Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No.132, 133, 139, 144 and 164 of 2011

Dated: 21st December, 2012

Present: HON'BLE MR. JUSTICE M. KARPAGAVINAYAGAM, CHAIRPERSON
HON'BLE MR.V J TALWAR, TECHNICAL MEMBER

Appeal No. 132 of 2011

In the matter of:

Tata Power Company Limited
Bombay House,
24, Homi Modi Street,
Mumbai -400001

....Appellant

Vs

1 Maharashtra Electricity Regulatory Commission
World Trade centre No. 1, 13th floor
Cuffe Parade, Colaba, Mumbai – 400001

2 Reliance Infrastructure Limited,
Reliance Energy centre,
Santa Cruz (East), Mumbai 400055

3 Prayas (Energy Group)
Amrita Clinic, Athvale Corner
Deccan Gymkhana, Carve Road,
Pune – 411004

4 Mumbai Grahak Panchayat
Sant Dynaneshwar Marg
Vile Parle (West), Mumbai – 400056

5 The Vidarbha Industries Association,
1st Floor, Udyog Bhawan
Civil Lines, Nagpur – 440001

6 Thane Belapur Industries Association
Rabale Village, Post Ghansoli
Plot P -14, MIDC, Navi Mumbai - 400701

....Respondent(s)

Counsel for the Appellant : Mr. Jai Deep Gupta Sr. Adv
Mr Sitesh Mukherjee
Mr.Avijeet Kumar Lala
Ms. Anusha Nagarajan

Counsel for the Respondent(s): Mr. Buddy Ranganadhan
Ms Richa Bhardwaja for R-1
Mr J J Bhatt SrAdv
Mr.Hasan Murtaza for R-2

Appeal No. 133 of 2011

In the matter of:

Mumbai International Airport Limited
Chhatrapati Shivaji International Airport
1st Floor, Terminal I B, Santa Cruz (East)
Mumbai -400099

.....Appellant

Vs

1 Maharashtra Electricity Regulatory Commission
World Trade centre No. 1, 13th floor
Cuffe Parade, Colaba, Mumbai – 400001

2 Reliance Infrastructure Limited,
Reliance Energy centre,
Santa Cruz (East), Mumbai 400055

3. Tata Power Company Limited
Bombay House,
24, Homi Modi Street,
Mumbai -400001

....Respondent(s)

Counsel for the Appellant : Mr. P S Narasimha Sr. Adv
Ms Kanika Agnihotri
Mr. K Paraneshwar

Counsel for the Respondent(s): Mr. Buddy Ranganadhan
Ms Richa Bhardwaja for R-1
Mr J J Bhatt SrAdv
Mr.Hasan Murtaza for R-2
Mr. Sitesh Mukherjee
Mr. Avijeet Kumar Lala for R-3

Appeal No. 139 of 2011

In the matter of:

Mumbai International Airport Limited
Chhatrapati Shivaji International Airport
1st Floor, Terminal I B, Santa Cruz (East)
Mumbai -400099

.....Appellant

Vs

1 Maharashtra Electricity Regulatory Commission
World Trade centre No. 1, 13th floor
Cuffe Parade, Colaba, Mumbai – 400001

2 Reliance Infrastructure Limited,
Reliance Energy centre,
Santa Cruz (East), Mumbai 400055

3 Tata Power Company Limited
Bombay House,
24, Homi Modi Street,
Mumbai -400001

..... Respondent(s)

Counsel for the Appellant Mr. P S Narasimha Sr. Adv.
Ms.Kanika Agnihotri
Mr. K Paraneshwar

Counsel for the Respondent(s): Mr. Buddy Ranganadhan
Ms Richa Bhardwaja for R-1
Mr J J Bhatt Sr Adv
Mr.Hasan Murtaza for R-2
Mr. Sitesh Mukherjee
Mr. Avijeet Kumar Lala for R-3

Appeal No. 144 of 2011

In the matter of:

Indian Hotel & Restaurant Association
B-2, Wadala Sriram Industrial Estate,
Ground Floor, G D Ambedkar Marg,
Wadala, Mumbai -400031

Shri Vinayak Gopal Joshi
32, Borivali Shivdarshan CHS Ltd.
S.V Road, Borivali (West)
Mumbai – 400092

.....Appellant

Vs

1 Maharashtra Electricity Regulatory Commission
World Trade centre No. 1, 13th floor
Cuffe Parade, Colaba, Mumbai – 400001

2 Reliance Infrastructure Limited,
Reliance Energy centre,
Shanta Cruz (East), Mumbai 400055

.....Respondent(s)

Counsel for the Appellant :Mr. Sanjay Sen
Ms Shikha Ohri
Mr.Anurag Sharma

Counsel for the Respondent(s): Mr. Buddy Ranganadhan
Ms Richa Bhardwaja for R-1
Mr J J Bhatt Sr Adv
Mr.Hasan Murtaza for R-2

Appeal No. 164 of 2011

In the matter of:

Tata Power Company Limited
Bombay House,
24, Homi Modi Street,
Mumbai -400001

....Appellant

Vs

1 Maharashtra Electricity Regulatory Commission
World Trade centre No. 1, 13th floor
Cuffe Parade, Colaba, Mumbai – 400001

2. Reliance Infrastructure Limited,
Reliance Energy centre,
Santa Cruz (East), Mumbai 400055

3. Maharashtra State Electricity Distribution Company Ltd
Prakashgad Bandra (East)
Mumbai-400 051

....Respondent(s)

Counsel for the Appellant : Mr. Jai Deep Gupta Sr. Adv
Mr Sitesh Mukherjee
Mr.Avijeet Kumar Lala

Counsel for the Respondent(s): Mr. Buddy Ranganadhan
Ms Richa Bhardwaja for R-1
Mr J J Bhatt Sr Adv
Mr.Hasan Murtaza for R-2
Mr. Abhishek Mitra
Ms. Puja Priyadarshini for MSEDCL

J U D G M E N T

PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON

"Whether the cross subsidy surcharge is leviable on change over consumers migrating from Reliance Infrastructure Limited, the distribution licensee to Tata Power Company, another distribution licensee to get supply from Tata Power Company by using the

network of the Reliance Infrastructure Limited in the same area of supply?"

The above is the question posed in this batch of Appeals.

1. These appeals have been filed by the different Appellants as against the common order passed by the Maharashtra Electricity Regulatory Commission (State Commission) on 29.7.2011 giving in principle approval to charge cross subsidy surcharge from cross over consumers from Reliance Infrastructure Ltd to Tata Power Company.

2. The Appellants are Tata Power Company (TPC), Mumbai International Airport Private Limited and Indian Hotel Restaurant Associations. The State Commission is the First Respondent. The Reliance Infrastructure Limited (RInfra) is the Second Respondent. Though there are other Respondents in these Appeals, they have not participated in the proceedings in these Appeals.

3. Aggrieved by the impugned order of the State Commission dated 29.7.2011 to the extent that cross subsidy surcharges have been made applicable to change over consumers from RInfra to the TPC, these Appeals have been filed by the TPC and others as against the impugned order.

4. In order to appreciate the circumstances giving rise to the dispute in question, it is necessary to set out the relevant

facts leading to the filing of these Appeals which are as under:

(A) Both the TPC (Appellant) and the RInfra (Respondent) are the distribution licensees, i.e. parallel distribution licensees having common area of supply.

(B) At the relevant time TPC was holding four distribution licenses as under:

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

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

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

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

(C) Consequent upon amalgamation of the Tata Hydro- Electric Power Supply Company Limited

and the Andhra Valley Power Supply Company Limited with Tata Power, the Government of Maharashtra on 12.7.2001 transferred the said 1907 licence, 1919 licence and the 1953 licence to Tata Power Company. Accordingly, the TPC, the Appellant came to hold all the four licenses. On the basis of these licenses, TPC claimed that it was entitled to sell, supply and distribute electricity not only to the other distribution licensees namely RInfra and BEST but also to all the other consumers of the Electricity in its area of supply.

(D) The TPC had a distribution license for distribution of energy in retail in the entire city of Mumbai consisting of both Island city and the suburban area of Mumbai. The RInfra is also a distribution licensee in the suburban area of Mumbai. The license was initially issued to the BSES Limited on 13.5.1930 and was subsequently renamed as Reliance Energy Limited and now as RInfra .

(E) Thus, the part of the TPC licensed area of supply for distribution is common to both TPC and the RInfra.

(F) The genesis of the present dispute dates back to the year 2002. The RInfra filed a Petition in case

No.14 of 2002 before the State Commission u/s 22 of the Electricity Regulatory Commission's Act 1998 complaining of the encroachment by the TPC within its area of supply.

(G) According to the RInfra, the TPC was contravening the terms and conditions of the licenses which had been granted to the TPC as well as against the policy of the Government. In the Petition filed by the RInfra before the State Commission, it was specifically alleged that supply and sale of electricity by the TPC directly to the retail consumers with a maximum demand below 1000 KVA within the RInfra's area of supply was in contravention of the licence terms as well as the provisions of the Indian Electricity Act, 1910 and the Electricity Supply Act, 1948. On the basis of these allegations, the RInfra sought a direction from the State Commission restraining the TPC from supplying and distributing electricity to the consumers situated within its area of supply with maximum demand below 1000 KVA.

(H) This Petition in the Case No.14/2002, was disposed of by the State Commission on 3.7.2003. In this order, the State Commission held that the

conjoint reading of the terms and conditions of the licenses issued to TPC and the applicable laws would show that the TPC, had been given unfettered right to supply electricity directly to all consumers in the area of supply of the RInfra However, the State Commission by the very same order restrained the TPC from offering connection to the new consumers with power requirements below 1000 KVA in its licensed area of supply which is common to both TPC and RInfra .

(I) As against this order dated 3.7.2003, both the parties filed separate Appeals before this Tribunal. The RInfra filed Appeal in Appeal No.31 of 2005 and TPC filed Appeal in Appeal No.43 of 2005.

(J) This Tribunal after hearing the parties by the judgment dated 22.5.2006, disposed of both these Appeals holding that the TPC under its license was entitled to supply energy only in bulk and not in retail to the consumers irrespective of their demand.

(K) On the basis of these findings, the order of the State Commission dated 3.7.2003 was set-aside. Through this judgment, the TPC was directed that it could undertake only bulk supply to distribution

licensees such as RInfra and others under the licenses held by them. This Tribunal further held that since the license granted to TPC did not entitle it to effect retail distribution directly to consumers, it was not necessary to restrain TPC from effecting such distribution. Accordingly, the Appeal filed by the RInfra was allowed and the Appeal by TPC was dismissed.

(L) Against this judgment of the Tribunal, the Appeals were filed by TPC and others before the Hon'ble Supreme Court.

(M) After hearing the parties, the Hon'ble Supreme Court in its judgment dated 8.7.2008 upheld the right of the TPC as a distribution licensee to supply electricity to all the retail consumers in its license area of Mumbai including those requiring a load below 1000 KVA, apart from its entitlement to supply energy to other distribution licensees for their own purposes in bulk within its area of supply.

(N) Thereupon, the TPC filed tariff petition before the State Commission in Petition No.113 of 2008 to determine the tariff for the Financial Year 2009-10. In this Petition, the TPC made proposals to lay

extensive distribution network in nine zones for retail supply to consumers in accordance with the judgment of Hon'ble Supreme Court dated 8.7.2008. Accordingly, on 15.6.2009, the State Commission passed the tariff order for the TPC for the Year 2009-10.

(O) While disposing of this matter by the order dated 15.6.2009, the State Commission suggested to TPC for the alternative option to supply electricity to different consumers in its licensed area of supply by using the network of the RInfra , the other distribution licensee in the same area of supply, so as to optimise on the capital expenditure requirement for development of distribution network by the TPC.

(P) In pursuance of this order, TPC made a request to Rinfra which in turn through its letter dated 30.7.2009 to the TPC, offered no objection certificate to the TPC for use of its distribution system to supply electricity to the consumers in the common license area to discharge all its universal service obligation u/s 43 of the Act.

(Q) On the strength of the judgment of Supreme Court and the letter of no objection sent by Rinfra

referred to above, the TPC on 31.8.2009 filed a Petition in case No.50 of 2009 before the State Commission requesting it to lay down the operating procedure for change over consumers who wanted to receive supply from the TPC while being connected through the distribution network of the RInfra

(R) During the course of these proceedings, the RInfra filed its reply in case No.50 of 2009 and submitted that the proposed mechanism for changeover of consumers requires implementation of open access within its license area/ over distribution network.

(S) The State Commission, after considering the pleas of both the parties, ultimately passed the order dated 15.10.2009 providing for interim arrangement while disposing of the Petition in case No.50 of 2009 and finalising the procedure for change over.

(T) In this order, the State Commission held that the change over consumers shall be the consumers of the TPC from whom it is receiving supply for all purposes under the law. The State Commission further held that the RInfra was allowed to collect

wheeling charges from the TPC for allowing it to use its network and for being the carrier of its electricity. As regards the proposal made by the RInfra for recovery of its regulatory assets and cross subsidy charges from change over consumers, the State Commission held that since the issues like cross subsidy surcharge would require more examination, the same would be considered separately later in the appropriate proceedings. This order has not been challenged by any party.

(U) On 27.4.2010, the RInfra filed a case No.7 of 2010 before the State Commission to specify mechanism for recovery of its past revenue gaps accumulated over the years and loss of cross subsidy from the consumers who had changed over to TPC. On 21.6.2010, TPC filed the reply to the prayer of the RInfra.

(V) This Petition was disposed of by the State Commission by the order dated 10.9.2010 declining to grant the relief sought for by the RInfra . However, the State Commission held that the issues namely Recovery of Revenue Gaps and Loss of Cross Subsidy raised by the RInfra

are essentially tariff design related issues and therefore, the State Commission would deal with those issues in the ARR Tariff Petition to be filed by the RInfra

(W) Accordingly, on 11.10.2010, the RInfra filed a Petition in case No.72 of 2010 for approval of the Truing-Up for the Financial Year 2008-09 and Annual Performance Review of 2009-10 and Tariff Determination for the Year 2010-11. In this tariff petition, the RInfra prayed the State Commission to approve the mechanism for recovery of loss of cross subsidy due to change over of the consumers.

