

APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)

APPEAL NO. 77 of 2015

Dated : 7th August, 2018

PRESENT: HON'BLE MR. JUSTICE N.K. PATIL, JUDICIAL MEMBER
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER

IN THE MATTER OF :

Global Energy Private Limited
207, Gera Imperium II
Patto Plaza, Panjim
North Goa, Goa – 403 001

.... **APPELLANT**

Versus

1. Maharashtra Electricity Regulatory Commission
World Trade Centre
Centre No. 1, 13th Floor
Cuffe Parade, Mumbai – 400 005
2. Tata Power Company Limited
Distribution Customer Services
Dharavi Receiving Station
Near Shalimar Industrial Estate
Matunga, Mumbai – 400 019
3. Tata Communications Limited
Tower C, 5th Floor
Bandra Kurla Complex
Mumbai – 400 041

.... **RESPONDENTS**

Counsel for the Appellant(s) : Mr. Sanjay Sen, Sr. Adv.
Mr. Hemant Singh
Mr. Piyush Singh
Mr. Matrugupta Mishra
Ms. Meghana Aggarwal
Ms. Jyotsna Khatri
Mr. Nimesh Kumar Jha
Mr. Saahil Kaul
Mr. Anurag Sharma
Mr. Nishant Kumar
Mr. Ananya Mohan
Ms. Ankita Batra

Counsel for the Respondent(s) : Mr. Amit Kapur
Mr. Vishrov Mukherjee
Mr. Apoorva Misra
Mr. Tushar Nagar
Mr. Abhishek Munot
Ms. Pallavi Mohan
Mr. Samir Malik
Mr. Kunal Kaul
Mr. Tabrez Malawat for R-2

J U D G M E N T

PER HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER

1. The **Appellant**, M/s Global Energy Private Limited, questioning the legality and validity of the impugned order dated 19.12.2014 (herein the “**impugned order**”) passed in Petition No. 148 of 2014 on the file of the Maharashtra Electricity Regulatory Commission (hereinafter referred to as “**Commission**” or “**Respondent Commission**” or “**Maharashtra Commission**”) presented this Appeal under Section 111 of the Electricity Act 2003.

- 1.1 The impugned order has been passed by the Respondent No. 1 Commission by dismissing the Petition filed by the Appellant herein, bearing Petition No. 148 of 2014, wherein the Appellant challenged the arbitrary and illegal actions of Tata Power Company Limited (hereinafter “**Respondent No. 2**” or “**TPCL**”) of imposing “temporary / mutual / unregulated” charges and other arbitrary charges on consumers opting for a partial open access, for the quantum of the retained / remaining contract demand with the Respondent No. 2. As per the provisions of the Electricity Act 2003 and the Regulations framed thereunder, a distribution licensee cannot charge any tariff which has not been determined by a Regulatory Commission, for an allocated contract demand of a consumer. The same is alleged to be an abuse of dominant position, and amounts to put roadblocks, including playing with the market in a manner so as to prevent consumers from availing open access / partial open access.
- 1.2 By the aforementioned actions, the Respondent No. 2 licensee is stated to have forced the consumers to either take full load open access for their entire electricity load, or to source the entire said load from the said Respondent without exercising the option of partial open access. Vide its impugned order dated 19.12.2014, the Respondent No. 1 Commission disposed off the aforementioned petition filed by the Appellant herein, on the ground that the Appellant did not have any “locus standi” to maintain the said petition.

- 1.3 It is the case of the Appellant, the Respondent No. 1 Commission failed to ascertain that the Appellant was the aggrieved party since its business was suffering on account of the above actions of the Respondent No. 2 licensee which prevented consumers to exercise the option of open access. Further, by its actions, the Respondent No. 2 is said to have abused its monopoly in distribution of electricity so as to suppress the competitiveness of the market by forcing the consumers not to seek open access.
- 1.4 Being aggrieved by the impugned order, the Appellant preferred this appeal.

2. Brief facts of the case are as follows:

- 2.1 Global Energy Private limited, the Appellant herein, is a company incorporated under the provisions of the Companies Act, 1956 having its registered office at 104, 10th Floor, Maker Chamber-VI, Nariman Point, Mumbai – 400 021, engaged in the business of trading of electricity.
- 2.2 Respondent No. 1 herein is the Maharashtra Electricity Regulatory Commission, which is exercising its powers and discharging functions under the provisions of the Electricity Act, 2003 as a sector regulator.
- 2.3 Tata Power Company Limited, the Respondent No. 2 herein, is a distribution licensee under the Electricity Act, 2003 in the state of Maharashtra providing electricity to the consumers in its licensed area in the said state.

- 2.4 Tata Communications Limited, the Respondent No. 3 herein, is a consumer of electricity located in the distribution area of Respondent No. 2
- 2.5 The Respondent No. 3 entered into an agreement, vide an LOI dated 05.09.2012, with the Appellant, who is a trader of electricity, for procurement of energy under open access for its two establishments located in Bandra Kurla Complex, Mumbai and Andheri, Mumbai.
- 2.6 Thereafter, the Respondent No. 3 made two applications on 28.03.2013 post execution of the above agreement with the Respondent No. 2. The source generator was mentioned as MSEDCL on account of the fact that a substantial portion of the Appellant's energy was lying banked with the MSEDCL and it was intended to supply the same to the Respondent No. 3. However, the said application was neither considered by the second Respondent nor rejected the same.
- 2.7 Under Regulation 5.1 of the MERC (Distribution Open Access) Regulations, 2005, for availing open access a mandatory "*Connection and Use of Distribution System Agreement*" has to be entered into between the Distribution Licensee, the Consumer seeking Open Access and the Licensee intending to give supply to the consumer using the distribution system of the Distribution Licensee for wheeling of power. The format of the Agreement is also provided in the said Regulations.
- However, the mandated "Connection and Use of Distribution System Agreement" was not entered, which was required as per the Distribution

Open Access Regulations of the Respondent Commission. The Respondent No. 2, through an email dated 07.05.2013, circulated a draft Connection and Use of Distribution System Agreement. In the light of the conditions imposed by the Respondent No. 2, in November 2013, and being left with no option, the agreement for Open Access Terms and Conditions (T & C) was entered between the Respondent No. 2 and Respondent No. 3. The said agreement of the Respondent No. 2 was contrary to the MERC (Distribution Open Access) Regulations 2005, since the same contained clauses with respect to the levy of mutual / unregulated / temporary tariff for the retained / remaining “contract demand” with the Discom.

2.8 On 25.06.2013, the Appellant, being a trader and supplier of energy under the above partial open access transaction, on behalf of Respondent No. 3, wrote to the Respondent No. 2 for issuance of No Objection Certificate in respect of the grant of partial open access permission. The letter further pointed out that the Respondent No. 2’s standard terms and conditions for open access had already been finalized.

2.9 On 28.06.2013, the Respondent No. 2 wrote to the Respondent No. 3 stating that the Respondent No. 2 was willing to grant partial open access, and vide the said letter, the Respondent No. 2 also intimated that the tariff for such open access transaction would have to be “mutually agreed” upon for the load continuing with the Respondent No. 2, i.e. retained contract demand.

- 2.10 On 11.07.2013, the Appellant, on behalf of the Respondent No. 3, wrote to the Respondent No. 2 stating that over 100 days had elapsed since the application for Open Access was made and delay in issuance of the NOC was causing a financial loss. Furthermore, due to the delay caused by the Respondent No. 2 while processing the said application, the Appellant's LOI with the generator had lapsed.
- 2.11 On 24.07.2013, the Respondent No. 2 wrote a letter to the Respondent No. 3 wherein the charges applicable to the consumer for load continued to be maintained with Respondent No. 2, i.e. retained contract demand, were stipulated. The charges pertained to Contract Demand Charges, Energy Charges, Wheeling and Transmission Charges, Wheeling and Transmission Losses were not in consonance with the tariff order of the Respondent No. 1 Commission. At this stage, Respondent No. 2 even proposed to levy Cross Subsidy Surcharge on the energy supplied by it to Respondent No. 3. The charges so intimated were blatantly in contravention of various orders and directions issued by the Respondent No. 1 Commission.
- 2.12 On 30.07.2013 a letter was issued by the Respondent No. 2 to the Appellant emphasizing on a single point contact which clearly ascertained that the clear intention of the Respondent No. 2 was to put the Appellant, who is a trader, out of picture in any of the open access transactions. For this very reason, the Respondent No. 2 was unwilling to sign the Connection and Use

of Distribution Agreement, which is a tripartite agreement between a Discom, Consumer and the Supplier / Trader.

- 2.13 The Appellant had received two Letters of Intent (LOI) from the Respondent No. 3 for supply of power to two different locations. However, on account of the adverse situation created by the conduct / actions of the Respondent No. 2, the Respondent No. 3 only went for open access for one of its locations while dropping the other location.
- 2.14 Post the delay in grant of NOC, the Respondent No. 3 issued a fresh LOI dated 14.08.2013 to the Appellant for procurement of energy under open access.
- 2.15 Post the issuance of the LOI from Respondent No. 3 to the Appellant, the said Respondent submitted a fresh application to the Respondent No. 2 on 19.08.2013 for availing partial open access to the extent of 1.5 MW.
- 2.16 On 09.10.2013, partial open access was granted to the Respondent No. 3 by the Respondent No. 2 after a substantial delay. The said delay was also caused as a result of the imposition of conditions by the Respondent No. 2, relating to charging of temporary / unregulated / mutual tariff for the retained / remaining contract demand, which conditions were contrary to the statutory requirements, relating to the retained contract demand. Hence, the Respondent No. 2, by such conduct, caused delays in the process of securing open access by the Respondent No. 3.

- 2.17 On 16.01.2014 the Respondent No. 3 vide its correspondence protested about the tariff being levied by the Respondent No. 2 on the retained / remaining contract demand being availed by the Respondent No. 3, which was in contravention to the provisions of the Electricity Act, 2003 read with the MERC (Distribution Open Access) Regulations 2005.
- 2.18 On 21.01.2014, the Respondent No. 2 wrote to the Respondent No. 3 justifying that it had granted partial open access as per the present and prevailing regulatory framework. It was further submitted by the Respondent No. 2 that once the Respondent No. 3 availed open access, only the wheeling charges determined by Respondent No. 1 Commission were applicable. It was also further stated that the charges applicable for supply of electricity to the Respondent No. 3 by the Respondent No. 2, for even a part of the load, would be as “mutually” agreed between the Respondent No. 2 and Respondent No. 3
- 2.19 Vide letter dated 30.01.2014 issued by the Appellant to the Respondent No. 2, being a trader and supplier of electricity to the various consumers under open access, concerns were raised with respect to the aforementioned illegal actions of the Respondent No. 2 in demanding a mutually agreed tariff for the retained / remaining contract demand. The said action violates the very license conditions of the Respondent No. 2 as a distribution licensee cannot charge a tariff which is not determined for discharging its Universal Supply

Obligation, as per Section 43 of the Electricity Act 2003, for the retained / remaining contract demand.

