APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)

APPEAL NO. 36 of 2018

Dated : 20th October, 2020

Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. S.D. Dubey, Technical Member (Electricity)

IN THE MATTER OF :

The Tata Power Company Limited (Distribution),
Through its Head – Corporate Legal,
Backbay Receiving Station,
148 Lt. Gen. J. Bhonsale Marg,
Nariman Point, Mumbai – 400021. …….Appellant

Versus

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

(2) Mumbai International Airport Pvt. Ltd.,
Through its Managing Director,
Terminal IB 1st Floor,
Chhatrapati Shivaji International Airport,
Santa Cruz (East), Mumbai 400 099.

(3) Hindustan Petroleum Corporation Ltd.
Through its Chief Manager – Elect. Maintenance,
Mumbai Refinery, B. D. Patil Marg, Mahul,
Chembur, Mumbai 400 074. …….Respondents

Counsel for the Appellant (s) : Mr. Amit Kapur,

Ms. Apoorva Misra,
Mr. Kunal Kaul,
Mr. Malcolm Dinyar Desai,
Mr. Abhishek Ashok Munot
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Ms. Surabhi Pandey
Ms. Swagatika Sahoo
Ms. Aradhna Tandon
Mr. Naveen hegde
Mr. Saransh Shaw for R-2

Mr. Ravi Prakash
Mr. Samir Malik
Mr. Raheel Kohli
Mr. Nitish Gupta
Mr. Farman Ali
Mr. Manuj Kaushik
Ms. Rimali Batra
Mr. Krishna Dayama
Ms. Nikita Choukse
Mr. G. Saikumar
Mr. Paritosh Goel
Ms. Shruti Awasthi for R-3

Ms. Rimali Batra for R-4

J U D G M E N T

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

1. The Present Appeal has been filed by the Tata Power Company Limited (Distribution) ("**Appellant**"/ "**Tata Power-D**") under Section 111 of the Electricity Act, 2003 ("**Electricity Act**") challenging the Maharashtra Electricity Regulatory Commission's ("**Maharashtra Commission**"/ "**Respondent No.1**") Order dated 28.11.2017 ("**Impugned Order**") passed in Case No.110 of 2017 ("**Petition**"), to the extent set out in the present Appeal.

2. Facts of the case:

2.1 The Appellant, Tata Power-D is a Distribution Licensee supplying electricity in the Island City of Mumbai and Suburban Areas of Mumbai and areas covered under Mira Bhayandar Municipal Corporation in terms the Distribution Licence No.1 of 2014 dated 14.08.2014.

2.2 The Respondent No. 1, Maharashtra Commission, is a statutory authority constituted under the Electricity Regulatory Commissions Act, 1998 with limited and specific powers vested by Sections 86 and 181 of the Electricity Act. The powers of Maharashtra Commission, *inter alia*, include the power to grant a licence for distribution of electricity, regulate the tariff of distribution companies etc.

2.3 The Respondent No.2, MIAL is a company incorporated under the Companies Act, 1956. MIAL is engaged, *inter alia*, in operating, maintaining, developing, designing, constructing, upgrading, modernizing and managing the Chhatrapati Shivaji International Airport, Mumbai ("**CSI Airport**").

2.4 The Respondent No. 3 is HPCL a Government of India Enterprise, and owns and operates 2 major refineries producing variety of petroleum fuels. HPCL is also a partial open access, bulk consumer of the Appellant and is

sourcing power/ availing open Access to cater to its load requirement in relation to its refinery in Mumbai.

2.5 On and from 01.11.2009, Tata Power-D started supplying electricity to MIAL, as its direct consumer. MIAL's current Contract Demand with Tata Power-D is 14.70 MVA. Since 01.11.2015, MIAL also procures power on Open Access for part of its demand (Partial Open Access consumer).

2.6 On 12.05.2010, Maharashtra Commission issued a Clarificatory Order in Case No. 113 of 2008 (filed by Tata Power-D for Truing Up for FY 2007-08, Annual Performance Review for FY 2008-09 and Tariff Determination for FY 2009-10). By the said Clarificatory Order, Maharashtra Commission in order to remove any ambiguity qua the applicability of Power Factor Incentive/ Penalty, presented the applicability in a tabular form for each slab of Power Factor. In the said Clarificatory Order as well, Maharashtra Commission did not specify that Power Factor Incentive/ Penalty would be applicable to Open Access consumers as well.

2.7 On 14.11.2013, this Tribunal passed a Judgment in Appeal No.231 of 2013 (*Jindal Stainless Ltd. vs. Dakshin Haryana Bijli Vitran Ltd. &Anr.*), which was relied upon by Maharashtra Commission for allowing MIAL's Petition.

2.8 On 26.06.2015, Maharashtra Commission passed its Order in Case No. 18 of 2015 ("**MTR Order**"), approving Tata Power's true-up for FY 2012-13 and FY 2013-14, provisional true-up for FY 2014-15 and the revised ARR and Tariff for FY 2015-16. The said Order qua Power Factor Incentive/ Penalty is applicable for direct consumers of Tata Power-D.

2.9 On 03.08.2015, MIAL filed a Review Petition (Case No. 103 of 2015) seeking review of Maharashtra Commission's MTR Order dated 26.06.2015 passed in Case No. 18 of 2015. By the said Petition, MIAL sought redetermination of the tariff applicable to it by creating a separate category in accordance with direction passed by this Tribunal.

2.10 On 10.08.2015, Tata Power-D filed a Review Petition (Case No. 110 of 2015) seeking review of Maharashtra Commission's MTR Order dated 26.06.2015 passed in Case No. 18 of 2015. In the said Petition, Tata Power-D, *inter alia*, prayed that Maharashtra Commission revise the Energy Charges for HT VI-Public Services category after considering revenue from Demand Charges and correct the percentage of Power Factor Incentive considered in the said order.

2.11 On 05.11.2015, Maharashtra Commission passed its Order in Case No. 110 of 2015, *inter alia*, holding that for calculation of Power Factor Incentive, Maharashtra Commission had used the same ratio as submitted by Tata Power-D in its MTR Petition. Therefore, there was no error in the computation of revenue from the Power Factor Incentive.

2.12 On 06.11.2015, Maharashtra Commission disposed-off Case No.103 of 2015 filed by MIAL seeking review of Maharashtra Commission's MTR Order dated 26.06.2015 passed in Case No. 18 of 2015 regarding tariff applicable to MIAL, since MIAL had filed an Appeal.

2.13 On 21.10.2016, Maharashtra Commission passed an order approving the Truing up for FY 2014-15, Provisional Truing up for FY 2015-16 and ARR and Tariff for FY 2016-17 to FY 2019-20 for Tata Power-D ("**MYT Order**") in Case No. 47 of 2016. The relevant extract of the MYT Order relating to Power Factor Incentive is reproduced hereunder:-

> ***"Power Factor Incentive***
>
> *Applicable for HT-I :Industry, HT II - Commercial, HT-IV : PWW, HT V- Railways, Metro & Monorail, HT-VI: Public Services [HT VI (A) and HT VI (B)], HT VII - Temporary Supply, LT II: Non-Residential/Commercial [LT II (B), LT II (C)] (for Contract Demand/Sanctioned Load above 20 kW), LT III (B): Industry above 20 kW, LT IV- PWW, LT VII (B) – Temporary Supply (Others), and LT IX : Public Service [LT IX (A) and LT IX (B)].*
>
> ***Whenever the average Power Factor is more than 0.95, an incentive shall be given at the rate of the following percentages of the amount of the monthly electricity bill****, excluding Taxes and Duties:*

Sl.	Range of Power Factor	Power Factor Level	Incent
1	0.951 to 0.954	0.95	0%
2	0.955 to 0.964	0.96	1%
3	0.965 to 0.974	0.97	2%
4	0.975 to 0.984	0.98	3%
5	0.985 to 0.994	0.99	5%
6	0.995 to 1.000	1.00	7%

Note: Power Factor shall be measured/computed upto 3 decimals, after universal rounding off."

2.14 It is pertinent to note that, on and from 01.11.2015, MIAL as a consumer of Tata Power-D started availing Open Access. During this period till date, no Power Factor Incentive was made applicable on the quantum of energy procured by MIAL through Open Access. However, by oversight Power Factor Incentive was getting inadvertently applied in the monthly bills only on the Regulatory Asset Charges ("**RAC**") of the Open Access quantum. When this was realised, with effect from May, 2017, Tata Power-D stopped providing Power Factor Incentive on RAC of the Open Access quantum that was being provided to MIAL earlier (i.e., till April 2017).

2.15 On 04.07.2017, MIAL filed a Petition (Case No.110 of 2017) before Maharashtra Commission under Section 86(1)(k) of the Electricity Act, read with Regulation 37 of the DOA Regulations, 2016, ***seeking clarification regarding applicability of Power Factor Incentive to Open Access power consumption by HT consumers***. While relying on the Judgment dated 14.11.2013 passed by this Tribunal in *Jindal's case*, MIAL sought the following relief:-

> *"a) Allow the present petition and clarify that the Petitioner is entitled for the power factor incentive on the monthly electricity bill, excluding taxes and duties, for Open Access consumption as well;*
>
> *b) Direct the Respondent to provide power factor incentive to the Petitioner, in its capacity as a consumer of the Respondent as well as in its capacity as an open access consumer, retrospectively from November, 2015, alongwith Delayed Payment Charge (DPC) and interest at such rates at which the Respondent is charging DPC and interest for the delayed payments of the bill amount by the consumers of the Respondent;"*

2.16 TPC-D filed their detailed reply on 16.09.2017. On 19.09.2017, Case No. 110 of 2017 was listed for hearing before Maharashtra Commission. After hearing the submissions of all concerned, Maharashtra Commission reserved the matter for orders. MIAL filed their detailed rejoinder on 20.09.2017.

2.17 On 28.11.2017, Maharashtra Commission passed the Impugned Order,*inter alia*, directing Tata Power to provide Power Factor Incentive (or levy Power Factor Penalty, as the case may be,) to MIAL and other similarly placed consumers on the charges levied on the power sourced by them through Open Access. Further for past periods, these charges to be adjusted in the ensuing bills of MIAL and other such Open Access consumers, along with applicable interest.

2.18 Aggrieved by the Order dated 28.11.2017, the Appellant Tata Power-D has filed the present Appeal.

3. Questions of Law:

The present Appeal raises the following issues/ questions for adjudication by this Tribunal.

3.1 Whether Maharashtra Commission erred in holding that Power Factor Incentive/ Penalty is to be made applicable to power sourced through Open Access?

3.2 Without prejudice to the above whether Maharashtra Commission erred in directing Tata Power-D to retrospectively provide Power Factor Incentive/ Penalty to MIAL and other similarly placed consumers along with applicable interest?

