Commission of India v Thomas Cook (India) Ltd. & Anr.*²⁴ has held that: *“For the imposition of penalty under section 43A, the Competition Action may not be mala fide in case there is a breach of the statutory provisions of the civil law, penalty is attracted simpliciter on its violation.”* Accordingly, in terms of Section 43A of the Competition Act, a maximum penalty of one per cent of the combined value of turnover of the Parties in India can be imposed.

²⁴ Civil Appeal No.13578 OF 2015 (17 April 2018)



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44. It is to be noted that Section 43A of the Act prescribes the maximum extent of penalty that can be levied for failure to file notice; however, the Commission can consider the conduct of the parties and circumstances of the case to arrive at an appropriate amount of penalty.
45. Considering that the Transaction was consummated without filing a notice, TPL cannot be absolved of its obligation to file a notice prior to the consummation of the Transaction. However, in the instant matter, the Commission considered the submissions of TPL with regard to the structural issues inherent to the bidding process like TPL's obligation to comply with the strict bid timelines, failure to abide by the bid timeline resulting in TPL losing its security deposit and right to acquire the target *etc.*, ambiguity due to overlapping provisions in the two special acts, *i.e.*, Competition Act and Electricity Act, the transaction not resulting in AAEC in the relevant market, and TPL extending full cooperation in respect of the ongoing proceedings as mitigating factors while determining extent of violation and penalty under the provisions of section 43A of the Competition Act and accordingly, the Commission decides not to impose any penalty on TPL.
46. It is made clear that nothing used in this order shall be deemed to be confidential or deemed to have been granted confidentiality, as the same has been used for the purposes of the Act in terms of the provisions contained in Section 57 thereof.
47. The Secretary is directed to communicate to TPL, accordingly.