(X) At the same time, i.e. on 25.10.2010, aggrieved over the earlier order passed by the State Commission on 10.9.2010, the RInfra filed the Appeal in Appeal No.200 of 2010 before this Tribunal as against the said order of the State Commission declining to grant the relief for the recovery for the loss of cross subsidy from the change over consumers. This Appeal was admitted.

(Y) During the pendency of the said Appeal before the Tribunal, the State commission on 28.2.2011

admitted the Tariff Petition filed by the RInfra on 11.10.2010.

(Z) On 1.3.2011, this Tribunal, on being noticed that tariff proceedings were pending before the State Commission, disposed of the Appeal No.200 of 2010 directing the State Commission to decide the issue of cross subsidy surcharge in the pending tariff proceedings in case No.72 of 2010, filed by RInfra, subsequent to the framing of the open access regulations.

(AA) Accordingly, the State Commission proceeded to decide the issue of cross subsidy surcharge. Only in these proceedings, the TPC objected to the levy of cross subsidy surcharge.

(BB) After hearing all the parties, the State Commission passed the impugned order in case No.72 of 2010 on 29.7.2011 deciding various issues. In this order, the State Commission held on the issue of cross subsidy surcharge directing that the cross subsidy surcharge be payable by the change over consumers to the RInfra to get supply from TPC for using the network of RInfra .

5. This impugned order dated 29.7.2011 relating to this issue is challenged in these Appeals.

6. Several other issues have been decided by the State Commission in the impugned order against which the separate Appeals have been filed. However, in these Appeals, we are confined only to the challenge made by the Appellants against the impugned order, in so far as it relates to the direction for payment of cross subsidy surcharge by consumers who have changed over from RInfra for getting supply from TPC using the network of RInfra

7. Let us refer to the relevant submissions made by the Appellants challenging the portion of the impugned order deciding the issue of cross subsidy charge. They are as follows:

   (A) The interim arrangement provided by the interim order dated 15.10.2009 passed by the State Commission is not open access arrangement. Open Access as provided in Section 42 applies only to a case where a consumer in a distribution licensee's area of supply obtains supply from another supplier outside the distribution licensee's area of supply using the network of the said distribution licensee within the area of supply. In other words, if a consumer in the area of supply of

a distribution licensee, obtains supply from some other supplier outside the area of distribution licensee, then alone Open Access under Section 42 (3) would apply and not otherwise.

(B) If there are two distribution licensees in one area of supply, use of one of the distribution licensee's network by another distribution licensee within the area of supply cannot be open access. The arrangements in which a parallel licensee using the network of the other parallel licensee shall be construed to be either u/s 23 or under the plenary powers or ancillary powers of the State Commission by which the State Commission can direct one distribution licensee to permit the use of its network by another distribution licensee in the same area of supply, but it does not involve Open Access.

(C) The Act envisages two distinct facets for competition in retail supply to consumers. (1) Open Access to consumers as per Section 42 (3) of the Act and (2) the Multiple/Parallel licensee in the same area of supply.

(D) These two distinct modes of competition in retail supply to consumers are recognised in the

National Electricity Policy. Open Access u/s 42(3) enables a consumer to get supply from a person other than the distribution licensee of his area of supply by using the wires of distribution licensee in whose area of supply, the premises of the consumers are situated.

(E) The presence of multiple licensees in the same area benefits the consumers by providing them with the choice of getting supply of electricity without any financial burden of cross subsidy surcharge. The competition among the distribution licensees helps improving the quality of power and reducing the cost of the supply.

(F) While the Electricity Act, 2003 contemplates that each of the parallel licensees should develop its own distribution system, it creates an enabling environment for parallel licensee to share the network to the extent that the State Commission feels that such a network sharing optimises the cost and reduces the burden on the consumers in the common area.

(G) The 6th proviso to Section 14, Section 42 (1) and Section 43 of the Act cannot be read to prevent the State Commission from directing the sharing

of wires among parallel licensees upon payment of wheeling charges. Such a network sharing arrangement among parallel distribution licensee is not an open access as envisaged u/s 42 (2) and 42 (3) of the Act, 2003.

(H) When there are two parallel licensees operating in the same area of supply, it is open to the State Commission to direct sharing of network. Such an arrangement through the order for sharing of network is not a right vested in distribution licensee. It is for the State Commission to allow sharing of network when it feels that such sharing of network will lead to development of an efficient and economical distribution system and would encourage competition, efficiency and economical use of its resources and good performance. This sharing of network as directed by the State Commission cannot be construed to be open access which alone attracts the cross subsidy surcharge.

(I) There is no mechanism either in the Electricity Act, 2003 or in the provisions of the applicable Regulations under which the State Commission could impose cross subsidy surcharge payable to

the RInfra from consumers who are no longer consumers of the RInfra as they are not receiving any power from the RInfra and instead they are obtaining supply from the TPC.

(J) The State Commission has proceeded on an erroneous basis while holding that the liability to pay cross subsidy surcharge due to the fact that consumers continued to be the consumers of RInfra . This finding is based upon an incorrect application of law.

8. From the above submissions made by the Learned Counsel for the Appellants, it is evident that the stand of the Appellants is that the change over consumers from RInfra to TPC does not come under open access as envisaged u/s 42 of the Act and consequently the change over consumers cannot be subjected to cross subsidy surcharge.

9. Let us now refer to the reply submissions made by the Learned Counsel for the Respondents namely the RInfra as well as the State Commission as under:

(A) The TPC, as admitted by them in their application before the State Commission, agreed to share the network under the open access. Once they agreed for the same, they cannot, now turn

around to say that it is not open access. In fact, there is no other provision under law which permits sharing of network. The sharing can only be done by way of open access as envisaged u/s 42 of the Act. The State Commission relied upon the judgment of Hon'ble Supreme Court which directed the parties to explore the possibilities of sharing to avoid unnecessary expenditure and accordingly directed the TPC to explore possibilities of sharing of network of RInfra. Therefore, the directions given by the State Commission cannot be held to be wrong.

(B) In terms of Section 42, it is the duty of every distribution licensee to establish, maintain and operate its own distribution system. Section 43 of the Act cast a duty upon every distribution licensee to supply on demand and to provide electric plant and electric lines for giving such supply under Universal Service Obligation. Section 42 (3) regarding Open Access would apply only to a parallel distribution licensee since no other distribution licensee outside the area of supply can supply power to any consumer outside its own area of supply.

(C) Appellants have contended that the Act does not mandate the distribution licensee to build its own network as the term “build” is absent in Section 42 of the Act which provides the duties of distribution licensees, in contrast to the duties of the transmission licensee as per Section 40 of the Act and the duties of the Generating Companies as per Section 10 of the Act. This is not tenable as Section 42 provides that it is the duty of the distribution licensee to develop and coordinate efficient distribution network. The term “develop” includes the term “build”.

10. The above submissions of the Learned Counsel for the Respondents would reveal that the stand of the Respondents is that the transactions clearly falls under the purview of the Section 42 of the Act and accordingly, change over consumers are liable to pay cross subsidy surcharge to the RInfra.

11. In the light of the rival contentions, the question framed above would arise for our consideration. The question is as follows;

> “Whether the cross subsidy surcharge as claimed by the parallel licensee, the RInfra , on the strength of the Open Access u/s 42 (3) of the Act is leviable on

change over consumers from RInfra, the parallel licensee to the TPC, the another parallel licensee for getting the supply of power from TPC by using the network of the RInfra , in the same area of supply?"

12. Before dealing with this question, it would be appropriate to refer to the discussion made by the State Commission in the impugned order on the issue of cross subsidy surcharge. The relevant portion of the State Commission's order is reproduced below:

"However, the Commission is of the view that it is necessary to give a ruling on the issue of applicability of the cross-subsidy surcharge, i.e., it is necessary to identify which set of consumers will be liable to pay the cross-subsidy surcharge. Based on the material available to the Commission, submissions of the stakeholders on this issue, and the Commission's analysis of the issues involved, the Commission hereby rules as under in this regard:

a) Had there been no migration of consumers, and all the consumers had continued to be connected to RInfra-D for receiving supply from RInfra-D, this issue would not have arisen, as there would have been no loss of cross-subsidy due to migration. The issue of levy of cross-subsidy surcharge has arisen because of the loss of cross-subsidy on account of migration of consumers from RInfra-D to TPC-D, in terms the Commission's Interim Order dated October 15, 2009 in Case No. 50 of 2009 considering the Judgment of the Hon'ble Supreme Court of India dated July 8, 2008 in Civil Appeal No. 2898 of 2006 with Civil Appeal

No.s 3466 and 3467 of 2006, wherein the Hon'ble Supreme Court ruled as under:

> *"The concept of wheeling has been introduced in the 2003 Act to enable distribution licensees who are yet to install their distribution line to supply electricity directly to retail consumers, subject to payment of surcharge in addition to the charges for wheeling as the State Commission may determine. ..."*

....

Based on the material available to the Commission, submissions of the stakeholders on this issue, and the Commission's analysis of the issues involved, the Commission hereby rules as under in this regard:

...

a) Had there been no migration of consumers, and all the consumers had continued to be connected to RInfra-D for receiving supply from RInfra-D, this issue would not have arisen, as the regulatory assets would have been recovered from all the consumers in a manner similar to that done in the past. The issue of recovery of regulatory asset has arisen because of the migration of certain consumers from RInfra-D to TPC-D, which has been facilitated by the Commission's Interim Order dated October 15, 2009 in Case No. 50 of 2009.

b) The consumers can be classified into the following three groups, viz.,

> *i) Group I: Consumers who continue to be connected to RInfra-D and continue to receive supply from RInfra-D*

ii) Group II: Consumers who continue to be connected to RInfra-D, but have migrated to TPC-D for receiving supply, i.e., consumers who are receiving supply from TPC-D through RInfra-D's wires

iii) Group III: Consumers who are no longer connected to RInfra-D, and have migrated to TPC-D for receiving supply, i.e., consumers who are receiving supply from TPC-D through TPC-D's wires

c) Electricity, being an ongoing business, consumers are also added regularly to the system, while some consumers would move away from the system, either to another license area or another State/country. Under 'business-as-usual' circumstances, regulatory assets as well as the impact of truing up and associated carrying costs as well as Fuel Adjustment Cost (FAC) Charges are recovered only from the consumers who are receiving supply at the time of recovery, and are not recovered on a one-to-one basis from the same set of consumers who were receiving supply at the time of incurring the costs. It may be noted that under 'business-as-usual' circumstances, the consumers who are receiving supply from the licensee are also the same set of consumers who are connected to the distribution network of the licensee.

d) However, the present situation is not a 'business-as-usual' situation, and is one of the few instances in the country where parallel licensees are operating in the same area of supply and consumers have the right to migrate from one licensee to another. The migration has been facilitated by the above-referred Commission's Interim Order dated October 15, 2009, which was based on the Judgment of the Hon'ble Supreme Court of India dated July 8, 2008 in Civil

Appeal No. 2898 of 2006 with Civil Appeal No.s 3466 and 3467 of 2006, wherein the Hon'ble Supreme Court ruled as under:

> *"The concept of wheeling has been introduced in the 2003 Act to enable distribution licensees who are yet to install their distribution line to supply electricity directly to retail consumers, subject to payment of surcharge in addition to the charges for wheeling as the State Commission may determine. ..."*

e) Thus, even though a sizeable number of consumers have 'migrated' from RInfra-D to TPC-D and are now receiving supply from TPC-D, a majority of these consumers are still connected to RInfra-D and hence, continue to be consumers of RInfra-D, as the definition of 'consumer' as per the EA 2003 [Section 2(15)] includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee.

....

d) Given this background, the applicability of the cross-subsidy surcharge for the above Groups and the rationale for the same are discussed below:

> *i) Group I: will not have to pay the cross-subsidy surcharge, since they continue to be consumers of RInfra-D, both for Wires as well as Supply, and are paying the extant cross-subsidy through their tariff*
>
> *ii) Group II: will have to pay the cross-subsidy surcharge, since they continue to be consumers of RInfra-D for Wires, and cross-subsidy surcharge has to be levied, to meet the requirements of current level of cross-subsidy.*

iii) Group III: will not have to pay the cross-subsidy surcharge, since they are no longer consumers of RInfra-D, either for Wires or Supply, and charges can be levied by a licensee only on a 'consumer'.

e) Since the scheme of migration has been formulated in accordance with the above-referred Hon'ble Supreme Court judgment, the cross-subsidy surcharge will be applicable from the date of migration, till such time the respective consumer disconnects from the distribution network of RInfra.

13. **The gist of the findings** given in the impugned order by the State Commission is as follows:

(A) **The consumers in the area of supply in which both the TPC and RInfra are the parallel licensees may be classified into three groups:**

(i) Group-I: Consumers who continued to be connected to RInfra and continued to receive supply from RInfra;

(ii) Group-II: The consumers who continued to be connected to the RInfra but have migrated to the TPC for receiving supply from TPC through the electric wires of RInfra.

(iii) Group-III: The consumers who are no longer connected to RInfra and have

completely migrated to the TPC for receiving supply from the TPC through the TPC Wires.

