IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 35 of 2020 &
IA NO. 60 OF 2020

Dated: 28th May, 2020

Present: Hon'ble Mr. Ravindra Kumar Verma, Technical Member
Hon'ble Mr. Justice R.K. Gauba, Judicial Member

In the matter of:

The Tata Power Company Limited
Through its authorized signatory
'A' Wing, Carnac Receiving Station,
34, Sant Tukaram Road,
Carnac Bunder,
Mumbai – 400 009 **... Appellant**

Versus

1. **Maharashtra Electricity Regulatory Commission,**
   Through its Secretary
   World Trade Centre, Centre No.1
   13th Floor, Cuffe Parade
   Mumbai – 400 005

2. **Adani Electricity Mumbai Limited (Distribution)**
   Through its Managing Director
   CTS 407/A (New), 408 Old Village,
   Eksar Devidas Lane,
   Off SVP Road, Borivali West,
   Mumbai- 400 103

3. **Jagdeo Mhatre**
   New Uttan, Gorai Road,
   Bhayander (West),
   Mumbai – 401 106 **... Respondents**

Counsel for the Appellant(s) : Mr. Basava Prabhu Patil, Sr. Adv.

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Mr. Lakshyajit Singh Bagdwal
Ms. Shruti Awasthi
Mr. Karan Govel For R-2

J U D G M E N T

PER HON'BLE MR. JUSTICE R.K. GAUBA, JUDICIAL MEMBER

1. This matter was heard and reserved for judgment prior to restrictions being imposed due to National Lockdown for containing spread of coronavirus (Covid-19).

2. The dispute brought for adjudication by the present appeal stems from parallel distribution licensing, one distribution company ("*Discom*") claiming right to bid to serve the interests of a new consumer (third respondent) as against the claim of the other Discom asserting itself to be in a superior position to do so in terms of the principles on the subject laid down by the Maharashtra State Electricity Regulatory Commission

(hereinafter referred to variously as *"MERC"* or *"State Commission"* or "*Commission"*).

3. The Electricity Act, 2003 was enacted to usher in reforms in the basic legal frame-work for electricity supply industry, the prime objective being to take such measures as are conducive to its development and promote "*competition*" so as to protect the interest of the consumers through efficiency and environmentally benign transparent policies including so as to rationalize electricity tariff and subsidy, making "*efficient and economical use of resources*", encouraging "*good performance*" and "*optimum investments*" ensuring, at the same time, "*recovery of reasonable cost*" for the generator.

4. The generation of electricity has been, by and large, de-licensed and competition allowed in the new regime, *inter alia,* by parallel licensing. The activities in the nature of transmission or distribution of, or trading in, electricity are permitted but only if a license for such purpose is obtained (in terms of Section 12 to 14 of Electricity Act, 2003) from the Electricity Regulatory Commission ("Commission"). The sixth proviso to section 14 in terms of which the Commission grants license, amongst others, for distribution of electricity "*in any area"* as may be specified, is of interest for the present discussion and reads thus:

"Provided also that the Appropriate Commission may grant a licence to two or more persons for distribution of electricity through their own distribution system within the same area, subject to conditions that the applicant for grant of licence within the same area shall, without prejudice to the other conditions or requirements under this 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 licence, shall be refused grant of licence on the ground that there already exists a licensee in the same area for the same purpose"

[Emphasis supplied]

5. The dispute at hand relates to Mumbai, a megalopolis of Maharashtra. By its Order dated 14.08.2014 (in case no. 90/2014), the first respondent i.e. MERC had granted distribution licence for the area in question to the appellant i.e. *The Tata Power Company Limited (TPC-D)* for twenty-five years, beginning 16.08.2014, it (TPC-D) having been in such business in the city for long time anterior thereto. Besides TPC-D, at least two other entities viz. *Brihanmumbai Electric Supply and Transport Undertaking (BEST)* and Reliance Infrastructure Limited [R-Infra (D)] were also operating as distribution companies (*Discoms*) in certain areas that have been described as Mumbai Island City and a part of Mumbai suburbs which are common to the area for which licence had been granted to TPC-D. It may be added here that the second respondent i.e. Adani Electricity Mumbai Limited (Distribution) ("*AEML-D"*), the

competing Discom, took over the business of electricity supply, in terms of licence granted to it by the State Commission, from R-Infra (D) over the subsequent period.

6. The Commission, by its Order dated 22.08.2012 (in case no. 151 of 2011), had directed TPC-D to roll-out its own distribution network in eleven identified clusters to enable it to provide supply to existing and prospective consumers within the period that was specified, in terms of Standard of Performance (*SoP*) Regulations. The said Order dated 22.08.2012 of the State Commission, had become subject matter of appeal, preferred by TPC-D and R-Infra (D), before this Tribunal (in Appeal nos. 229 & 246 of 2012). This Tribunal, by judgment dated 28.11.2014, had laid down certain principles on the subject of network roll-out respecting the area in which context there was an overlap between TPC-D and R-Infra (D). The broad theme and spirit of the said principles were to the effect that TPC-D could not claim a right to lay down its distribution network selectively even in areas where a reliable network of R-Infra (D) has existed and that its endeavour for laying its network should be restricted to areas where such parallel network would improve the reliability of supply thereby benefiting the consumers, no restrictions, however, being permissible against any distribution licensee from laying a network for supply to new connections.

7. On 10.10.2014, TPC-D filed a petition (case no. 182 of 2014) before the State Commission seeking approval of a revised "*Network Roll-out Plan*" covering the distribution licence area common to the three entities. On 09.11.2015, the State Commission passed an interim order in the said matter (case no. 182 of 2014) taking decisions as to the principles to be followed for physical roll-out by TPC-D noting, at the same time, the ruling of this Tribunal by judgment dated 18.11.2014. The Commission held that the "*consumer choice is a primary consideration"*, it being the responsibility of the Licensees "*to ensure that the mode of supply opted for is the most cost effective and avoids duplicating or wasting national resources"*, it being essential that the "*existing network"* was " *used to its maximum potential"*, new lines to be laid only when "*reliability and adequacy, and economic viability along with consumer demand require it to be done"*. By its observations (in para 53) in the interim Order dated 09.11.2015, the State Commission visualized four scenarios. It would be apt to quote the relevant portion of the said para (no. 53) of the interim order as under:

> *"53. The Commission is of the view that one of the issues that needs to be addressed in this Case is the responsibility of the Licensees, especially TPC-D, towards consumers who apply for a connection. This would arise in the following Scenarios: -*

(a) Location, Municipal Ward or other area which is completely covered by one Licensee, but consumers within such area still wish to shift from their existing provider to the other Licensee;

(b) Location, Ward or other area which is completely covered by both Licensees, but consumers within such area wish to shift from their existing provider to the other Licensee;

(c) Locations, Wards or other areas where neither Licensee is presently supplying power through its wires;

(d) Locations, Wards or other areas where either or both Licensees are present, and where the projected growth could considerably increase the number of consumers wishing to avail supply from either Licensee..."

[Emphasis supplied]

8. Even plain reading of the above formulation by the Commission makes it clear that the idea of describing the possible scenarios was to address the "*wish*" of the consumer as to his choice of the supplier (licencee).

9. Concluding that "*adequacy of existing networks*" in specific locations or areas is an important consideration in determining the *Rollout Plan*, and that its modalities and the methodology for dealing with consumer demand, parameters such as loading of network, ageing of network, obsolescence of technology, etc. determine the adequacy of the network, the Commission took the view that the term '*Rollout Plan*' has now also to be understood in a wider sense to encompass the nature of the response

required to such applications for supply in different scenarios mentioned above, which may or may not involve laying or augmentation of network by one or the other Licensee or consideration of an extensive, area-wise physical master plan except perhaps in respect of the area covered by BEST.

10. In order to finalize the operational specifics, the State Commission, by its interim order dated 09.04.2015, decided to seek advice and thus constituted a committee of experts. The committee submitted its report on 28.03.2016 and, upon consideration of the recommendation made in the said report, final order was passed by the State Commission on 12.06.2017, this covering not only the petition (case no. 182 of 2014) of TPC-D for approval of revised network roll-out plan but also another petition (case no. 40 of 2015), also of TPC-D, regarding protocol for consumer migration in the Mumbai Parallel licensing area pursuant to judgment of this Tribunal dated 28.11.2014.