4. Mr. Amit Kapur, Learned Counsel for the Appellant has filed the Written Submissions for our consideration as under:-

4.1 By the Impugned Order, MERC erroneously held that:-

(a) PF Incentive / Penalty for consumers sourcing power directly from TPC-D in terms of the Multi-Year Tariff Order dated 21.10.2016 in Case No.47 of 2016[1]("**MYT Order dated 21.10.2016**") shall also apply to Open Access power sourced by such consumers (from sources other than TPC-D) with retrospective effect[2] applicable from 01.11.2015.

(b) Recovery of such charges for the past period must be adjusted by TPC-D in the ensuing bills of MIAL and such other consumers with interest[3].

4.2 MIAL has been a Direct/ Retail Consumer of TPC-D since 01.11.2009. Being directly connected to the wires of TPC-D and an embedded consumer, MIAL was undisputedly availing PF Incentive on the power sourced through TPC-D.

4.3 The issue at hand relates to the liability of a Distribution Licensee to provide PF Incentive on power sourced through Open Access during the period 01.11.2015 to 08.06.2019. This rises from the fact that:-

(a) MIAL has been a Direct/ Retail Consumer of TPC-D since 01.11.2009. Being directly connected to the wires of TPC-D and an embedded consumer, undisputedly, MIAL was availing PF Incentive on the power sourced directly through TPC-D.

(b) On and from 01.11.2015, MIAL started availing part of its demand through Open Access. All along, in terms of the Tariff Orders passed by MERC, PF Incentive/ Penalty was not applicable to energy procured through Open Access by consumers. In fact, MERC vide its Order dated 03.01.2013 passed in Case No. 8 of 2012 &

[1]MYT Order dated 21.10.2016 in Case No.47 of 2016 – Annx. 7 @ Running Pg. Nos. 136-146 of the Compilation
[2]Paras 9 and 13 of the Impugned Order @ Running Pg. No. 73 of the Compilation
[3]Para 13 of the Impugned Order @ Running Pg. No. 74 of the Compilation

Batch[4] *(Indian Wind Power Association vs. MERC & Ors.*) had categorically held that, PF Incentive / Penalty is to be made applicable to Open Access consumers only on the Net Energy supplied (as a Direct Consumer) by the Distribution Licensee, after deducting the power procured by such consumers through Open Access.

This Order has not been challenged and has attained finality. Furthermore, this Order has been relied upon by MERC in its subsequent Orders dated 23.07.2018 and 28.11.2018 passed in the case of a competing Distribution Licensee – Maharashtra State Electricity Distribution Company Limited ("**MSEDCL**"), where MERC *per contra* has held that PF Incentive/ Penalty is not applicable on power sourced through Open Access.

(c) The difficulty arose in May 2017, when TPC-D discovered that ***due to an error in TPC-D's computerised billing system (a software glitch), adjustment for PF Incentive was wrongly applied in the monthly bills of Open Access during July 2013 to April 2017.*** Due to this error, PF Incentive was inadvertently provided only on the Regulatory Asset Charge ("**RAC**") component of the Open Access quantum.

(d) Upon discovering the said error, in May 2017, TPC-D rectified the software glitch and validly stopped applying PF Incentive on RAC of the Open Access quantum in the monthly bills of all Open Access users.

(e) Aggrieved, on 04.07.2017, MIAL filed Case No.110 of 2017[5] before MERC, seeking clarification re. applicability of PF Incentive to Open

[4] Order dated 03.01.2013 in Case No. 8 of 2012 & Batch – Annexure-2 @ Running Pg. No.365 of the Compilation [relevant para 3.138]

[5] Petition Case No. 110 of 2017 filed by MIAL - Annx. A-8 @ Running Pg. Nos. 147-163 of the Compilation

Access power consumption by HT consumers. In this case, the Impugned Order was issued to make PF Incentive applicable to Open Access Consumers of TPC-D, alone.

(f) Without prejudice to its rights and arguments in the instant Appeal, pursuant to the Impugned Order (i.e., for supply since November, 2017) TPC-D had been providing PF Incentive on the power sourced by its consumers on Open Access. Further, once this Tribunal refused to grant stay on implementation of the Impugned Order, TPC-D refunded the PF Incentive charges along with interest (i.e., an amount of Rs. 26.04 Crores) to MIAL and other similarly placed consumers.

(g) Since a Distribution Licensee is a revenue neutral, regulated entity, the costs towards retrospective application of PF Incentive on power procured through Open Access along with interest (as tabulated below), was passed onto all the Direct Consumers of TPC-D.

Power Factor Incentive (in Rs. Crores)				
CONSUMER	**FY 2015-16**	**FY 2016-17**	**FY 2017-18**	**Total**
HPCL	0.84	3.68	5.69	10.22
MIAL	0.15	1.53	2.16	3.84
Other Partial Open Access Consumers	1.49	3.90	4.03	9.42
Total	2.48	9.11	11.08	23.48
Total with interest				**26.04**

(h) On 08.06.2019, MERC vide Regulation 14.11 of the MERC (Distribution Open Access) (First Amendment) Regulations, 2019[6] ("**MERCDOA Regulations, 2019**") specified that, "***Entitlement to PF incentives or levy of PF penalty****, as the case may be, as specified under Tariff Schedule of the Tariff Order issued from time to time* ***shall be applicable only for the net energy supplied by Distribution Licensee to the Open Access consumer and captive***

[6]MERC (DOA) First Amendment Regulations, 2019 - Annexure-B @ Pgs. 24-36 of TPC-D's Note for Hearing dated 09.06.2020

user after adjusting *the banked energy and* ***actual open access consumption during the month****."* Regulation 14.11 is the same as MERC's finding in its Order dated 03.01.2013 passed in Case No.8 of 2012 & Batch.

(i) In view of the aforesaid from 08.06.2019 onwards, TPC-D stopped providing PF Incentive to Partial Open Access Consumers (including MIAL) on the power procured by them through Open Access.

(j) Thereafter, on 30.03.2020, MERC in the Multi-Year Tariff Order[7]for the Distribution Licensees within the State, has approved Tariff based on 'kVAh billing' for all HT consumers. MERC has all together discontinued PF Incentive / Penalty for HT Consumers (i.e., even on the quantum of power procured directly from the Distribution Licensees). This is because with implementation of kVAh billing, any adverse impact due to poor PF is to be recorded as increased consumption in kVAh.

(k) It is pertinent to highlight that, neither the Respondents herein nor any other consumer have challenged:-

(i) The stoppage of PF Incentive on Open Access power post 08.06.2019;

(ii) MERC's DOA Regulations, 2019;

(iii) MERC's Multi Year Tariff ("**MYT**") Order dated on 30.03.2020.

On the contrary, MIAL during the hearing before this Tribunal has admitted that, it is neither aggrieved by MERC's DOA Regulations 2019 (holding that PF Incentive is to be provided only on net energy supplied by the Distribution Licensee), nor is not seeking PF Incentive for the period post 2019.

[7] Relevant extracts of the Multi-Year Tariff Order dated 30.03.2020 passed in Case No. 326 of 2019 (for TPC-D) – Annexure -C @ Pgs. 37-45 of TPC-D's Note for Hearing dated 09.06.2020.

Issues for consideration

(a) Whether MERC erred in holding that PF Incentive/ Penalty applies to power sourced through Open Access?

(b) Without prejudice to the above, whether MERC erred in directing TPC-D to retrospectively provide PF Incentive/ Penalty to MIAL and other similarly placed consumers with applicable interest?

(c) Whether MERC has discriminated between the Distribution Licensees in the State of Maharashtra qua the applicability of PF Incentive/ Penalty on power sourced through Open Access, thereby adversely prejudicing TPC-D?

A. Concept of Power Factor

4.4 The underlying principle governing the Indian Electricity Grid Code ("**IEGC**") and all grid operations across India (in Transmission and Distribution) is securing Grid stability by regulating frequency, voltage and load. To achieve this IEGC provides for a dynamic balance to be maintained between demand and supply, so that the Grid operation is kept closest to its ideal frequency of 50 Hz.

4.5 To implement this effectively, the regulatory mechanism provides for incentives and disincentives to influence behaviour of all Utilities and Users connected to the Grid, including:-

(a) Principles of Merit Order Despatch.

(b) Unscheduled Interchange (UI) Charge now substituted by the Deviation Settlement Mechanism.

(c) Load Factor Incentive.

(d) Power Factor Incentive/ Penalty.

(e) Reactive Energy Charge.

4.6 Electrical power in normal conditions consists of two components:(i)Active Power or Real Power; and(ii)Reactive Power. The active or real power(P)is actually consumed and converted into useful work for creating heat, light and motion. It is measured in (kW/ MW)and is totalized by the energy meter as kW. Reactive Power(is used to provide electro-magnetic field in inductive equipment, facilitate useful work for creating heat, light and motion. This Reactive Power is drawn from Grid and is measured in kVAr (Lag / Lead) and is totalized by the energy meter as kVArh (Lag /Lead).

4.7 Desired PF is unity i.e. 1, and its range is Zero Lag–unity-Zero Lead. For purely capacitive loads PF is Zero Lead and for purely inductive loads PF is Zero Lag. Unity PF signifies that there is no reactive power exchange between consumer and grid.PF incentive seeks to keep the Reactive Power/ energy at a minimum, since PF is inversely proportionate to Reactive Energy at the load center.

4.8 When any entity (consumer) connected to the Grid contracts for supply of power through Open Access, it pays only for the Active Energy consumed by it. Whereas the Reactive Power continues to be provided by the Distribution Licensee to whom such consumer is connected. This essentially means that, the Distribution Licensee is providing the Reactive Power to the Open Access consumer, considering the Distribution Licensee will be arranging for the Reactive Power compensation to keep the Grid stable.

4.9 It is an undisputed fact that power interchange as part of Open Access agreements is only Active Power. Hence, consumers like MIAL and HPCL only consume Active Power from their Open Access source and draw their quantum of Reactive Power from the Grid. Evidently, such Open Access consumers are provided Reactive Power for free, at the cost of all other consumers of TPC-D. It is for this reason that, the Grid Code specifically provides for Reactive Energy Charges ("**REC**") to be paid by such Open

Access users to the Distribution Licensee. As is evident, **while the consumers like MIAL and HPCL are not bearing the costs towards drawl of Reactive Energy from the Grid for the Active Power drawn by them through Open Access, they are seeking an incentive in the form of PF Incentive on this quantum, thereby seeking a double benefit at the costs of the Direct Consumers of TPC-D**.