2.20 Thereafter, the Respondent No. 2 vide letter dated 20.03.2014 wrote to the Appellant responding to all the issues highlighted by the Appellant in its letter of 30.01.2014. The arbitrary and illegal acts of the Respondent No. 2 are further confirmed vide admissions made by them in the said letter.

2.21 As per the Appellant, the Respondent No. 2 has apparently abused its dominant position by making concerted efforts to thwart Open Access within its Distribution System. The actions of the Respondent No. 2 in treating the partial open access customer as a full open access customer are arbitrary, illegal and non-est in the light of the provisions of the Electricity Act, 2003, Regulations relating to non-discriminatory open access and various orders passed by the Respondent No. 1 Commission and this Appellate Tribunal. The Respondent No. 2 has further been raising illegal charges vis-à-vis the retained contract demand, which charges have not been determined and approved by the Respondent No. 1 Commission.

2.22 The Respondent No. 2 is an entity which enjoys a monopoly in terms of the power supply business of its licensed area. Further, the said monopoly stands established by the fact that any open access has to be permitted by the said Respondent through its lines, and the said permission was being withheld on account of the illegal stand of the said Respondent in treating the retained / remaining contract demand attracting temporary / mutual

tariff / charges as if the same is meant for a person who has availed a full open access.

- 2.23 Aggrieved by the above actions of the Respondent No. 2 in imposing “mutually” agreed tariff for the retained / remaining contract demand, in case of a partial open access, the Appellant was constrained to file a petition, being Case No. 148 OF 2014, on the file of the first Respondent Commission.

The Respondent No. 2 also filed a reply dated 21.11.2014 to the petition filed by the Appellant. In the said reply the Respondent No. 2 justified its interpretation for levying mutual / unregulated / temporary tariff for the reduced / remaining “contract demand”.

- 2.24 Thereafter, the Respondent No. 1 Commission passed the impugned order dated 19.12.2014 wherein the petition of the Appellant was disposed off on the ground that the Appellant did not have any “locus standi” to maintain the said petition. The relevant paragraphs of the impugned order are reproduced hereunder:

“Commission’s Analysis and Ruling

8. The Petitioner, GEPL, seeks penal action against TPC under Section 142, 146 and 149 of EA, 2003 for making partial Open Access to TCL conditional on levy of a Tariff and penal Demand Charges for its reduced Contract Demand which was contrary to the Regulations governing Open Access and the Tariff approved by the

Commission. It also seeks compensation and damages from TPC for the losses it has incurred on account of TPC's actions.

9. The impugned actions of TPC, a Distribution Licensee, relate to the conditionalities regarding Tariff and charges imposed on its consumer, TCL. The being the case, the matter is entirely between TPC and TCL, and not between TPC and the Petitioner. TCL is a Respondent in these proceedings. The fact that it has chosen not to appear or participate in them does not give GEPL any locus on its behalf. It is for TCL alone, as the consumer, to raise a dispute or grievance in this regard, and it has chosen not to do so before the Commission or, apparently, elsewhere. If TPC's actions vis-a-vis TCL have also adversely affected GEPL, as the Trading Licensee from whom TCL sought Open Access supply, it is the Civil Courts before whom GEPL may claim compensation or damages. This Petition is, therefore, not maintainable before the Commission.

10. The provision of Open Access and the regulation of Tariffs and charges are basic features of the EA, 2003. In the present matter, TPC has submitted that, on 22 April 2014, it revised the terms on which partial Open Access was granted to TCL so as to apply the Commission-approved Tariff to its reduced Contract Demand, and has refunded the differential amount thereafter. TPC has also mentioned that it had applied such Tariff in a subsequent case of M/s Mahindra and Mahindra also. However, TPC is directed to submit to the Commission, within a month, details of all applications seeking Open Access from April, 2013 up to 24th June, 2014 (following which the new Distribution Open Access Regulations, 2014 were notified), including the time taken for their disposal, the Tariff and various charges levied, any refunds made with interest thereon and any

conditionalities imposed, benchmarked against the parameters laid down in the Regulations and Tariff Orders. The Commission would decide thereafter whether to initiate separate formal proceedings in that regard.

The Petition filed by M/s Global Energy Pvt. Ltd. in Case No. 148 of 2014 stands disposed of accordingly”

The Appellant claims to be the aggrieved party since the business of the Appellant was suffering on account of the actions of the Respondent No. 2 licensee which prevented consumers to exercise the option of open access. Further, by its actions, the Respondent No. 2 abused its monopoly in distribution of electricity so as to suppress the competitiveness of the market by forcing the consumers not to seek open access. Being aggrieved by the impugned order, which is prima facie cryptic and bad in law, the Appellant has preferred the instant appeal.

3. Question of Law

Following questions of law have been raised in the appeal for consideration:

- 3.1 Whether the Respondent Commission was correct in holding that it had no Locus to initiate and maintain Case No. 148 of 2014 despite the fact that a legal injury was inflicted on the Appellant?
- 3.2 Whether the Respondent Commission was correct in holding that it had no jurisdiction to adjudicate Case No. 148 of 2014 despite the fact that the dispute was between two licensees?

- 3.3 Whether the Respondent Commission has erred in not considering the fact that even a legal injury is enough to initiate proceedings before a court of law?
- 3.4 Whether the Respondent No. 2 was correct in levying temporary / mutual / unregulated tariff and penal demand charges in the event of a part load open access, for the retained / remaining contract demand with the said Respondent?
- 3.5 Whether the Respondent No. 2, by charging temporary / mutual / unregulated tariff and penal demand charges from a consumer availing part load open access, for the retained / remaining contract demand with the said Respondent, manipulated the market in a manner so as to dissuade the potential open access customers from availing the said option of open access?
- 3.6 Whether the Respondent Commission by passing the impugned order failed to further the intent of the Electricity Act 2003 which is to promote competition in the market?
- 3.7 Whether the Respondent No. 2 abused its dominant position in levying temporary / mutual / unregulated tariff and penal demand charges from a consumer (Respondent N. 3) in the event of a part load open access, for the retained / remaining contract demand of the said consumer with the said Respondent?

- 3.8 Whether the Respondent Commission ignored the fact that open access is a right of a consumer, and not an obligation, and a consumer can choose to avail a part of his energy requirement through open access, and for the remaining part the said consumer can choose to continue being a consumer of the area distribution licensee, without levy of any unregulated / mutual / unregulated tariff to the extent of the retained / remaining contract demand with the said discom?
- 3.9 Whether the Respondent No. 2, in levying temporary / mutual / unregulated tariff and penal demand charges from a consumer (Respondent No. 3) in the event of a part load open access, for the retained / remaining contract demand of the said consumer with the said Respondent, violated the Commission's orders and Regulations?
- 3.10 Whether the consumer (Respondent No. 3) was entitled to avail a partial open access as per the provisions of Regulation 4.2.2 of the MERC (Distribution Open Access) Regulations 2005 and maintain part of its Contract Demand with the Distribution Licensee in whose area it was situated. The same cannot be taken away by a misinterpretation of the statutory provisions by the Respondent No. 2?
4. **Submissions of learned counsel, Mr. Hemant Singh, appearing for the Appellant are as follows:-**
- 4.1 The Appellant is primarily aggrieved by the following para of the impugned order:

“9. The impugned actions of TPC, a Distribution Licensee, relate to the conditionalities regarding Tariff and charges imposed on its consumer, TCL. That being the case, the matter is entirely between TPC and TCL, and not between TPC and the Petitioner. TCL is a Respondent in these proceedings. The fact that it has chosen not to appear or participate in them does not give GEPL any locus on its behalf. It is for TCL alone, as the consumer, to raise a dispute or grievance in this regard, and it has chosen not to do so before the Commission or, apparently, elsewhere. If TPC’s actions vis a vis TCL have also adversely affected GEPL, as the Trading Licensee from whom TCL sought Open Access supply, it is the Civil Courts before whom GEPL may claim compensation or damages. This Petition is, therefore, not maintainable before the Commission.”

Therefore, the entire issue in the present appeal relates to the fact that the Respondent Commission in the impugned order has erroneously held that the petition filed by the Appellant before the Respondent Commission was not maintainable, and that for adjudication of any disputes between the Appellant, which is a trading licensee, and the Respondent No. 2, which is a distribution licensee, the same can only be done by the Civil Courts and not by the said Commission, which is in the teeth of Section 86(1)(f) of the Electricity Act, 2003. As such, the present case has to be remanded back to the Respondent Commission for afresh adjudication on merits as it is only

the Respondent Commission which has the jurisdiction to adjudicate upon disputes between two licensees.

4.2 BRIEF BACKGROUND

4.2(a) The factual issue in brief relates to whether the Respondent No. 2, which is a distribution licensee and a regulated entity, has the ability to charge “temporary / mutual / unregulated” tariff, qua the reduced contract demand, from open access consumers who choose to avail power under partial open access, from the Appellant. This is outside the regulatory regime as a distribution licensee cannot at all charge a tariff from its own consumers which is unregulated/ mutually agreed for a contract demand maintained by such consumers, as the Respondent No. 2 can only charge a retail tariff from its consumers which is approved by a regulatory commission under Section 62(1)(d) of the Electricity Act, 2003.

4.2(b) Since the Respondent No. 3 sought to source a part of its power demand from the Appellant, which is a trading licensee as per Section 14 of the Electricity Act 2003, the said Respondent reduced its contract demand from the Respondent No. 2. In the present case, the Respondent No. 2 sought to impose temporary / mutually agreed/ unregulated tariff for the said reduced contract demand maintained by the Respondent No. 3 (which is a consumer) with the Respondent No. 2. This resulted in manipulation of the market in a manner which made open access a completely unviable option for the end consumers, thereby forcing the said consumers to remain with

the Respondent No. 2 by not availing open access and consequentially affecting the business/ functioning of the Appellant who is a trading licensee and supplies power to consumers under open access. It is submitted that as per the provisions of the Electricity Act, 2003 a distribution licensee cannot demand charges for supply of power, which have not been determined by a regulatory commission

4.2(c) In a partial open access, a consumer (Respondent No. 3) sources a part of its electricity requirement from an independent/ 3rd party source of its choice (Appellant), and continues to source the remaining part of its electricity requirement from its own area distribution licensee (Respondent No. 2). For sourcing the part-requirement of electricity from its own area distribution licensee, a consumer has to maintain a contract demand which is either equal to or more than the said part-requirement of electricity. For the remaining part, the said consumer is dependent upon the open access source. In such a scenario, a distribution licensee, in terms of Section 62(1)(d) of the Electricity Act 2003, can only charge tariff as determined by a regulatory commission in its retail tariff order to the extent of power sourced by the consumer which is less than or equal to the contract demand the said consumer maintains with the said distribution licensee.