11. It may be mentioned here that the four scenario visualized in para 53 of the interim order (as quoted earlier) have been referred in all the subsequent orders, and in the submissions of the parties also, as Scenario 53(a), 53(b), 53(c) or 53(d), as the case may be, the paragraph

number (“53”) having become the reference point for comprehending the contours.

12. It would be of advantage to take note of certain crucial parts of the Order dated 12.06.2017 of the State Commission, whereby broad principles were laid down to guide future action.

13. The Commission identified five levels of the extension circumstances and work required for releasing a connection setting them out thus:

> *“(a)* ***Level 1*** *-The LT or HT consumer connection is possible by extending the service line from the existing LT or HT distribution mains, respectively, without any extension or augmentation.*
> *(b)* ***Level 2*** *- The LT consumer connection is possible only after augmentation or extension of the nearest LT distribution mains.*
> *(c)* ***Level 3*** *- The LT consumer connection is possible only after providing new CSS or augmenting the existing CSS.*
> *(d)* ***Level 4*** *- The LT / HT consumer connection is possible only after laying or augmenting HT cable/mains and associated switchgear.*
> *(e)* ***Level 5*** *- The LT/ HT consumer connection is possible only after laying or augmenting the HT cable/mains and associated switchgear, and commissioning of new or augmentation of the existing DSS or Receiving Station in the area.”*
>
> [Emphasis supplied]

14. On the meaning of the expressions "*completely covered*" (by distribution licensee) and (of a licensee) being "*present*", the Commission held thus:

> *"123.6 In view of the foregoing, the Commission rules that a Distribution Licensee will be considered as 'completely covering' an area, locality or location, for the purposes of this Order, when it has its distribution mains in place there and the consumer connection can be given by laying a service line without augmenting or extending the distribution mains.*
>
> *123.7 Therefore, an existing consumer of a Distribution Licensee may switch-over to the other Distribution Licensee if the latter also has its distribution mains there and the consumer connection can be provided by merely laying a service line. In other words, if both Licensees have their distribution mains in an area and consumers can be connected by merely laying a service line, the consumer would have the option to select both the network and the Supply Licensee since both Distribution Licensees are 'completely covering' the area.*
>
> *123.8 As regards a Distribution Licensee being 'present' in an area, the Commission is of the view that, unless the Licensee is directly supplying HT consumers, the existence of backbone HT distribution mains would be the most relevant and appropriate identifying criterion because it is the primary requirement for the further spread of the distribution network in an area."*
>
> [Emphasis supplied]

15. The Commission clarified, *albeit* in context of Scenario 53(c), and 53(d), the method of determination of appropriate scenario, thus:

"59.1 While there are certain areas such as the salt pan lands which can unambiguously be pre-identified as falling in Scenario 53(c), there would also be smaller scattered areas or pockets elsewhere which are not so clearly identified. That is why the Interim Order has expressly used the more narrow term 'location' in addition to the term 'area' while defining Scenario 53(c). That being the case, the Commission is not inclined to list or freeze the areas falling in this category. As explained in Chapters 5 and 6, while the Institutional Mechanism is primarily intended for deciding the Licensees' proposals on applications at Levels 3 to 5 in areas in Scenario 53(d), it will also verify any claim that an area (or locality) from which applications are received falls in Scenario 53(c) or other Scenarios. In that case, they would be dealt with in accordance with the Commission's dispensation for such areas.

59.2 As a general principle, for determining whether an area or location falls in one Scenario or another, the reference point would be the consumer to whom a connection is to be provided. Thus, for instance, if a new connection cannot be provided by a Licensee without establishing or augmenting its distribution mains, that location would not be considered as completely covered by it. The same location would, however, be considered as being completely covered by the other Licensee if the latter can do so through its existing distribution mains without extension or augmentation."

[Emphasis supplied]

16. The scenario 53(c) was explained (in Chapter 5) in following words:

"125.1 Scenario 53 (c) of the Commission's Interim Order refers to an area or locality where neither Licensee is presently supplying power through its wires, and is akin to a Greenfield area. The Committee has given some examples of areas in which neither Licensee presently has a distribution system in the absence of any existing consumer or demand. However, as explained earlier at Para. 59, while some distinct areas such

as the salt pan lands cited by the Committee can easily be identified as falling in Scenario 53(c), it would also cover other scattered locations or pockets where neither Licensee has established its distribution mains and would, therefore, also be open to competition between the Parallel Licensees and to the unfettered choice of prospective consumers."

[Emphasis supplied]

17. The Committee advising the State Commission had recommended that applications for connections in all "*redevelopment*" cases should be considered as applications from new consumers. This was contested by one of the Discoms contending that in cases of "*redevelopment*", the Discom supplying to the previous occupant/premises should be permitted to supply to the redeveloped premises also since it would already have a developed distribution network in the vicinity. The Commission decided as under:

"128.3 In the case of redevelopment of buildings resulting in redeveloped premises, the existing structures are demolished and altogether new structures are constructed for occupation by a new set of persons or the previous occupiers or a mix of both. In these circumstances, the Distribution License which was supplying electricity before the structure was demolished has to permanently disconnect the premises. Therefore, as per the definition of 'consumer' under the EA, 2003 and as discussed earlier, such redeveloped premises no longer remain consumers of the existing Distribution Licensee as they are no longer connected to its distribution system and are not for the time being receiving supply from it. Therefore, every application for supply to such redeveloped premises would qualify as an application from a new consumer.

128.4 In cases of redevelopment, the Licensee who was earlier supplying electricity to the previous occupant/ premises might ordinarily have a natural advantage as it would already have its distribution mains in the vicinity and may, therefore, be better placed to connect and supply such new consumers/ premises. However, if it so happens that the other Licensee is also in the vicinity and is better placed to connect the consumer in the most economical and optimal manner, it should be allowed to provide supply.

128.5 In any event, as stated earlier and as in other cases, an application made by a new consumer in the case of redevelopment will be placed before the Institutional Mechanism for evaluation and decision as to which Licensee is better placed to set up or augment or extend the distribution system to effect supply to such consumers in the most optimal manner, if the application falls within Levels 3 to 5 in areas covered in Scenario 53(d).”

[Emphasis supplied]

18. On the question of criteria for evaluating the economics of network extension, or augmentation, in Scenario 53(d), the Commission held thus:

“133.1 Scenario 53(d) refers to an area or location where either or both Distribution Licensees are present but neither has a distribution system that completely covers it. Therefore, when an applicant seeks supply from a Licensee who is present in the area, that Licensee needs to only augment or extend its nearby network and provide last mile connectivity to connect and supply power to him.

133.2 However, when both Distribution Licensees are present, it is necessary to evaluate which can augment or extend its distribution mains to connect such applicants in the most economical manner. When a Licensee augments or extends its distribution mains, it will incur a cost which will be passed on to all its consumers through future tariffs. Therefore, considering the interests of the consumers at large, the

Licensee which can connect the consumer in the most optimal and cost-effective manner should lay its network."

[Emphasis supplied]

19. Since the solutions identified by the State Commission for resolving the dispute arising from the competing claims would invariably require evaluation of "*cost effectiveness"* of the proposals, the State Commission introduced an "*institutional mechanism"* in the form of a '*Mumbai Distribution Network Assessment Committee (M-DNAC)',* its composition having been spelt out by the order dated 12.06.2017.

20. The manner in which applications from existing and new consumers in areas covered by the four scenarios and at different levels were to be dealt with, was laid down in the Order dated 12.06.2017 of the State Commission in the following terms:

"136.1 ***Scenario 53 (a)***

comprises areas or locations which are completely covered by one Licensee since it has its distribution mains there but Licensee B does not.

a. Level 1

A New Consumer

may opt for a connection from Licensee A, which shall provide it on its already existing network;

or

may opt for a connection from Licensee B, in which case Licensee B shall provide it using Licensee A's

already existing network since it does not have its own, so as to avoid unnecessary network duplication

An Existing Consumer
may continue with Licensee A

or

may opt for a connection from Licensee B using Licensee A's already existing network through the Change-over Protocol since it does not have its own, so as to avoid unnecessary network duplication

b. Levels 2 to 5

Over time, in such areas, the existing distribution network of Licensee A may require extension, addition or augmentation to the extent of Level 2 or higher to cater to the increasing load of its existing consumers or to cater to new consumers (for instance, because of redevelopment).