4.10 Although **appropriate ABT/ SEM meters** capable of recording active/ reactive power amongst other parameters on 15 minute time block basis **had always been installed at the Open Access consumers premises**(in Mumbai City – being a pre-condition for grant of Open Access)and the fact that the MERC DOA Regulations, 2016 specifically provided for REC to be applicable to Open Access consumers, MERC had never determined the said charges. By the Impugned Order, while MIAL and HPCL do not pay for the Reactive Power, they are now being rewarded with PF Incentive at the cost of the other consumers of TPC-D.

B. PF Incentive decided by MERC in Tariff Orders was to be given by Supply Distribution Licensee only to Direct Consumers

4.11 Never before the Impugned Order did MERC provide for PF Incentive to be provided to Open Access consumers. PF Incentive specified under the Mid Term Review ("**MTR**") Order dated 26.06.2015 in Case No. 18 of 2015[8] and Multi-Year Tariff ("**MYT**") Order (for TPC-D) dated 21.10.2016 in Case No.47 of 2016[9] was only applicable on the power sourced directly from the Distribution Licensee. It is only on 28.11.2017 by the Impugned Order that MERC has retrospectively for TPC-D alone, provided PF Incentive on Open Access consumption.

[8]MTR Order dated 26.06.2015 in Case No. 18 of 2015 – Annx. A-4 @ Running Pg. Nos. 117-120 of the Compilation

[9]MYT Order dated 21.10.2016 in Case No.47 of 2016 – Annx. 7 @ Running Pg. Nos. 136-146 of the Compilation

4.12 MERC in the MYT Order (for TPC-D) dated 21.10.2016[10] did not:

(a) Consider Open Access supply (the quantum of electricity transported by a consumer like MIAL and HPCL over the network of TPC-D but procured from others) while Truing-up the Supply Annual Revenue Requirement ("**ARR**") of TPC-D for FY 2014-15;

(b) Determine PF Incentive amount which is now directed to be paid by the Retail Supply Business of TPC-D to such Open Access consumers for the period FY 2015- 16 to FY 2019-20.

4.13 The ***quantum of electricity considered by MERC*** in the said MYT Order dated 21.10.2016 ***was only for Direct Sales*** (i.e., supply of power by TPC-D to its Direct Consumers). **Since Open Access supply was not considered by MERC** while determining TPC-D's ARR/ tariff, **the Tariff Orders never provided for PF Incentive to Open Access Consumers**, such as MIAL and HPCL.

4.14 It is settled law that, Tariff of a Distribution Licensee is determined after a thorough public consultation process, in terms of the MYT Regulations. Since a Distribution Licensee is a revenue neutral, regulated entity, the retrospective application of PF Incentive on power procured through Open Access along with interest directed by MERC, was passed onto the Direct Consumers of TPC-D.

4.15 PF Incentive/ Penalty cannot be provided and/ or denied at the whims and fancies of a Distribution Licensee. The same has to be specifically determined and made leviable by the State Commission. Evidently, the Tariff Orders passed by MERC no-where provided that PF Incentive/ Penalty was to be extended to power sourced through Open Access.

4.16 Per contra, MERC in its ***Order dated 03.01.2013 passed in Case No.8 of***

[10]MYT Order dated 21.10.2016 in Case No.47 of 2016 – Annx. 7 @ Running Pg. Nos. 136-146 of the Compilation

2012 & Batch[11]*(Indian Wind Power Association vs. MERC & Ors.*), had categorically held that ***PF Incentive is to be made applicable to Open Access consumers only on the Net Energy supplied (as a Direct Consumer) by the Distribution Licensee, after deducting the power procured by such consumers through Open Access.*** The relevant extract of MERC's Oder dated 03.01.2013 is reproduced below for ease of reference:-

> *"**3.138** The **Commission is of the view of that levy of penalty or provide incentives for various parameters as specified** by the Commission in Tariff Schedule of the Tariff Order of MSEDCL from time to time (**e.g., Power Factor incentive, Power Factor Penalty**, Prompt Payment discount, etc.) **shall be charged on the net energy supplied by MSEDCL to the open access consumer and captive user after adjusting the banked energy and actual generation during the month**. A sample illustration for net energy to be considered for incentives and penalty is shown the Table below:*
>
> | ***Particulars*** | | ***Unit (MU)*** |
> |---|---|---|
> | *Total consumption recorded at Consumer end* | *A* | *100* |
> | *Wind generation during the month after adjusting applicable losses (wheeling, transmission or both depending upon open access)* | *B* | *30* |
> | *Available Banked Energy* | *C* | *20* |
> | *Net Energy to be considered for Incentives and Penalties* | *D = [A-(B+C)]* | *50* |
>
> ** Note: Above illustration is for representation purpose"*

4.17 The fact that, PF Incentive on Open Access quantum was never factored in the Tariff Orders and that PF Incentive was applicable only on the Net Energy supplied by the Distribution Licensee (in terms of the aforesaid Order dated 03.01.2013 in Case No.8 of 2012) has been reiterated and reaffirmed by MERC in its Orders dated 23.07.2018 and 28.11.2018 passed subsequent to the Impugned Order, in the case of MSEDCL – another Distribution Licensee in the State of Maharashtra, which is placed on the

[11]Order dated 03.01.2013 in Case No. 8 of 2012 & Batch – Annexure-2 @ Running Pg. No.365 of the Compilation

same footing as TPC-D as far as the law and Regulations are applicable in the State of Maharashtra

4.18 Tariff Orders (re. applicability of PF Incentive/ Penalty) for TPC-D and MSEDCL are the same. Therefore, **there cannot be a situation where PF Incentive/ Penalty is to be provided by one Distribution Licensee (TPC-D) to Open Access consumers, while another Distribution Licensee (MSEDCL) is liable to provide PF Incentive/ Penalty only on the Net energy (actual energy) supplied by such Distribution Licensee**. Evidently, not only is MERC's finding in the Impugned Order erroneous, it is also inconsistent with the treatment given to other distribution licensees within the State.

4.19 PF Incentive/ Penalty provided in ***Annexure-VI*** - ***"Schedule of Electricity Tariff"*** of the MYT Order dated 21.10.2016 in Case No.47 of 2016 specifically provided that, the **said incentive/ penalty** and other charges therein ***have been determined under Sections 61 and 62 of the Electricity Act for the supply of electricity by TPC-D to various classes of its Retail Consumers***. ***Evidently, the said Schedule only related to Direct Consumers of TPC-D receiving supply from it***. It did not apply to Open Access consumers who get power supply from other sources. This is in line with MERC's treatment provided to MSEDCL (State Distribution Licensee) in Case No.8 of 2012 & Batch read with the recent Orders dated 23.07.2018 and 28.11.2018, as demonstrated hereinabove.

4.20 Further, when a consumer avails Open Access under Section 42(2), the State Commission is empowered to ***determine only the Wheeling Charges and Surcharges for such Open Access consumers*** in terms of Section 86(1)(a) of the Electricity Act. Tariff, incentives and penalties determined by MERC under Sections 61 and 62(1)(d) of the Electricity Act are not applicable to Open Access Consumers.

4.21 Charges applicable to an Open Access consumer are stipulated in the MERC DOA Regulations, 2016. Only the quantum of the charges payable by Open Access consumers are determined by MERC through the Tariff Orders (e.g., Wheeling Charges applicable to Open Access consumers are specifically provided for under the DOA Regulations). Therefore, the various charges determined in the MYT Order are applicable to consumers sourcing power through Open Access, only if the said charge(s) are specifically provided for in the DOA Regulations. ***It is noteworthy that, PF Incentive/ Penalty to Open Access consumers had not been provided for in the DOA Regulations, 2016 (relevant at that point in time)***. ***MERC had also not factored the same while determining the Tariff for TPC-D***.

4.22 As regards the Respondent's contention that PF Incentive determined under the Tariff Orders is also applicable on Open Access consumption, it is submitted that:

(a) The Tariff Orders clearly distinguish between Direct Consumers of a Distribution Licensee and Open Access consumers, when it comes to Tariff/ charges payable by them.

(b) While determining Wheeling Charge, RAC, CSS, etc. payable by Open Access consumers, MERC in the MYT Order dated 21.10.2016 has specifically referred to them as "OA Consumers" vis-à-vis "consumers".

(c) Per contra, while determining PF Incentive applicable to different categories of "Consumers", MERC had nowhere specified that the same will also be applicable to "OA Consumers" or on the power sourced through Open Access.

4.23 In light of the foregoing, it is submitted that there was no requirement for challenging the said Tariff Orders, as they nowhere provided for PF Incentive to be made applicable on Open Access consumption. Tariff is

determined by the State Commission based on the Tariff proposal submitted by a Distribution Licensee. **The Tariff proposal made by TPC-D was duly approved by MERC after public consultation and did not consider any PF Incentive on the Open Access consumption by its consumers.** Therefore, there was no need for TPC-D to challenge the said Tariff Orders.

4.24 As regards MIAL's contention that, there was clarity on application of PF Incentive to Open Access consumption in terms of this Tribunal's Judgment dated 14.11.2013 in Appeal No.231 of 2012[12] (titled *Jindal Stainless Ltd. v. DHBVN & Anr.*) ("**Jindal Stainless Judgment**") and therefore, there was no issue in MERC directing retrospective application of PF Incentive to TPC-D's Open Access Consumers, it is submitted that:-

(a) The issue of the applicability of PF Incentive to Open Access Consumers was never raised by MIAL, HPCL or any Open Access consumer before MERC either during the Public Hearings or in the Review Petition (Case No.103 of 2015)[13] filed by MIAL, seeking review of the Mid-Term Review (MTR) Order dated 26.06.2015 qua its classification in a separate Tariff category.

(b) Although MIAL has been availing Open Access since 01.11.2015 (i.e., after the Jindal Stainless Judgment) and was aware that PF Incentive was not being provided on the entire Open Access quantum (PF Incentive was erroneously provided only on the RAC quantum due to a computer/ billing glitch), it was ***only in May 2017 that MIAL belatedly approached MERC (after a period of approx. 2 years), seeking clarification on the applicability of PF Incentive to Open Access Consumers***.

(c) ***MIAL had filed the Petition*** before MERC ***under Section 86(1)(k)***

[12]Jindal Stainless Judgment dated 14.11.2013 - Annx. A-3 @ Running Pg. Nos. 79-116 of the Compilation
[13]Order dated 06.11.2015 - Annexure A-6 @ Running Pg. Nos. 133-135 of the Compilation

seeking clarification and not otherwise.