In the event of a consumer drawing power from the area distribution licensee which is more than the contract demand maintained with the said

licensee, and is also not covered under the open access on account of either the open access source failing to supply power or the drawl of electricity is over and above the said open access source, then the area distribution licensee is free to charge a temporary tariff which is also determined by a regulatory commission. As such, in no circumstance an area distribution licensee can charge a mutually agreed tariff for supply of power to a consumer in its licensed area.

4.2(d) On account of the above protocol, the action of the Respondent No. 2 in seeking to impose a mutual agreed/ temporary / unregulated tariff upon the Respondent No. 3 for the reduced contract demand the said Respondent had with the Respondent No. 2, as a result of availing partial open access from the Appellant, amounts to an abuse of dominant position and a manipulation of market so as to kill open access by making it an expensive proposition. In this context reference may be made to the contents of para 7 of the main appeal. The same further amounts to adversely affect the interests of the Appellant as the said Appellant is dependent upon open access for trading in electricity. Any action of the Respondent No. 2 which directly and materially affects by restraining end consumers from availing open access would be amenable to the regulatory jurisdiction of this Hon'ble Commission.

4.2(e) Upon being aggrieved by the aforementioned actions of the Respondent No. 2, the Appellant herein filed a petition, being Case No. 148 of 2014, before

the Respondent Commission thereby, *inter alia*, claiming damages / compensation on account of loss of business as well as compensation with respect to abuse of dominant position by the Respondent No. 2. In the said petition, the Respondent Commission passed the impugned order.

4.3 **ISSUES INVOLVED FOR ADJUDICATION**

4.3(a) In view of the above, the Appellant has submitted that the impugned order is wholly erroneous on following counts:

- (i) The Respondent Commission has wrongly observed that the Appellant/ Trading Licensee had no locus to initiate proceedings against the Respondent No. 2; and
- (ii) The Respondent Commission has wrongly observed that the Appellant ought to approach a Civil Court for adjudication of disputes, qua claiming of damages / compensation, against a distribution licensee / Respondent No. 2.

The Appellant in the present appeal, is therefore, seeking setting aside of the impugned order, as under the provisions of the Electricity Act, 2003 it is only the Respondent Commission which has to adjudicate disputes between licensees. As such, the Appellant is further seeking a remand of the entire case to the Respondent Commission for a fresh adjudication on merits, as there has not been a proper application of mind qua the grievances of the Appellant. It is stated that there cannot at all be an adjudication on merits by

a court/ commission once it had been held that the petition was not maintainable.

4.4 **LEGAL SUBMISSIONS**

4.4(a) In the context of the issue involved, the Appellant refers to Section 86 of the Electricity Act, 2003, which is set out herein below:

“Section 86. (Functions of State Commission): --- (1) The State Commission shall discharge the following functions, namely: -

(f) adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration”

As per Section 86(1)(f) of the Electricity Act 2003, a State Electricity Regulatory Commission is empowered to adjudicate upon disputes between licensees and generating companies, and inter-se between the licensees and generating companies. In the present case, the Appellant is an inter-state trading licensee and the Respondent No. 2 is a distribution licensee.

4.4(b) As per the provisions of Section 86(1), sub clauses (a) to (e) and (g) to (k) relate to regulatory and administrative powers of the State Electricity Regulatory Commission. It is only the sub clause (f) which deals with the adjudicatory powers of a regulatory commission. The present case deals with the adjudicatory powers of the Respondent Commission under Section

86(1)(f) to adjudicate a dispute raised between two licensees (Appellant and the Respondent No. 2), and to award compensation/ damages. The said dispute was on account of the violation of provisions of Sections 42, 57, 60, 61 and 62 of the Electricity Act, 2003 by the Respondent No. 2 which caused a legal and financial injury to the Appellant.

4.4(c) The Respondent Commission was absolutely wrong to hold that the Appellant had no locus to institute the proceedings against the Respondent No. 2. This is on account of the following:

- a. Firstly, the Respondent Commission observed that the Appellant had filed the petition on behalf of the Respondent No. 3. This was wrong as the Appellant was independently aggrieved on account of the actions of the Respondent No. 2; and
- b. Secondly, the Appellant itself suffered a legal and financial injury on account of manipulation of the market by the Respondent No. 2, by seeking to impose temporary / mutual / unregulated tariff on an open access consumer (Respondent No. 3) for the power drawn against the reduced contract demand the said consumer maintains with the Respondent No. 2. This created a perception in the market that a consumer seeking to avail open access will be subjected to imposition of temporary / mutual / unregulated tariff for the power

drawn against a contract demand maintained with its own area distribution licensee, thereby killing the open access market and preventing the Appellant from trading in electricity. As per Section 42(2), the Respondent No. 2 has to grant a non-discriminatory open access, and the above actions of the said Respondent created discrimination between the consumers opting for open access and those who do not opt for the same.

4.4(d) The Respondent Commission is a creature of Statute and has to function within the four corners of the said Statute. The jurisdiction to exercise power by the Respondent Commission depends upon the existence of a “jurisdictional fact” as required by Section 86(1)(f). As per the said provision, the jurisdictional fact required to invoke the jurisdiction of the Respondent Commission is as follows:

- a. The parties before the Respondent Commission have to be either licensees and/ or generating companies or both; and
- b. The party initiating a proceeding has to allege a dispute.

Once the aforementioned jurisdictional fact is in existence, then a regulatory commission has to necessarily adjudicate the dispute raised in the petition. The regulatory commission may finally allow the petition or dismiss the same based upon the merits of the dispute raised in the light of the extant law. However, upon the existence of the jurisdictional fact, a

court of first instance / regulatory commission cannot at all dismiss the proceedings by either questioning the locus of the party filing a petition or directing the parties to approach a different forum.

4.4(e) On the issue of the existence of a “jurisdictional fact”, the Hon’ble Supreme Court in the case of *Arun Kumar v. Union of India*, reported in (2007) 1 SCC 732, has held as follows:

“74. A “jurisdictional fact” is a fact which must exist before a court, tribunal or an authority assumes jurisdiction over a particular matter. A jurisdictional fact is one on existence or non-existence of which depends jurisdiction of a court, a tribunal or an authority. It is the fact upon which an administrative agency's power to act depends.”

76. The existence of jurisdictional fact is thus sine qua non or condition precedent for the exercise of power by a court of limited jurisdiction.

77. In Raja Anand Brahma Shah v. State of U.P. [(1967) 1 SCR 373 : AIR 1967 SC 1081] sub-section (1) of Section 17 of the Land Acquisition Act, 1894 enabled the State Government to empower the Collector to take possession of “any waste or arable land” needed for public purpose even in the absence of award. ... It was urged that since the jurisdiction of the authority depended upon a preliminary finding of fact that the land was “waste land”, the High Court was entitled in a

proceeding for a certiorari to determine whether or not the finding of fact was correct.

.....
79. *In State of M.P. v. D.K. Jadav [(1968) 2 SCR 823 : AIR 1968 SC 1186] the relevant statute abolished all jagirs including lands, forests, trees, tanks, wells, etc., and vested them in the State. It, however, stated that all tanks, wells and buildings on occupied land were excluded from the provisions of the statute. This Court held that the question whether the tanks, wells, etc., were on “occupied land” or on “unoccupied land” was a jurisdictional fact and on ascertainment of that fact, the jurisdiction of the authority would depend.*

.....
84. *From the above decisions, it is clear that existence of “jurisdictional fact” is sine qua non for the exercise of power. If the jurisdictional fact exists, the authority can proceed with the case and take an appropriate decision in accordance with law.”*

4.4(f) The Hon’ble Supreme Court in the case of ***Carona Ltd. v. Parvathy Swaminathan & Sons***, reported in (2007) 8 SCC 559, has held as follows:

“Jurisdictional fact and adjudicatory fact

29. *But there is distinction between “jurisdictional fact” and “adjudicatory fact” which cannot be ignored. An “adjudicatory fact” is a “fact in issue” and can be determined by a court, tribunal or authority on “merits”, on the basis of evidence adduced by the parties. It is no doubt true that it is very difficult to distinguish “jurisdictional fact” and “fact in*

issue” or “adjudicatory fact”. Nonetheless the difference between the two cannot be overlooked.

.....

36. It is thus clear that for assumption of jurisdiction by a court or a tribunal, existence of jurisdictional fact is a condition precedent. But once such jurisdictional fact is found to exist, the court or tribunal has power to decide adjudicatory facts or facts in issue.

4.4(g) A “jurisdictional fact” for initiating the proceedings before a regulatory commission under Section 86(1)(f) of the Electricity Act, 2003 is that the parties before the said commission have to be either licensees and / or generating companies or both. In the present case, the dispute which was raised before the Respondent Commission was between two licensees (Appellant and the Respondent No. 2 herein). In this context, reference may be made to the following judgments:

- a. The Hon’ble Supreme Court in the case of ***Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd.***, reported in (2008) 4 SCC 755, has held as follows:

“60. In the present case, it is true that there is a provision for arbitration in the agreement between the parties dated 30-5-1996. Had the Electricity Act, 2003 not been enacted, there could be no doubt that the arbitration would have to be done in accordance with the Arbitration and Conciliation Act, 1996. However, since the Electricity Act, 2003 has come into force w.e.f.

10-6-2003, after this date all adjudication of disputes between licensees and generating companies can only be done by the State Commission or the arbitrator (or arbitrators) appointed by it. After 10-6-2003 there can be no adjudication of dispute between licensees and generating companies by anyone other than the State Commission or the arbitrator (or arbitrators) nominated by it. We further clarify that all disputes, and not merely those pertaining to matters referred to in Clauses (a) to (e) and (g) to (k) in Section 86(1), between the licensee and generating companies can only be resolved by the Commission or an arbitrator appointed by it. This is because there is no restriction in Section 86(1)(f) about the nature of the dispute.”

- b. This Tribunal in the case of ***PTC India Limited v. Gujarat Electricity Regulatory Commission & Anr.***, reported in ***2012 SCC OnLine APTEL 161: [2012] APTEL 200***, which also related to a dispute between an inter-state trading licensee (PTC India Ltd.) (*as in the present case*) and a distribution licensee (GUVNL) has held as follows:

“60. The plain reading of section 86(1)(f) of the Act would indicate that the section refers to the disputes between the licensees and generating companies. The term used is “licensees” as opposed to a “licensee” (singular). ... The term “adjudicate” denotes vide amplitude. The word “between” can not mean i.e. only between the generating companies on one hand and licensees on the other hand. On a proper interpretation

the word “between” can be understood to mean “among”.