In such cases also, since Licensee B has no distribution network in place and Licensee A does, Licensee A would develop its network further to cater to the additional load of existing and new consumers.

Similarly, the same options as are available to existing and new consumers at Level 1 would be available to them if the network has to be further developed by Licensee A to Levels 2 and higher.

Institutional Mechanism

Since no comparative evaluation of the cost of network expansion of the Licensees is required, applications of new consumers need not be referred to the Institutional Mechanism.

However, the Institutional Mechanism shall confirm the claim of the concerned Licensee that an application at Level 3 or higher is indeed from an area falling in Scenario 53(a).

136.2 ***Scenario 53 (b)***

comprises areas or locations which are completely covered by both Licensees, i.e. both Licensees have their distribution mains there and the consumer connection can

be given by laying a service line without augmenting or extending the distribution mains.

a. *Level 1*

A new consumer

may opt for a connection from either Licensee, since both completely cover the area, and the chosen Licensee may provide it on its existing network;

An existing consumer

may continue with Licensee A

or

may migrate to the other Licensee B in accordance with the Change-over or Switch-over Protocol, according to his choice.

Additional load of existing and new consumers

b. *Levels 2 to 5*

Over time, in such areas, the existing distribution network of either or both Licensees may require addition or augmentation to the extent of Level 2 or higher to cater to the increasing load of its existing consumers. In such cases also, the concerned Licensees may develop their network further to cater to the additional load of existing consumers.

As Scenario 53 (b) envisages only laying of service line from the existing distribution mains, new consumers at Levels 2 to 5 cannot be classified under it. Such new consumers will be covered by Scenario 53 (d).

Institutional Mechanism

Since only laying of service line is involved, the cost of which is borne by the applicant, no comparative evaluation of the cost of network expansion of the Licensees is required in this Scenario either, and applications of new consumers need not be referred to the Institutional Mechanism.

136.3 ***Scenario 53 (c)***

comprises areas or locations where no Licensee is presently supplying power through its wires, i.e. neither Licensee is even 'present'.

a. *Levels 1 and 2*

By the very definition of such areas, the question of providing connections to new consumers at Levels 1 and 2 does not arise, and there are no existing consumers.

b. *Levels 3 to 5*

Over time, the distribution network would need to be established in such areas to cater to new consumer demand. Since neither Licensee has an existing network in place, the question of change-over or switch-over of consumers does not arise, and network development by one or the other Licensee will depend on the choice of the new consumers.

However, once new consumers emerge and the distribution network is set up, the character of such areas will change and they would graduate to other Scenarios. Once that takes place, subsequent applications from existing or new consumers would be governed by the dispensation applicable to areas under such other Scenarios.

Institutional Mechanism

Since no comparative evaluation of the cost of network expansion of the Licensees is required since neither Licensee has any presence in the area, applications of new consumers need not be referred to the Institutional Mechanism.

However, the Institutional Mechanism shall confirm the claim of the concerned Licensee that an application at Level 3 or higher is indeed from an area falling in Scenario 53(c).

136.4 ***Scenario 53 (d)***

comprises areas or locations where one or both Licensees are present, and where the projected growth

could increase the number of consumers wishing to avail supply from either Licensee.

a. *Level 1*

By the very definition of such area, the question of providing connections to new consumers at Level 1 or switch-over of existing consumers does not arise since neither Licensee is completely covering the area.

b. *Levels 2 to 5*

(if only Licensee A is present)

A New Consumer

may opt for a connection from Licensee A, which shall provide it on its already existing network;

or

may opt for a connection from Licensee B, in which case Licensee B shall provide it using Licensee A's already existing network since it does not have its own, so as to avoid unnecessary network duplication.

Institutional Mechanism

Since only one Licensee is present, comparative evaluation of the cost of network expansion does not arise, and hence applications of new consumers need not be referred to the Institutional Mechanism.

However, the Institutional Mechanism shall confirm the claim of the concerned Licensee that an application at Level 3 or higher is indeed from an area falling in Scenario 53(d) with only one Licensee present.

c. *Levels 2 to 5*

(if both Licensees are present)

A New Consumer

may opt for a connection from either Licensee. However, since neither Licensee is completely covering the area or location, the Licensee which can set up or extend distribution system required in the most cost-effective manner shall connect the new consumer.

Hence, every application of Level 3 to Level 5 shall be referred to the Institutional Mechanism.

However, in case of a Level 2 application, the connection can be released by the Distribution Licensee to whom the application has been made without reference to the Institutional Mechanism.

Institutional Mechanism

In case of requirements at Levels 3 to 5, the Institutional Mechanism shall decide which Licensee shall connect the new consumer by setting up or extending its distribution system considering the comparative costs."

[Emphasis supplied]

21. It is so stated in the pleadings, and the written submissions, and was also brought out at the hearing on the appeal at hand that the principles regarding laying of distribution network in the sub-urban area of Mumbai, as enunciated by Order dated 12.06.2017 of the State Commission, are subject matter of challenge through appeals presented by AEML (Appeal nos. 195 and 296 of 2017), TPC-D (Appeal no. 243 of 2017) and another party, described as MIDC Marol, Mumbai (Appeal no. 250 of 2017) wherein issues relating to the principles of network Roll-out of a parallel licensing scenario, meaning of the term "*completely covered"*, switch over of consumers, restrictions on supply of electricity to consumers (including new ones) and legality of the powers conferred (by delegation) on M-DNAC, have been raised. The said batch of appeals is pending, in the category of '*part heard',* before the co-ordinate bench.

22. On 26.11.2018, AEML-D filed a petition (case no. 345 of 2018) before the State Commission seeking clarification and/or issuance of practice directions to implement the Order dated 12.06.2017 in Case no. 182 of 2014 in respect of applications of new consumers under Scenario 53(a) for area which is "*completely covered"* by one distribution licensee. It appears that *Medinee Niketan Cooperative Housing Society* ("Medinee"), an existing consumer, had applied to AEML for supply of electricity after *"redevelopment"*. It is undisputed case that AEML had been supplying electricity prior to the redevelopment to the erstwhile occupants of the premises of the *Medinee Niketan CHS*. The M-DNAC, to which the matter had been taken, appears to have held that the case pertained to Scenario 53(d) and AEML could not supply electricity merely by providing a service line. The case of *Medinee* (also referred to hereinafter as Case no. 345 of 2018) was decided by Order dated 04.02.2019 of State Commission.

23. The background facts of the case of *Medinee* have been relied upon by the appellant and, therefore, may be extracted from the Order dated 04.02.2019 of the State Commission as under:

> *"3.13 AEML-D had received an application of power supply from M/s Medinee Niketan CHS, dated 7 September, 2018. This was a case of redevelopment, where the earlier premise was supplied by AEML-D on LT network without a substation.*

However, as a result of redevelopment and consequent increase in load, the power supply to the re-developed premises could not be released without construction of a consumer sub-station. AEML-D conducted an assessment of the presence of TPC-D's network and realized that TPC-D's distribution mains was located at least at a distance of 650 meters from the said premises, the fact which is not disputed by TPC-D in its submission to M-DNAC.

3.14 Based on para 136.1 (b) of the Order, AEML-D considered the said application as a Level 3 application falling under Scenario 53(a) i.e. a Scenario where even though the location was completely covered by AEML-D's network, the load increase due to re-development required network extension of Level 3 (i.e. construction of a substation). At the same time, the other Licensee i.e. TPC-D's distribution mains was at a considerable distance from the said location. This situation, as per AEML-D, completely fits the meaning and interpretation of Para 136.1(b) of the Order, because AEML-D's LT distribution network is in place but is required to be enhanced to Level 3, while TPC-D's nearest distribution network is at least 650 mtrs away (if not more), which clearly does not fall within the meaning of "being in place".

3.15 Based on the above understanding, AEML-D referred the application to the M-DNAC as a Scenario 53(a) application, giving details of network presence, as well. However, the claim of AEML-D was disputed by TPC-D and, subsequent to exchange of several letters between AEML-D, TPC-D and M-DNAC and meetings organized by the M-DNAC on 16 October, 2018, M-DNAC communicated its decision vide letter dated 30 October, 2018 that the Scenario for the said application is 53(d) and not 53(a) and accordingly directed both Licensees to submit their respective cost proposals, which AEML-D has submitted on 15 November, 2018, without prejudice to its contentions.