4.25 MIAL's contention that TPC-D had vide its emails sent in February 2016 stated that the amount of PF Incentive (for both retail and open access power) will be adjusted in the subsequent month, is wrong and denied. At the outset, it is submitted that, the Email communications were never placed on record before MERC or before this Tribunal. It is for the first time at the stage of final hearing that the same have been placed before this Tribunal by way of an annexure in the Written Submissions. Without prejudice to the above, it is submitted that a thorough reading of the email communications evidence that TPC-D had never agreed that PF Incentive is applicable on power sourced through Open Access. In fact, TPC-D in the subsequent mails had provided detailed justification that PF Incentive decided by MERC in the Tariff Orders was only applicable on the power sourced directly through the Distribution Licensee, which MIAL was already receiving. In any case, an email, as alleged by MIAL cannot override applicable Regulations and the Tariff Orders passed by MERC which did not provide PF Incentive on Open Access consumption.

C. Differential treatment meted out by MERC to different Distribution Licensees qua applicability of PF Incentive to Open Access Consumers

4.26 By the Impugned Order, MERC had held that PF Incentive provided in the electricity tariffs of TPC-D and other Distribution Licensees is applicable to the power sourced by a consumer through Open Access also. **However, within a few months of passing the Impugned Order, MERC issued at least 15 Orders** on 23.07.2018 and 28.11.2018relating to the State Distribution Licensee - Maharashtra State Electricity Distribution Company Ltd. (MSEDCL), **holding that PF Incentive/ Penalty is not applicable to Open Access consumers.** Copies of the aforesaid Orders dated

23.07.2018 and 28.11.2018 were tendered as separate compilation during the hearing on 09.06.2020.

4.27 It is submitted that, MERC accepted MSEDCL's submissions qua non-applicability of PF Incentive to Open Access consumption (while rejecting the very same contention in the Impugned Order, when advanced by TPC-D). Consequently, while being similar Distribution Licensees (operating under the same applicable Regulations), MSEDCL was held exempt from PF Incentive, while TPC-D was held obliged to give benefit of PF Incentive to consumers availing power through Open Access, that also retrospectively. Evidently such arbitrary and discriminatory treatment ***meted out by MERC to two similarly placed Distribution Licensees*** is unlawful and deserves interference.

4.28 Evidently, in its Orders dated 23.07.2018 (MSEDCL's matter), MERC has rightly distinguished this Tribunal's Judgment dated 14.11.2013 in *Jindal Stainless matter* qua its applicability in Maharashtra. Yet in the Impugned Order, MERC found that Jindal Stainless Judgment was squarely applicable to TPC-D (when the actual position is squarely the same as MSEDCL).

4.29 The MSEDCL's submissions qua non-applicability of PF Incentive to Open Access consumption as accepted by MERC in its Orders dated 23.07.2018 and 28.11.2018 were similar to those made by TPC-D in the impugned proceedings (i.e., Case No.110 of 2017).

4.30 Evidently, MERC in contradistinction to the Impugned Order, has by its subsequent Orders dated 23.07.2018 and 28.11.2018 (in MSEDCL's case), rightly:-

(a) **interpreted** the provisions of its previous Tariff Orders, and **the Statutory mandate requiring Open Access consumers to install Power Factor correction equipment**,

(b) **held that there cannot be any retrospective application of PF**

Incentive to Open Access consumers, **as the same was not factored into the Tariff** of the Distribution Licensees.

4.31 It is pertinent to highlight that, except for in the Impugned Order, MERC has consistently held that in the State of Maharashtra PF Incentive/ Penalty is not applicable on power sourced through Open Access. In this regard, the following is noteworthy:

(a) MERC's Order dated 03.01.2013[14] (issued prior to the Impugned Order);

(b) MERC's subsequent Orders dated 23.07.2018 and 28.11.2018 (passed in the case of MSEDCL); and

(c) Regulation 14.11 of the MERC DOA Regulation 2019.

In light of the foregoing, it is most humbly prayed that **this Tribunal be pleased to set aside the Impugned Order, since MERC's direction of retrospective application of PF Incentive to Open Access consumers of TPC-D alone, is not in line with MERC's past orders and direction and amounts to providing differential treatment** to similarly placed Licensees. It is further submitted that, MERC's findings in the Orders dated 23.07.2018 and 28.11.2018 that PF Incentive to Open Access consumers was not factored into the Tariff of the Distribution Licensee, fortifies the submissions made by TPC-D hereinabove.

D. Distribution Open Access Regulations do not provide for PF Incentive/ Penalty to be applied on Open Access consumption

4.32 The MERC DOA Regulations, 2016 do not provide for PF Incentive to be provided on Open Access consumption. While the DOA Regulations in Regulation 14 specifically provides for the various charges payable by Open Access consumers, the same nowhere indicates that PF Incentive/ Penalty

[14] Order dated 03.01.2013 in Case No. 8 of 2012 & Batch – Annexure-2 @ Running Pg. No.365 of the Compilation [relevant para 3.138]

is to be advanced to Open Access as well.

4.33 The applicable billing components for Open Access consumption, as provided in Regulation 14 of the DOA Regulations, 2016, does not consider PF Incentive/ Regime since, in this regime:-

(a) Charges contemplated under Regulation 14.1 ***are exclusively related to the Wires Business*** of the Distribution Licensee.

(b) ***PF Incentive/ Penalty is neither a charge nor a surcharge*** contemplated under Regulation 14.1(vi) of the MERC DOA Regulations, 2016. ***Maharashtra Commission erred in the Impugned Order to misconstrue this provision*** since the same is linked to/ is a component of the Supply Business of the Distribution Licensee.

4.34 In order to appreciate the challenge, it is necessary to distinguish amongst two categories of consumers/ users connected to a Distribution Licensee, being:-

(a) ***Direct Consumers*** connected to the Distribution System who consume their complete requirement / load from the Distribution Licensee concerned.

(b) ***Open Access consumers/users*** connected to the Distribution System who procure power directly from a Generator or a Trader using the distribution network of a licensee.

4.35 **In terms of Regulation 16.4 of the Grid Code, Open Access Consumers are statutorily mandated/ responsible for maintaining the Grid parameters, specifically the system voltage within 97% to 103% range**. In this regard, Open Access Consumers are required/ mandated to install Power Factor corrective equipment (e.g. capacitors/ shunt reactors) to ensure grid stability/ system voltage. These Open Access consumers are

entitled to incentive/ penalty, in the form of **Reactive Energy Charges** (like a Distribution Licensee) **for the actual support extended by them to maintain the system voltage, as and when necessary**.Neither had a thorough study been conducted nor had MERC in the DOA Regulations, 2016 or in the Tariff Orders determined/ decided that PF Incentive/ Penalty is also to be made applicable on Open Access consumption.

Re. Reactive Energy Charge (REC) and not PF Incentive/ Penalty is applicable on Open Access consumption in terms of the DOA Regulations

4.36 The following Regulations of Maharashtra Commission ***specifically provide for Reactive Energy Charges (as an incentive/ penalty) to be made applicable for Open Access*** and do not envisage PF Incentive/ Penalty as being applicable to Open Access Consumers:-

(a) Regulations 2.1(y) and 16.4 of the MERC (State Grid Code) Regulations, 2006 **("Grid Code")**;

"*2.1(y) "**User**" means persons, including in-State Generating Stations, Distribution Licensees Consumers of the Distribution Licensees directly connected to intra- State transmission system **and persons availing of Open Access**, who are connected to and/or use the intra-State transmission system:"*

"16.4 Reactive Power Compensation

16.4.1 ***Reactive Power compensation and/or other facilities shall be provided by Users, as far as possible, in the low voltage systems close to the load points thereby avoiding the need for exchange of Reactive Power to/from the InSTS and to maintain the InSTS voltage within the specified range****.*

…….

16.4.4 ***Users shall endeavour to minimize the Reactive Power drawal at an interchange point when the voltage at that point is below 95% of rated voltage, and shall not inject Reactive Power when the voltage is above 105% of rated voltage****. …..."*

[Emphasis supplied]

(b) Regulations 27 and 21 of the MERC (Distribution Open Access) Regulations, 2014 and 2016 respectively:

DOA Regulations, 2014

*"**27. Reactive Energy Charge***

27.1 In respect of Open Access Customer having a load of 5 MW or above, the methodology for payment for the reactive energy charges by Open Access consumers shall be in ***accordance with provisions stipulated in the State Grid Code and MYT Regulations, 2011*** *as amended from time to time.*
27.2 In respect of Open Access consumers of load less than 5 MW, reactive energy charges shall be calculated on Power Factor basis as specified by the Commission…" [Emphasis supplied]

DOA Regulations, 2016

"21. Reactive Energy Charge
21.1. The methodology for ***payment for the reactive energy charges by an Open Access Consumer****, Generating Station or Licensee* ***with load of 5 MW or moreshall be in accordance with the State Grid Code and the Regulations of the Commission governing Multi-Year Tariff or relevant orders of the Commission****.*
21.2. The reactive energy charges in respect of Open Access Consumers with load less than 5 MW shall be calculated on Power Factor basis as may be specified in relevant orders of the Commission. ……."[Emphasis supplied]

(c) Regulations 70 and 67 of the MYT Regulations 2011 and 2015 respectively.

MYT Regulations, 2011

*"**70 Reactive Energy Charges***
…..
70.2 ***The Transmission System Users shall be subjected to the following Incentive/ Disincentive for maintaining the reactive energy balance in the transmission system****:*

Party responsible for reactive energy compensation	***Threshold performance***	***Voltage at Interchange point (V_p)***	***Rate for compensation***
TSU (Distribution Licensee / OA Users directly connected to State transmission network)	*Maximum reactive energy drawal at each interchange point to be limited corresponding to power factor of 0.9*	- *If V_p >103% of V_{nom}* - *If V_p < 97% of V_{nom}* - *If 97% < V_p<103%*	- *Incentive at the rate of Rs. 0.10/RkVAh for additional drawal* - *Penalty at the rate of Rs. 0.10 RVkAh for additional drawal* - *Nil*

Where, V_p = Voltage at the Interchange point and V_{nom} = Nominal Value of Voltage"

MYT Regulations, 2015

*"**67. Reactive Power Charges***
67.1 A Generating Station shall inject/absorb the reactive power in to the grid on the basis of machine capability as per the directions of MSLDC.
67.2 Reactive power exchange, only if made as per the directions of MSLDC, for the applicable duration (injection or absorption) shall be

compensated/levied by the MSLDC to the Generating Station at rate of 12.00 paise/RkVAh for FY 2016-17 escalated at 0.50 paise/RkVAh annually in subsequent Years of the Control Period, unless otherwise revised by the Commission.