61. The scheme of Electricity Act, 2003 would clearly show that the provisions of 86(1)(f) would be applicable even to the disputes between two licensees. In other words, on a plain reading of the provision, it is noticed that the expressions “licensees” (plural) generating companies(plural) have been used and this would show that the provisions would be applicable in the event of disputes not only between (a) generating company and licensee but also (b) between two generating companies and (c) between two licensees. There is no rationale whatsoever to limit or restrict the application of section 86(1)(f) of the Act, only to those mentioned in clause (a) as referred to above as contended by the Appellant. Similarly, there is no rationale whatsoever to exclude the dispute between two licensees from the adjudication under section 86(1)(f) of Electricity Act, 2003.

.....

85. In view of the above, we find that State Commission has got jurisdiction to adjudicate upon the disputes not only between the licensees and generating companies but also between two licensees.”

On account of the aforementioned judgments, it is clear that the Respondent Commission had the jurisdiction to entertain disputes between two licensees viz. an inter-state trading licensee and a distribution licensee. Further, the

moment the dispute raised before the Commission involved the above two licensees, the same became a “jurisdictional fact” necessary for exercise of jurisdiction by the said Commission under Section 86(1)(f) of the Electricity Act, 2003.

4.4(h) The “adjudicatory fact” before the Respondent Commission was the dispute raised by the petitioner (Appellant herein) against the Respondent No. 2 with respect to the action of the said Respondent in seeking to impose temporary / mutual / unregulated charges on the reduced contract demand maintained by consumers who avail partial open access, which in turn affected the business of the Appellant thereby causing losses. The sole intention of the Respondent No. 2 was to make open access (partial or complete) as an economically unviable option for the end consumers so that the said consumers are forced to remain with the said Respondent and are not enticed to seek their independent source of power, through the Appellant, by availing open access under Section 42(2) of the Electricity Act, 2003. The said adjudicatory fact qua the above dispute was on account of the legal and financial injury suffered by the Appellant herein on account of the illegal acts of the Respondent No. 2.

4.4(i) As per the provisions of Section 42(2) of the Electricity Act, 2003 the Respondent No. 2 is obligated to provide a non-discriminatory open access. In the present case, the ability of the Appellant to supply power to its

consumers under open access was compromised by the aforementioned illegal conditions sought to be imposed by the Respondent No. 2 with the sole intention of killing the open access market thereby affecting not only the legal right of the Appellant to supply power to the end consumers through open access, but also causing financial injury to the Appellant by preventing it to carry on its business. As per the aforementioned provisions, the Respondent No. 2 is mandated to grant a “non-discriminatory” open access in its system to an end-consumer or a trading licensee, as the case may be. However, the aforementioned condition of imposition of temporary / mutual / unregulated charges on the reduced contract demand maintained by consumers who avail partial open access amount to create a discrimination between consumers opting for open access.

The aforementioned action of the Respondent No. 2 was also in violation of Sections 57, 60, 61 and 62 of the Electricity Act, 2003. As per the said provisions, the Respondent No. 2 cannot at all charge consumers a tariff which is not approved by the Respondent Commission under its tariff orders with respect to the contract demand maintained by the said consumers with the said Respondent No. 2. Further, the Respondent Commission was required to analyse if there had been an abuse of dominant position by the Respondent No. 2, as per Sections 57 and 60, by indulging in manipulation of market, and to award compensation. The Respondent

Commission miserably failed to fulfil its functions, in terms of adjudication of the petition filed by the Appellant on merits, and instead shirked from its responsibility by observing that the Appellant should approach the Civil Courts.

4.4(j) A person / entity aggrieved by the actions of another entity is entitled to raise a dispute before a court of competent jurisdiction. It is a settled principle of law that a party can raise a dispute on account of a legal injury.

In this context, reference may be made to the following judgements:

- a. This Tribunal in the case of ***Reliance Industries Limited v. Petroleum & Natural Gas Regulatory Board***, reported in ***2014 SCC OnLine APTEL 5 : [2014] APTEL 7***, has held as follows:

“12. It is held by the Hon'ble Supreme Court in the Gajendra Haldia v. GRIDCO, (2008) 13 SCC 414 that a “person aggrieved” must be a person who suffered legal grievance or legal injury or one who has been unjustly deprived and denied of something which he would have been entitled to obtain in usual course.

14. The scope and ambit of the word “person aggrieved” would include any person whose interest may be prejudicially affected by what is taking place. In other words, it includes any person who has a genuine grievance against something which has been done which affects him, determines or threatens with injury of his

rights and obligation which has been created under a statute.

15. *The following are the other decisions:*

(a) *Northern Plastics Ltd. v. Hindustan Photo Films Mfg. Co Ltd., (1997) 4 SCC 452;*

(b) *United India Insurance Company Ltd v. Shila Datta, (2011) 10 SCC 509;*

(c) *Bar Council of Maharashtra v. M.B.V. Dabholkar, (1975) 2 SCC 702;*

(d) *JasbhaiMotibhai Desai v. Roshan Kumar, Haji Bashir Ahmed, (1976) 1 SCC 671;*

(e) *Thammanna v. K Veera Reddy reported in (1980) 4 SCC 62;*

(f) *SP Gupta v. Union of India, 1981 Supp SCC 87;*

(g) *Infosys Technologies Limited v. Jupiter Inforsys Limited, (2011) 1 SCC 125;*

(h) *Kanwar Singh Saini v. High Court of Delhi, (2012) 4 SCC 307;*

16. *The principles regarding the aspects of the person aggrieved and his locus-standi have been laid down by the Hon'ble Supreme Court as referred to above are as follows:*

(a) *The meaning of the term “person aggrieved” will have to be ascertained with reference to the purpose and the provisions of the statute.*

(b) *A person will be held to be aggrieved by a decision if the decision is materially adverse to him.*

(c) *The term “person aggrieved” are of wide import. It should not be subject to a restricted interpretation of possession or denial of legal rights. The test is whether the words “person aggrieved” includes “a person who has a genuine grievance because an order has been passed which prejudicially affects his interests”.*

(d) *In order to have locus-standi to invoke the extraordinary jurisdiction under the Article 226, an applicant should ordinarily be one who has a personal or individual right in the subject matter of the application. In other words, infringement of some legal right or prejudice to some legal interest inhering in the applicant is necessary to give him locus-standi in the matter.*

(e) *In exceptional cases even a stranger or a person who was not a party to the proceedings before the authority but has a substantial and genuine interest in the subject matter of the proceedings will be covered by this Rule.*

(f) *Normally, a person aggrieved, must be a man who has suffered legal grievance, a man against whom a*

decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something or wrongfully affected his title to something.

(g) To be an aggrieved person, he must be one whose interest is affected in some possible way. It must not be a fanciful suggestion of grievance but a likelihood of some injury or damage to the Applicant may make a test of locus standi.

(h) In order to earn a locus standi as a “person aggrieved”, other than the arraigned party before the adjudicating authority, it must be shown that such a person aggrieved being third party has a direct legal interest in the goods involved in the adjudication process.

(i) The expression “any person aggrieved” will have to be interpreted in the context in which it appears, having due regard to the provisions of the act and scheme. Any person aggrieved, is a person whose legal rights have been affected, injured or damaged in a legal sense or who has suffered a legal grievance. The person is entitled to file an Appeal.

(j) It is one of the fundamental rules of our constitutional set-up that every citizen is protected against exercise of arbitrary authority by the statute. If there is power to decide and determine to the prejudice of a person, the duty to act judicially is implicit in the

exercise of such powers. In those cases, the rule of natural justice operates. This warrants the hearing of the party who is likely to get prejudiced of the order passed by the adjudicating authority.”

- b. The Hon’ble Supreme Court in the case of ***AyaaubkhanNoorkhan Pathan v. State of Maharashtra***, reported in (2013) 4 SCC 465, has held as follows:

“Person aggrieved

9. *It is a settled legal proposition that a stranger cannot be permitted to meddle in any proceeding, unless he satisfies the authority/court, that he falls within the category of aggrieved persons. Only a person who has suffered, or suffers from legal injury can challenge the act/action/order, etc. in a court of law. The legal right that can be enforced must ordinarily be the right of the appellant himself, who complains of infraction of such right and approaches the Court for relief as regards the same. [Vide State of Orissa v. Madan Gopal Rungta [AIR 1952 SC 12] ,Saghir Ahmad v. State of U.P. [AIR 1954 SC 728] , Calcutta Gas Co. (Proprietary) Ltd. v. State of W.B. [AIR 1962 SC 1044] , Rajendra Singh v. State of M.P. [(1996) 5 SCC 460 : AIR 1996 SC 2736] and Tamilnad Mercantile Bank Shareholders Welfare Assn. (2) v. S.C. Sekar [(2009) 2 SCC 784] .]*

10. *A “legal right”, means an entitlement arising out of legal rules. Thus, it may be defined as an advantage,*

or a benefit conferred upon a person by the rule of law. The expression, “person aggrieved” does not include a person who suffers from a psychological or an imaginary injury; a person aggrieved must, therefore, necessarily be one whose right or interest has been adversely affected or jeopardised. (Vide Shanti Kumar R. Canji v. Home Insurance Co. of New York [(1974) 2 SCC 387 : AIR 1974 SC 1719] and State of Rajasthan v. Union of India [(1977) 3 SCC 592 : AIR 1977 SC 1361].)

4.5 RELIEF SOUGHT

4.5(a) From the aforementioned submissions, the impugned order is wrong on account of the following:

- a. On account of the existence of the “jurisdictional fact” as per the provisions of Section 86(1)(f), the Respondent Commission is the only adjudicatory body which can adjudicate upon disputes raised between two licensees, viz. the Appellant (trading licensee) and the Respondent No. 2 (distribution licensee);
- b. As per Section 86(1)(f), the Respondent Commission had to decide the “adjudicatory fact” qua the dispute, as detailed in the present note, raised by the Appellant against the Respondent No. 2;
- c. The Appellant had the locus to initiate proceedings before the Respondent Commission against the Respondent No. 2 licensee on account of the legal injury qua denial of a non-discriminatory open access as guaranteed under Section 42(2) of the Electricity Act, 2003; and

d. The Appellant cannot at all be directed to approach a Civil Court for claiming damages / compensation from the Respondent No. 2 on account of the applicability of Section 86(1)(f).

4.5(b) The present case has to be remanded back to the Respondent Commission for a de-novo hearing qua the dispute raised by the Appellant and for the purposes of awarding of damages / compensation by the Respondent No. 2. The grievance of the Appellant is independent of the grievance of the Respondent No. 3 with the Respondent No. 2, and even if the said Respondents have settled their disputes, the grievance of the Appellant, qua business loss on account of manipulation of market and abuse of dominant position by the Respondent No. 2, was required to have been adjudicated by the Respondent Commission, and it cannot be directed that the Appellant should approach a Civil Court for redressal of its grievances in the light of Section 86(1)(f) of the Electricity Act, 2003.