3.16 M-DNAC's above decision does not provide any reasoning as to why the scenario for the concerned application was not 53(a). It only states that Scenario 53(a) is applicable

where connections can be provided by laying service line and since both Licensees' network is present, the scenario is 53(d).

3.17 The present Petition has been filed to seek clarification in view of the said decision, because the said decision of M-DNAC puts all new connection applications of Level 3 and above in Scenario 53(d) only. This effectively means that, with respect to L3 to L5 applications, as long as the distribution mains of either Licensee are present anywhere, regardless of the distance from the location, the application would fall under Scenario 53(d) only.

3.18 The Order clearly specifies that L2 and above applications will exist in Scenario 53(a) in situations where, even though a location is completely covered by a Licensee, further network development of L2 and above may be necessary in view of load increase due to, say, re-development of the said location/premises and, in such cases, the scenario of the said location would continue to be 53(a) only. The application referred by AEML-D squarely fitted this definition, particularly, in view of the fact that TPC-D's network is at a considerable distance from the said location, a fact that TPC-D has never disputed in any of their communications.

...

3.20 This Petition seeks a clarification from the Commission rather than challenge the decision of M-DNAC, as a challenge would delay the concerned consumer's power supply. The Commission is requested to kindly clarify the meaning and intent of Para 136.1(b) of the Order in Case No. 182 of 2014 to define as to how exactly Level 3 and above applications are distinguished between Scenario 53(a) and Scenario 53(d). This clarification is important because, as stated above, if M-DNAC's decision with respect to the application of Medinee Niketan CHS is considered, Scenario 53(a) applies only for L1 (service cable only) applications and all L2 and above applications fall under Scenario 53(d) only, which position does not conform to the Order."

[Emphasis supplied]

24. The relevant extract of the Order dated 04.02.2019 in Case no. 345 of 2018 has been quoted (in the impugned order) by the State Commission, it having guided its decision, the same reading thus:

> *"14. With this background, the Commission now deals with the contentions made by the Parties on the scenario classification of 53(a). AEML-D has stated that the present Petition has been filed to seek clarification of the Order as the decision dated 30 October, 2018 of M-DNAC puts all new connection applications of Level 3 and above in Scenario 53(d) only. This effectively means that, with respect to an L3 to L5 applications, as long as the distribution mains of either Licensee are present anywhere, regardless of the distance from the location, the application would fall under Scenario 53(d) only. On the other hand, TPC-D has contended that the Order is absolutely clear that, if a Distribution Licensee can supply electricity to a 'new consumer' only by laying a service line, then the said consumer would fall under Scenario 53(a). However, if for supplying electricity to a 'new consumer' a Distribution Licensee is required to lay down or augment its distribution mains, then the said consumer would fall under Scenario 53(d), as the same would only be under Scenario 53 (d) where one or both licensees are 'present'…*
>
> *...*
>
> *25.Thus, the Order is very clear and recognizes that there would be level 3 and above applications in scenario 53(a). The scenario 53(a) comprises areas or locations which are completely covered by one Licensee since it has its distribution mains there but other Licensee does not. Therefore under such scenario, network development (for all the levels i.e. level 1 to level 5) in response to new connections is to be undertaken by the Licensee which has its network existing in the area. No question arises of the other Distribution Licensee*

developing its parallel distribution network in such scenario since this would result in network duplication which is against the objective of the Order. If any consumer wishes to get supply from the other licensee, then the other licensee would supply to the consumers through the network of existing licensee.

26. Further, in light of the rulings set out in the earlier part of the Order in Case No. 182 of 2014, the Commission, at para. 136 of the Order, has summarized the manner in which applications from existing and new consumers in areas in Scenarios 53(a) to 53(d) and at Levels 1 to 5 are to be dealt with by the Licensees and the Institutional Mechanism. In the said para, the scenario 53(a) has been stated to be areas or locations which are completely covered by one Licensee since it has its distribution mains there but Licensee B does not. Thus, it is clear that non-existence of the other Distribution licensee is the criteria for scenario 53(a). Due to non-existence of other Distribution Licensee, cost comparison and submission of the cost proposals to M-DNAC is not required."

[Emphasis supplied]

25. The above-said decision dated 04.02.2019 of MERC is the subject matter of challenge by appeal to this Tribunal, the Appeal, being no. 142 of 2019, it having been heard by the co-ordinate bench, judgment having been reserved on 09.05.2019.

26. It further appears that AEML was approached by another consumer i.e. *M/s Tejal Minerals and Grinders Private Limited ("Tejal"), Bandra (West)* and the request was placed by it (AEML-D) before M-DNAC for confirming that the location in question fell within Scenario 53(a), its HT

distribution main being present within the premises, that of TPC-D being located around three kilometres away. It was contended by TPC-D that AEML-D could not be considered as having "*completely covered"* the location, since it was required to establish a sub-station for such purposes and consequently the scenario was that of 53(d). The M-DNAC took note of the decision of the State Commission, as rendered by Order dated 04.02.2019 in Case no. 345 of 2018, and upheld the contention of AEML-D about it being Scenario 53(a), observing thus:

> *"7. The Committee is of the opinion that although, distance is not the criteria for scenario classification as per the Commission's Order, TPC-D's claim that its distribution network is also present in vicinity doesn't have merit presuming TPC-D's network spread (as claimed by AEML-D' or '53(d) with only one licensee present'."*
>
> [Emphasis supplied]

27. It is undisputed that the decision of M-DNAC rendered on 26.03.2019 in case of *Tejal* was not assailed by any petition or appeal before any forum.

28. It is against the above backdrop that the third respondent – Jagdeo Mhatre, a resident of Bhayander (West), Mumbai, approached AEML on 17.07.2019 with a request for supply of electricity of 145 kW-LT-II commercial category for his premises, used as studio, it being located in area described as Survey No 224, New Uttan, Behind Law College, Goral

Rd., Bhayander (W). It is admitted case that AEML's nearest 11 KV mains (sub-station) is located approximately 850 metres away from the said premises, it being in a position to supply electricity by extending power supply lines laying 11 KV cable and commissioning a sub-station and associated LT network in the premises. It is also admitted case that the nearest LT network of TPC-D is located at a distance of more than nine kms from the site while its nearest HT network is six kms away. AEML-D approached M-DNAC, by its letter of request dated 30.07.2019, for verification of the scenario categorization contending that the consumer fell under Scenario 53(a).

29. The above request of AEML-D was contested by TPC-D (appellant) by objections submitted formally. The M-DNAC, however, upheld the contention of AEML-D on 05.09.2019, observing thus:

> *"1. Mumbai Distribution Network Assessment Committee (M-DNAC) received a letter dated 1 August, 2019 from AEML-D seeking confirmation for going ahead with providing supply in response to application received from Jagdev Mhatre, New Uttan, Gorai Rd, Bhayandar (W) for supply of 145 kW – LT-II Commercial category claiming that the location belongs to scenario 53(a) as per the Commission's Order in Case No. 182 of 2014. AEML-D stated that its LT Network is covered in the vicinity of the location but it cannot cater to the requirement of the applicant and thus required extension of 11kV Cable from nearest substation for commissioning of the 11/0.433 kV substation. AEML-D's 11kV mains is located about 850 mtr. from the proposed substation location. Also, TPC-D's LT*

network is located outside of 9.2 km and HT network outside 6.1 km from the concerned location of the applicant. AEML-D submitted a map indicating the consumers' location, AEML-D's and TPC-D's nearby network spread.

2. TPC-D, vide its letter dated 21 August, 2019 disputed on AEML-D's scenario classification and stated that the applicant can be supplied electricity only after extending/augmenting its distribution mains and not by merely laying a service line. Hence the said applicant is not completely covered by AEML-D. Further, TPC-D's Distribution Network is also in the vicinity. Since both TPC-D and AEML-D require to install a new substation or augment the existing substation, a said applicant falls under 53(d) scenario.

3. TPC-D further stated that the Order dated 4 February, 2019 in Case No. 345 of 2018 is not applicable to the present case since the case of Case No. 345 of 2018 (M/s Medinee Niketan) was a re-development case and thus permitted under Scenario 53(a). However, present case is not re-development case and thus would fall under Scenario 53(d).