(B) **The issue of levy of cross subsidy surcharge has arisen only because of the loss of cross subsidy on account of the migration of the 2nd group of consumers from RInfra to TPC as per the interim arrangement made in the order passed by the State Commission on 15.10.2009 on the strength of the judgment of Hon'ble Supreme Court on 8.7.2008.**

(C) **Had there been no migration of consumers from RInfra to TPC and all the consumers had continued to be connected to RInfra for receiving supply from RInfra , this issue of cross subsidy would not have arisen as there would have been no loss of cross subsidy due to migration.**

(D) **The present situation is one of the few instances in the country where two parallel licensees are operating in the same area of supply and consumers have the right to migrate from one parallel licensee to another parallel licensee. This migration has been**

facilitated by the State Commission's interim arrangement made in the order dated 15.10.2009 which was passed on the strength of the Hon'ble Supreme Court judgment dated 8.7.2008 in which it is held that the parallel distribution licensee who is yet to install their distribution lines to supply electricity directly to retail consumers, was permitted to use the network of other distribution licensee subject to the payment of surcharge as well as the wheeling charges. These charges have to be determined by the State Commission.

(E) **The definition of the 'consumer' as per the Act, 2003 u/s 2 (15) would include any person whose premises are situated in the area of supply of a distribution licensee for the time being connected for the purpose of receiving electricity with the works of a licensee.**

(F) **Even though a sizeable number of consumers have migrated from RInfra to TPC, they are now receiving supply from TPC out of which majority of the consumers are still connected to electric wires of the RInfra.**

(G) **In view of the definition the term 'consumer', the consumers though they are getting supply from the TPC, they continue to be consumers of RInfra as they are connected to the network of the RInfra Therefore, the State Commission in order to fix the applicability of the cross subsidy surcharge divided the consumers into 3 groups:**

(i) Group-I: Consumers continue to be the consumers of RInfra both for wires as well as for supply. Therefore, they need not pay the cross subsidy surcharge as they are paying the cross subsidy surcharge through their tariff to the distribution licensee.

(ii) Group-II: Consumer continued to be connected with RInfra through wires though they have received supply from the TPC and as such the cross subsidy surcharge has to be levied on them to meet the requirement of a current level of cross subsidy. Therefore, Group-II consumers are liable to pay the cross subsidy surcharge to the RInfra.

(iii) Group-III consumers who are no longer connected to the RInfra and have completely migrated to TPC for receiving supply from the TPC using the TPC wires as such they need not have to pay the cross subsidy surcharge as they are not the consumers of the RInfra ”

14. The crux of the above findings by the State Commission relating to this issue is that Group II consumers who changed over to TPC from RInfra for using the network of RInfra, are liable to pay the cross subsidy surcharge to Rinfra.

15. Being aggrieved by the above findings, TPC and others have filed these Appeals contending that the cross subsidy surcharge cannot be made applicable to change over consumers, i.e. 2nd group of consumers.

16. Let us now discuss the issue in question in detail.

17. According to the Appellants, both the TPC and the RInfra are the parallel licensees of the same area of supply and as such, the change over consumers from RInfra to TPC do not come under the open access as per Section 42 of the Act and therefore, the change over consumers cannot be subjected to cross subsidy surcharge.

18. According to the RInfra, the transactions clearly fall under the purview of the Open Access u/s 42 of the Act, 2003 and therefore the change over consumers from RInfra to TPC are liable to pay cross subsidy surcharge to RInfra since they use the wires of the RInfra for getting supply from the TPC.

19. The main plea made by the learned Counsel for the State Commission before this Tribunal is that the impugned order had been passed in pursuance of the directions given by the Hon'ble Supreme Court in Civil Appeal No.2898 of 2006 dated 8.7.2008 wherein, it has been specifically held that the distribution licensee who is yet to lay down its network can use the other distribution licensee's network on payment of subsidy surcharge in addition to the wheeling charges and therefore, impugned order which was based upon the judgment of Hon'ble Supreme Court cannot be held to be wrong.

20. In view of the above plea of the State Commission, it would be appropriate to quote the relevant findings of the Hon'ble Supreme Court in Civil No.2898 of 2006 rendered on 8.7.2008 in regard to sharing of network of one distribution licensee by another distribution licensee. The relevant portion is quoted below:

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

100. The concept of wheeling has been introduced in the 2003 Act to enable distribution licensees who are yet to install their distribution line to supply electricity directly to retail consumers, subject to payment of surcharge in addition to the charges for wheeling as the State Commission may determine. We, therefore, see no substance in the said submissions advanced by Mr.Venugopal. {Emphasis added}

21. The above finding of the Hon'ble Supreme Court would clearly indicate that while interpreting the provisions providing a concept of wheeling in the Act, 2003, the Hon'ble Supreme Court has categorically held that where a distribution licensee (TPC) has not laid its own net work to supply electricity directly to the consumers, it is entitled to use the network of another licensee (RInfra) upon making the payment of surcharge and wheeling charges.

22. On the strength of this judgment, the TPC proposed intensive capital investment to develop distribution system in the common area of supply in the tariff petition filed before the State Commission in Petition No.113 of 2008 to determine the tariff for the Financial Year 2009-10. Accordingly, on 15.6.2009, the State Commission passed the tariff order for the TPC for the financial year 2009-10. In the very same order, the State Commission suggested to the TPC for adopting the alternative option to supply electricity to different consumers in its license area by using the network of the RInfra so as to optimise the capital expenditure requirements for development of the distribution network of the TPC.

23. In the light of the judgment of the Hon'ble Supreme Court as well as the order dated 15.6.2009, passed by the State Commission in Petition No.113 of 2008, the TPC filed a Petition in case No.50 of 2009 under Regulation 20 (1) of the Maharashtra Commission's Open Access Regulations, Section 86 (1) (a) and Section 86 (1) (f) of the 2003 Act, praying for laying out the operating procedure for change over consumers who wanted to receive supply from the TPC while being connected through the distribution network of the RInfra. Thus, it is clear that it is the TPC, which invoked the provisions of the Open Access Regulations as well as the provisions of the Act.

24. Let us now refer to the Regulations 20 (1) of the MERC (Open Access) Regulations:

> ***20. Use of distribution system***
>
> *20.1 The Distribution Licensee shall allow the **Supplier** to use its distribution system for wheeling of electricity, in a non-discriminatory manner, on terms and conditions that are no more onerous than those applicable to other comparable users of the distribution system of the Distribution Licensee.*
>
> *20.2 **The Supplier** shall make reasonable use of the distribution system of the Distribution Licensee in a manner that does not, as a result of such use, adversely affect:-*
>
> *(a) use of the distribution system by other users of the Distribution Licensee;*
>
> *(b) quality and reliability of supply of electricity to consumers of the Distribution Licensee; and*
>
> *(c) safety of the Distribution Licensee's works and personnel, as may be required of the Supplier in accordance with the regulations specified under Section 53 of the Act"*

25. As per this Regulation, the distribution licensee, shall allow the supplier to use its distribution system for wheeling of electricity on terms and conditions imposed on the supplier. The supplier will also make reasonable use of the distribution system of the distribution licensee in a manner

that does not adversely affect the use of the distribution system by other users of the distribution licensee.

26. Therefore, the supplier can use the distribution system of the distribution licensee for supply of electricity to the consumer subject to the terms and conditions.

27. What is the meaning of the term “Supplier”? The term has been defined in Regulation 2 (P) of the Maharashtra Commission’s Open Access Regulations, 2005 which is as under:

> *“ 2(P) “**Supplier**” means a Generating Company or Licensee, as the case may be, giving supply of electricity to a consumer or a person situated in the area of supply of the Distribution Licensee by using the distribution system of the Distribution Licensee in his area of supply pursuant to a Connection and Use of Distribution System Agreement;*

28. The reading of the above definition would reveal that the term “licensee” used in the definition of supplier includes the distribution licensee. Therefore, the conjoint reading of the Regulations 20 (1) and the definition clause 2 (P) of the said Regulations would indicate that this Regulation contemplates the existence of two or more distribution licensees having common area of supply.

29. Now let us refer to Section 86 (1) (a) of the Electricity Act quoted by the TPC in its Petition No.50 of 2009:

> ***"86. Functions of State Commission.***—*(1) The State Commission shall discharge the following functions, namely:—*
>
> *(a) Determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State: Provided that where* ***open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge*** *thereon, if any, for the said category of consumers;*

30. The reading of the above provision would make it clear that the proviso to Section 86 (1) (a) would envisage that where open access has been permitted, the State Commission shall determine the wheeling charges as well as the subsidy charges.

31. Now let us refer to Section 86 (1) (f) which is as follows:

> *"86 (1)(f): adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration;"*

32. This Section deals with the adjudication of the dispute between the licensees and Generating Companies.

33. As indicated above, the TPC had filed the petition No.50 of 2009 under the Open Access Regulations and under Section 86 (1) (a) and Section 86 (1) (f) of the 2003 Act. The

prayers made by TPC before the State Commission in case No.50 of 2009 are as follows:

> *"(i) Allow the protocol set out in paragraph 17 above to be followed by the distribution licensees while dealing with Changeover Consumers with such modifications as the Commission may deem necessary;*
>
> *(ii) Allow-in principle the Petitioner to recover a service charge per unit of electricity supplied to the consumers* ***through open access to the system of another distribution licensee****; and fix an actual service charge after considering the material and submissions placed by the Petitioner;*
>
> *(iii) Pass such other and further orders / directions as the Hon'ble Commission may deem appropriate in the facts and circumstances of the case."*

34. These prayers would clearly indicate that the TPC requested the State Commission to adjudicate upon the dispute between the RInfra and TPC regarding open access to the distribution system of the RInfra and prayed for finalisation of protocol to facilitate smooth changeover from one distribution licensee to the other.

35. During the course of these proceedings in case No.50 of 2009, the RInfra a party to the said proceedings, as a Respondent filed a reply submitting that the proposed mechanism for changeover consumers requires implementation of open access within its license area over distribution network. In the proceedings in Petition No.50 of

2009, a public notice was issued. Public was heard. Ultimately, the State Commission by the order dated 15.10.2009 u/s 94 (2) of the Act while providing for some interim arrangement held that the State Commission would consider the issue of cross subsidy surcharge on the strength of open access separately in an appropriate proceedings later.

36. Pursuant to this order dated 15.10.2009, the consumers of the RInfra became entitled to obtain supply from the TPC by using the RInfra network though the cross subsidy charge issue would be determined later since the issue would require more examination.

37. Pursuant to this order, the high end consumers of the RInfra started migrating in large numbers to the TPC for its supply through the RInfra network. As a result, the RInfra was left increasingly with subsidized consumers while subsidizing consumers were migrating to the TPC for supply of power by using the RInfra network.

38. Under those circumstances, on 27.4.2010, the RInfra Company filed a case No.7 of 2010 before the State Commission for specifying the mechanism for recovery of the previous years' revenue gaps and loss of cross subsidy from the changeover consumers who have changed over to TPC. TPC filed a reply opposing this prayer. This Petition

was disposed of by the State Commission by the order dated 10.9.2010 declining to grant relief sought for by the RInfra. However, the State Commission gave a liberty to RInfra to raise the issue at the time of filing the Tariff Petition by the RInfra.

39. Accordingly, on 11.10.2010, the RInfra Company filed a tariff petition before the State Commission praying for the approval of the truing-up for the Financial Year 2008-09, APR for the year 2009-10 and tariff determination for the year 2010-11. In this tariff petition, as permitted by the State Commission, the RInfra Company also prayed for the approval of the mechanism for recovery of loss of cross subsidy surcharge due to change over of consumers.

40. But, at the same time, i.e. after filing Tariff Petition before the State Commission, RInfra filed an Appeal on 25.10.2010 in Appeal No.200 of 2010 as against the order dated 10.9.2010 passed by the State Commission declining to give the relief relating to the cross subsidy surcharge. This Tribunal heard this Appeal and delivered the judgment on 1.3.2011 by taking note of the pendency of the tariff proceedings before the State Commission directing the State Commission to decide the issue of cross subsidy surcharge in the said tariff proceedings itself after framing

the appropriate open access Regulations within the time frame.

41. Accordingly, the State Commission heard the parties and determined the tariff as prayed for in the tariff petition and also decided the issue of cross subsidy by holding that the cross subsidy surcharge be payable to the RInfra by the changeover consumers taking power from TPC using the network of the RInfra through the impugned order dated 29.7.2011.

42. The above facts would make it clear that the TPC itself through their application in case No.50 of 2009 filed on 31.8.2009 requested to lay down the operating procedure for changing over of the consumers from RInfra to TPC by using the network of RInfra under the Open Access Regulations as well as U/S 86 (1) (a) and 86 (1) (f) also in the light of the judgment of the Hon'ble Supreme Court. So, the entire process which was started before the State Commission was mainly based upon the judgment of Hon'ble Supreme Court and the petition filed by TPC before the State Commission under the Open Access Regulations.

43. It cannot be disputed that only on the strength of the judgment of the Hon'ble Supreme Court, the TPC filed a Petition before the State Commission to adjudicate upon the dispute between the RInfra and TPC regarding the open

access to the distribution system of RInfra and prayed for finalisation of protocol to facilitate smooth change over from one distribution licensee to other.

44. As referred to in the judgment, Hon'ble Supreme Court has pointed out a new concept of wheeling which has been introduced in the 2003 Act to enable the distribution licensee who are yet to install their distribution lines to supply electricity to retail consumers from the network of the other distribution licensees subject to payment of subsidy surcharge as well as wheeling charge. These specific observations made by the Hon'ble Supreme Court relating to open access are clear cut findings.

45. In this context, it would be appropriate to refer to the order passed by the State Commission dated 15.6.2009 in case No.113 of 2008 which was filed by the TPC for determining the tariff for the Financial Year 2009-10 on the strength of the Hon'ble Supreme Court judgment holding that the TPC are at liberty to supply electricity directly to retail consumers in the area of supply by using the network system of the RInfra by making the payment towards the surcharge and wheeling charges.