4.5(c) The impugned order ought to be set aside and none of the observations can be sustained qua the Appellant as there has not been a proper application of mind on account of the observation of the Respondent Commission that the petition filed by the Appellant was not maintainable. There cannot at all be an adjudication on merits once it has been held that the petition is not maintainable. As such, in the light of the submissions made herein above,

the petition filed by the Appellant before the Respondent Commission was maintainable and the matter may be remitted back for fresh consideration.

5. Submissions of learned counsel, Mr. Amit Kapur, appearing for Respondent No. 2 – Tata Power Company Limited are as follows:-

5.1 On 02.02.2015, Global Energy Private Limited (“GEPL” / “Appellant”) has filed the present Appeal before this Tribunal, challenging Maharashtra Electricity Regulatory Commission’s (“Maharashtra Commission”) Order dated 19.12.2014 (“Impugned Order”) in Case No.148 of 2014. GEPL has primarily prayed for the following reliefs:-

“(i) To set aside the impugned order dated 19.12.2014 passed by the Hon'ble Maharashtra Electricity Regulatory Commission in Petition No. 148 of 2014, and to further:

(a) Hold that the Appellant had the locus to initiate and maintain the proceedings in Case No. 148 of 2014 before the Respondent Commission;

(b) Hold that the Respondent Commission had the necessary jurisdiction to adjudicate Case No. 148 of 2014;

(c) Quash/ set aside the letters dated 28.06.2013 (Annexure A - 7), 24.07.2013 (Annexure A - 9) and 21.01.2014 (Annexure A - 15) to the extent the same pertain to charging of temporary / mutual / unregulated tariff and penal demand charges from the retained/

*remaining contract demand of a partial Open Access consumer
(Respondent No. 3)*

- (d) Declare and direct that the Respondent No. 2 cannot charge temporary / mutual / unregulated tariff and penal demand charges from consumers, who opt for a part load Open Access, for the quantum of retained / remaining contract demand with the said Respondent;*
- (e) Declare and direct that the Respondent No. 2 has to **charge Tariff as determined by the Respondent No. 1 Commission** for supply of electricity to consumers for the quantum of retained/ remaining contract demand in the event of a partial load Open Access;*
- (f) Direct that the Respondent No. 2 has to grant Open Access, for the full or partial load, strictly in accordance with the provisions of the Electricity Act, 2003 read with the relevant open access regulations;*
- (g) Hold / declare that the **Respondent No. 2 has abused its dominant position** in charging temporary / mutual / unregulated tariff and penal demand charges from consumers, who opt for a part load Open Access, for the quantum of retained; remaining contract demand the said Respondent;*
- (h) Declare that **the Appellant has suffered a loss; damage of Rs 92,40,848/-** on account of loss of business due to the actions of the*

Respondent No. 2 in charging temporary; mutual / unregulated tariff and penal demand charges from consumers, who opt for a part load Open Access, for the quantum of retained contract demand with the said Respondent;

- (i) Hold / declare that the actions of the Respondent No. 2 in charging temporary / mutual / unregulated tariff and penal demand charges from consumers, who opt for a part load Open Access, for the quantum of retained / remaining contract demand with the said Respondent, attract Sections 142 / 146 of the Electricity Act, 2003;*
- (j) Direct the Respondent Commission 2 to initiate action against the Respondent No. 2 / officials of the Respondent No. 2 as per the provisions of Sections 142 / 146 of the Electricity Act, 2003;*
- (k) Issue appropriate directions, under Section 121, upon the Respondent Commission to discharge its functions, as detailed in the present appeal, in strict adherence to the provisions of the law and the mandate of Electricity Act, 2003; and...”*

5.2 Several consumers of Tata Power have availed Open Access for procuring power from Global Energy Private Limited (GEPL) since FY 2012-13 onwards. On 30.07.2014, Petition No. 148 of 2014 was filed by GEPL. The Petition filed by GEPL before Maharashtra Commission regarding charges leviable for supply of electricity by Tata Power to TCL for a premise

situated at Bandra Kurla Complex (“**BKC**”).

- 5.3 On 17.11.2016, GEPL filed its Written Note confining the scope of the present Appeal to the issue of jurisdiction. Accordingly, Tata Power is filing the present note limited to the extent of jurisdiction as mentioned above.
- 5.4 On 11.07.2018, the present Appeal was listed for hearing before this Tribunal. On the said date, Counsel for GEPL, while making submissions, limited the scope of GEPL’s Appeal only on the issue of Maharashtra Commission’s jurisdiction to adjudicate the alleged dispute between GEPL and Tata Power, and GEPL’s locus to initiate the impugned proceedings.
- 5.5 It is an admitted position of law that Section 86(1)(f) of the Electricity Act vests jurisdiction with the State Commission to adjudicate a dispute between a trading licensee and a distribution licensee. However, whether or not the State Commission’s adjudicatory powers under Section 86(1)(f) can be exercised in a particular matter, has to be gleaned from the facts of the said case. Therefore, in the present case, it is pertinent to note certain crucial facts before analysing if at all there is any dispute per se between GEPL and Tata Power.
- 5.6 The relevant crucial facts necessary for analysing whether or not there is a dispute between GEPL and Tata Power-D is provided hereunder:-

Date	Particulars
05.09.2012, 19.08.2013	Various applications were made by TCL /

Date	Particulars
	GEPL to Tata Power for seeking partial Open Access on its distribution network to enable it to seek supply of electricity for various injecting entities for its premises situated at BKC.
28.06.2013, 24.07.2013 &21.01.2014	Tata Power issued a letter to TCL, amongst others, stating that, as per its understanding of the regulatory regime, regulated tariff is not applicable for the contract demand retained with the distribution licensee after seeking partial open access and the tariff for the same has to be mutually decided between the parties.
22.04.2014	Tata Power sent a new proposal to TCL wherein the tariff for the reduced contract demand was proposed to be equal to the regulated tariff applicable, as determined by Maharashtra Commission.
30.07.2014	GEPL filed a Petition (Case No. 148 of 2014) before Maharashtra Commission under Section 86(1)(f), 86(1)(i), 86(1)(k) read with Sections 142 and 146 of the Electricity Act, challenging Tata Power's act of charging mutually agreed tariff on TCL's reduced contract demand.

Date	Particulars
18.11.2014	GEPL's Petition was heard by Maharashtra Commission when Maharashtra Commission observed that GEPL had failed to demonstrate the legal injury caused to it due to the mutually agreed tariff between Tata Power and TCL for the reduced contract demand on account of grant of Open Access by Tata Power to TCL. Maharashtra Commission directed GEPL to file additional submissions to demonstrate how it was an aggrieved party. Maharashtra Commission directed Tata Power to file its Reply to the Petition and GEPL to file its Rejoinder to the Reply of Tata Power.
20.11.2014	Tata Power released credit notes to TCL for Rs.46,55,972/-, being the difference between mutually agreed tariff and regulated tariff for the reduced contract demand for the period from 01.10.2013 to 28.02.2014.
21.11.2014	GEPL filed its Additional Submissions where it admitted/ acknowledged that the Petition was filed at the behest of TCL.
25.11.2014	TCL sent a letter acknowledging the receipt of the credit notes being the

Date	Particulars
	difference between mutually agreed tariff and the regulate tariff with regard to the reduced contract demand. TCL confirmed that there was no dispute between Tata Power and TCL.
19.12.2014	<p>Impugned Order was passed by Maharashtra Commission, holding that:-</p> <p>(a) Conditionalities of tariff and charges imposed by Tata Power on its consumer, is a matter between TCL and Tata Power, not between Tata Power and GEPL.</p> <p>(b) Merely because TCL has chosen not to appear or participate in the proceedings, would not give GEPL locus on its behalf. TCL alone is the consumer and it has chosen not to raise a grievance or dispute.</p> <p>(c) GEPL's petition is not maintainable.</p> <p>(d) Tata Power is directed to submit to Maharashtra Commission, details of all applications seeking Open Access from April 2013 to 24.06.2014, including the time taken for their disposal, the Tariff and various charges levied, any refunds made with interest thereon and any conditionalities imposed. Maharashtra</p>

Date	Particulars
	<p>Commission would decide thereafter whether to initiate separate formal proceedings in this regard.</p> <p>(e)Tata Power has also refunded the differential amount to TCL.</p>
16.01.2015	<p>In compliance of the directions in the Impugned Order, Tata Power filed the relevant information with Maharashtra Commission. A copy of the relevant information submitted by Tata Power is available on the website of Maharashtra Commission. Maharashtra Commission was satisfied with information provided by Tata Power and no further information or separate proceedings have been initiated by Maharashtra Commission and/ or any other consumer.</p>

(Re: Submissions of Tata Power qua locus standi of GEPL and Jurisdiction of Maharashtra Commission)

5.7 GEPL had filed Case No. 148 of 2014 (“**Petition**”) before Maharashtra Commission to adjudicate upon the alleged dispute between GEPL (a Trading Licensee) and Tata Power (a Distribution Licensee), which had arisen on account of Tata Power’s *conduct of charging mutually agreed tariff to TCL (a consumer) on its reduced contract demand*. TCL had been granted partial open access by Tata Power. It is noteworthy that, GEPL is a

trading licensee which procures power from various generators to supply power to TCL and other Open Access consumers. In the present case, GEPL is supplying power procured from various generating companies to TCL by seeking Open Access on Tata Power's distribution network. TCL is a consumer located in Tata Power's area of supply and is connected to Tata Power's distribution network. It is pertinent to note that, GEPL is not a consumer of Tata Power. GEPL sought the following reliefs in the Petition before Maharashtra Commission, which are reproduced here in below for ease of reference:-

“....