4. The Committee observed that although TPC-D stated that its network is also in vicinity, it did not deny the AEML-D's submission that TPC-D's network is 6 to 9 km away. Accordingly, during meeting held on 5 September, 2019, TPC-D was requested to clarify the same. During the meeting, TPC-D admitted that its nearby network is at least 6 km away from the proposed consumers' location.

5. The Committee notes that in its Order dated 4 February, 2019 in Case No. 345 of 2018, the Commission has already acknowledged that there could be level 3 and above applications in scenario 53(a). Hence, there is no merit in the TPC-D's contention that a said consumer falls under 53(d) scenario just because AEML-D would require to install a new substation to supply to the consumer. Further, the Committee does not agree with the contention of TPC-D that the ruling in Case No. 345 of 2018 would only applicable to re-development cases since no such segregation is made in that Order.

6. AEML-D has confirmed that it has its LT network nearby which cannot cater the applicant's load and hence new substation is required which is level 3 of the scenario of 53(a).

7. Further, although, distance is not the criteria for scenario classification as per the Commission's Order, TPC-D's claim that the location falls under scenario 53(d) doesn't have merit considering the network spread of both the Licensees in present case.

8. Therefore, the Committee is of the opinion that the location of Applicant Jagdev Mhatre, Nw Uttan, Gorai Rd, Bhayandar (W) for supply of 145 kW falls under scenario 53(a) as per Case No. 182 of 2014.

9. In view of the above, the Committee has decided to confirm for releasing power supply connection to Applicant (Jagdev Mhatre, New Uttan, Gorai Rd, Bhayandar (W)) which falls under scenario 53(a) and this criteria is satisfied by AEML-D."

[Emphasis supplied]

30. The above quoted proceedings dated 05.09.2019 of M-DNAC were assailed by appellant (TPC-D), by bringing the dispute to MERC (registered as Case no. 283 of 2019). The State Commission, by its Order dated 03.12.2019, upheld and adopted the view taken by M-DNAC holding that there was no infirmity therein and thus dismissed the petition of appellant.

31. The prime argument of the appellant (other than concerning the authority exercised by M-DNAC being *ultra-vires)* before the State Commission was that the view of M-DNAC - that the scenario pertained to 53(a) - leans towards creation of, or perpetuating, monopoly in favour

of AEML. The State Commission rejected the argument of the appellant noting, *inter-alia,* that requisite clarification on the issues arising out of the principles laid down by order dated 12.06.2017 had already been given in Case no. 345 of 2019 decided on 04.02.2019, also approvingly quoting, in that context, the view taken by M-DNAC in its Order dated 05.09.2019, and observing as under:

> *"26. The Commission notes that the term "network spread" has been used by M-DNAC in its decision of scenario confirmation. The term "spread" has been defined in the Cambridge Dictionary as "the area or range covered by something". When M-DNAC referred to the word ""network spread", as per the dictionary meaning it would mean as the "area covered by the Network" of the Distribution Licensees. The Commission also notes that the four scenarios i.e. scenario 53(a), 53(b), 53(c) and 53(d) have been defined in Case No. 182 of 2014 based on the extent the Distribution Licensee's network covers the area/location concerned. Hence, the Commission does not find any infirmity in the decision passed by M-DNAC dated 5 September 2019 merely because it uses the term "network spread" which has not been used in Order dated 12 June, 2017. The spirit of decision of M-DNAC is evident and cannot be bound by semantics.*
>
> *27. It is also observed that the necessary details such as applicant's load, Tariff category, applicable level, applicable scenario, GIS sketch/geographical map showing network positions etc. were before the M-DNAC as a part of submission from AEML-D. It is also seen from the decision of M-DNAC that the M-DNAC has duly confabulated with the Distribution Licensees. It sought few clarifications from them during the meeting. The M-DNAC has recorded the objections raised by TPC-D in its decision and has come to the decision made by expounding the rulings of the Commission in relevant Orders.*

Hence, the Commission does not find merit in the contention of TPC-D that M-DNAC accepted AEML-D's claim of scenario 53(a) without any verification. The Commission further notes that although TPC-D has raised objection that AEML-D is not completely covering the area/location and has stated that its Distribution Network is also in vicinity, it did not provide the exact supporting details of its Distribution Network in area nearby to the applicant's location along with the map justifying its argument as regards its presence in the vicinity rather than objecting to proposal of AEML-D.

28. As regards TPC-D's contention that M-DNAC relied on the distance, the Commission notes that the decision passed by the M-DNAC clearly states as follows:

> *"7. Further, although, distance is not the criteria for scenario classification as per the Commission's Order, TPC-C's claim that the location falls under scenario 53(d) doesn't have merit considering the network spread of both the Licensees in present case."*

Thus, it is inappropriate to state that the M-DNAC has taken its decision based on distance between the consumer's location and the networks of AEML-D and TPC-D.

29. TPC-D has further contended that M-DNAC recognised the procedure to be followed for scenario 53(d), while deciding the matter of earlier Power Supply Application of M/s Medinee Niketan CHS Ltd., Village Sahar, Andheri (East), Mumbai. However, it has completely ignored the same procedure while passing the impugned decision. On this contention, the Commission notes that the procedure referred by TPC-D is the procedure to be followed by the Distribution Licensees and M-DNAC, for processing applications under Scenario 53(d). In the instant matter, the M-DANC was required to verify the scenario classification of 53(a) as claimed by AEML-D after taking into consideration TPC-D's objection for such scenario classification. Hence, no question could have arisen to follow

the procedure as contended by TPC-D. Nevertheless, the Commission also notes that pursuant to decision passed by the M-DNAC in the matter of earlier Power Supply Application of M/s Medinee Niketan CHS Ltd., Village Sahar, Andheri (East), Mumbai, AEML-D approached the Commission in Case No. 345 of 2018 seeking clarification with respect to implementation of the Order dated 12 June, 2017 in Case No. 182 of 2014, so as to clearly define as to what criteria should be applied while referring to Level 3 and above applications for new consumers to the M-DNAC under Scenario 53(a). The Commission issued the clarification as mentioned at para. 23 above.

30. TPC-D has further contended that the Impugned decision of M-DAC virtually makes it impossible for TPC-D to connect to any new consumers and leans towards creation of a monopoly in a competitive environment, which is not the intent of Hon'ble ATE Judgment in Appeal No. 246 & 229 of 2012 and the Commission's Order in Case 182 of 2014. The Commission is of the opinion that the intent of the Order in Case No. 182 of 2014 dated 12 June, 2017 based on the Hon'ble ATE Judgment in Appeal No. 246 & 229 of 2012 is to ensure that unnecessary distribution network duplication is avoided while ensuring that the consumers are benefitted from the parallel licensing situation that exists in the Mumbai suburban area. The Order dated 12 June, 2017 has been passed by the Commission in terms of the various principles laid down by the Hon'ble ATE in its Judgement dated 28 November, 2014 in Appeal No. 246 and 229 of 2012. This ATE Judgment has not been challenged by TPC-D (by any other Party for that matter) and hence, has achieved finality. Therefore, as long as the M-DNAC decision has been taken in accordance with the principles and stipulations of the Order dated 12 June, 2017 (which is the case in present matter), allegation that the decision is against the intent of Hon'ble ATE Judgment in Appeal No. 246 & 229 of 2012 and the Commission's Order in Case 182 of 2014, is not correct. Nevertheless, the Commission also notes that in terms of the

Order dated 12 June, 2017, TPC-D and AEML-D are allowed to release new connection to any consumer without approaching M-DNAC if the said consumer can be connected on level 1 and level 2. The Commission has stipulated a format on its website in which TPC-D and AEML-D are required to submit monthly reports to the M-DNAC for providing the details of connections released by them on Level 1 and Level 2. As per the directions in the Order dated 12 June, 2017, both AEML-D and TPC-D have been submitting these monthly reports to the M-DNAC. It is observed that TPC-D has been able to connect many new consumers as per the availability of its distribution network in nearby area."

[Emphasis supplied]

32. It is the above decision dated 03.12.2019 which is assailed by the appeal at hand brought to this Tribunal under Section 111 of the Electricity Act, 2003.