67.3 ***The Transmission System Users shall be subjected to the following Incentive/ Disincentive to be compensated/levied by the MSLDC for maintaining the reactive energy balance in the transmission system****:*

Party responsible for reactive energy compensation	***Threshold performance***	***Voltage at Interchange point (V_p)***	***Rate for compensation***
TSU	*Maximum reactive energy drawal at each interchange point to be limited corresponding to power factor of 0.9*	- *If V_p >103% of V_{nom}* - *If V_p < 97% of V_{nom}* - *If 97% < V_p<103%*	- *Incentive at the rate of Rs. 0.12/RkVAh for additional drawal* - *Penalty at the rate of Rs. 0.12 RVkAh for additional drawal* - *Nil*
Where, ***V_p = Voltage at the Interchange point*** ***V_{nom} = Nominal Value of Voltage***			

4.37 Evidently, the Regulations of MERC always envisaged applicability of Reactive Energy Charges on Open Access consumers and never factored providing PF Incentive/ Penalty on Open Access consumption in the Tariff Orders of the Distribution Licensees including TPC-D. Furthermore, the meters installed in the State of Maharashtra in terms of the Open Access Regulations were ABT/ SEM meters capable of recording both active and reactive energy amongst other parameters on 15 minutes time block basis. As such, there would have been no difficulty in determining the methodology for payment for the reactive energy charges by an Open Access Consumer, as the information was readily available with all Distribution Licensees.

4.38 It is not the Respondent's case that, TPC-D was levying PF Penalty and not providing PF Incentive on power consumed through Open Access. The Respondents have only contested that, PF Incentive provided on power sourced directly through the Distribution Licensee should also be made

applicable on the power sourced by such consumers through Open Access (i.e., either through a generator or trader).

4.39 It is not TPC-D's contention that MIAL, HPCL and similarly placed consumers should now (retrospectively) be made liable to pay REC to TPC-D. It is an undisputed fact that MERC had never determined REC payable by Open Access consumers, although the appropriate provisions for the levy were specified in the DOA Regulations. However, that does not mean that MIAL and other similarly placed consumers become entitled to PF Incentive on the power sourced by them through Open Access, which also had never been determined/ factored in by MERC.PF Incentive/ Penalty being a tariff related issue could not have been decided by MERC in the petition filed by MIAL seeking a mere clarification, *de hors* of a proper public consultation process.

4.40 MIAL's reliance on Clause 16.3 of Annexure II (Draft Connection Agreement) appended to the DOA Regulations, 2016 to contend that, TPC-D was to provide PF Incentive on power sourced through Open Access, is erroneous and misplaced. It is submitted that, MIAL has craftily excluded the term **"S*upply"*** which precedes the term 'Distribution Licensee' in the said Clause 16.3, so as to mislead this Tribunal. The relevant extract of the proviso to Clause 16.3 of Annexure II of the DOA Regulations, 2016, necessary for adjudication of the instant *lis* is reproduced hereunder:-

> *"Provided that the **Supply Distribution Licensee** may charge penalty or provide incentive for low / high power factor and for harmonics, in accordance with relevant orders of the Commission."*

4.41 A bare perusal of the DOA Regulations, 2016 evidence that the terms 'Distribution Licensee' and 'Supply Distribution Licensee' have been **used, so as to demonstrate the different entities, who have been entrusted with specific/ distinct responsibilities**. This Clause is in context of the

Parallel Licence scenario in the City of Mumbai, where there are certain consumers (i.e., Change-over Consumers) who receive supply of power from TPC-D through the wires of another Distribution Licensee (i.e., a parallel licensee in the same area of operations e.g. Adani Electricity Mumbai Ltd. (earlier RInfra-D). Change-over Consumers are Open Access consumers, as established by MERC in its Order dated 29.07.2011 in Case No. 72 of 2010, which was upheld by this Tribunal in its Judgment dated 21.12.2012 in Appeal No. 132 of 2011.

4.42 Therefore, the aforesaid Clause provided that the Supply Distribution Licensee may charge penalty or provide incentive for low/high power factor harmonics to the consumer in line with MERC's orders. This was only to identify *which Licensee* was to charge the penalty or give incentive i.e., the Wheeling Licensee or the Supply Licensee. The term '***Supply Distribution Licensee***' has been defined in MERC in its Order dated 15.10.2009 passed in Case No.50 of 2009, to mean *"**the Distribution Licensee who provides electricity supply to the consumer using the distribution system of the Wheeling Distribution Licensee.**"* When a consumer procures power on Open Access, the Distribution Licensee ceases to be a Supply Licensee to that consumer for the quantum of power procured on Open Access and becomes the Wheeling Licensee for that quantum of Open Access power. Hence, the aforesaid Clause was not applicable to Open Access consumption. In is pertinent to highlight that, MERC in the MYT (Tariff) Regulations applicable to the State of Maharashtra, has treated a Distribution Wires Licensee and a Retail Supply Licensee as two distinct entities.

4.43 Furthermore, ***this Clause nowhere provides for the Wheeling Licensee (TPC-D) to provide PF Incentive to Open Access Consumers.*** In the case of Change-over Consumers, as per this Tribunal's Judgment dated 26.11.2014 in Appeal No. 331 of 2013, ***TPC-D as a Supply Distribution***

Licensee, has been providing PF Incentive to the Change-over Consumers (who are akin to Open Access Consumers). In other words, the ***Wheeling Distribution Licensee does not pay any PF Incentive to the Change-over Consumers*** (who are Open Access Consumers as held by this Tribunal is Judgement dated 21.12.2012) for usage of Wheeling Licensees network.

4.44 It is in light of the aforesaid parallel licence scenario prevalent in the City of Mumbai that, MERC in Proviso to Clause 17.3 of Annexure II of the MERC (Distribution Open Access) Regulations, 2014, and Clause 16.3 of Annexure II of the DOA, 2016 (Draft Connection Agreement) had specifically provided that, a '***Supply' Distribution Licenseemay charge penalty or provide incentive for low/ high Power Factor, in accordance with relevant orders of the Commission.*** Therefore, the Respondent's contention that TPC-D (as the Wheeling Distribution Licensee) is liable to provide PF Incentive on Open Access consumption, in terms of the DOA Regulations is erroneous and has no basis in facts of the case or law. Even in the MYT (Tariff) Regulations, MERC has clearly differentiated between a Wires Licensee and a Retail Supply Licensee.

4.45 In the instant case, MIAL and HPCL as a Partial Open Access consumers are ***only using the wires of TPC-D*** (who is the Wheeling Distribution Licensee) and receiving supply from sources other than the Distribution Licensee (i.e., either from Generating Stations or a Trader). However, in contradiction to the treatment applied to Change-over Consumers (who are akin to OA consumers as determined by this Tribunal), MERC in the Impugned Order burdened TPC-D (the Wheeling Distribution Licensee in the instant case) by directing it to retrospectively provide PF Incentive for the Open Access quantum consumed by MIAL and other similarly placed consumers.

4.46 In order words, **the Impugned Order is ex-facie erroneous and contrary to MERC's own Regulations and previous dispensation (in Case No.50 of 2009), since TPC-D is not the Supply Distribution Licensee in the facts of the case, to provide PF Incentive to Open Access Consumers. Even otherwise, as submitted above, PF Incentive/ Penalty on the quantum of power procured through Open Access was not factored while determining Tariff of TPC-D**.

4.47 In light of MERC's inconsistent treatment (qua directing TPC-D as a Supply as well as a Wheeling Licensee to provide PF Incentive to both Change-over and Open Access consumers respectively), thisTribunal ought to decide as to which Licensee (i.e., Supply or Wheeling Licensee) was required to provide incentive to a consumer for maintaining Power Factor. Accordingly, TPC-D shall become entitled to seek refund along with applicable interest.

Re. MERC (Distribution Open Access) (First Amendment) Regulations, 2019

4.48 On 08.06.2019, MERC vide Regulation 14.11 of the MERC (Distribution Open Access) (First Amendment Regulations), 2019 ("**MERC DOA Regulations, 2019**") specified that:

> *"**14.11. Availability of PF Incentive/ PF Penalty**:*
>
> ***Entitlement to PF incentives or levy of PF penalty**, as the case may be, as specified under Tariff Schedule of the Tariff Order issued from time to time **shall be applicable only for the net energy supplied by Distribution Licensee to the Open Access consumer and captive user after adjusting** the banked energy and **actual open access consumption during the month**." [Emphasis supplied]*

4.49 The Regulation 14.11 of the MERC DOA Regulations, 2019 is in line with

MERC's earlier Order dated 03.01.2013 in Case No. 8 of 2012 & Batch[15], wherein it was categorically held that, **PF Incentive is to be made applicable to Open Access consumers only on the Net Energy supplied (as a Direct Consumer) by the Distribution Licensee, after deducting the power procured by such consumers through Open Access**.

4.50 This Order dated 03.01.2013 has not only attained finality but has also been upheld by MERC its recent orders on the exact same issue re. Applicability of PF Incentive on Open Access consumption. The Respondents reliance on the Statement of Reasons of the MERC DOA Regulations, 2019 to contend that PF Incentive on Open Access power was applicable under the DOA Regulations 2016 and the MTR and MYT Orders is incorrect. On the contrary, MERC has fortified TPC-D's contention that, an Open Access consumer is required to maintain PF within the range stipulated as per the CEA Regulations.

4.51 The CEA (Technical Standards of Grid Connectivity) Regulations have been in place since21.02.2007, i.e., much prior to the Respondents availing Open Access. It is no body's case that, MERC has amended the DOA Regulations, so as to remove applicability of PF Incentive/ Penalty from Open Access consumption due to some change in the applicable CEA Regulations or any other Regulations. As a matter of fact, there has been no change either in the extant statutory framework or any other circumstances, except of passing of the Impugned Order, which is contrary to:

(a) MERC's express finding in its Order dated 03.01.2013, which has attained finality.

(b) The MTR and MYT Orders passed for TPC-D where PF Incentive to

[15] Order dated 03.01.2013 in Case No. 8 of 2012 & Batch – Annexure-2 @ Running Pg. No.365 of the Compilation

be provided to Open Access consumers was never factored while determining TPC-D's tariff.

(c) The subsequent Orders passed in the case of MSEDCL holding that PF Incentive is to be provided only on the net energy supplied by the Distribution Licensee (and not on the Open Access quantum).

4.52 It is further submitted that, on 30.03.2020, MERC in the Multi-Year Tariff Order for the Distribution Licensees within the State, has approved Tariff based on 'kVAh billing' for all HT consumers. MERC has all together discontinued PF Incentive / Penalty for HT Consumers (i.e., even on the quantum of power procured directly from the Distribution Licensees). This is because with implementation of kVAh billing, any adverse impact due to poor PF is to be recorded as increased consumption in kVAh.