- (a) *quash / set aside the letters dated 07.05.2013, 28.06.2013, 24.07.2013 and 21.01.2014 to the extent the same pertain to charging of temporary charges and penal demand charges from the sanctioned reduced contract demand of a partial open access consumer (Respondent No. 2);*
- (b) *hold and declare that the Respondent No. 1 cannot charge temporary tariff and penal demand charges from consumers, who opt for a part load open access, for the quantum of reduced contract demand in the event of a partial open access;*
- (c) *hold and declare that the Respondent No. 1 has to charge tariff as determined by this Hon'ble Commission for supply of electricity to consumers for the quantum of reduced contract*

demand in the event of a partial load open access;

- (d) *hold and declare that the Respondent No. 1 has to grant open access, for the full or partial load, strictly in accordance with the provisions of the Electricity Act, 2003 and the MERC (Distribution Open Access) Regulations, 2005;*
- (e) *hold and declare that the Respondent No. 1 has abused its dominant position in charging temporary tariff and penal demand charges from consumers, who opt for a part load open access, for the quantum of reduced contract demand;*
- (f) *direct the Respondent No. 1 to **refund the amount of Rs. 92,40,848 along with interest recovered under temporary charges and penal demand charges in the present case for the quantum of reduced contract demand of the Respondent No. 2;***
- (g) *hold and declare that the **Petitioner has suffered a loss / damages of Rs. 15 lacs on account of loss of business due to the actions of the Respondent No.1 in charging temporary tariff and penal demand charges from consumers, who opt for a part load open access, for the quantum of reduced contract demand in the event of in the event of partial open access;***
- (h) *hold and declare that the actions of the Respondent No. 1*

in charging temporary tariff and penal demand charges from consumers, who opt for a part load open access, for the quantum of reduced contract demand in the event of a partial open access, have violated Sections 142 / 146 of the Electricity Act, 2003;

- (h) direct the Respondent No. 1 to pay to the Petitioner a compensation, in terms of Section 60 of the Electricity Act 2003 as determined by this Hon'ble Commission on account of the abuse of dominant position by the said Respondent;*
- (i) direct the Respondent No. 1 to pay to the Petitioner loss / damages suffered on account of the delay caused in the grant of NOC to the Respondent No. 2 for partial load under open access;*
- (j) issue appropriate directions under Sections 142 and 146 against the Respondent No. 1, and its officials, for violating the provisions of the Electricity Act 2003, and the regulations framed thereunder, for levying temporary charges and penal demand charges to consumers for the quantum of reduced contract demand, when such consumers opt for part load open access;*
- (k) pass such or further orders as this Hon'ble Commission may*

deem just and proper in the circumstances of the case.”

- 5.8 During the impugned proceedings, GEPL had failed to show the cause of action for filing of the Petition. As is evident from the factual matrix set out in the Table above, GEPL’s cause of action, if any, related to Tata Power charging mutually agreed/ unregulated tariff on the reduced contract demand of TCL (i.e. Tata Power’s consumer). However, on 22.04.2014, Tata Power had revised its position about charging mutually agreed/ unregulated tariff and had issued a fresh / new proposal to GEPL wherein Tata Power had proposed to charge regulated tariff for TCL’s reduced contract demand. Meaning thereby that, on the date of filing of the Petition before Maharashtra Commission (i.e. 30.07.2014), there was no cause of action for GEPL and/ or TCL to claim a dispute and initiate the present lis. It is submitted that there was no demonstrable dispute between GEPL and Tata Power that would warrant the present lis. GEPL has failed to show any claim or basis for filing of the present lis and the losses / damages claimed by it, for a transaction that pertained to conditionalities of tariff between Tata Power (a distribution licensee) and TCL its consumer.
- 5.9 GEPL had filed the Petition seeking the aforementioned reliefs on 30.07.2014 and Maharashtra Commission has passed the Impugned Order on 19.12.2014. However, as is evident from the factual matrix set out in the Table above:-

- (a) Well before GEPL filed the Petition, on 22.04.2014, Tata Power had revised the tariff and terms as per regulated tariff applicable, as determined by Maharashtra Commission.
- (b) During the pendency of the Petition:-
 - (i) On 20.11.2014, Tata Power, pursuant to sending its revised proposal to TCL, released credit notes aggregating Rs. 46,55,972/-, being the difference between the mutually agreed tariff and the regulated tariff for the reduced contract demand for the period from 01.10.2013 to 28.02.2014.
 - (ii) On 25.11.2014, TCL issued a letter to Tata Power acknowledging receipt of the credit notes stating that no dispute exists between TCL and Tata Power.

5.10 Without prejudice to the above, even if it is assumed, without admitting, that GEPL had a valid cause of action to initiate the present lis, during the pendency of the Petition, GEPL's prayers had been rendered infructuous. The reliefs sought by GEPL before the Maharashtra Commission pertained to the mutually agreed / unregulated tariff sought to be charged by Tata Power on TCL. However, once Tata Power revised its position about charging mutually agreed / unregulated tariff and refunded the differential amount (by way of credit notes) between the mutually agreed / unregulated tariff and the regulated tariff to TCL, GEPL's Petition had been rendered

infructuous.

5.11 It is in this context that the Maharashtra Commission has passed the Impugned Order, holding that if at all GEPL has a grievance against Tata Power, then the same should be agitated before a Civil Court. This is further evidenced by the fact that in the Impugned Order, Maharashtra Commission has noted the fact that Tata Power had paid the differential amount (between mutually agreed tariff and regulated tariff) to TCL. Hence, Maharashtra Commission rightly understood that there was no demonstrable dispute between Tata Power and GEPL that would require the Maharashtra Commission to exercise its adjudicatory powers under Section 86(1)(f) of the Electricity Act. It is submitted that, in the context of the facts of the present case (as set out in the Table above), Maharashtra Commission could not have passed any other order.

5.12 The present lis is nothing but an abuse of process of the court and amounts to vexatious litigation by GEPL. It can be gleaned from the records that the present lis amounts to *proxy litigation* initiated by GEPL at the behest of TCL. In this regard, it is pertinent to note that:-

- (a) On 18.11.2014, GEPL's Petition was listed before Maharashtra Commission. Maharashtra Commission had pointed out during the hearing that GEPL has failed to demonstrate any legal injury caused to it on account of mutually agreed tariff being levied by Tata Power

on TCL for the reduced contract demand (Partial Open Access being availed by TCL). As such, on 18.11.2014, Maharashtra Commission gave GEPL an opportunity to file its additional submissions to demonstrate how it was an aggrieved person.

- (b) Pursuant to Maharashtra Commission's directions in its Order dated 18.11.2014, GEPL filed its Affidavit dated 21.11.2014. In the said Affidavit, GEPL admitted that the Petition was filed on behalf of/ at the behest of TCL, based on the email exchanged between GEPL and TCL. The relevant part of the said Affidavit dated 21.11.2014 is reproduced below for ease of reference:-

“10. The Petitioner further submits that it is only on the instance of the Respondent No.2 who was bearing continuous losses due to the arbitrary approach of Respondent No.1 that the present issue was raised by the Petitioner before this Hon'ble Commission.

- (c) On a perusal of the e-mail exchange between GEPL and TCL, it is evident that GEPL has in fact *induced TCL to permit it to initiate the present lis*, on the pretext of waiving lawyers' fee etc.
- (d) The actual intent of extracting monies is evident from prayer (h) sought before this Tribunal at page 49 of the GEPL's Appeal and prayers (f) & (g) sought before Maharashtra Commission at page 149 of GEPL's Appeal.

5.13 Evidently, the entire lis has been initiated by GEPL at the behest of, and by inducing, TCL. Meaning thereby that, GEPL itself had no locus to file the present lis. Initiating a litigation at the behest of any other person or on behalf of any other person is not permitted under the Electricity Act. The Electricity Act does not envisage filing of a PIL for adjudication of disputes. This has been confirmed by this Hon'ble Tribunal by its Order dated 20.12.2012 in I.A. No. 392, 393, 394 and 399 of 2012 in DFR No. 1844 of 2012 titled as *Bharat Jhunjhunwala v. Uttar Pradesh Electricity Regulatory Commission*. The relevant part of the said order is extracted below:

“ ...
9. When we sought clarifications on this issue, the Ld. Counsel for the Applicant said that this Appeal has been filed as a Public Interest Litigation. We do not find any provision in the Electricity Act for filing PIL against the orders of the State Commission. In view of above, we are unable to entertain the above IAs and the Appeal. Thus, the Application Nos. 392, 393, 394 and 399 of 2012 in DFR No. 1844 of 2012 are dismissed. Consequently, the Appeal is also rejected...”

5.14 The said Order passed by this Hon'ble Tribunal was confirmed by the Hon'ble Supreme Court in its Order dated 19.08.2013 in in Civil Appeal No. 7303-7304 of 2013 titled as *Bharat Jhunjhunwala v. Uttar Pradesh Electricity Regulatory Commission*. The relevant paragraph of the said

Order is extracted hereinbelow, for ease of reference:-

“...Since the Public Interest Litigation was not maintainable before the U.P. Electricity Regulatory Commission, we find no reason to entertain these appeals, which are, accordingly, dismissed...”

5.15 It is a settled position of law that, filing of proxy litigation for the purpose of achieving private interest(s) cannot be permitted. The said practice tantamount to abuse of process of law and these practices have to be deterred at the threshold itself. In this regard, the following Judgments are noteworthy:-

- (a) *Kalyaneshwari v. Union of India* reported as (2011) 3 SCC 287 (Para 46-48).
- (b) *B. Singh (Dr.) v. Union of India* reported as (2004) 3 SCC 363 (Para 16).

5.16 From the reliefs sought by GEPL in its Petition before Maharashtra Commission, it is evident that GEPL is not a person aggrieved¹ who has suffered any legal harm or injury on account of unregulated/ mutually agreed tariff being levied by Tata Power (distribution licensee) on TCL (consumer) for its reduced contract demand. The dispute, if any, could only be between Tata Power and TCL (the consumer) on account of any unregulated charges being recovered by Tata Power from TCL (as also

¹ With regard to the meaning of the term “person aggrieved”, the following Judgments are noteworthy:-

- (a) *Bar Council of Maharashtra v. M.V. Dabholkar & Others*, : (1975) 2 SCC 702 (Paras 21-25, 27-28).
- (b) *Jasbhai Motibhai Desai v. Roshan Kumar*: (1976) 1 SCC 671 (Paras 47 and 48).
- (c) *BSES Rajdhani Power Ltd. Vs. Delhi ERC & Ors*: [2010 ELR (APTEL) 0404 (paras 10-13)].
- (d) *Pushpendra Surana Vs. Central ERC*: [2014 ELR (APTEL) 820 (para 28)].
- (e) *Gujarat Electricity Regulatory Commission v. Century Rayon*: (2013) ELR (APTEL) 768 (Para 51).
- (f) *GRIDCO Ltd. v. Jindal Stainless Limited* : [2009 ELR (APTEL) 459 (paras 17-19)].

admitted by GEPL in its Affidavit dated 21.11.2014). In such an event TCL would have to be a person aggrieved and not GEPL. It is a settled principle of law that a dispute between a consumer and a distribution licensee cannot be raised before / adjudicated by the State Commission. [**Ref:-Maharashtra ERC v Reliance Energy Limited & Ors. and Maharashtra State Electricity Distribution Co. Ltd. v. Lloyds Steel Industries Limited**, reported as (2007) 8 SCC 381 (paras 13, 33 and 34)]. The consumer, if aggrieved, ought to approach the Consumer Grievance Redressal Forum, in terms of Section 42 of the Electricity Act read with MERC (Distribution Open Access Regulations), 2005 (“**DOA Regulations 2005**”). The relevant extracts of DOA Regulations, 2005 are extracted below for ease of reference:-

“...