33. As noted earlier, the validity of the Order dated 12.06.2017 of the State Commission (in Case no. 182 of 2014) laying down the principles to be followed for parallel distribution network is under challenge before this Tribunal in a batch of appeals led by Appeal no. 195 of 2017. That challenge, it be noted here, also includes the legality and validity of the order of the State Commission entrusting function of evaluation on case-to-case basis to M-DNAC, setting it up as the "*institutional mechanism*", it being the contention that such delegation is not permissible under the law, not the least under Section 97 of Electricity Act, 2003. The decision of the

State Commission rendered on 04.02.2019 in the matter of *Medinee* (supra) in Case no. 345 of 2018 is also under challenge by Appeal no. 142 of 2019 which is pending, the decision thereupon being awaited.

34. The appeal at hand concerning the supply of electricity to the third respondent (new consumer) was brought with an interim application (IA no. 60 of 2020) with the request for stay of the operation of the impugned order dated 03.12.2019. The matter was accordingly listed for urgent hearing upon request to that effect (by IA no. 61 of 2020) being allowed. However, mid-course the hearing, the learned counsel on both sides requested that the main appeal itself be taken up for hearing and decision. Thus, on the request of the learned counsel on both sides, we have heard arguments on the main appeal.

35. During the hearing, it was submitted by learned counsel for both contesting parties that the questions raised in the appeals challenging the previous decisions of the State Commission rendered by Orders dated 12.06.2017 (subject matter of Appeal no. 195 of 2017 and batch) and 04.02.2019 (subject matter of Appeal no. 142 of 2019) need not be addressed here, the validity of the impugned decision to be examined on the appeal at hand, upon assumption that M-DNAC has been validly conferred with the responsibility of carrying out evaluation as to the

relevant scenario and that the principles laid down vis-a-vis for scenario are applicable in letter and spirit.

36. Notwithstanding the concession made with regard to the issues that are subject matter of the earlier set of appeals (Appeal no. 195 of 2017 & batch and Appeal no. 142 of 2019), a slightly nuanced argument was raised by the learned counsel for the appellant that the procedure followed by the State Commission is illegal in the sense it has delegated its power of adjudication to another entity which is not permissible even in terms of Section 97 of Electricity Act, 2003, the provision reading thus:

> *"97. **Delegation.** – The Appropriate Commission may, by general or special order in writing, delegate to any Member, Secretary, officer of the Appropriate Commission or any other person subject to such conditions, if any, as may be specified in the order, such of its powers and functions under this Act (except the powers to adjudicate disputes under section 79 and section 86 and the powers to make regulations under section 178 or section 181) as it may deem necessary."*

37. We have examined the plea to above effect but find no merit in it. In the present case, the conclusion reached by M-DNAC has been treated more as recommendatory or advisory in nature than as a "*decision"* of an adjudicatory body. What is under challenge before us is the decision of the State Commission in which the advice tendered by M-DNAC stands subsumed. Pertinent to add here that even MERC has not been taking

the reports of M-DNAC as conclusive or binding. If an illustration in this regard were required, reference could be made to the case of *Medinee* (supra) wherein, by its order dated 04.02.2019, the State Commission had ignored the view formulated by M-DNAC and ruled contrarily. The practice followed shows that MERC has been entertaining objections against the dispensation by M-DNAC and, therefore, has asserted its position as the statutory authority to adjudicate on the dispute rather than abdicating its responsibility. In this view of the matter, reliance on decisions of Supreme Court reported as *Naraindas Indurkhya v The State of Madhya Pradesh and Others [(1974) 4 SCC 788], A.L. Kalra v Project and Equipment Corporation of India Ltd [(1984) 3 SCC 316], District Collector, Chittoor and Others v Chittoor District Groundnut Traders' Association, Chittoor and Others [(1989) SCC 58]* and *Babu Verghese and Others v Bar Council of Kerala and Others [(1999) 3 SCC 422* as also a decision of House of Lords reported as *Anisminic Ltd v Foreign Compensation Commission and Another* [(1968) UKHL 6], is misplaced.

38. The appellant assails the order dated 03.12.2019 of the State Commission by arguing that it alters the substratum of the order dated 12.06.2017 thereby violating the principles laid down by MERC for allowing parallel network in Suburban Mumbai, the principle of "*network spread"* as a criteria for scenario classification having been wrongly

upheld, it being in the teeth of the order dated 12.06.2017 thereby virtually allowing "*distance"* as the criterion for connecting the consumers, and further that reliance on the decision rendered on 02.04.2019 in Case no. 345 of 2018 (*Medinee Niketan)* of MERC is inappropriate, the factual matrix being distinguishable.

39. It is the submission of the appellant that in terms of the order dated 12.06.2017 of MERC, the following filters are to be applied for satisfaction as to the relevant scenario:

Scenario 53(a)	
Licensee A	**Licensee B**
Completely covers	Does not completely cover

Scenario 53(b)	
Licensee A	**Licensee B**
Completely covers	Completely covers

Scenario 53(c)	
Licensee A	**Licensee B**
	Not Present

Scenario 53(d)	
Licensee A	**Licensee B**
	Present/Not Present

40. The appellant submits that the approach adopted by M-DNAC renders the purposes of defining terms as "*completely covered"* and "*present"* redundant, since it subsumes Scenario 53(d) into Scenario 53(a). The argument is that if a Discom is constrained to "*augment"* its distribution mains to connect to a new consumer, the area cannot be

considered as "*completely covered"*. It is argued that invocation of test of "*network spread"* by M-DNAC was introduction of a muster beyond the scope of the principles laid down in order dated 12.06.2017 by the State Commission which had delegated the authority for verification to the former (*M-DNAC*) and, therefore, impermissible, the delegate having misread and misapplied the said principles, reference in this context being made to judgments of Supreme Court reported as *P.S. Sathappan v Andhra Bank Ltd. (2004) 11 SCC 672* and *Islamic Academy of Education v State of Karnataka (Constitutional Bench (2003) 6 SCC 697.*

41. The respondent Discom (AEML) contests the appeal primarily arguing that applicability of relevant Scenario is to be examined on case-to-case basis because there is no pre-existing classification of locations or areas or wards, the subject of consumer addition and network development being evolving and dynamic, the State Commission having consciously not given the "*distance"* as a criterion. It is submitted that the permissibility of an existing licensee undertaking extension, addition or augmentation of its network to cater to the increasing load demand of existing consumers, or for purposes of new consumers, is envisaged even in the Scenario 53(a), particularly from the perspective of second classification (levels 2 to 5), the idea of permitting the other licensee to provide new connectivity through the existing/available network (of the

former) being to preclude unnecessary duplication. It has been submitted that "*redevelopment"* in the context of second classification (Levels 2 to 5) of Scenario 53(a) is only by way of illustration and not meant to restrict its applicability to new consumers on account of redevelopment. It is the submission of the respondent Discom that the words "*in place"* appearing in said second classification (Levels 2 to 5) under scenario 53(a) connote *"in proximity".*

42. The respondent argues that an exercise to analyse whether a licensee has its distribution network "*in place"* in a particular area necessarily requires consideration of its "*network spread"* and, therefore, the objection to such test is flawed, the scrutiny not permitting "*distance"* and "*cost"* (required for network spread) to be divorced from each other. It has been submitted that the order dated 04.02.2019 in Case no. 345 of 2018 was more of a clarificatory order *vis-a-vis* the prime dispensation on the subject by Order dated 12.06.2017.

43. From the background facts of the case of *Medinee* (supra), as extracted earlier from the order dated 04.02.2019 of the State Commission, it does appear that unlike the case at hand concerning third respondent, the former was a case of "*redevelopment"*. While we are conscious of this difference in the facts of the two cases, we have

examined the validity of the approach of the State Commission in the impugned order with particular focus on the legality of the test of "*network spread"* that has been applied to the Scenario verification exercise in terms of the principles laid down in the order dated 12.06.2017. But, before we do so, we must also note here that the principle of *"network spread"* has been followed by the State Commission in other cases including by approving the view taken by M-DNAC in the case of *Tejal* decided on 26.03.2019 (supra) and a set of fifty one other consumers - referred to as those of *Jhamjhadpada, Gorai, Borivali (West)* - decided on 27.12.2018. It is fairly conceded that there was no challenge brought to the view taken in the matters of *Tejal* and *Jhamjhadpada* and, further, that there is no stay or interim order granted in the two sets of appeals (Appeal no. 195 of 2017 & batch and Appeal no. 142 of 2019) which are pending before the co-ordinate bench.