4.53 On one hand the Respondents claim that PF Incentive (during the period 2014-2019) was to be provided purely on technical and engineering grounds, without reference to the source of power. On the other hand, they contend that they are not aggrieved by the MERC DOA Regulations, 2019 which specifically provides that, PF Incentive is to be provided only on the Net energy supplied by the distribution licensees and have therefore not challenged it. If the Respondents claim that PF Incentive is to be provided purely on technical and engineering grounds was correct, they would have certainly challenged the 2019 Regulations, as the factual aspect qua PF Incentive has not undergone any change between 2016 and 2019. Admittedly neither are the Regulations challenged nor the subsequent MYT Order passed by MERC in 2020. The Respondent's contention that PF Incentive is to be provided on Open Access consumption is purely opportunistic and a means to reduce their Open Access expense, at the cost of other consumers of the Distribution Licensees.

E. Non-applicability of the Jindal Stainless Judgment dated

14.11.2013

4.54 At the outset, it is submitted that, MERC has applied the findings of this Tribunal's Judgment dated 14.11.2013 in Appeal No.231 of 2012 (Jindal Stainless Judgment) differently for competing Distribution Licensees in the State of Maharashtra.

4.55 On one hand MERC in the Impugned Order has held that this Tribunal's Jindal Stainless Judgment is squarely applicable to TPC-D and on the other hand, vide its Orders dated 23.07.2018 and 28.11.2018 MERC has distinguished Jindal Stainless Judgment in favour of the State Distribution Licensee (i.e., MSEDCL) and held that PF Incentive is not applicable on power sourced through Open Access.

4.56 Without prejudice to the fact that MERC has discriminated between two Distribution Licensees in the State in relation to the exact same issue, it is submitted that, there is a variance in the regulatory and metering scenario in TPC-D's present case and that in Jindal Stainless' case. Therefore, MERC's reliance on the findings of Jindal Stainless Judgment in the Impugned Order, without considering the factual position is erroneous.

4.57 In this regard, it is pertinent to note that:-

(a) In Jindal's case, the petition came to be filed before HERC for allowing "Power Factor Rebate" after relying on the definition of consumption charges. In TPC-D's case before MERC, no such petition was ever filed. On the contrary, MIAL had merely sought a clarification.

(b) In Jindal's case, due to the absence of appropriate ABT compliant metering arrangement, there was no methodology or basis to segregate Reactive Energy drawn from Open Access and that drawn from the Distribution Licensee. For this reason, this Tribunal had held that, the methodology of allocating total reactive power drawn on pro-

rata basis, adopted by Haryana Commission (in that case) to arrive at the Reactive Energy Charges was incorrect, till appropriate meters were installed, due to which Reactive Energy Charges could not be applied to the consumers.

(c) In the Jindal Stainless Judgment, this Tribunal had framed four issues for consideration, of which, the following two questions are essential for the instant *lis*:

(i) Whether an Open Access Consumer is obligated to pay Reactive Energy Charges for the quantum of power taken on Open Access; and

(ii) Whether the PFI provided for in the Tariff Order was applicable to the Appellant therein for the quantum of the power sourced on Open Access?

(d) This ***Tribunal had held that such an Open Access Consumer is liable to pay the Reactive Energy Charges***. **However, since appropriate metering system (ABT meters) had not been provided**, same could not be implemented. **Only then, did this Tribunal venture into second and third questions**.

(e) It is pertinent to note that, if appropriate ABT compliant meters had been provided at the consumer premises (in the Jindal case), then this Tribunal had no occasion to go further in to the second and third questions. Because it would not be prudent to hold that a person is subjected to Reactive Energy Charges as per Open Access Regulations as well as Incentive/ Penalty under Tariff Order. This would amount to double jeopardy, which is not permissible in law.

4.58 In the present (TPC-D's) case, necessary ABT compliant meters have always been installed by MIAL, HPCL and all Open Access Consumers (the same being a mandatory requirement for Open Access) which are not only

capable of recording voltage but also record Active and Reactive Energy on 15 minute time block basis. Accordingly, Reactive Energy Charges could have been computed and ought to have been determined and applied to MIAL and other similarly placed Open Access consumers, as envisaged in the Distribution Open Access Regulations.

4.59 It is submitted that on an analysis of the Meter data of MIAL for the period from 22.01.2018 to 19.03.2018 [approx. 2½ months, for 5435 fifteen-time blocks spanning 57 days, 14 hours and 45 mins] evidences that, the system voltage at MIAL's end during the said sample period was always higher than 97%. Therefore, MIAL would not have been entitled to any Reactive Energy Charges, which demonstrates the actual benefit provided by an Open Access consumer to the system.

4.60 In light of the above, it is evident that ***this Tribunal's Judgment in the case of Jindal Stainless is not applicable in the facts of the present case*** and MERC's reliance on the same with respect to the Impugned Order is therefore erroneous. It is a settled position of law that, a decision is only an authority for what it actually decides. What is of the essence in a decision is its 'ratio-decidendi' and not every observation found therein nor what logically follows from the various observations made in the judgment. Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there, is not intended to be exposition of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. It is, therefore, not profitable to extract a sentence here and there from the judgment and to build upon it because the essence of the decision is its 'ratio-decidendi' and not every observation found therein. These principles are carved out of:-

(a) Quinne v. Leathem: 1901 AC 495: HL (at pg. 506);

(b) Ambica Quarry Works v. State of Gujarat & Ors: (1987) 1 SCC 213 (Para 18);

(c) Krishna Kumar v. Union of India: (1990) 4 SCC 207 (Paras 19-20); and

(d) Arasmeta Captive Power Co. (P) Ltd. v. Lafarge India (P) Ltd.: (2013) 15 SCC 414 (Paras 31 to 41).

4.61 It is reiterated that, the non-applicability of the Jindal Stainless Judgement in Maharashtra, on account of the difference in the metering arrangement in Haryana and Maharashtra (availability of ABT compliant meters which are not only capable of recording voltage but also record Active and Reactive Energy on 15 minute time block basis) has been duly acknowledged and accepted by MERC in its subsequent Orders dated 23.07.2018 and 28.11.2018 in the case of MSEDCL.

F. Miscellaneous Submissions

4.62 As regards the Respondent's contention that Open Access consumers maintain Power Factor near unity and in turn help the system, only because of the Incentive (PF Incentive) provided to them, and that they incur high cost in installing and operating the equipment for maintaining high Power Factor, it is submitted that the same is completely incorrect and fallacious.

4.63 It is an admitted position that maintaining of Power Factor is a mandatory obligation cast upon a consumer. In this regard the following is noteworthy:-

(a) As per the provisions of Section 22 (General Conditions of Wiring) of Indian Electricity Rules 1956, it was mandatory for consumers to maintain the Power Factor above 0.85.

(b) As per Regulation Part IV of the CEA (Technical Standards of Grid Connectivity) Regulations dated 21.02.2007, it is mandatory for Distribution Licensees and Bulk Consumers (such as HPCL) to

maintain Power Factor above 0.95, so as to provide sufficient reactive compensation to their inductive loads.

(c) Power Factor above 0.95 means it is for both lead and lag.

4.64 The Respondents have installed the Power Factor equipment under the mandate of law, when they were purely Retail Consumers of TPC-D (i.e., prior to seeking Open Access). **In terms of Regulation 16.4 of the Grid Code, Open Access Consumers are statutorily mandated/ responsible for maintaining the grid parameters, specifically the system voltage within 97% to 103% range**.

4.65 Furthermore, **MERC in its recent MERC DOA Regulations, 2019** has specifically dealt with this contention and in its Statement of Reasons clearly stated that, **an Open Access Consumer is mandated to maintain Power Factor within range stipulated as per CEA Regulations**.

4.66 Without prejudice to the above, it is submitted that, maintaining high-Power Factor also helps the Open Access consumer in appropriating the maximum Open Access quantum wheeled. Hence arguments on the issue of high-Power Factor leading to benefit to Grid and leading to low losses to the Distribution Licensees alone is completely baseless and is rather opportunistic.

4.67 In this regard, it is rather pertinent to highlight the benefits received by MIAL (an Open Access Consumer) by installing Power Factor correction equipment and that provided to the system:-

(a) The line used to procurer power directly from TPC-D and through Open Access is the same. The Power Factor correction ***equipment installed by the consumer is also common***. ***MIAL's investment*** for installation of Power Factor correction equipment (capacitors) in FY 2011-12 ***would be around Rs.4.50 Crores.***

(b) The Power Factor correction equipment (capacitors) are relatively ***maintenance free*** and the annual maintenance cost would ***not exceed Rs.2 Lacs p.a***.

(c) Since FY 2011-12, TPC-D ***has paid MIAL*** (as a Direct Consumer) a sum of approx. ***Rs. 33.24 Crores towards PF Incentive*** on the power procured from TPC-D, i.e.,***740% of its investment.***

4.68 Evidently, MIAL as a Direct Consumer of TPC-D has already recovered/ received a benefit/ incentive of 740% (of Rs. 33.24 Crores) on its investment of approx. Rs.4.50 Crores. It is submitted that, PF Incentive were provided to Direct Consumers of a Distribution Licensee qua the efforts taken by them to maintain a high Power Factor, which reduces the system losses and leads to lower quantum of power being procured by the Distribution Licensees and ultimately lowers the cost of power availed by the consumers. Undisputedly, the Power Factor correction equipment installed by MIAL is on account of statutory mandate, as well as a continuation of past practice when it was a full consumer of the Distribution Licensee.

4.69 On the other hand, Open Access consumers get direct benefit by way of reduction in the cost on account of reduction in the quantum of power purchased by it from the generators (on account of reduction of system loss due to maintaining appropriate system voltage level). It is submitted that, since the benefit of improving/ maintaining a high Power Factor directly benefits the Open Access consumer while procuring power, passing on any additional benefit by the distribution licensee will only burden the other larger set of direct consumers of the licensees, which would not be justifiable.

4.70 The Respondent's contention that if PF Incentive is not provided to Open Access consumers, it will lead to deterioration of the system voltage is false, baseless and misleading. This is also evident from the fact that, neither

MIAL nor any other consumer has challenged MERC's DOA Regulations, 2019 which excluded applicability of PF Incentive on the quantum of power procured from Open Access (this without any change in the extant statutory framework).

4.71 In light of the above, it is most respectfully submitted that, this Tribunal be pleased to:

(a) Allow the Appeal and set aside the Impugned Order;

(b) Hold and declare that PF Incentive was not applicable on power sourced through Open Access.

(c) Permit TPC-D to recover the amounts already paid by it to the Open Access consumers towards PF Incentive pursuant to the Impugned Order, along with applicable interest.

5. Mr. Parinay Deep Shah, Learned Counsel for the Respondent No. 2 has submitted the following Written Submissions for our Consideration.