46. The State Commission disposed of the said petition giving some suggestions to the TPC. The relevant portion of the

said order passed by the State Commission on 15.6.2009 in case No.113 of 2008 is as follows:

> *"Section 43 of the Electricity Act, 2003 specifies the distribution licensee's duty to supply on request, within one month of the application being received. Further, in terms of the MERC (Specific Conditions of Distribution License applicable to The TPC Company Limited) Regulations, 2008, notified by the Commission on August 20, 2008, TPC-D has to comply with all the provisions of the EA 2003 as well as the MERC (General Conditions of Distribution License) Regulations, 2006, notified on November 28, 2006. Accordingly, the Commission directs TPC-D not to discriminate between various consumer categories while providing connections to new consumers, and ensure that the Universal Service Obligations are met. The Commission also directs TPC-D to submit quarterly status report of category-wise applications received for new connections and new connections released by TPC-D, to the Commission. Further, TPC-D should ensure wide publicity periodically to communicate to all categories of consumers in its entire license area that they can approach TPC-D for availing supply, detailing the procedure and contact addresses, ward-wise, etc., for going about the process of submitting applications, etc.*
>
> *As stated above, TPC-D has proposed a roll-out plan covering only 9 Wards, primarily overlapping with the license area currently being served primarily by RInfra Infrastructure Limited – Distribution Business (RInfra-D), and no roll out plan has been proposed for the Wards being served primarily by the BEST till FY 2011-12, except one Ward at Wadala. TPC-D will have to meet its license obligations in its entire license area, and cannot pick and choose the Wards wherein*

it will supply electricity. Moreover, incurring heavy capital expenditure for the network roll-out is not the only option available to TPC-D in its efforts to supply electricity to different consumers in its license area, and the provisions of the EA 2003 relating to Open Access and the provisions of the MERC (General Conditions of Distribution License) Regulations, 2006 relating to use of the distribution network of another distribution licensee, need to be explored by TPC-D, so that the cost is optimized. The Honorable Supreme Court also, in its Judgment on the matter of TPC's distribution license, observed that TPC could supply to consumers in its license area, by utilizing the distribution network of the other distribution licensee already present in the area. Hence, incurrence of cost cannot be a condition for meeting the Licensee's obligations to all the consumers. In fact, the capital costs should be incurred only when there is no better optimal solution.

47. The aforesaid order specifically referred to and recommended for use of the network system of the RInfra by the TPC on the footing that the TPC would have open access with all its concomitants on the said network.

48. That apart, there are two other orders passed by the State Commission on 22.7.2009 clarifying the earlier tariff orders fixing the tariff of the TPC and the RInfra. In both the orders, the State Commission indicated that the TPC could supply power to the consumers of the RInfra by using the distribution system of the RInfra in implementation of the Hon'ble Supreme Court judgment in letter and spirit. The following is the observation:

"The Utilities are directed to not only enable the consumers to exercise their choice easily but also facilitate the same proactively, by allowing the use of their distribution network to the other distribution licensees to implement the Judgment of the Hon'ble Supreme Court in letter and spirit".

49. This would clearly affirm that the TPC not having laid its distribution network, could use the distribution network of the RInfra on the open access basis subject to the payment of surcharge in addition to the charges of the wheeling as the State Commission may determine. Therefore, there is no merit in the contention of the TPC that the Hon'ble Supreme Court's observation in its judgment was only a fleeting observation and the same need not be acted upon even though the TPC itself filed the application in case No.113 of 2008 acting upon the said Hon'ble Supreme Court judgment.

50. These findings of the State Commission in the orders referred to above, would show that the State Commission repeatedly understood and pronounced the orders on the basis of the fact that the TPC could supply power to the change over consumers from RInfra to TPC by using the distribution network of the RInfra in implementation of the judgment of the Hon'ble Supreme Court in letter and spirit thereby clearly affirming that the TPC not having laid its distribution network could use the distribution network of

the RInfra on open access basis subject to the payment of surcharge in addition to charges for wheeling as the State Commission may determine.

51. That apart, as mentioned earlier, acting upon the said judgment and the order in case No.113 of 2008 dated 15.6.2009, the TPC again approached the State Commission and filed a Petition on 31.8.2009 in case No.50 of 2009 praying the State Commission to formalise the procedure to enable a distribution licensee to supply to its consumers using the open access to the existing wire infrastructure of another distribution licensee. The detailed averments contained in the Petition in Case No.50 of 2009 filed by the TPC seeking for the relief are as follows:

> "*Petition seeking approval of operating procedure to be adopted by the Petitioners and the Respondent, while supplying power to consumer in their common area of license. Using open access to each others' existing distribution network*"
>
> *"Based on the aforesaid suggestion from this Hon'ble Commission, the Petitioner had entered into discussion with the Respondent to work out a protocol to ensure a smooth changeover of consumers and supply of electricity through open access arrangements between the two licensees while ensuring the interest of both parties and the fulfilment of their obligations towards the consumers in an effective manner"*

"6. The Respondent vide letter dated 30.7.2009 gave an omnibus no-objection certificate (NOC) allowing open access to all their consumers. A copy of the letter dated 30.7.2009 is annexed hereto and marked as Annexure P-2".

"7. Subsequent, however, the Respondent vide its letter dated 1.8.2009 while responding to the Petitioner's proposal in the letter dated 29.7.2009, referring to the Regulation 7 of the MERC Distribution (Open Access) Regulations 2005 (hereinafter referred to as "DOA") insisted on continuing with the present setup where it will continue to do the Inter Installation, meter reading, testing, maintenance etc. even for the changeover consumers. The Respondent further indicated in its comments that the Respondent will provide the meter reading data to the Petitioner for the billing purpose as per the open access Regulations. The Respondent also forwarded some draft guidelines to the Petitioner to convey their position. It is respectfully submitted that the draft guideline is prepared by the Respondent and their insistence on retaining control over the metering system, relying on the provisions of DOA, is misconceived. While the supply by the Supplier Distribution Licensee to the changeover consumers will involve use of open access of the Wheeling Distribution Licensee's wire network, the supply to be carried out by the Supplier Distribution Licensee to the consumers will necessarily require metering by the Supplier Distribution Licensee for the purpose of proper recording of supply and billing of changeover consumers.".

"*19. In the facts and circumstances of the present case, necessary clarifications/directions are required to be issued by this Hon'ble Commission to formalize*

the procedure to enable a distribution licensee to supply to its consumers using open access to the existing wire infrastructure of another distribution licensee."

"MAINTAINABILITY:

The Hon`ble Commission may under the provisions of Regulation 21 of the MERC Distribution Open Access Regulations, 2005, Section 86(1)(a) and 86(1)(f) of Electricity Act, 2003 consider the submissions made above and provide appropriate directives and guidelines for resolving the issues highlighted above".

"PRAYERS:

It is therefore most respectfully prayed that this Hon`ble Commission may be pleased to:

(i) Allow the protocol set out in paragraph 17 above to be followed by the distribution licensees while dealing with changeover consumers with such modification as the Commission may deem necessary;

(ii) Allow in-principle, the Petitioner to recover a service charge per unit of electricity supplied to its consumers through open access to the system of another distribution licensee; and further fix an actual service charge after considering the material and submissions placed by the Petitioner;

(iii) Pass such other and further orders/directions as the Hon`ble Commission may deem appropriate in the facts and circumstances of the case."

52. As indicated above, in the said application, the TPC referred to Regulations 21 of the MERC Distribution (Open Access) Regulations, 2005. The Regulations 21 of the MERC Distribution (Open Access) Regulations, 2005 is as follows:

> *"21. If any difficulty arises in giving effect to the provisions of these Regulations, the Commission may, by general or specific order, make such provisions, not inconsistent with the provisions of the Act, as may appear to be necessary for removing the difficulty."*

53. The factual aspects referred to above would clearly reveal that the TPC from the beginning proceeded on the basis that they were seeking open access on the network of the RInfra but since there was no specific provisions for such a situation in the existing Regulations, the State Commission should exercise its power to remove the difficulties in the implementation of the existing Regulations to provide open access in case where the Appellant wanted to use the network of the RInfra to supply electricity to the consumers.

54. As referred to above, after completing the pleadings in case No.50 of 2009 filed by the TPC, the order had been passed by the State Commission on 15.10.2009 providing for the interim arrangement holding that the issue of cross subsidy surcharge could be decided separately in the appropriate

proceedings later and as such the arrangement through the said order was only interim arrangement pending finalisation of various issues including the cross subsidy surcharge. This is clear from the following paragraphs of the said order:

> ***"****14. This interim arrangement shall be applied mutais mutandis in scenarios where RInfra-D is the Supply Distribution Licensee and TPC-D is the Wheeling Distribution Licensee in Mumbai area. The detailed procedure to be followed for changeover consumers is given in the Appendix –I.*
>
> *15. The interim arrangement as above shall stay in effect until formulation of the final scheme in the form of regulations or otherwise dealing with all the relevant aspects of changeover are issued by the Commission".*

55. Thus, the situation that prevailed pursuant to the order dated 15.10.2009 was that the consumers of the RInfra could obtain supply from the TPC on the network of RInfra but the issue relating to the cross subsidy surcharge would be determined later.

56. According to the TPC, the said interim arrangement is merely for sharing the distribution network by parallel distribution licensee which can be sanctioned by the State Commission by virtue of its plenary powers and in such a situation, tariff alone is payable and cross subsidy charge is not payable u/s 42 of the Act as the interim arrangement

made in the order dated 15.10.2009 is not an open access. This contention is absolutely untenable.

57. Situation of a parallel licensee is contemplated under the 6th proviso of Section 14. As per this proviso, the Appropriate Commission may grant a license to two or more persons for distribution of electricity through their own distribution system within the same area subject to the conditions.

58. Thus, Section 6th proviso of Section 14 clearly stipulates that a parallel licensee is required to set-up its own distribution system as defined in Section 2 (19) of the Act, 2003. In the present case, admittedly, the TPC had not set-up its distribution system for nearly over a century in the entire area of its distribution license. If the TPC claim to be a parallel licensee, they are obliged to set-up their own distribution system. It cannot claim any right whatsoever over the distribution system of RInfra In fact, the RInfra has voluntarily agreed to permit the use of its distribution system on the basis of the open access to the TPC in line with the letter and spirit of the judgment of the Hon'ble Supreme Court and also in the light of the provisions of the Electricity Act, 2003 applicable to open access.

59. Ultimately, as mentioned above, in the tariff petition filed by the RInfra in case No.**72 of 2010**, the State Commission,

after hearing the parties including the TPC and RInfra , passed the impugned order dated 29.7.2011 directing the cross subsidy surcharge to be paid to RInfra by the change over consumers who are taking power from the TPC using the network of the RInfra.

60. According to the Appellants, interim arrangements provided by the order dated 15.10.2009 is not open access arrangements since the open access would apply only to a case where a consumer in a distribution licensee area of supply, obtains supply from another supplier outside the distribution licensee area using the network of the distribution licensee within the area of supply. In short, it is the contention of the Appellant that if a consumer in the area of supply of the distribution licensee obtains supply from a supplier from outside the area of distribution licensee, then only, the provision relating to open access u/s 42 (3) would apply and not otherwise. This submission is also totally wrong.

61. As indicated above, the interim arrangements made by the State Commission through the order passed by the State Commission on 15.10.2009 was only as a result of the judgment of the Hon'ble Supreme Court rendered on 8.7.2008. It was argued before the Hon'ble Supreme Court by the RInfra that TPC had no license to distribute in the

area of supply of RInfra as the TPC had not laid its distribution network. Hon'ble Supreme Court rejected the said contention and declared that the distribution licensee namely TPC who is yet to install their distribution system is entitled to supply electricity to retail consumers of the area of supply which is common to both, subject to the payment of surcharge and wheeling charges to other distribution licensee for using the network of the said distribution licensee. As mentioned earlier, The TPC acting upon the said judgment filed a Petition in Case No.113 of 2008 and Petition No.50 of 2009 claiming the open access as per the Open Access Regulations.

62. However, the Appellants now contended that only when a consumer in the area of supply of a distribution licensee obtains supply from a supplier from outside the area of distribution licensee, the provision of open access under Section 42 (3) would apply and not otherwise.

63. The crux of the submission is that if there are two distribution licensees in one area of supply, then use of one of the two distribution licensee's network by another distribution licensee within the same area of supply cannot be open access. This stand is completely contrary to the stand of the TPC taken before the State Commission while the TPC approached the State Commission in case No.50

of 2009 filed on 31.8.2009 praying for the State Commission to formalize the procedure to enable their distribution licensees to supply to its consumers using open access to the existing network of another distribution licensee.