18. Dispute

1. Any dispute under these Regulations between a Distribution Licensee and a person availing open access shall be adjudicated upon by the Consumer Grievance Redressal Forum....”

It is pertinent to note that no dispute has been raised by TCL against Tata Power.

5.17 It is a settled principle of law that a remedy is available only if there is a violation of a legal right (*ubi jus ibi remedium*). From the perusal of the facts of the present case, the following is noteworthy:-

- (a) GEPL has challenged the conduct of Tata Power in a transaction between Tata Power (being the distribution licensee) and TCL (being the consumer). As stated above, no legal injury has been caused to GEPL from the said transaction. This is also rightly understood by GEPL, as GEPL in its Petition has sought reliefs on behalf/ in favour of/ beneficial to TCL.
- (b) The charging of mutually agreed tariff by Tata Power, to the extent of reduced contract demand of TCL, has nothing to do with GEPL.
- (c) There is no contractual relationship between Tata Power and GEPL which will give a right to GEPL to initiate proceedings against Tata Power. Consequently, there is no demonstrable legal injury being caused to GEPL by Tata Power's conduct. As such, GEPL is not an '*aggrieved person*'. Tata Power is not concerned/ liable for any alleged indirect losses which may have been incurred by GEPL on account of GEPL's commercial arrangement with TCL.

5.18 In this regard, it is submitted that, even on account of TCL, there exists no cause of action to allege a dispute with Tata Power, since:-

- (a) Tata Power revised its proposal of charging mutually agreed / unregulated tariff, to charging tariff as approved by Maharashtra Commission; and
- (b) Tata Power refunded the differential amount between the mutually

agreed/ unregulated tariff and regulated tariff, by way of credit notes.

- (c) TCL acknowledged that no dispute exists between TCL and Tata Power.

Therefore, the present lis is untenable and an abuse of process of the court.

The present Appeal ought to be dismissed with exemplary costs.

5.19 Without prejudice to the above, it is submitted that the transaction with TCL was a unique / standalone transaction by which partial open access was provided for the first time. The said transaction lasted for a period of five months, i.e. from 01.10.2013 to 28.02.2014. It is submitted that there was no other firm power partial open access granted by Tata Power, wherein mutually agreed tariff was charged by Tata Power from the consumer for reduced contract demand. This is evident from the fact that, in compliance of Maharashtra Commission's directions in the Impugned Order, on 16.01.2015, Tata Power filed the relevant information with Maharashtra Commission. A copy of the relevant information submitted by Tata Power is available on the website of Maharashtra Commission. Maharashtra Commission was satisfied with information provided by Tata Power and no further information or separate proceedings have been initiated by Maharashtra Commission and / or any other consumer.

5.20 Therefore, in view of the above, it is submitted that nothing survives in the present Appeal that would warrant a remand back to Maharashtra

Commission for fresh adjudication.

5.21 In view of the above, it is evident that the provisions of Section 86(1) (f) of the Electricity Act can be relied upon if there is a dispute between the licensees (trader and a distribution licensee in the present case). As demonstrated, there cannot be any dispute / lis between GEPL and Tata Power in the facts of the present case.

In view of the above, the learned counsel, Mr. Amit Kapur appearing for the second respondent, at the outset vehemently submitted that the instant appeal filed by the Appellant is liable to be dismissed at threshold as devoid of merits, confirming the order impugned passed by the first Respondent Commission in the interest of justice and equity.

6. The first Respondent – Maharashtra Electricity Regulatory Commission, and the third Respondent – Tata Communications Limited, served unrepresented.
7. **We heard learned senior counsel appearing for the Appellant and learned counsel appearing for the second Respondent at considerable length of time. We have gone through carefully the written submissions filed by the Appellant and the second Respondent through their counsel and also taken into consideration the relevant material on records available in file. On the basis of the pleadings available, the issues emerged in the instant appeal for our consideration are as follows:**

7.1 **Issue No.1**

Whether it was correct on the part of the Respondent Commission in holding that it had no jurisdiction to adjudicate the case vide Petition No. 148 of 2014 with the observation that the Appellant ought to approach a Civil Court for adjudication of disputes despite the fact that the dispute was between two licensees?

7.2 **Issue No.2**

Whether it was correct on the part of the Respondent Commission in holding that the Appellant had no locus to initiate and maintain the case vide Petition No. 148 of 2014 despite the fact that a legal and financial loss was premised to be inflicted on the Appellant?

7.3 **Issue No.3**

Whether Respondent No. 2, the distribution licensee, had violated the intent of the Electricity Act, 2003 by denying non-discriminatory open access and instead, charging temporary / mutual / unregulated tariff from consumer?

8. **OUR FINDINGS & ANALYSIS :**

8.1 **Issue No.1**

8.1(a) The learned senior counsel appearing for the Appellant has submitted that the entire issue in the present appeal relates to the fact that the Respondent Commission in the impugned order had erroneously held that the Petition filed by the Appellant was not maintainable and that for adjudication of any dispute between the Appellant which is a trading licensee, and the

Respondent No. 2 which is a distribution licensee, the same can only be done by the Civil Court and not by the Respondent Commission.

8.1(b) In the context of the issue involved, the counsel further relied on the Section 86(1)(f) of the Electricity Act, 2003, which is set out below:

“... The State Commission shall discharge the following functions, namely:-

(f) adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration”

It would thus, appear from the above that a State Electricity Regulatory Commission is empowered to adjudicate disputes between licensees and generating companies, and inter-se between the licensees and generating companies, as in the present case where the Appellant is an interstate trading licensee and Respondent No. 2 is a distribution licensee.

8.1(c) The learned senior counsel appearing for the appellant to substantiate his submissions, placed reliance on several judgments of the Hon’ble Supreme Court and this Tribunal which have, inter alia, held that the State Commission has been empowered by the Act to adjudicate all types of disputes between the licensees. The Hon’ble Supreme Court in the case of *Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd.* reported in (2008) 4 SCC 75, has held that –

“60. After 10-6-2003 there can be no adjudication of dispute between licensees and generating companies by

anyone other than the State Commission or the arbitrator (or arbitrators) nominated by it. We further clarify that all disputes, and not merely those pertaining to matters referred to in Clauses (a) to (e) and (g) to (k) in Section 86(1), between the licensee and generating companies can only be resolved by the Commission or an arbitrator appointed by it. This is because there is no restriction in Section 86(1)(f) about the nature of the dispute.”

8.1(d) Further, the learned senior counsel cited the judgment of this Tribunal in the case of ***PTC India Limited v. Gujarat Electricity Regulatory Commission & Anr.***, reported in ***2012 SCC OnLine APTEL 161: [2012] APTEL 200***, which also related to a dispute between an inter-state trading licensee (PTC India Ltd.) and a distribution licensee (GUVNL), which has held that –

“61. The scheme of Electricity Act, 2003 would clearly show that the provisions of 86(1)(f) would be applicable even to the disputes between two licensees. In other words, on a plain reading of the provision, it is noticed that the expressions “licensees” (plural) generating companies(plural) have been used and this would show that the provisions would be applicable in the event of disputes not only between (a) generating company and licensee but also (b) between two generating companies and (c) between two licensees. There is no rationale whatsoever to limit or restrict the application of section 86(1)(f) of the Act, only to those mentioned in clause (a) as referred to above as contended by the Appellant.

Similarly, there is no rationale whatsoever to exclude the dispute between two licensees from the adjudication under section 86(1)(f) of Electricity Act, 2003.

.....

85. In view of the above, we find that State Commission has got jurisdiction to adjudicate upon the disputes not only between the licensees and generating companies but also between two licensees.”

8.1(e) In view of the well settled law laid down by the apex court and this Tribunal, the counsel contended that the Respondent Commission has the jurisdiction to entertain the dispute between two licensees viz. an interstate trading licensee (GEPL) and a distribution licensee (TPCL). It was accordingly alleged by the Appellant that the Respondent Commission has erred in holding that it had no jurisdiction to adjudicate the case and wrongly observed in the impugned order that the Appellant are to approach a Civil Court for adjudication of the dispute between the party contrary to the settled principal of law and case made out by the Appellant.

8.1(f) **Per contra**, the learned counsel for the Respondent No. 2 (TPCL) contended that Section 86(1)(f) of the Act vests jurisdiction with the State Commission to adjudicate a dispute between licensees, however, whether or not the State Commission can exercise its powers in a particular matter has to be gleaned from the facts of the referred case. In fact, GEPL filed the case No. 148 of 2014 before the State Commission to adjudicate upon the

alleged disputes between it and TPCL which had primarily arisen on account of TPCL's conduct of charging mutually agreed tariff to TCL (a consumer) on its reduced contract demand. GEPL, a trading licensee procures power from various generators to supply power to TCL and other open access consumers. While TCL is a consumer located in TPCL's area of supply and connected with TPCL's distribution network, GEPL is not a consumer of TPCL.

8.1(g) The learned counsel vehemently submitted that there was no cause of action for GEPL and / or TCL to claim a dispute and initiate the present appeal in view of the fact that there were no demonstrable dispute between GEPL and TPCL. The counsel pointed out that GEPL has failed to show any claim or basis for filing of the present appeal and the losses / damages claimed by it for a transaction that pertained to conditionalities of tariff between TPCL (a distribution licensee) and TCL (its consumer).

8.1(h) The counsel further brought out that well before GEPL filed the petition in Maharashtra Commission, TPCL had already revised the tariff and terms as per the regulated tariff applicable for TCL and settled all the dues related to the difference between the mutually agreed tariff and the regulated tariff for the period from 01.10.2013 to 28.02.2014. In view of these facts, the petition of GEPL before the Commission is liable to be dismissed as having become infructuous.

8.1(i) The counsel highlighted that the Commission has rightly understood that there was no demonstrable dispute between TPCL and GEPL that would require it to exercise its adjudicatory powers under Section 86(1)(f) of the Electricity Act, and passed a right order in the matter. The Commission further held that if at all GEPL has a grievance against TPCL, then the same should be agitated before a jurisdictional Civil Court.

8.1(j) **Our findings:**

We have analysed the rival contentions of the learned senior counsel appearing for the Appellant and the learned counsel appearing for the Respondent No. 2 and also, took note of cited judgments of the Hon'ble Supreme Court and this Tribunal. It is a settled principle of law that after enactment of the Electricity Act, 2003 which came into force with effect from 10-06-2003, there can be no adjudication of disputes between licensees by anyone other than the State Commission or the arbitrator nominated by it. This Tribunal also illustrated the adjudicatory powers of the State Commission in its various judgments and has held that the State Commission has got jurisdiction to adjudicate upon the disputes not only between the licensees and generating companies but also between two licensees. **We therefore, hold that the Respondent Commission ought to have adjudicated the case relating to the referred dispute between a trading licensee and a distribution licensee on merit and decided the case as per the well settled principle of law. With substantial**

adjudicatory powers under the Act, it ought not to have held that the Appellant should approach a Civil Court for adjudication of disputes.