5.1 The instant appeal has been filed by the Appellant challenging the Impugned Order dated 28.11.2017, passed by Respondent No. 1, Maharashtra Electricity Regulatory Commission ("State Commission") in Case No. 110 of 2017. This case was filed by Respondent No. 2, Mumbai International Airport Limited ("MIAL"), before the State Commission, under relevant provisions of Electricity Act, 2003 ("EA 2003") and MERC (Distribution of Open Access) Regulations, 2016 (hereinafter "DOA Regulations, 2016").

5.2 By way of the Impugned Order, the State Commission has held that Power Factor Incentive ("PFI") is payable to Open Access consumers such as MIAL, on the charges levied by the Appellant on the power sourced through such consumers by open access. Consequently, the State Commission

directed the Appellant to adjust payment, with respect to PFI towards past period in the ensuing bills of open access consumers along with applicable interest.

5.3 The Appellant has made the following submissions while assailing the Impugned Order:

a) The State Commission has historically never held that PFI is payable to open access consumers;

b) The judgment dated 14.11.2013 passed by this Tribunal in Appeal No. 231 of 2012 ("APTEL Judgment") is not applicable in the instant case;

c) The State Commission has subsequently passed multiple orders, for another distribution licensee i.e. MSEDCL, on the same issue wherein it gave contrary finding and held that PFI is not payable to open access consumers;

d) Consumers in State of Maharashtra have installed ABT compliant energy meters which are capable of reading active and reactive energy consumption. Thus, State Commission should have computed Reactive Energy Charges ("REC")

e) The DOA Regulations, 2016 only provide for payment of Reactive Energy Charges to open access consumers; and

f) The benefit of improving/maintaining high Power Factor directly benefits Open Access consumers, such as MIAL, while procuring power, passing on any additional benefit such as PFI will only unfairly burden the other larger set of direct consumers of the Appellant.

5.4 The Respondent/ MIAL has been a retail consumer of the Appellant since 01.11.2009 and has been receiving PFI from the Appellant since then. From 01.11.2015, MIAL started availing a part of its demand through open access. MIAL, however, continued to receive PFI on power, availed through the Appellant, both as a Direct consumer and Open Access consumer. It is

pertinent to mention that the Appellant was giving PFI to MIAL till April, 2017 on Regulatory Asset Charge ("RAC"),a component of Open Access charges levied on MIAL, by the Appellant, as an Open Access consumer. Subsequently, MIAL vide its email dated 17.04.2017 requested the Appellant to give PFI on other Open Access charges, such as CSS and Wheeling Charges as well. However, instead of giving PFI, as requested by MIAL, the Appellant stopped giving PFI even on RAC.

5.5 Due to Appellant's sudden and wrong decision to withhold PFI, on Open Access charges, MIAL approached the State Commission, vide Case No. 110 of 2017, seeking clarification on applicability of PFI on power availed through open access. MIAL, in its petition, prayed for directions to the Appellant to provide PFI, on the Open Access charges paid by MIAL, to the Appellant, as an Open Access consumer. MIAL relied on the APTEL Judgment and the previous Tariff Orders, passed by the State Commission, for the Appellant.

5.6 Subsequently, the State Commission passed the Impugned Order, directing the Appellant to provide PFI or levy penalty on MIAL and other similarly placed consumers, on open access charges levied on them. The relevant extract of the Impugned Order are as under:

> "*8. Power Factor Incentive / Penalty has been provided in the electricity tariffs of TPC-D and other Distribution Licensees since long to encourage consumers to improve their Power Factor by providing shunt compensation and bring it as close as possible to unity so that system losses are reduced. Lower Power Factor causes higher system losses and consequent loss to the Distribution Licensee.*
>
> *9. Although Open Access consumers source part or all of their power requirement from sources other than their Distribution Licensees, they use the distribution system of the Licensees for wheeling of this power and, hence, also contribute to system losses (unless they are independently connected to a Generator and physically isolated from the rest of the Licensee's network). If they have no incentive to maintain a high Power Factor, the onus on the Distribution Licensees to take corrective measures to compensate for the variation in Power Factor of such consumers will be correspondingly greater. Moreover, Power Factor improvement can best be achieved if such measures are implemented at*

the consumer level. On this principle, the Power Factor Incentive / Penalty provided in the MYT Order for consumers sourcing power from TPC-D is equally applicable to the Open Access power sourced by such consumer, who also contribute by way of Wheeling / Transmission Charges and Losses, CSS, and Additional Surcharge, if any.

10. This is also consistent with the Judgment dated 14.11.2013 in Appeal No. 231 of 2012 in which APTEL held as follows:

"56. Summary of the findings:-

> *…II. The very purpose to provide higher power factor rebate is to encourage the consumer to maintain high power factor and to minimize the system losses. Any loss before the meter installed at consumer's premises is on account of the distribution licensee. In order to reduce these losses, the State Commission has incentivized high power factor based on pure technical and engineering principle. It has nothing to do with the source of power. Accordingly, power factor rebate is payable to the consumer who also avails open access.*
>
> *III. As per clause 2(19) of the Supply Code, the surcharge referred to in Regulation 3 is the Cross Subsidy Surcharge payable by Open Access consumer is a part of SoP charges and, therefore, the incentive on power factor would also be applicable on this amount. The Respondent till date has been recovering penalty on the low power factor and penalty for exceeding contract demand on the sale of power including Cross Subsidy Surcharge from embedded open access consumers. The licensee cannot probate and approbate at the same time. Therefore, the State Commission now cannot permit the utility, the Respondent to use different yardstick to the consumer while giving rebate and recovering MDI penalty, when both are to be charged on sale of power. Therefore, this treatment is contrary to the commercial principles."*

11. The list of charges specified in Regulation 14 of the DOA Regulations, 2016 has been cited by TPC-D. However, that is not an exhaustive list of the charges leviable while billing Open Access consumers, as will be seen from Regulation 14.1(v) (quoted earlier in this Order).

12. With reference to Regulation 21 of the DOA Regulations, 2016, TPC-D has raised the issue of levying a Reactive Energy Charge on Open Access consumers. As present, in the MYT Orders in respect of TPC-D and other Distribution Licensees, the Commission has not determined any Reactive Energy Charge. In its forthcoming Mid-Term Review Petition, TPC-D is at liberty to propose such determination.

13. In view of the foregoing, the Commission directs TPC-D to provide Power Factor Incentive (or levy Power Factor Penalty, as the case may be,) to MIAL and other similarly placed consumers on the charges it levies on the power sourced by them through Open Access. For past periods, these may be adjusted

in the ensuing bills of MIAL and other such Open Access consumers, along with applicable interest."

5.7 To summarize, the State Commission in the Impugned Order noted as under:

a) PFI/Penalty has been provided in thetariff orders to encourage consumers to improve their power factor such that system losses are reduced.

b) Open Access consumers use distribution system of the licensee for wheeling of power and hence, contribute to system losses. Thus, if they have no incentive to maintain a highPower Factor, the burden will shift on the distribution licensees to take steps to compensate for the variation in Power Factor.

c) PFI/Penalty provided for in the MYT Order and other tariff orders is also to be extended to open access consumers sourcing power from sources other than the Appellant, who also contribute by way of open access charges.

A. The State Commission has regularly passed orders holding that PFI is payable to Open Access consumer:

5.8 The Appellant has incorrectly submitted that the State Commission has historically never provided PFI for Open Access consumers and that it was in the Impugned Order that such provision was made for the first time. This contention is denied. The State Commission in its MTR Order dated 26.06.2015 and the subsequent MYT Order dated 21.10.2016, passed for the Appellant, clearly provided that PFI is payable on power sourced through Open Access. The relevant extracts of the two orders are as under:

MTR Order dated 26.06.2015

"*Power Factor Incentive*

Applicable for HT-I :Industry, HT II - Commercial, HT-V (A)- Railways, HT-V(B)- Metro & Monorail, HT-VI(A): Public Services Government Educational Institutions

and Hospitals, HT VI (B)- Public Service Others, LT II: Non-Residential/Commercial LT II (B), LT II (C)] (for Contract Demand/Sanctioned Load above 20 kW), LT IV: Industry, and LT IX: Public Service LT IX (A) and LT IX (B].

Whenever the average Power Factor is more than 0.95, an incentive shall be given at the rate of the following percentages of the amount of the monthly bill including Energy Charges, Wheeling Charges, RAC, FAC and Fixed/Demand Charges but excluding Taxes and Duties"(Emphasis Supplied)

MYT Order dated 21.10.2016

"*Power Factor Incentive*

Applicable for HT-I :Industry, HT II - Commercial, HT-IV : PWW, HT V- Railways, Metro & Monorail, HT-VI: Public Services [HT VI (A) and HT VI (B)], HT VII - Temporary Supply, LT II: Non-Residential/Commercial [LT II (B), LT II (C)] (for Contract Demand/Sanctioned Load above 20 kW), LT III (B): Industry above 20 kW, LT IV- PWW, LT VII (B) – Temporary Supply (Others) , and LT IX : Public Service [LT IX (A) and LT IX (B).

Whenever the average Power Factor is more than 0.95, an incentive shall be given at the rate of the following percentages of the amount of the monthly electricity bill, excluding Taxes and Duties:

Sr. No.	*Range of Power Factor*	*Power Factor Level*	*Incentive*
1	*0.951 to 0.954*	*0.95*	*0%*
2	*0.955 to 0.964*	*0.96*	*1%*
3	*0.965 to 0.974*	*0.97*	*2%*
4	*0.975 to 0.984*	*0.98*	*3%*
5	*0.985 to 0.994*	*0.99*	*5%*
6	*0.995 to 1.000*	*1*	*7%*

Note: Power Factor shall be measured/computed upto 3 decimals, after universal rounding off. " (Emphasis Supplied)

5.9 Evidently the State Commission in Tariff Orders, passed for the Appellant prior to the Impugned Order, directed that PFI should be given to Open Access consumers. The State Commission in the MTR Order has clearly mentioned that "*Whenever the average Power Factor is more than 0.95, an incentive shall be given at the rate of the following percentages of the amount of the monthly Electricity bill including Energy Charges, Wheeling Charges, RAC, FAC,CSS and Fixed/Demand Charges but excluding Taxes and Duties*". It is submitted that "*Wheeling Charges, RAC*" are all components of Open Access charges paid by MIAL as an Open Access consumer to the Appellant. The tariff fixed in the aforementioned orders is

same for both categories of consumers. The State Commission in both the MTR Order and MYT Order noted that PFI will be applicable to HT-VI B category of consumers, which includes MIAL. It is submitted that had the State Commission wanted to exclude such Open Access charges, from applicability of PFI, then the same would have been specifically mentioned and clarified by the State Commission in the Impugned Order. The State Commission, however, relied on the APTEL Judgment to state that PFI is payable to Open Access consumers.