64. The recital in the said Petition in the Case No.50 of 2009 would clarify the specific stand taken by the TPC. The relevant extracts of the said Petition is as follows:

> *"Petition seeking approval of operating procedures to be adopted by the Petitioners and the Respondent, while supplying power to consumer in their common area of license,* ***using open access to each others' existing distribution network".*** *(Page 96 of R-2 Reply)*
>
> *"Based on the aforesaid suggestion from this Hon`ble Commission, the Petitioner had entered into discussion with the Respondent to work out a protocol to ensure a smooth* ***changeover of consumers and supply of electricity through open access arrangements between the two licensees*** *while ensuring the interest of both parties and the fulfilment of their obligations towards the consumers in an affective manner". (Page 98 of R-2 Reply)*
>
> *"6.* ***The Respondent vide letter dated 30.7.2009 gave an omnibus no-objection certificate (NOC) allowing open access to all their consumers****. A copy of the letter dated 30.7.2009 is annexed hereto and marked as Annexure P-2". (Page 99 of R-2 Reply)*

"7. Subsequent, however, the Respondent vide its letter dated 1.8.2009 while responding to the Petitioner's proposal in the letter dated 29.7.2009, referring to the Regulation 7 of the MERC Distribution (Open Access) Regulations 2005 (hereinafter referred to as "DOA") insisted on continuing with the present setup where it will continue to do the Inter Installation, meter reading, testing, maintenance etc. even for the changeover consumers. The Respondent further indicated in its comments that the Respondent will provide the meter reading data to the Petitioner for the billing purpose as per the open access Regulations. The Respondent also forwarded some draft guidelines to the Petitioner to convey their position. It is respectfully submitted that the draft guideline is prepared by the Respondent and their insistence on retaining control over the metering system, relying on the provisions of DOA, is misconceived. ***While the supply by the Supplier Distribution Licensee to the changeover consumers will involve use of open access of the Wheeling Distribution Licensee's wire network****, the supply to be carried out by the Supplier Distribution Licensee to the consumers will necessarily require metering by the Supplier Distribution Licensee for the purpose of proper recording of supply and billing of changeover consumers.". (Page 99 of R-2 Reply)*

"19. In the facts and circumstances of the present case, necessary clarifications/directions are required to be issued by this Hon'ble Commission to formalize the ***procedure to enable a distribution licensee to supply to its consumers using open access to the existing wire infrastructure of another distribution licensee."*** *(Page 115 of R-2 Reply)*

"MAINTAINABILITY:

*The Hon`ble Commission may under the **provisions of Regulation 21 of the MERC Distribution Open Access Regulations, 2005,** Section 86(1)(a) and 86(1)(f) of Electricity Act, 2003 consider the submissions made above and provide appropriate directives and guidelines for resolving the issues highlighted above". (Page 115 of R-2 Reply)*

"PRAYERS:

It is therefore most respectfully prayed that this Hon`ble Commission may be pleased to:

(i) Allow the protocol set out in paragraph 17 above to be followed by the distribution licensees while dealing with changeover consumers with such modification as the Commission may deem necessary;

*(ii) **Allow in-principle, the Petitioner to recover a service charge per unit of electricity supplied to its consumers through open access to the system of another distribution licensee**; and further fix an actual service charge after considering the material and submissions placed by the Petitioner;*

(iii) Pass such other and further orders/directions as the Hon`ble Commission may deem appropriate in the facts and circumstances of the case."

65. Admittedly, this application had been filed by the TPC under Regulation 21 of the MERC Distribution (**Open Access**) Regulations, 2005.

66. Thus, the TPC after the judgment of Hon'ble Supreme Court proceeded on the footing that they were seeking open access for using the network of the RInfra for the purpose of supply to change over consumers. In this case, i.e. in No.50 of 2009, the State Commission after conducting the public hearing, passed an interim order under Section 94 (2) of the Act, 2003 stating that the interim arrangements as per the interim order pending the finalization of various aspects including the aspects of cross subsidy surcharge. Thus, the situation that prevailed pursuant to the interim order dated 15.10.2009 that the consumers of the RInfra could obtain supply from TPC by using the network of the RInfra but the issues like cross subsidy surcharge will be determined later. As a result of this order, the high end consumers of the RInfra were tempted to get supply from the TPC on RInfra network and started migrating in large numbers for getting supply from the network of the RInfra

67. The RInfra thus became deprived of the cross subsidy recovery. This compelled the RInfra to take proceedings before the State Commission for fixing of the cross subsidy surcharge. Ultimately, this Tribunal in the Appeal filed by the RInfra remanded to the State Commission directing for fixing the cross subsidy surcharge. Till then the TPC has never raised any objection with regard to the jurisdiction of

the Commission to decide about the issue of cross subsidy surcharge.

68. As indicated above, even the interim arrangements made by the State Commission by the order dated, 15.10.2009 was on the basis of the open access. In other words, the genesis of the interim arrangements providing for the open access is the judgment of the Hon'ble Supreme Court dated 8.7.2008 in the case of the TPC Company Vs RInfra reported in 2008 10 SCC 321.

69. In view of the above, the TPC cannot now contend that the observation of the Hon'ble Supreme Court is merely a fleeting observation which cannot be acted upon.

70. As indicated above, the TPC had belatedly taken a different stand by choosing to brush aside the judgment of the Hon'ble Supreme Court by stating that it is only a fleeting observation.

71. As mentioned earlier, the specific conduct of the TPC as well as the RInfra would clearly show that relying upon the said observation, the parties, particularly, the TPC have proceeded on the footing that the said arrangement would be an open access. The following particulars would clearly show the same:

(i) The order of the State Commission dated 15th June 2009 in Case No. 113 of 2008 where Commission relied upon the judgment of the Hon`ble Supreme Court.

ii) The Petition in Case No. 50 of 2009 filed by the Appellants claiming open access as quoted hereinabove.

iii) State Commission understood the petition of the Appellants to be under Regulation 21 of the Open Access Regulations.

iv) The Appellants themselves contended before the Commission that the discussions between the Appellants and Reliance Infrastructure Limited "to work out a protocol to ensure smooth changeover of consumers and supply of power through open access arrangement between both of them" had failed.

v) The State Commission itself in the impugned order has proceeded on the basis that the present arrangement is open access arrangement in view of the observations of the Hon`ble Supreme Court.

72. Thus, all the parties, including the TPC proceeded on the footing that the arrangement was an open access arrangement and such an understanding emanated only from the judgment of the Hon'ble Supreme Court. According to RInfra, the TPC having obtained the advantage of the consensual approach of the RInfra in agreeing to the use of RInfra network by TPC on the basis of the Open Access is now resiling from this position in

order to take undue advantage of the situation. We find force in this submission.

73. The State Commission in the impugned order, in fact, has proceeded on the basis that the present interim order arrangements as made earlier was open access arrangements in view of the observations made by Hon'ble Supreme Court. So, the proceedings initiated by both the parties before the State Commission was on the footing that the arrangements were an open access arrangements and on the basis of the observations made by the Hon'ble Supreme Court.

74. Now let us go into the question as to whether the concept of more than one licensee in the same area of supply is a new concept introduced in the 2003 Act by virtue of Section 14 of the Act.

75. According to TPC, the concept of multiple licensees in the same area of supply has been introduced in 6th proviso of the Section 14 of the Act, 2003.

76. The TPC admittedly had been a licensee under the 1910 Act. The provision for multiple licensees in the same area of supply existed in 1910 Act itself by virtue of Section 3 (e) of the 1910 Act. That apart, clause 4 to 6 of the Schedule to 1910 Act required every licensee to establish its own

network to meet the universal service obligation. Sixth proviso to Section 14 deals with a new licensee in the same area. According to TPC it had been a licensee under the old law and became a deemed licensee by virtue of 1st proviso of Section 14. Therefore, Section 14 would not be applicable to TPC and as such, the essential requirements of having owned its distribution network would not be applicable to TPC.

77. A bare reading of the provisions of the 1910 Act and the Schedule would reveal that even under the 1910 Act every licensee was required to lay down its own network within three years from the date of issuance of license. The TPC had been granted license under the 1910 Act and was required to lay the distribution network to supply power on demand to any consumer where it had already laid the network and extends its network to area where two or more persons had requisitioned the supply.

78. In view of the above, the submissions on this issue made by the TPC have no basis.

79. The Learned Counsel for the State Commission by referring Section 2 (17), 42 (1) of the Act, 2003 has contended that it is the duty of the distribution licensee to lay down its network to meet its Universal Service Obligation u/s 43 of the Act.

80. Let us quote the definition 2 (17) of the Act which is as under:

> *"2. Definitions*
>
> *In this Act, unless the context otherwise requires,*
>
> *(17) 'Distribution licensee' means a licensee authorised to operate and maintain a distribution system for supplying electricity to the consumers in his area of supply;*

81. Let us quote Section 42 of the Act which is as under:

> *42. Duties of distribution Licensee and open access*
>
> *(1) It shall be the duty of a distribution licensee to develop and maintain an efficient, co-ordinated and economical distribution system in his area of supply and to supply electricity in accordance with the provisions contained in this Act."*

82. It is strenuously contended by the Appellants that while the transmission licensee is authorised to establish and build transmission lines (Section 40) and generating companies are also mandated to establish a generating station (section 10), the distribution licensee is authorised only to operate and maintain the distribution system (section 2(17)) and term 'build' or 'establish' is absent in both the definition of distribution licensee or in the section providing for the duties of the distribution licensee.

83. The above submission is misplaced.

84. Section 42 prescribing the duties of the Distribution Licensee mandates the Distribution Licensee to 'develop' and maintain an efficient and coordinated distribution network. The term 'develop' used in this definition is wider than the term 'build' or 'establish' used for transmission licensee or generating company. Development of distribution system requires proper planning and building of the network. The planning of transmission system has been entrusted to Central Transmission Utility or State Transmission Utility, as the case may be, under Sections 38 and 39 of the Act. Transmission licensee is responsible for building, maintaining and operation of transmission lines. Transmission licensee does not carryout the planning aspect. It is for the Central Transmission Utility or State Transmission Utility to carryout planning and identifying the transmission requirements at the national or State levels respectively. Once the transmission requirements are identified, the Transmission Licensee is required to build the identified lines. The need for centralised planning of transmission system arose for the reason that the transmission systems of various transmission licensees operate in synchronous mode and intermingle with each other.

85. However, in distribution, the distribution system of one licensee works in the standalone basis. It cannot run in

parallel with a distribution system of another licensee. The reason for this standalone requirement is the presence of Delta/Star transformers in the distribution system. Therefore, the Act mandates the distribution licensee to carry out all the activities relating to the distribution i.e. from planning to lay down to operate and maintain the distribution network.

86. According to the Respondents, the transactions clearly falls under the Open Access within the purview of Section 42 of the Act and accordingly change over consumers are liable to pay cross subsidy surcharge to RInfra for using their network system.

87. According to the Appellants, the distribution system does not belong to distribution licensee and is owned by the consumers who pay all costs in the form of the tariff.

88. The above contention is misconceived. Where there exist two or more distribution licensees, having same area of supply, every distribution licensee will have to supply electricity through its own distribution system. The network of a distribution licensee belongs to the licensee. This is evident from the definition of the term ‘utility’. The term utility as defined in Section 2(75) of the Act means that the electric lines or electrical plants including all lines,

buildings, works etc., attached thereto belonged to any person who is the licensee.

89. That apart, Sections 17 (3) and 20 would indicate that the licensee cannot sell its utility without the prior approval of the State Commission and for that a suitable direction is required to be issued by the State Commission requiring the licensee to sell the utility. Thus, the entire scheme of the Act contemplates that it is the duty of the licensee, which owns its utility, to develop maintain and operate the system.

90. The TPC, the Appellant has contended that the network of RInfra qualifies to be intervening distribution system as per regulation 8.6.3 of MERC (General terms & conditions for distribution licensees) Regulations and, therefore, the TPC has right to use the system to meet its Universal Service Obligation and make supply available to its consumers. The TPC has also relied upon the definition of intervening transmission facility as given in CERC (intervening transmission facilities) Regulations 2010. Regulation 8.6.3 of MERC (General Terms & Conditions) Regulations. The same is as follows:

> *"8.3.6 The Distribution Licensee shall provide to other licensees the intervening distribution facilities to the extent of surplus capacity available, in his Distribution System in accordance with the Regulations made by*

the Commission for the purpose or as directed by the Commission and in the event of any dispute as to the availability of the surplus capacity the same shall be determined by the Commission. The charges, terms and conditions for the use of the intervening facilities may be mutually agreed between the Licensees subject to any order made by the Commission for the purpose. Provided that any dispute or difference, regarding the extent of surplus capacity available with the licensee, shall be adjudicated by the Commission."

91. Now let us see CERC (intervening Transmission Facilities) Regulations, 2010:

CERC (intervening Transmission Facilities) Regulations 2010

"3. Scope and Applicability:

(1) These regulations shall apply only where a contract path can be identified.

(2) These regulations shall apply where the ***intervening transmission facilities*** *incidental to inter-State transmission owned or operated by a licensee,* ***are used or proposed to be used*** *by any trading licensee or distribution licensee for transmission of power* ***through long-term access, medium-term open access or short-term open access****, and where the contracting parties have failed to mutually agree on the rates and charges for the usage of such intervening transmission facilities as envisaged under the proviso to sub-section (1) of Section 36 of the Act.*

92. The reading of the Regulations of the Central Commission would make it clear that the Intervening Transmission

Regulations, 2010 mandates that the sharing of the Intervening Transmission Facilities is only to be through "open Access". Thus, reliance of the TPC on Regulation 8.6.3 of the MERC Regulations and CERC Regulations is of no use to them.

93. If the contention of the TPC is accepted, then there would be no case of open access and all the generating companies or all the licensees can supply power to any consumer without obtaining open access. This is not the objective of the Regulations and the Act.

94. According to the Appellant, the Act, 2003 has mandated the State Commission to keep consumers interest as a primary one while performing its functions assigned under the Act but the State Commission has not kept consumers interest while imposing the cross subsidy surcharge on the changeover consumers. This contention of the Appellant is also misconceived.

95. The principle contained in the preamble is well settled. The relevancy of objects and reasons for enacting an Act is important consideration for the Court while complying the various principles of interpretation of statutes.

96. It is true that there are various provisions in the Act, 2003 which would show that the Act, 2003 aims at protecting the

interest of the consumers. But from the reading of the objects and reasons and the preamble to the Act, 2003, it is clear that the object of the Act is to take measures conducive to the development of the electricity sector and promoting competition along with protecting the interest of the consumers. While protecting the interest of the consumers, the State Commission must not disregard the survival of the distribution companies.

97. The license of the TPC Company distribution was granted much earlier in 1907. The RInfra Company has been given the license to distribute power in its area of supply in the year 1926. However, the TPC had laid only minimal network which was selectively laid to meet the demand of very few high end consumers.

98. On the other hand, the RInfra in compliance of its universal service obligation has laid extensively in its area of supply incurring huge capital expenditure.

99. The State Commission recognizing the imbalance heavily tilted in favour of the low end consumers, has fixed the tariff in such a manner so that the tariff of the high subsidizing consumers is quite higher than the consumers of the same category supplied by the TPC and the tariff of the subsidized consumers is marginally higher than those supplied by the TPC. As a result, after interim order dated

15.10.2009, there was a large scale demand for the RInfra high end consumers to receive supply from the TPC Company through network of RInfra. Most of the high end consumers have started taking supply from the TPC using the network of RInfra Resultantly, the RInfra was left mainly with the low end subsidized consumers.