8.2 Issue No.2

8.2(a) The learned senior counsel appearing for the Appellant submitted that the impugned order is erroneous due to the fact that the Respondent Commission has wrongly observed that the Appellant had no locus to initiate proceedings against the Respondent No. 2 (TPCL). He further contended that the Appellant itself had suffered a legal and financial loss on account of manipulation of the market by the Respondent No. 2 by seeking to impose temporary / mutual / unregulated tariff on an open access consumer (Respondent No. 3 – TCL) for the power drawn against the reduced contract demand.

8.2(b) The learned counsel further pointed out that the actions of Respondent No. 2 for imposition of unregulated tariff has created a wrong perception in the market, thereby killing the open access market and preventing the Appellant from trading in electricity. As per Section 42(2) of the Electricity Act, the Respondent No. 2 is required to grant a non-discriminatory open access. The counsel emphasized that the Respondent Commission is a creation of the Statute and has to function within the four corners of the said Statute and its jurisdiction to exercise powers depends upon the existence of a jurisdictional fact as envisaged under Section 86(1)(f). As a matter of fact, upon the existence of a jurisdictional fact, a court of first instance /

Regulatory Commission cannot at all dismiss the proceedings by either questioning the locus of the party filing a petition or directing the parties to approach a different forum and instead it may finally allow the petition or dismiss the same based on the merits of the disputes raised in the case in light of the well settled principle of law.

8.2(c) To support his contentions on the jurisdictional fact, the learned senior counsel has cited a number of judgments of the Hon'ble Supreme Court. The counsel highlighted that from the various decisions of the Hon'ble Supreme Court, it is clear that existence of jurisdictional fact is sine qua non for the exercise of power. If the jurisdictional fact exists, the authority can proceed with the case and take an appropriate decision in accordance with law. Accordingly, a person / entity aggrieved by the actions of another entity, is entitled to raise a dispute before a court of competent jurisdiction. It is a settled principle of law that the party can raise a dispute on account of a legal / financial loss.

8.2(d) In support of his contentions, the counsel further cited various judgments of the Hon'ble Supreme Court and this Tribunal. This Tribunal in the case of *Reliance Industries Limited v. Petroleum & Natural Gas Regulatory Board*, reported in *2014 SCC OnLine APTEL 5 : [2014] APTEL 7*, has illustrated the term "person aggrieved" and other expressions relating to locus standi for seeking adjudication before the competent authority.

8.2(e) In view of the well settled law laid down in the judgments cited above, the learned counsel for the Appellant contended that the Appellant is an aggrieved entity and demonstrable legal / financial loss has been caused to it by the arbitrary action of the Respondent No. 2. Therefore, he submitted that the impugned order passed by the first Respondent Commission is liable to be vitiated.

8.2(f) **Per contra**, the learned counsel for Respondent No. 2 submitted that the present appeal is nothing but an abuse of process the Court and amounts to vexatious litigation by GEPL on behalf of TCL. The Maharashtra Electricity Regulatory Commission had pointed out during the hearing that GEPL had failed to demonstrate the legal injury caused to it on account of the mutually agreed tariff being levied by TPCL on TCL for the reduced contract demand. The counsel referred to the Affidavit dated 21-11-2014 filed by GEPL, which among others, envisaged that the petition was filed on behalf of / at the behest of TCL (Respondent No. 3) based on the email exchanged between GEPL and TCL. The counsel pointed out that the contents of the Affidavit and email reveal that GEPL has in fact induced TCL to permit it to initiate the present appeal.

8.2(g) The counsel had further contended that the prayers of the Appellant sought before this Tribunal clearly establish the actual intent of the Appellant which is nothing but the case of extracting money. Accordingly, GEPL had

no locus to file the present appeal initiating a litigation at the behest of another person which tantamounts to filing a PIL.

8.2(h) The learned counsel further relied on the Judgment / Order of this Tribunal dated 20-12-2012 wherein it has been categorically held that there is no provision in the Electricity Act for filing PIL against the orders of the State Commission. The said Order passed by this Tribunal has also been confirmed by the Hon'ble Supreme Court in its Order dated 19-8-2013 in the Civil Appeal No. 7303-7304 of 2013.

8.2(i) **Our findings:**

We have carefully considered the submissions of the learned senior counsel for the Appellant as well as the learned counsel for Respondent No. 2 and also perused various judgments cited by the counsel. The Appellant is a trading licensee as per Section 14 of the Electricity Act and supplies power to consumers under open access. By the alleged actions of the Respondent No. 2, which sought to impose temporary / mutual / unregulated tariff for the reduced contract demand maintained by Respondent No. 3 has resulted into manipulation of the market in a manner which made open access a completely unviable option for the end consumers, thereby forcing the said consumers to remain with the Respondent No. 2 and are not enticed to seek power from other sources including the Appellant. This consequentially affected the business of the Appellant badly who is a trading licensee and

its business is primarily depending on the non-discriminatory open access to be granted by the distribution licensee. **Accordingly, we opine that the Appellant is a bona fide aggrieved entity as per the interpretations of various judgments of the Hon'ble Supreme Court as well as this Tribunal. In view of the legal and financial loss caused to the Appellant, as an aggrieved entity, it has a right to get adjudicated by the Regulatory Commission. Accordingly, we do not find any justification to accept the reasoning given by the first Respondent Commission that the Appellant has no locus standi to initiate the proceedings for redressal of their grievances before the Commission. Hence, we are of the considered view that the order impugned passed by the first Respondent Regulatory Commission is liable to be dismissed at threshold.**

8.3 Issue No. 3

8.3(a) The learned senior counsel appearing for the Appellant submitted that the impugned order is erroneous due to the fact that it has not penalised the Respondent No. 2 which has been imposing temporary / mutual / unregulated charges and other arbitrary charges on consumers opting for a partial open access for the quantum of the retained contract demand. As per the counsel, it tantamounts to an abuse of dominant position, and playing with the market in a manner so as to prevent consumers from availing open access / partial open access and avail power from other sources. As per the

provisions of the Electricity Act, 2003, and the Regulations framed therein, a distribution licensee cannot deny open access to any consumer and also cannot charge any tariff which has not been determined by the Regulatory Commission for an allocated contract demand of a consumer. It is alleged that the Respondent No. 2 abused its monopoly in distribution of electricity so as to suppress the competition in the market by forcing the consumers not to seek open access.

8.3(b) The learned counsel for the Appellant submitted that the Respondent Commission has entirely ignored that the open access is a right of the consumer and not an obligation, and a consumer can choose to avail a part of his energy requirement through open access, and for the remaining part, the said consumer can remain to be a consumer of the area distribution licensee without levy of any unregulated charges. Even Maharashtra Electricity Regulatory Commission (Distribution Open Access) Regulations, 2005 envisages the provision of partial open access under the Regulation 4.2.2.

8.3(c) **Per contra**, the learned counsel for Respondent No. 2 submitted that several consumers of TPCL have availed open access for procuring power from Global Energy Private Limited (GEPL) since Financial Year 2012 onwards. The counsel further indicated that TPCL had already revised tariff and terms as per the regulated tariff applicable, relating to TCL well

before GEPL filed the petition and released Credit Notes aggregating Rs. 46,55,972/- to TCL on 20-11-2014. Further, TCL also issued a letter to TPCL acknowledging receipt of the Credit Notes stating that no dispute exists between TCL and TPCL. The counsel further submitted that it is a settled principle of law that a dispute between a consumer and a distribution licensee cannot be raised before / adjudicated by the State Commission, and the consumer if aggrieved, ought to approach the Consumer Grievance Redressal Forum in terms of Section 42 of the Electricity Act read with MERC (Distribution Open Access Regulations), 2005 (DOA Regulations 2005). The learned counsel has also relied upon various judgments of the Hon'ble Supreme Court, in this regard. Hence, the appeal filed by the Appellant may kindly be dismissed as devoid of merits.

8.3(d) Our findings:

We have evaluated the rival contentions of both the counsel and also glanced at findings of various judgments cited by the counsel relating to this issue. It is pertinent to note from the provisions of Electricity Act 2003 that there has to be a non-discriminatory open access to any consumer and also, tariff chargeable to any consumer should be a regulated one as determined by the relevant Regulations of the Appropriate Commission. The learned counsel for the Respondent submitted that there exists no cause of action to allege a dispute with TPCL even on account of TCL when issues relating to tariff as well as other terms stand settled and also, TCL

acknowledges that no dispute exists between TCL and TPCL. As per the Electricity Act, trading activity has been recognised as a distinct and licensed activity which can be accomplished effectively only with the non-discriminatory open access provided to consumers intending to avail power from the other sources including trading licensee. **We therefore, hold that the charging of any unregulated tariff on its negotiated terms and conditions by any distribution licensee so as to keep its supply business intact by manipulation of the market tantamounts to frustration of the principal objects and reasons of the Electricity Act and in turn defeats the purpose for which the Act has been enacted. Therefore, we are of the considered view that the order impugned passed by the first Respondent Regulatory Commission is liable to be set aside.**

9. **SUMMARY OF OUR FINDINGS :**

In the light of the facts and circumstances of the case and the foregoing deliberations, analysis and findings, we are of the considered view that the issues raised in the instant appeal answered in favour of the Appellant. Further, it is significant to note that the impugned order passed by the first Respondent Regulatory Commission is liable to be set aside. The matter deserves to be remitted back to the first Respondent State Commission for fresh adjudication on merits in accordance with law keeping in view the well settled principles of law laid down by the apex court and this Tribunal in host of judgments as referred above.

ORDER

For the forgoing reasons, as stated above, we are of the considered view that the issues raised in the present appeal have merits. Hence, the instant appeal being Appeal No. 77 of 2015 is allowed and the impugned order dated 19-12-2014 in Petition No. 148 of 2014 passed by the Maharashtra Electricity Regulatory Commission, Respondent No. 1 herein, is hereby set aside.

The matter stands remitted back to the first Respondent State Commission for fresh consideration in accordance with law after affording reasonable opportunity to both the parties and dispose off as expeditiously as possible at any rate within a period of six months from the date of appearance of the parties.

The Appellant and the Respondents are directed to appear before the first Respondent State Commission personally or through their counsel without notice on 27-8-2018 for collecting further date of hearing.

No order as to costs.

Pronounced in the Open Court on this 7th day of August, 2018.

(S.D. Dubey)
Technical Member

(Justice N.K. Patil)
Judicial Member

✓
REPORTABLE / NON-REPORTABLE

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