44. We cannot but agree that the broad principles laid down by the State commission in its order dated 12.06.2017 followed the broad theme that had been commended by this tribunal by judgment dated 28.11.2014 viz. the best interests of the consumers have to be protected even while competition is to be encouraged and, from this perspective, the scenario being evolving and dynamic, duplication of the network development is to be avoided. Though we must observe that the principles could have been

formulated by the Commission with a little more clarity, it cannot at the same time be denied that laying down unexceptional or rigid regime would also have created room for some confusion, it coming in the way of the consumer being served.

45. The State Commission, in its order dated 12.06.2017, observed thus:

> *"The Committee is of the view that it would not be practical to consider only a Municipal Ward or other such area for assessing and categorizing an area in one or the other of the Scenarios at Para 53 of the Interim Order. It would be difficult to map the entire area on such criteria. Moreover, the distribution systems have evolved over time and electrical nertwork boundaries do not correspond to geographical area limits such as Municipal Wards."*
>
> [Emphasis supplied]

46. Given the fact that it is not possible to lay down the contours of the specific area or location with reference to which parallel distribution licensee must operate, some amount of overlap in the different scenarios that could be conceived is always unavoidable. When the State commission set about to put on paper the fundamentals through its interim order dated 09.11.2015, the description of the four possible scenarios was articulated, through para no. 53 (quoted earlier), only to build a skeleton structure. Given the fact that the endeavour was to create a foundation on basis of which the rules were to eventually evolve, the language employed at that stage could not be anything but tentative. The structure thus

created had to be fleshed out and this was done by the order dated 12.06.2017 whereby detailed rules were framed. Naturally, the initial or nascent thoughts (of interim order) found expansive expression in the regime thereby put in position, the overlap occurring obviously because the room for competitive play had to take into account not only the environment of the four scenarios originally visualized but also the different levels of development of network or support systems. Thus, any enforcement or application of these principles must factor in the presence of the competing distribution licensees and, in equal measure, the extent of their presence, the possibility of increased demand of supply (inclusive of the additional load requested by existing consumers or the additional demand of new consumers) being responded to, the readiness and capacity of the distribution licensee(s) to cater to such increased demand which, in turn, depends on reach of the existing distribution mains (LT or HT), associated switchgear, distribution substations, age of such equipment or network (that also bringing in the check of obsolescence), need or feasibility of augmentation, *et al*. In this view of the matter, it will not be just or fair to apply the description of the four scenarios as given in para no. 53 of the interim order dated 09.11.2015 as rigid rules.

47. For same reasons as set out above, and also for some more as we would elaborate hereinafter, the manner in which the demand of additional

load or supply (to new or existing consumers) is to be subjected to scrutiny by the institutional mechanism (*M-DNAC*) created by order dated 12.06.2017 of the State commission cannot be only in the light of the norms summarised in para 136 vis-à-vis the four scenarios with reference to the five levels of extent of development of supply systems or the network. The document has to be read in its entirety and definitely not construed selectively. The decision one way or the other – in favour of one distribution licensee or the other – must be upon consideration of ground realities objectively assessed and evaluated, based on requisite proof of rival claims. The very fact that the State commission has been conscious that each scenario may present five different levels of developed networks or systems, put in position by either or both of the distribution licensees, must lead to the realisation that the scrutiny cannot be so simplistic that (and here taking up the most non-complex situation) possibility of new connectivity merely by extending the "service line" should be the decisive factor.

48. Noticeably, provision for connection by "extending the service line" from the existing distribution mains – particularly without the need of "any extension or augmentation" – represents only the first level, this applying both to LT or HT connections. The State commission, by its order dated 12.06.2017, has made it clear that such situation (first level) would occur

only in the first two scenarios – viz. scenario 53 (a) and scenario 53 (b) – wherein either one or both the distribution licensees have already deployed and developed distribution mains and supply systems, this attempted to be described as a classification of “completely covered”. At the same time, the State commission has chosen to bear in mind the possibility of each scenario presenting levels beyond that of the first level i.e. Levels 2 to 5. Each of the four levels beyond that of the first level requires some additional work in the nature of augmentation or extension to be undertaken. In Level-2, such augmentation or extension relates to the nearest distribution mains for LT connection (HT connection clearly being excluded here); in Level-3, again pertaining to LT connection only, the CSS needs to be created or existing one augmented. The last two levels (Level-4 and Level-5) are common for LT and HT connections, laying or augmentation of cable/mains or associated switchgear being the necessity in the former, the latter requiring not only such work but also commissioning of new or augmentation of existing substations (DSS or receiving). What is, however, crucial to note is that the dispensation vis-à-vis each scenario – and that, interestingly, includes scenario 53 (a) as well as scenario 53 (d) – permits role to the existing distribution licensees qua new consumer or to meet the demand of existing consumer for additional load for the higher levels, that is to say Levels-2 to 5, going beyond Level-1 where all that is required is extension by a “service line”.

For the last scenario, of course, participation depends on purely economic considerations.

49. Bearing in mind the above, it is not correct to construe the principles applicable to scenario 53 (a) as to be conveying that they would kick in only if the new connectivity is possible by extending a “service line” from the existing distribution mains to the premises of the concerned consumer. Scenario 53 (a) is one wherein the location or the area in question, where the concerned consumer expects connectivity, is “completely covered” by one licensee. The meaning of the expression “completely covered” is sought to be explained by the State commission in its orders but has not been subjected to any rigid definition. Noticeably, in para 123.6 quoted earlier, the State commission has mentioned the possibility of consumer being connected “by laying a service line” so as to rule out the need for the “distribution mains” to be augmented or extended. Provision of new or augmentation or extension of existing CSS, cables, switchgear or DSS etc. also require to be knitted into the principles, this being based on same concerns as of economy. It is interesting to note that in context of Level-2, connectivity by augmentation or extension of distribution mains which is “nearest” is shown as the preferred option.

50. The explanation of the expression “completely covered” in order dated 12.06.2017 of the State Commission cannot be treated as its all-encompassing or comprehensive definition. To do otherwise would do violence to the spirit of the norms and be a very narrow and, therefore, incorrect way of looking at things in as much as it pertains to Level-1 only. It bears repetition to say that given the dynamic state of network development, it has not been possible for the State commission to divide the area of license common to the two competing players into geographical divisions with clearly marked out boundaries. To do so, it would not be wrong to add, would have been inadvisable, rather in the teeth of the expectation that competition would inure to the benefit of consumers at large. The State commission has correctly observed (see sub-paras-b of paras 136.1 and 136.2 quoted earlier) that even in an area which is “completely covered” by one licensee or the other, the existing network of distribution might require work in the nature of “extension, addition or augmentation” to be undertaken “over time” so as to be in a position to respond to stresses of higher-level. Since the demands of the consumers – new or existing – are bound to rise above Level-1, it has been necessary, and the State commission has accordingly so arranged, for situations like those of the higher levels (Level-2 To Level-5) also to be properly taken care of even for purposes of scenario 53 (a), as indeed for

scenario 53 (d), irrespective of the fact as to whether or not one or the other distribution licensee “completely covers” or is “present”.

51. The norms for parallel distribution network wherein both distribution licensees operating in the area sub-serve the best interests of the consumers at large are not covered by any formal regulations. When the State commission set out on the task of laying down the ground rules, it examined the ground realities by some survey, calling for requisite data and information as also seeking expert advice. What were laid out as the general principles in the interim order dated 09.11.2015 crystallised into specifics enunciated in order dated 12.06.2017. In such evolutionary exercise, there is always scope for improvement. After all, the actual working of the principles introduced would expose the fault-lines and also throw up the possible solutions based on which the principles can be improved, modified, recast or recalibrated. In the present age of cutting-edge commercial competition, in such crucial sector of economy as the power industry, carving out geographical divisions or subdivisions is not possible or advisable. The experience gained in the wake of order dated 12.06.2017 seems to have made the State commission, and its delegate (M-DNAC), to realise that such evaluation cannot be contingent upon mere question as to which of the two licensees can connect the new consumer (or even the old one) by a “service line” with its nearest

distribution mains. It is for this reason - and we fully endorse the justification therefor - that the test of “network spread” was expressly added by the subsequent orders.