100. Taking this into consideration, the State Commission has come to the conclusion that the cross subsidy surcharge is liable to be recovered from the change over consumers who are receiving supply from the TPC Company using the network of RInfra. Thus, the action of imposing surcharge on such consumers is not only in consonance with the provisions of the Act, 2003 but also reasonable in the fact situation especially when it is mandated by the object of the Act, 2003. This action of imposing cross subsidy surcharge is to preserve the competition in order to promote the industry and simultaneously to protect the interest of the consumers.

101. The issue as to whether the Commission has kept in view the consumer's interest could be examined from yet another angle.

102. Admittedly, every licensee has to lay down its own distribution network to meet the Universal Service Obligation. Accordingly, TPC, who was given first license in

the country in the year 1907, renewed from time to time, was also required to lay down its network and to meet Universal Service Obligation even under the old Act of 1910. BSES, the predecessor of RInfra, was given license in the year 1926. Consequent upon the judgment of the Hon'ble Supreme Court in CA No. 2898 of 2006, TPC has submitted a rollout plan to lay down its own network in 9 wards of Mumbai in the area being served by RInfra. According to rollout plan, TPC proposed to cover the entire Mumbai in two phases. Relevant paragraph of the Rollout plan is reproduced below:

> *"It is estimated that the investment in the first phase would be around Rs 1127 Crores and the investment in the second phase would be around 1000 Crores. Apart from co-ordinated and economical development, the other main consideration whilst working out the investment plan was to minimise the increase in tariff. Thus based on the proposed capital investment of Rs 1127 Crores, the consumers of Tata Power will have a marginal impact of tariff of 45 Paise in FY 2011-12"*

103. The price level indicated in the rollout plan reproduced above was of 2010-11. Actual cost of the works on completion would have been much higher. Even assuming that the cost of the works remained at Rs 1127 Crores in the 1st phase and Rs 1000 Crores in the 2nd phase, the impact on tariff of both the phases would have been around 90 Paise per unit to be loaded on all the consumers,

existing as well as the change over to TPC. If the State Commission had decided to restrict the impact only on migrating consumers, by taking a view that wheeling charges would be shared by the migrating consumers in the new areas only and existing consumers of TPC would be paying wheeling charges for existing network, the impact would have been many times higher. Thus, the State Commission took the right approach to impose certain burden, in the form of cross subsidy surcharge being permitted by the Act, only on the migrating consumers who are the main beneficiaries of changeover in the larger interest of remaining consumers of Mumbai.

104. According to the TPC, though the Hon'ble Supreme Court upheld the right of the TPC to supply electricity directly to all the consumers situated in its license area of supply, the part of which overlapped with RInfra area of supply, the State Commission directed the TPC in the Tariff Order dated 15.6.2009 to explore the possibility of utilizing the existing distribution network of the RInfra and only in pursuance of the said direction, the TPC had to resort to utilize the distribution network of the RInfra, instead of laying its own distribution system.

105. This submission is stoutly denied by the learned Counsel for the State Commission stating that the State

Commission never directed the TPC Company not to create its own network.

106. We have gone through the order dated 15.6.2009 passed by the State Commission. The perusal of the said order would reveal that the State Commission had never directed the TPC not to set-up its own network. On the other hand, the State Commission merely suggested that the TPC Company could explore the other options of using the existing network till it sets-up its own network.

107. As a matter of fact, the State Commission in the subsequent order dated 22.2.2010, affirmed the statutory duty of the TPC u/s 42 (1) of the Act to develop and maintain its own distribution system in its area of supply. Therefore, the reason given by the TPC for not setting-up of its own network was because of the direction of the State Commission has no basis.

108. According to the Appellant, Section 42 (3) of the Act providing for the open access would not be applicable to the present case of parallel licensee and as such the levy of cross subsidy surcharge on change over consumers would result in the infringement of the right of the consumers' u/s 43 of the Act.

109. Thus, the main contention of the Appellant TPC is that when the two parallel distribution licensees operating in the same area of supply are sharing the network among themselves, it is not a case of open access under Section 42 (3) of the Act, 2003.

110. It is further contended by the TPC that Section 42 (3) would not be applicable to the present case of parallel licensee because the term "such a licensee" is present in sub section 3 of the Section 42.

111. On the other hand, it is the contention of the RInfra, the Respondent that the only way for a person who has changed over from one distribution licensee to another distribution licensee for getting supply by using the wires of said distribution licensee shall be by way of open access u/s 42 of the Act and there is no other way provided in the Act.

112. Let us examine the provisions of Section 42 of the 2003 Act which is as under:

> "*Where any person, whose premises are situated within the area of supply* ***of a distribution licensee****.,, requires a supply of electricity from a generating company or any licensee other than such* ***distribution licensee,*** *such person may, by notice, require the* ***distribution licensee*** *for wheeling such electricity in accordance with regulations made by the State*

*Commission and the duties of **the distribution licensee** with respect to such supply shall be of a common carrier providing non-discriminatory open access".*

113. In this Section, the term '**distribution licensee'** has been used at four places. All the three later references to distribution licensee pertain to a distribution licensee appearing at the opening of the section.

114. According to the Appellant, the term "distribution licensee" would mean both the RInfra as well as the TPC Company and the reason for the same is that they have common area of supply and the person's premises are situated in the common area of both the licensees. This interpretation is not correct.

115. The term "distribution licensee" appearing at the opening of the Section is preceded by "a". The term "a" indicates one distribution licensee and not two or more licensees. A person whose premises is within the area of supply of a distribution licensee, such a person is required to give notice to that distribution licensee i.e. notice is required to be given to the distribution licensee whose network is to be utilized. The duties of the said distribution licensee would be that of the common carrier. The term "distribution licensee" appearing at all the places in this Section would mean the distribution licensee whose network is to be used.

116. This apart, the term in the opening section is referred to as **“a distribution licensee”** not “**distribution licensees**”. Therefore, reference is made only to one distribution licensee whose net work is likely to be used. Since the term “a distribution licensee” is very specific, it cannot be substituted by distribution licensees. Thus, it has to be either RInfra or TPC and not both. So, the meaning of this Section is where any person whose premises are situated within the area of supply of RInfra Company, a distribution licensee requires the supply of electricity from any other distribution licensee other than the RInfra, such a person may require RInfra for wheeling such electricity in accordance with the Regulations and in that event the duties of RInfra with respect to such supply shall be of a common carrier.

117. The Act, 2003 has recognized three types of licensees (1) Transmission Licensee (2) Distribution licensee and (3) Trading Licensee. Transmission licensee cannot trade in electricity. Therefore, the other two types of licensee could alone be within the purview of the term “licensee”.

118. A distribution licensee cannot supply electricity outside its area of supply. Therefore, the distribution licensee within the purview of “any licensee” in Section 42 (3) has to be a parallel licensee only.

119. Section 42 (3) of the Act uses the expression “wheeling” in conjunction with open access. Where a person claims the right to get the supply from a licensee and to wheel the said electricity to his premises through the network of another licensee, such a right to wheel has to be construed to be open access. So, if the arrangements of the change over consumers from one licensee to another licensee to get the supply from the said licensee through the network system of the first licensee is open access, then the necessary consequences would be the imposition of the cross subsidy surcharge u/s 42 (2) of the Act.

120. Section 42 (1) casts an obligation on a distribution licensee to maintain an efficient, co-ordinated and economical distribution system in its area of supply. The said Section enjoins upon the distribution licensee to develop its own distribution network and not to treat the system of another distribution licensee as its own system. Section 42 (2) enjoins the State Commission to introduce a system of open access to enable a consumer to choose its supplier in the competitive scenario and take supply from one supplier using the network of another licensee based upon open access. In other words, in the case where the second supplier is a distribution licensee, the consumer may chose to take supply from the second supplier who is yet to lay down the network by using the existing network of the first

distribution licensee in the said area of distribution on open access basis.

121. Section 42 (4) stipulates that a consumer receiving supply from second distribution licensee other than the distribution licensee with whom the consumer is currently connected, would be liable to pay additional surcharge apart from the charges of wheeling to meet the fixed costs of the distribution licensees arising out of its obligation to supply.

122. Thus, Section 42 read as a whole, clearly stipulates that a consumer requires supply from another distribution licensee other than the distribution licensee with whom the said consumer is currently connected to, he shall bound to pay wheeling charge and additional surcharge for the use of the network of the first distribution licensee to the said first distribution licensee.

123. This aspect can be looked at from another angle. Electricity Act, 2003 would reveal that the 'term' open access has been used in Sections 2(70), 9, 10, 38, 39, 40, 42, 49 and 86(1) only. Let us assume for a minute, for sake of argument, that Section 42(2), 42(3), 42(4) along with references to open access in other sections are removed from the statute. In other words, the legislature did not introduce the concept of open access at all. Could, in that case, one distribution licensee supply power to its

consumers utilizing the network of parallel distribution licensee? The answer would be a emphatic ‘NO’. It is only because of introduction of open access in distribution under section 42 of the 2003 Act, a licensee, who has not extended its network, can supply electricity to its consumers utilizing the network of other licensee in the same area of supply. Thus, the only way a distribution licensee can use the network of other parallel distribution licensee is under open access permitted by the State Commission under Section 42 of the 2003 Act and by no other way.

124. A distribution licensee, who is yet to lay down its own distribution network, cannot claim as a right in law to use the distribution system of another licensee to discharge its Universal Service Obligation under the Act unless such rights were available in terms of statutes under which the licensee holds its licensee.

125. As mentioned earlier, the only way a distribution licensee can use the network of the other parallel licensee for supply to the consumers could be under open access permitted by the State Commission u/s 42 of the Act. There is no other way.

126. The sharing of network is only possible by open access u/s 42 of the Act, 2003. There is no other power available to

the State Commission to permit sharing of network other than open access u/s 42 of the Act. In the present case, in pursuance of the change over scheme, the consumers of RInfra have migrated to TPC but they continue to use the distribution system of the RInfra Therefore, till the TPC lays out its own net work, the change over consumers to Tata are to be treated as consumers of both the Tata and RInfra Consequently, the changeover consumers are liable to pay wheeling charges as well as cross subsidy charges to RInfra for use of its distribution system.

127. When the Act does not recognize a scheme where one distribution licensee is permitted to use the distribution network of another distribution licensee to supply to its consumers by any other provision, this would be possible only through the mechanism of open access u/s 42 of the Act. The 6th proviso to Section 14 which mandates that a distribution licensee undertakes to supply to its consumers only through its own distribution network. Therefore, the only way for the distribution licensee to undertake the supply of electricity to the change over consumers in the absence of its network system may resort to open access only.

128. In view of the above, the contention of TPC that provisions of Section 42 (3) would not be applicable to a situation of

parallel licensee and wheeling charges alone would be payable and not the cross subsidy surcharge, cannot be accepted. The correct interpretation is that the Section 42 (3) expressly contemplates a situation of parallel licensees. Section 42 (3) enables the use of distribution system by a consumer. The use of distribution system for wheeling electricity by any person is only possible when such a person is one whose premises are connected with the works of such a licensee for the purpose of receiving electricity from the second licensee.

129. A conjoint reading of Section 42 (3), definition Section 2 (15) and Section 2 (47), would make it clear that the words “any person” in Section 42 (3) is nobody other than a consumer u/s 2 (15). A person other than a consumer can never be connected to the works of distribution licensee. The word “any licensee” in section 42 (3) cannot be restricted to some licensee outside the area of supply of the distribution licensee who has been requisitioned to wheel the electricity. If that is so, the second distribution licensee will not be allowed to supply electricity to the consumers of the first distribution licensee.

130. The simple meaning of this provision is that if a consumer is within the area of supply of one distribution licensee wants supply from any other distribution licensee of the

same area other than such a distribution licensee, he is entitled to wheel the electricity through the wires of the first distribution licensee. In other words, the person situated in the area of supply of the RInfra can require the RInfra to wheel the electricity from TPC, another distribution licensee.

131. Thus, in a parallel licensee situation, if a consumer is situated within the common area of supply of two distribution licensees, such a consumer could require any one of the distribution licensee to wheel electricity from the other distribution licensee.

132. According to TPC, a distribution licensee means other than the distribution licensee in whose area the consumer is situated. By this interpretation, the Appellant claims that open access means that the consumer is getting supply from a distribution licensee outside the area of supply through the network system of the local distribution licensee to which he is connected, would be alone termed as open access. This interpretation is thoroughly baseless. Unless such area of supply also falls within the license area of supplying distribution licensee, such a supply distribution licensee cannot sell electricity to a consumer in the area of supply of wheeling distribution licensee.

133. The Act, 2003 envisages the possibility of more than one distribution Company within the area of supply, so that there is a competition among the distribution licensees for providing open access to the consumers. In other words, the wires of a utility should be treated as pathways where the other distribution licensee could use the same to move the electricity to its consumers.

134. According to the Appellant, as per Section 49 and 86 (1)(a) proviso, the present situation is not of open access. This is not correct. The applicability of Section 49 and 86 (1) (a) proviso would arise only after there was an existing situation on open access. Such an existing situation of open access would result in applicability of Section 49 and 86 (1)(a) of the proviso. Open Access is an option i.e. a right which a consumer may chose to exercise. The same cannot be forced to opt for open access simply because such category of consumer in which he falls is eligible for open access.

135. If a consumer opts to continue to receive supply from the distribution licensee to whom he is connected, such a consumer would have to pay only the tariff as determined by the State Commission. On the other hand, if such a consumer opts for open access, then only Section 49 and 86 (1) (a) would apply to such a consumer.

136. The consumers who are connected to one licensee and receive supply from another licensee are in a completely different clause from that of the consumers who are connected to and receiving supply from the same licensee. These two sets of consumers belong to different clauses. This means that these two sets of consumers are not equals. It is on this basis, the State Commission concluded that the consumers who were availing open access are liable to pay cross subsidy surcharge whereas the consumers who are not availing open access need not pay cross subsidy surcharge.

137. The right u/s 43 (1) is a right of the consumer to get supply from a licensee. Under this Section, if a consumer applies to a licensee for supply then that licensee is liable to give its supply since it is an Universal Service Obligation. Similarly, the said licensee is also liable to provide electric plant for giving such supply u/s 43 (2) of the Act.

138. In the present case, when a consumer applies to TPC for supply, the TPC is obliged to give such supply u/s 43 (1) and to provide electric lines for providing such supply under Section 43 (2). The TPC in this case, though it is obligated to provide electric lines, is unable to discharge its obligation by offering its electric lines for the purpose of giving its supply. Under the said situation, the only way in which the

consumer can take supply from TPC is by using the wires of the RInfra and by availing open access on RInfra lines. Hence, such availing of the open access facility would attract cross subsidy surcharge.

139. On behalf of the TPC it is contended that the consumers who changed over to other parallel licensee for getting supply of power have in fact, terminated its relationship with erstwhile supply licensee and that therefore, they need not pay any subsidy surcharge to the first licensee.

140. As indicated above, the definition of the term 'consumer' in Section 2(15) of the Act specifically includes a person who is connected to the wires of a licensee for the purpose of receiving supply. Under this definition, a person who avails open access from the wires of one licensee to which he is already connected and avails supply from another licensee, is also to be termed as a consumer not only to the licensee from whom he gets supply but also to the licensee to whom the consumer is connected to. In other words, even when such a consumer is not receiving supply from the 1st licensee, so long it is connected with the said licensee for the time being, he is called a consumer of the said licensee also.

141. The consumer's interest is one of the most important facets of the Act, 2003. In same way, the interest of the licensee

also is to be protected. The financial well being of the licensee itself is in keeping with the long term consumer's interest. The cross subsidy surcharge is essentially a charge to allow the distribution licensee to recover some part of the loss of cross subsidy surcharge that the subsidized changeover consumers would otherwise have contributed to it. Such recovery is essential not only for the finances of the wheeling distribution licensees but also for the protection of the remaining consumers of the wheeling distribution licensees who otherwise have to bear the loss of cross subsidy surcharge.

142. Hence, the imposition of the cross subsidy surcharge for the protection of the wheeling distribution licensee would show that the State Commission was constrained to do so to protect the interest of the consumers as well as the interest of the distribution licensees.

143. TPC further contended that if Section 42 is to be applied in the present case, it would mean that the State Commission has no jurisdiction to fix the tariff in respect of the change over open access consumers u/s 49 and 86 (1) (a) of the act. This contention also is misplaced. The TPC is an independent distribution licensee in the same area of supply. They are entitled to have the tariff of their consumers determined by the State Commission. In other

words, the State Commission alone has got the jurisdiction to fix the tariff of the consumers of the TPC u/s 62 of the Act. The TPC and its Open Access Consumers have chosen to adopt the said tariff out of their own choice and volition.

144. According to RInfra , the TPC are taking away the high end consumers from RInfra on representation that the tariff fixed by the State Commission for high end consumers of Tata is lower than the tariff fixed for the high end consumers of the RInfra If the TPC Company are to start negotiating the tariff in the case of each high end consumers, there will be a vast disparity among the consumers which will negate the spirit of the competition under the Act.

145. As mentioned earlier, in the present case, TPC has voluntarily chosen to supply and the open access consumers have voluntarily chosen to receive supply from the TPC on the basis of the tariff fixed by the State Commission as applicable generally to the TPC Consumers within the area of distribution. This shows that Section 49 and Section 86 (1) (a) have no application.

146. The TPC has also contended that interim order dated 15.10.2009 does not refer to the open access but it merely contemplates a situation of “parallel licensing” and the said

arrangements was only for sharing the distribution network by parallel distribution licensee and for that, no cross subsidy surcharge is payable. This contention also is misconceived.

147. On the one hand, the TPC contends that the sharing of the network can be sanctioned by the State Commission by virtue of its power under the Electricity Act, 2003. On the other hand, the TPC contends that there is no provision of cross subsidy charge payable to the distribution licensee who looses to the consumers in a situation of a parallel distribution licensee in the same area.

148. If there is no provision in the Act to promote the network of the RInfra Company to be utilized by the TPC, there will be no question of allowing such a use as contemplated in the interim order dated 15.10.2009.

149. The situation of a parallel licensee is contemplated under the 6th proviso of Section 14. This provides that the State Commission may grant a license to two or more persons for distribution through their own distribution system within the same area subject to the conditions.

150. As mentioned above, 6th proviso of Section 14 stipulates that a parallel licensee is required to set-up its own distribution system. Admittedly, TPC has not set-up its

distribution system. If the TPC claims to be a parallel licensee, they are obliged to set up its own distribution system. They cannot claim as of right over the distribution system of RInfra In the present case, the RInfra has voluntarily permitted TPC Company to use its distribution system on the open access on the strength of the judgment of the Hon'ble Supreme Court.

151. The TPC having failed to set-up their distribution system to enable to fulfill their universal service obligation cannot now claim to have a right over the distribution system of RInfra without any obligation either to supply to the consumers on demand or to pay the charges for using the distribution network of RInfra, as determined by the State Commission. In other words, there is no provision in the Act for a situation where one licensee in the same area of supply could claim right over the distribution system of another licensee.

152. The Act provides only two methods by which the two licensees can operate within the same area of supply (i) either on their own respective distribution network as envisaged under sixth proviso of Section 14 or (ii) by utilizing the provisions relating to the open access as interpreted by the Hon'ble Supreme Court. No other mode is permissible.

153. In this context, it would be appropriate to quote the preamble of the Electricity Act, 2003. The same is as follows:

> "*An Act to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity, industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalization of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto"*

154. The perusal of the preamble makes it clear that the object of the Act, 2003 is to take measures conducive to the development of electricity industry by promoting the competition and also to protect the interest of the consumers. It is not the sole object of the Electricity Act, 2003 to give cheapest electricity to the consumers at any cost without regard to the survival of distribution companies.

155. The RInfra claims that at the relevant time, it had approximately 27 lac consumers out of which 22 lac consumers were low end consumers, consuming less than 300 units. The balance consumers of about 4 lac were residential consumers consuming more than 300 units and high end consumers likes malls, airports, shopping centers,

multiplexes etc. Since the consumer's mix of RInfra had heavily tilted towards low end consumers, it was not possible for the RInfra to keep an equal electricity tariff for all consumers prior to the Regulations of the Commission Act, 1998 or thereafter.

156. The State Commission recognizing the imbalance heavily tilted in favour of low end consumers has fixed the tariff in such a manner as the tariff of low end consumers is lower even than the average cost of supply and the shortfall is compensated by imposing higher tariff on high end consumers. This would help in maintaining economic equilibrium of RInfra.

157. As a matter of fact, the tariff of the TPC for high end consumers is lower than the tariff of high end consumers of RInfra. Similarly, the tariff of the low end consumers of the TPC is marginally lower than the tariff imposed on the low end consumers of the RInfra.

158. As a result, there was a large scale demand by the high end consumers of the RInfra to receive supply from the TPC by using the network of the RInfra after the interim order was passed on 15.10.2009. Consequently, most of the high end consumers such as airports, malls, multiplex and large shopping centers have started taking supply from the TPC using the network of the RInfra.

159. In this way, the RInfra was being left increasingly with low end consumers whose tariff when they receive supply from RInfra is only marginally higher than the supply of the TPC.

160. In this situation, the RInfra was left mainly with low end subsidized consumers whereas the TPC Company had taken away the high end consumers from the RInfra by giving them to the network owned by the TPC owned network.

161. In the above circumstances, there was a huge economic impact on RInfra. This situation will further enhance when the RInfra is left only with low end consumers in the absence of cross subsidy elements. In that event, the tariff of low end consumers would also increase who in turn will chose to receive supply from TPC thereby eroding the entire consumer base of the RInfra. If such a situation is allowed to continue, the RInfra would be driven out of the competition and consequently the TPC will be left with monopoly.

162. Taking this aspect into consideration, the State Commission came to the conclusion that cross subsidy surcharge is liable to be recovered from the consumers who are receiving supply from the TPC on the network of the RInfra. This again is to preserve the competition to promote the interest of industry as well as to protect the interest of the consumers simultaneously.

163. The TPC contends that if the consumers who seek to receive the power from the TPC on the network of the RInfra are liable to pay cross subsidy, then, the consumers of the TPC would be having additional burden. This contention is not tenable. The surcharge which is being paid by the consumers to the RInfra shall be considered to be the surcharge for the loss of the consumers cross subsidizing the low end consumers when the TPC have not laid their own work for nearly a century. The TPC now wants to supply to the existing consumers of RInfra whom the RInfra has developed and supplied the power all along for a period of time.

164. The TPC for nearly eight decades have not laid its own distribution network as it is satisfied in acting as a bulk licensee supplying its entire generation.

165. On the other hand, the RInfra laid a huge network to supply on demand to consumers in the entire area of supply. The network put up by the RInfra is spread over approximately 400 Sq. Km. area. Such a distribution network is backed by manpower to service 28 lacs of consumers.

166. As mentioned above, at present, approximately 22 lacs consumers take less than 300 units. As a result, the supply and consumer mix has been skewed towards low end subsidized consumers.

167. The cross subsidy surcharge is levied only on consumers. For TPC, it is only a pass through. Therefore, there cannot be any serious prejudice to the TPC so as to claim that they are aggrieved.

168. The argument of the Appellants is that if the changeover was to be made only by way of open access, the same would undermine the right guaranteed to the consumers' u/s 43 of the Act. This contention is again not correct. There are two different issues. One is relating to the consumer who is to get the supply through the mechanism of open access u/s, 42 (2), 42(3) and 42 (4). Second relates to the supply of electricity by a distribution licensee through its own distribution network in pursuance of Section 43. These are two entirely different mechanisms under the Act, 2003. One does not absolve the duty cast upon under another Section.

169. A statutory obligation cast upon the distribution licensee u/s 43 cannot be met by the provision of Section 42(2) to 42 (4). The only exception is by permitting TPC to supply electricity to the consumers by using the network system of the RInfra under Open Access till TPC installs its own distribution network as directed by the Hon'ble Supreme Court through its order dated 8.7.2009.

170. As indicated above, the TPC itself originally took a stand that the changeover was an open access and therefore, in its

Petition filed on 31.8.2009 before the State Commission sought for the removal of difficulties under the Distribution Open Access Regulations and the Regulations 21 of the State Commission, 2005 on the strength of the Hon'ble Supreme Court judgment.

171. Admittedly, the TPC prayed the State Commission in the said petition for permitting the TPC to supply to the changeover consumers through the open access by using the network system of another distribution licensee, the RInfra The TPC has now taken a different stand from that of the original stand before the State Commission in the Petition filed by TPC in case No.50 of 2009 contending that the open access u/s 42 (3) would not apply where there are two parallel distribution licensees in the same area of supply. This is quite strange.

172. According to the Appellants, the State Commission had promulgated change over scheme by the orders dated 22.7.2009 and 15.10.2009 whereby consumers who were connected to the network of the RInfra and receive supply from Tata Power Company Limited but in those orders, the State Commission did not indicate that this change over scheme would be akin to third party open access.

173. It is further contended by the Appellant that the change over consumers from RInfra to TPC shall be the consumers of TPC for all purposes and therefore, the State Commission cannot

allow the RInfra to collect the wheeling charges as well as the cross subsidy charges from the consumers of the TPC. This contention is not correct for the following reasons:

(a) The term "Distribution Licensee" has been defined u/s 2 (17) of the Act which is as follows:

> *"distribution licensee means a licensee authorized to operate and maintain a distribution system for supplying electricity to the consumers in his area of supply".*

(b) The term "Distribution System" has been defined under Section 2 (19) of the Act which is as follows:

> *"distribution system means the system of wires and associated facilities between the delivery points on the transmission lines or the generation station connection and the point of connection to the installation of the consumers".*

(c) The term "wheeling" has also been defined in Section 2 (76)of the Act which is as follows:

> "*wheeling means the operation whereby the distribution system and associated facilities of a transmission licensee or distribution licensee, as the case may be, are used by another person for the conveyance of electricity on payment of charges to be determined under Section 62".*

174. A distribution licensee may be granted a license upon application by the State Commission under Section 14 of the Act. The said section authorizes the existence of two or more licensees in the same area. The relevant portion of section 14 and its relevant proviso are as follows:

> *"The Appropriate Commission may, on an application made to it under Section 15, grant a license to any person-*
>
> *(a) To transmit electricity as a transmission licensee; or*
>
> *(b) To distribute electricity as a distribution licensee; or*
>
> *(c) To undertake trading in electricity as an electricity trader' in the area as may be specified in the license;*
>
> *……*
>
> *Provided also that the Appropriate Commission may grant a license to two or more persons for distribution of electricity through their own distribution system within the same area, subject to the conditions that the applicant for grant of license within the same area shall, without prejudice to the other conditions or requirements under the Act, comply with the additional requirements relating to the capital adequacy, creditworthiness, or code of conduct as may be prescribed by the Central Government, and no such applicant, who complies with all the requirements for grant of license, shall be refused grant of licence on the ground that there*

already exists a licensee in the same area for the same purpose:

Provided also that where a distribution licensee proposes to undertake distribution of electricity for a specified area within his area of supply through another person, that person shall not be required to obtain any separate licence from the concerned State Commission and such distribution licensee shall be responsible for distribution in his area of supply:

……..”

175. Thus, this Section authorizes the existence of more than one distribution licensee in an area to encourage competition and to provide benefit to the consumers.

176. The TPC has argued that there is nothing to stop a distribution licensee from selling its power outside its area of supply and only in that case, the open access would apply. This argument is wrong for the following reasons:

(i) Grant of a license to any person under Section 14 is necessarily in respect of an area as may be specified in the license’.