52. We must reject the argument that the test of “network spread” changes the ground rules proclaimed by order dated 12.06.2017. We see no such change. Instead, we find continuity of the same principles as were enforced earlier. This muster had been seeded in the explanatory narrative on expressions “completely covering” and “present” in the order dated 12.06.2017 (see para 123.8 quoted earlier). It (the test of “network spread”) only fine-tunes the method of scrutiny ordained by order dated 12.06.2017. The reliance of the appellant on the decisions of the Supreme Court in *P.S. Sathappan* (supra) and *Islamic Academy of Education* (supra) is found to be misplaced.

53. Noticeably, in para no. 136 of order dated 12.06.2017, the State commission has described the various scenarios with reference to “areas” or “locations”. It is inherent in this that the “areas” or “locations” being referred to are numerous pockets or localities that dot or are scattered over the area of licensee. It would be advantageous to go by the plain dictionary meanings (Cambridge Dictionary) of the two expressions may be noted. While “area” is defined as “a particular part of a place, piece of

land, or country", the word "location" is explained as "a particular place or position". Since the need for providing electricity would, generally speaking, arise primarily in areas or locations which are used for human habitation or activity, the use of these expressions cannot relate to the license area as a whole.

54. Speaking specifically in the context of scenario 53 (a), since two distribution licensees would be operating in the larger area of licence, they are bound to have some distribution system in place. The first test essentially is as to whether the distribution mains are in existence. Since the area of license is a wide geographical division, existence of distribution mains anywhere in that wide area cannot suffice. Though, it was argued before us that the "distance" cannot be the benchmark in such an analysis, we are of the considered view that the factor of distance will always have a role to play. After all, the idea is to find out as to which distribution company is "better placed" to connect to the consumer "in the most economical and optimal manner" and in this context the existence of distribution means "in the vicinity" was flagged as a crucial factor (para 128.4 of order dated 12.06.2017 of the State commission). That muster of "in the vicinity" has been consistent part of scrutiny by the Commission is vivid even in the impugned order (see para 27 extracted earlier). The dictionary meanings (Cambridge Dictionary) of the word "vicinity" include

"neighbourhood" and "locale". It is also explained as "the area immediately surrounding something". The word "neighbourhood" is defined as "an area of a town" or "the people who live or work in this area". Similarly, the word "locale" is explained as "an area or place, especially one where something special happens, such as the action in a book or film". Its synonyms include "setting", "position" or "venue". It is inherent, therefore, in the use of the expression "in the vicinity" that the distribution mains must be in "proximity (the state of being near in space)" of the consumer expecting to be served. From the above, it naturally follows that to reach a satisfaction that such distribution system is geared to provide the requisite connectivity without much ado, the location or the area in question must be shown to have some contiguity with the location of the area to which the distribution licensee has already reached out. The area or location must necessarily be a composite neighbourhood and definitely cannot be pockets separated by several kilometres. This approach is the only correct one, it being in *sync* with the aims and objectives of Electricity Act, 2003 which, as noticed at the outset, visualizes, *inter alia*, efficicient and economical use of resources, good performance and protection of the interests of the consumers at large.

55. We do not agree with the submissions of the appellant that the decision of the State commission in the case of *Medinee* (case no. 345 of

2018) could not have been referred to because of the fact that the consumer in that case was located in a property that had been redeveloped. It is the principle which has been picked up and applied appropriately. Mere fact that the consumer was housed in a property that had undergone redevelopment in the case under reference makes no difference. It is quite clear that the appellant is seeking to read para 136.1 (b) of order dated 12.06.2017 of the State commission very narrowly. It is wrong to contend that provision is made for consumer falling in Levels-2 to 5 of scenario 53 (a) only if it is a case of "new consumer" located in property that has undergone "redevelopment". For clarity, we may quote yet again the relevant portion of para 136.1 (b) as under:

> "*Over time, in such areas, the existing distribution network of Licensee A may require extension, addition or augmentation to the extent of Level 2 or higher to cater to the increasing load of its existing consumers or to cater to new consumers (for instance, because of redevelopment)*"
>
> [Emphasis supplied]

56. Pertinent to note that reference was made to the demands of load of new consumers on account of "redevelopment" only by way of illustration. The application of the provision otherwise is not restricted or limited to such consumers coming up with the demand due to redevelopment only.

57. It is clear from the chronology of events that provide the backdrop to the present litigation that the State commission as indeed the institutional mechanism created by it (M-DNAC) have learnt from mistakes. The general description of the four scenarios envisaged in the interim order dated 09.11.2015 has been found to be wanting. The principles laid down in the order dated 12.06.2017 created confusion primarily for the reason of reference to possibility of connectivity by mere provision of a "service line". This obviously was not sufficient for needs of a consumer beyond Level-1. The deficiency was brought to fore in the wake of a very narrow view taken by M-DNAC in the case of *Medinee*. That virtually rendered the second part of dispensation vis-à-vis scenario 53 (a) relating to Levels-2 to 5 redundant. It was appropriately clarified by the State commission by its order dated 04.02.2019 (case number 345 of 2018) that if the other licensee does not even have its distribution mains in the vicinity of the consumer, the licensee which was in a better position to do so would legitimately be called upon to augment its systems so as to enhance its capacity to the higher levels. Thus, in the next round of dispensation – in the case of *Tejal* – M-DNAC applied the test of "network spread" which was approved, and in our opinion rightly so, by the State commission by its order dated 26.03.2019. It is a matter of satisfaction that the State commission and its delegate (M-DNAC) have been consistent in their scrutiny of such proposals as gave rise to the present

dispute and, in this context, reference has been rightly made not only to the case of *Tejal* but also that of *Jhajhampada*.

58. In our view, the test of "network spread" has been properly explained by the State commission in the impugned order. It confirms to the tests of proximity and contiguity of the consumer to the existing distribution mains of the distribution licensee which also apply. We may add that the words "network spread" do not necessarily mean that the licencee must have its supply cables reaching out to every nook, corner or inch of the area. It would suffice if the connectivity can be arranged by augmenting the system within the meaning of the works envisaged in levels higher than that of Level-1.

59. It is not the case of the appellant that it "completely covers" the area or location in question. It is interesting to note that the appellant has not even claimed to be present in the vicinity or proximity of the location where the consumer is expecting to be provided with the electricity connection. We have serious doubts as to whether the appellant can even claim to be "present" vis-à-vis the area on location of the third respondent within the meaning of the expression used in the dispensation of the State commission for parallel distribution network. The demand is for 11 kW LT commercial connection. The nearest LT network of the appellant is

admittedly 9.2 km away. This can hardly be described as a system in proximity or vicinity. The nearest HT sub-station of the appellant is concededly 6.1 km away. That apparently cannot serve the purpose in as much as the appellant would have to additionally provide for stepdown transformers. Be that as it may, the location of the two substations of the appellant at 9.2 km and 6.1 km distance itself shows that there cannot be any contiguity between their locations or that of the consumer. In sharp contrast, the LT substation of the other distribution licensee (AEML) is 850 meters away. It does not call for much imagination to decide who has the requisite network available at hand. The case of connection demanded by the third respondent squarely falls within Level-2 of scenario 53 (a) and has been rightly so held by the State commission by the impugned order.

60. We reject the argument that the view taken by the State commission adopting the test of “network spread” leans in favour of creating, or perpetuating, monopoly thereby nixing the possibility of competition between the two distribution licensees. The argument holds no water for the simple reason the dispensation by the State commission by its order dated 12.06.2017 retains the right of the consumer – new or existing – to switch over from one distribution licensee to the other and sufficient provision in this regard is made in the rules laid down for the purpose. The responsibility to augment the existing network of a distribution licensee

which is present or completely covers the area or location cannot come in the way of the best interests of the consumers being sub-served. Indubitably, should any consumer (new or existing) seek to move to the other distribution licensee, the one having developed the distribution network is bound to share the same subject, of course, to abiding by the discipline created for the purpose. There is no question of monopoly being the end product of the impugned decision.

61. For the foregoing reasons, and in the circumstances, we find no merit in the appeal. The appeal, along with the applications filed therewith, is dismissed.

PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO CONFERENCING ON THIS 28th DAY OF MAY, 2020.

(Justice R.K. Gauba)
Judicial Member

(Ravindra Kumar Verma)
Technical Member

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