(ii) Section 2(3) provides for the definition of area of supply’ as meaning the area within which a distribution licensee is authorized by his license to supply electricity’.

(iii) Section 2 (70) defines the term ‘supply’ meaning the sale of electricity to a licensee or consumer.

(iv) Section 2(17) specifically lays down the authorization of a distribution licensee inter alia ‘for supplying electricity to the consumers in his area of supply’. Hence if a distribution licensee supplies electricity to consumers outside his area of supply, then clearly that would be an act not authorized by the law.

(v) The exception however is when a distribution licensee has surplus electricity and engages in its deemed trading functions under the last proviso to Section 14 to sell that surplus electricity outside its area of supply but not as a part of its Distribution Business.

(vi) The word “licensee” has been defined in Section 2(39) to mean any person who has been granted a “license “under Section1 4 of the Act.

(vii) Section 14 contemplates grant of a “distribution license”, a “trading license” and a “transmission license”. Hence, the word “licensee” would in any event include all three.

(viii) Section 2 (26) of the Act defines electricity trader"" to mean a person who has been granted a license to undertake trading in electricity under Section 12 of the Act.

(ix) The use of the term "any licensee" in Section 42 (3) in fact contemplates a "distribution licensee" more than a "trading licensee" since if the expression "any licensee" in 42 (3) were to contemplate a "trading licensee", only the expression which would have been used would have been "electricity trader" as defined in Section 2 (26) of the Act and also used elsewhere in the Act wherever a "Trader" is referred to.

177. The whole idea is that the consumer should be able to select a producer of power instead of being forced to buy electricity from distribution licensee of the area. Competitive market place can certainly reduce the tariff and save consumers from paying more. The Act, in fact, envisages the possibility of more than one distribution licensee within the area of supply. Then only, there would be a competition among the distribution companies for providing open access to the consumers. In short, it is to be held that the wires of a utility should be treated as pathways where a

generator or licensee could use the same to move electricity to its consumers without the consumers having to pay exorbitant charges on account of open access provided for reaching the electricity to them. Otherwise, the right to seek open access will be of no use.

178. Section 42 provides that it is the duty of the distribution licensee to develop and maintain an efficient, co-ordinate and economical distribution in his area of supply and to supply electricity in accordance with the provisions contained in the Act. However, incurring heavy expenditure for establishment of network is not the only option available to a distribution licensee to supply electricity to different consumers in its area of supply. The Act for this purpose introduces open access system. The term 'open access' has been defined under Section 2 (47) of the Act. The same is as follows:

> "*Open Access means the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the Regulations specified by the Appropriate Commission".*

179. While referring to the open access, Section 42 of the Act requires that the State Commission shall introduce open access in phases and subject to some conditions such as cross subsidy, the operational constraints etc., as may be

specified. It also provides that this must be established within one year and it shall have due regard to all relevant factors including such cross subsidy and other operational constraints. Such Open Access shall be allowed on payment of surcharge in addition to the wheeling charges as may be determined by the State Commission.

180. Section 42 also provides that where any person whose premises is situated within the area of supply of a distribution licensee, requires supply of electricity from either a generating company or any other licensee other than such a distribution licensee, such person may require the distribution licensee for wheeling such electricity in accordance with the Regulations made by the State Commission. The duties of such a distribution licensee with respect to such a supply shall be of a common carrier providing non discriminatory open access.

181. Where the State Commission permits a consumer to receive supply of electricity from a licensee other than the distributor of his area of supply such a consumer shall be a liable to pay additional surcharge apart from the wheeling charges to meet the fixed cost of such a distribution licensee arising out of his obligation to supply.

182. As per section 43 (2), it shall be the duty of every distribution licensee to provide electric plant or electric lines

for giving electricity supply to the premises of the consumers provided that no persons shall be entitled to demand from a licensee the supply of electricity from any premises having a separate supply, unless he has agreed with the licensee to pay the licensee such price as determined by the Commission.

183. Section 46 of the Act also empowers the State Commission to frame Regulations to authorize a distribution licensee to charge from a person requiring a supply of electricity in pursuance of Section any expenses reasonably incurred in providing any electric line or electric plant used for the purpose of giving that supply.

184. When the Act expressly authorizes the payment of surcharge and wheeling charges to the distribution licensee whose lines are being used, the Appellants cannot contend that the change over scheme never hinted that the Regulatory scheme of change over customers would be akin to a third party open access customer.

185. The Appellant has contended that the consumers interest is the hallmark of 2003 Act and the Act has mandated the Commission to keep the consumer’s interest as primary while performing its functions assigned to it under the Act but, the State Commission has not kept the consumer’s

interest in view while imposing cross subsidy surcharge on the change over consumers.

186. This contention also is not correct. In this context, we have to point out both the promotion of completion and protection of the consumer's interest is the principal objective of the Act, 2003.

187. The preamble of the Act, 2003 outlines the essence of the new Act by providing "taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas". Thus, the preamble of the Act, 2003 is distinct from those of the previous legislation. The preamble of the Indian Electricity Act, 1910 would indicate that it was an act to amend the law relating to the supply and use of electrical energy. The Electricity (supply) Act, 1948, stipulated in its Preamble that the said legislation was enacted to provide for the "rationalization of the production and supply of electricity and generally for taking measures conducive to electrical development". The preamble of the Electricity Regulatory Commission Act, 1998 states that it was an Act to provide for "rationalization of electricity tariff, transparent policies regarding subsidies, promotion of efficient and environmentally benign policies".

188. So, the difference between the preambles of the Legislation quoted above, is that the 2003 Act places an emphasis upon both the aspects of consumer's interest and promotion of competition and these are the salient objectives of the Act, 2003.

189. Let us now quote various provisions of the Electricity Act, 2003 indicating the objective of the Act to protect the interest of the consumers. Those are as under:

(a) **S. 22** - Provides for framing of scheme for operation of utility by the appropriate Commission where the utility is not sold.

(b) **S. 42** - Provides for establishment of CGRF and Ombudsman for settling the grievances of consumers.

(c) **S. 43** - Provides for universal service obligation (USO) for the licensee to provide connection to a consumer within a stipulated period of time, failing which the licensee is liable to pay compensation to the affected consumer.

(d) **S. 56** - Provides that no sum due from a consumer can be recovered after a period of two years unless such sum has been shown as arrears continuously from the date such sum became first due.

(e) **S. 57** - Requires the appropriate Commission to frame regulations on standards of performance which a licensee is required to follow failing which it is liable to pay penalty.

(f) **S. 60 –** Provides for promotion of competition and prevention of anti-competitive practices.

(g) **S. 61(d)** - Provides for safeguarding of consumer's interests at the time of determining the terms and conditions of tariff determination.

(h) **Proviso to S. 62(1) -** Provides for ceiling on retail tariff.

(i) **S. 63 -** Provides for competitive procurement of power.

(j) **S. 81(d)** - One of the objects of the Central Advisory Committee is to advise CERC on protection of consumer interest.

(k) **S. 88(iv)** - One of the objects of the State Advisory Committee is to advise SERC on protection of consumer interest.

(l) **S. 94(3)** - Empowers the Commission to authorise any person to represent the interest of the consumers in the proceedings before it.

(m) **S. 131(5)(a)** - Provides that the transfer scheme made for reorganization of State Electricity Boards should provide for protection of consumer interests.

(n) **Various Paragraphs of the National Electricity Policy**

(o) **Para 8 of the Tariff Policy**

190. It cannot be disputed that the perusal of these provisions would indicate the one of the mandates given to the Commission is to protect the consumers. In that event, the question arises as to what type of consumers?. Whether the Commission has to look-after the interest of only a handful high end consumers changing over the TPC from RInfra or to look-after the interest of the consumers at large

most of whom are the low income subsidized consumers not only being served by the RInfra but also being served by the TPC. In this context let us reiterate the Preamble of 2003 Act which is as under:

> *"An Act to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalization of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto".*

191. From the reading of the Preamble, it is clear that the object of the 2003 Act is to take measures conducive to the development of both electricity industry and to promote competition therein while protecting the interest of the consumers.

192. Taking the above aspects into consideration, the State Commission came to the conclusion that an amount is liable to be recovered from the consumers who are receiving supply from the TPC on the network of the RInfra. Thus, the action of imposing subsidy surcharge on such consumers is not only in consonance with the Act, 2003 but also mandated by the object of the Act, 2003.

193. In other words, the action is to preserve the competition, to promote the industry and simultaneously to protect the interest of the consumers.

194. The learned Counsel for the Appellant TPC contended that the levy of cross subsidy surcharge on change over consumers paying a regulated tariff is anti competitive and against the interest of the consumers and it is, therefore contrary to the most important tenets which form the basis of the electricity reform process and the Electricity Act, 2003.

195. It is also contended by the Appellant that since the change over consumers who get supply from the other parallel licensee, remain bound by the tariff as determined by the State Commission which means there would be an element of cross subsidy built into the tariff paid by the change over consumers to the supply distribution licensee and if the same is imposed on them by way of cross subsidy surcharge, it would burden the consumers unreasonably and is therefore against the interest of the consumers.

196. On the other hand, it is contended by the Learned Counsel for the State Commission that it is true that the exorbitant and excessive cross subsidy surcharge discouraging the consumer to seek open access would kill the competition but reasonable cross subsidy surcharge would encourage

the competition as the absence of cross subsidy surcharge would result in exodus of consumers, firstly the subsidizing consumers, resulting in tariff shock to the remaining subsidized consumers and then the remaining subsidizing consumers of the RInfra . We find force in this contention urged by the learned Counsel for the State Commission. Without reasonable subsidy, there is a possibility that all the consumers in RInfra may move to TPC and in that event, the monopoly of the TPC would be created.

197. One more aspect to be noticed in this context is this. As in the case of TPC, Mumbai International Airport Pvt Ltd., has also gone back upon the stand that it had originally taken when they wrote a letter to RInfra on 30.7.2009. In that letter, the Mumbai International Airport Pvt Ltd the existing consumers of the RInfra requesting the RInfra to get supply from the TPC through open access. The relevant portion of the letter is as follows:

"*Mumbai International airport Pvt. Ltd.*

To,
RInfra Energy Limited,
Santa Cruz (E),
Mumbai 400055.
Dear Sir,

Sub: Open Access to distribution system.

I, Ravinderkumar Seth, Head-Engineering & Maintenance, has been authorized by Mumbai 42 International Airport Pvt. Ltd. ("Applicant") to file the present application on behalf of the Applicant. The Applicant is desirous of obtaining supply of electricity from The TPC Company Ltd.-D (TPC-D) in accordance with the sub-section (47) of Section 2 read with sub-sections (2) and (3) of Section 42 of the Electricity Act, 2003 and the Regulations specified thereunder by the Maharashtra Electricity Regulatory Commission ("MERC").

.....
.....

In view of the above, we request you to kindly grant your concurrence/no-objection and allow the application filed by the ***Applicant for open access allowing access to your distribution system for the purpose of obtaining supply from TPC-D in accordance with sub-section 47 of Section 2 read with sub-sections (2) and (3) of Section 42 of the Electricity Act, 2003, the Regulations specified there under and orders passed by the MERC from time to time****".*

198. The aforesaid letter would clearly indicate that they being the existing consumers of the RInfra sought no objection to get the supply from TPC only through open access u/s 42 of the Act. As such, the present stand taken by the Mumbai International Airport which is in line with the TPC to the effect that the open access provision would not apply to the present case, is clearly contrary to the earlier stand.

199. Summary of Our Findings

(A) **Hon'ble Supreme Court in its judgment in Civil Appeal No. 2898 of 2006 dated 8.7.2008 had categorically held that the concept of wheeling has been introduced in the 2003 Act to enable distribution licensees who are yet to install their distribution line to supply electricity directly to retail consumers, subject to the payment of surcharge in addition to the charges for wheeling as the State Commission may determine. Acting upon this judgment of Hon'ble Supreme Court, the Appellant TPC had filed petition before the State Commission under MERC (Open Access in Distribution) Regulations and consequently, the State Commission permitted changing over of Consumer from RInfra to TPC to get supply by using the network of RInfra. Having availed of the same, the Appellant TPC cannot now be permitted to contend that the observations of the Hon'ble Supreme Court relating to surcharge were 'fleeting' observations and not the findings.**

(B) **Various provisions of the 2003 Act as well as 1910 Act required a distribution licensee to lay down its own distribution network for meeting the**

universal service obligation to consumers. TPC, the distribution licensee who had been granted license in the year 1907 and who failed to lay its own distribution network cannot now claim right over the distribution network of other licensee to meet its universal service obligations.

(C) **The only method to use the network of the Distribution Licensee namely RInfra, by the another Distribution Licensee namely TPC, is only through open access under Section 42 of the Act. Section 42(3) envisages the existence of parallel distribution licensee and it is equally applicable in this case where a consumer connected to the network of one distribution licensee i.e. RInfra, takes power from other distribution licensee i.e. TPC in the same area of supply.**

(D) **The State Commission does not have any plenary power to permit something which is not permitted within the Act itself. In this case, there is specific provision for Open Access to allow the TPC to supply to the change over consumers by using the network of RInfra. Hence, the question of invoking plenary powers does not arise.**

(E) **The State Commission is required to look after not only the interest of the consumers but also the interest of licensees. Therefore, the State Commission, while deciding that the change over consumers are liable to pay cross subsidy surcharge to RInfra for using their network has in fact taken into consideration the interest of the consumers as well as the interest of the licensees. Therefore, findings and directions given in the impugned order by the State Commission which would promote healthy competition are perfectly justified.**

200. In view of our above findings, we do not find merit in these Appeals. Consequently, all these Appeals are dismissed as devoid of merits.

201. However, there is no order as to costs.

(V J Talwar)
Technical Member

(Justice M. KarpagaVinayagam)
Chairperson

Dated: 21st December, 2012

√REPORTABLE/~~NONREPORTABLE~~