5.10 Further, from the Appellant's own conduct it is evident that it was aware that PFI has to be paid on the Open Access charges being levied on MIAL, as an Open Access consumer. The Appellant, cognizant of the APTEL Judgment and Tariff Orders, paid PFI to MIAL, till April 2017, on a component of Open Access charges. In fact, in emails sent by the Appellant to MIAL, in February, 2016, the Appellant clearly stated that the amount of power factor incentive (for both Direct and open access power) will be duly paid to MIAL in subsequent month. An authorized representative of MIAL, in his email dated 06.02.2016, sought clarification from the Appellant with respect to PFI being paid only on units consumed as Direct consumer and not on total units. The Appellant replied by its email dated 15.02.2016 and said that the Appellant *"will be giving the necessary PF incentive differential amount in next bill*". Thus, the Appellant was clearly informed that PFI is applicable to both Direct and Open Access consumers.

B. The APTEL Judgment is applicable to the instant appeal:

5.11 It is submitted that the instant appeal is not maintainable, as the only issue involved therein i.e. applicability of PFI on Open Access consumers has already been decided in the APTEL Judgment. The judgment having not been challenged has attained finality and is thus, now binding on this Tribunal by law of precedent.

5.12 In the APTEL Judgment, the Tribunal has categorically held that **Power Factor incentive is based on technical and engineering principles and is unrelated to the source of power.** The Tribunal further held that there is no basis whatsoever for making any distinction between Open Access consumers and Direct consumers while giving PFI. PFI, thus, must be given to all consumers, including Open Access consumers. Relevant extracts of the judgment are as under:

> "*33…….**The very purpose of providing higher power factor incentive is to encourage the consumers to improve their power factor by providing shunt compensation and bring it as close as possible to unity so that the system losses are reduced to the minimum. This is a purely technical and engineering principle and it does not distinguish as to whether the power has been drawn from the licensee or on availing the 'open access.***'
>
> *34. The above analysis would show that very purpose to provide higher power factor rebate is to encourage the consumer to maintain high power factor and to minimize the system losses. Any loss before the meter installed at consumer's premises is on account of the distribution licensee. In order to reduce these losses, the State Commission has incentivized high power factor based on pure technical and engineering principle. It has nothing to do with the source of power.* ***Accordingly, power factor rebate is payable to the consumer who also avails open access.***
>
> *……*
>
> *39. We have carefully considered the submissions of the parties on this issue. High Power Factor reduces the system loss and vice-versa. This is purely a technical and engineering principle. It has universal application irrespective of source of power. If a consumer procures power from other sources through open access at high power factor, the system loss would be less as in the case of his drawal of power from the distribution licensees."* (Annexure A-3 at pages 103-104 and 106 of the Appeal paper book)

5.13 The Appellant has tried to distinguish the APTEL Judgment from the matter at hand by pointing out superficial differences in regulatory and metering scenario. The Appellant has submitted that in the APTEL Judgment appropriate ABT compliant metering arrangement was absent due to which there was no methodology for segregating Reactive Energy drawn from Open Access and that drawn from the Distribution Licensee. Consequently, the Tribunal, in the APTEL Judgment, directed that PFI be paid to Open

Access Consumers. It is the Appellant's submission that had appropriate metering been available at consumer premises, then the Tribunal would not have held that an Open Access consumer, subject to Reactive Energy Charges, is also subject to PFI/Penalty. As per the Appellant, MIAL has installed the necessary ABT compliant meters, capable of recording voltage and Reactive Energy on 15 minutes' time block basis. The State Commission should have, thus, calculated and applied REC on MIAL in accordance with the DOA Regulations.

5.14 This contention of the Appellant is flawed and hence denied. From the APTEL Judgment it is evident that REC is applicable on drawl of reactive energy by the consumer, which in MIAL's case is 0 (nil). Since, MIAL is only consuming active power, no REC is applicable on it. The relevant extract of the APTEL Judgment is as under:

> "*…**payment has to be made to the beneficiary when it draws reactive power during the period of voltage being higher than 103% of the rated voltage or he returns reactive power, when voltage is lower than 97% of the rated voltage.** Further, it was held that while the reactive energy charges deal with debit and credit based on injection or drawal of reactive power at particular interval when the supply voltage is above 103% or below 97% of the rated voltage, whereas the active power flow is right throughout the day irrespective of the period of threshold limits of the supply voltage. Hence, the methodology adopted by the State Commission is without application of mind. Hence, the conclusion by the State Commission cannot be held to be valid."* (Emphasis Supplied)

5.15 Further, even though MIAL has installed the ABT compliant meters, the State Commission is yet to calculate REC. The same is also noted in the Impugned Order as under:

> *"12. With reference to Regulation 21 of the DOA Regulations, 2016, TPC-D has raised the issue of levying a Reactive Energy Charge on Open Access Consumers. As present, in the MYT Orders in respect of TPC-D and other Distribution Licensees, the Commission has not determined any Reactive Energy Charge. In its forthcoming Mid-Term Review Petition, TPC-D is at liberty to propose such determination"*

5.16 In such a scenario, when REC has not even been calculated by the State Commission, the Appellant's contention of applying REC to MIALis

irrelevant. The Appellant was clearly at liberty to approach the State Commission and propose determination of REC, since it has chosen not to approach the State Commission for the same, it is not open to the Appellant to now argue that REC should be applied on MIAL.

5.17 The Appellant has merely mentioned that REC and PFI are two distinct charges and cannot be applied interchangeably but has failed to give any reason for its assertion that PFI is not applicable if REC can be calculated. It is reiterated that in the instant case **REC has not been calculated by the State Commission and thus, only PFI is being applied** to MIAL and other Open Access consumers. It is also important to mention that since a common network is being used, by the Appellant, for supply of power to both direct and Open Access consumers variation in externality/distortions in Appellant's system' voltage/stability cannot be attributed to Open Access consumers only. The single energy meter records both the direct and Open Access consumption thus, making it impossible to distinguish distortions and attribute the same to Open Access consumption alone. It is stated that the absence/ presence of ABT metering has no correlation to PFI/penalty to Open Access consumers. The Tribunal, in the APTEL Judgment, directed paying PFI to Open Access consumers as it did not agree with the distinction made between power sourced through distribution licensee and open access.

5.18 The Appellant gives PFI to its direct consumers and is only refusing to apply the same to Open Access Consumers. Such distinction is in teeth of the APTEL Judgment, wherein the Tribunal has clearly held that while giving PFI no distinction can be made between Open Access and Direct Consumers. The Tribunal categorically held that CSS, payable by Open Access charges, has to be treated as part of electricity charges and has to be factored in while determining the rebate admissible for PFI. The Tribunal has held that PFI would be applicable irrespective of the source of power.

The findings in the APTEL Judgment, with respect to PFI are completely independent and separate from findings on REC and is thus a settled position of law. In the aforesaid judgment, it has been **categorically held that PFI is purely a technical and engineering principle and has universal application, irrespective of source of power and as such it will also be applicable in the case of Open Access consumers**.Further, as per the National Electricity Policy and EA 2003 consumer categorization can be done only on the basis of usages/voltage level. The Appellant's manner of seeking to categorize consumers on the basis of source of power is erroneous and illegal. Further, allowing such categorization would lead to an absurdity, as an Open Access consumer could become direct consumer for multiple times in a year making it difficult to determine tariff for such consumers.

5.19 The Tribunal, in the APTEL Judgment, framed two different questions with respect to application of REC and PFI. The same are as extracted as under:

> *"7…..*
>
> *(a) Whether a person who is an embedded customer receiving power from the Distribution Company, seeks to draw power through Open Access, is obligated to pay the Reactive Energy Charges for the 'quantum of power taken on Open Access?*
> *(b) Whether the Power Factor Rebate provided for in the Tariff Order is applicable to the Appellant on Open Access"*

Further, even the findings with respect to PFI (Annexure A-3 at pages 98 to 104 of the Appeal paper book) are completely independent and separate from findings on REC (Annexure A-3 at pages 95 and 98of the Appeal paper book), without any correlation to one another. Thus, the APTEL Judgment is squarely applicable to the instant appeal.

5.20 It is further submitted that the APTEL Judgment having not been challenged has attained finality and is thus, binding on this Tribunal under the rules of precedent. The Hon'ble Supreme Court of India, in the matter of *Sant Lal*

Gupta and Ors. v. *Modern Co-operative Group Housing Society Ltd. and Ors.*, has held as under:

> "*The earlier decision of the coordinate bench is binding upon any latter coordinate bench deciding the same or similar issues. If the latter bench wants to take a different view than that taken by the earlier bench, the proper course is for it to refer the matter to a larger bench."*

Thus, the Appellant's submission that the APTEL Judgment is not applicable to instant matter is devoid of merit and ought to be set aside.

C. The DOA Regulations provide for applicability of PFI/Penalty on Open Access consumers

5.21 The Appellant has also wrongly claimed that the DOA Regulations, 2016 do not provide that PFI is payable to Open Access consumers. The Appellant has contended that under Regulation 21 of DOA Regulations only REC is payable to Open Access consumers, such as MIAL. This contention of the Appellant is denied. It is submitted that while Regulation 21 provides for REC, it nowhere excludes applicability of PFI on Open Access consumer. Further in the instant case, the State Commission has not even calculated REC and thus, the same cannot be applied to MIAL and other Open Access consumers. Regulation 21 reads as under:

> *"21. Reactive Energy Charges*
>
> *21.1. The methodology for payment for the reactive energy charges by an Open Access Consumer, Generating Station or Licensee with load of 5 MW or more shall be in accordance with the State Grid Code and the Regulations of the Commission governing Multi-Year Tariff or relevant orders of the Commission.*
>
> *21.2. The reactive energy charges in respect of Open Access Consumers with load less than 5 MW shall be calculated on Power Factor basis as may be specified in relevant orders of the Commission.*
>
> *21.3. The reactive energy charges in respect of Renewable Energy Generating Stations shall be in accordance with the charges approved by the Commission in its relevant Tariff Orders."*

5.22 The Appellant has also contended that all the charges applicable to Open Access consumers are mentioned in the DOA Regulations, 2016 and only such charges can be determined by the State Commission. This submission

of the Appellant is incorrect. Regulation 14.1 of the DOA Regulations, 2016 clearly provides, under sub-clause (vi), that the bill for use of the Distribution System for wheeling of electricity in its network raised by the Distribution Licensee on the entity to whom the Open Access is granted may include any other charges, surcharge or other sum recoverable from the Consumer under the EA 2003 or any Regulation or Orders of the Commission. Relevant extract of Regulation 14 is as under:

> *"14. Billing*
>
> *14.1 The bill for use of the Distribution System for wheeling of electricity in its network shall be raised by the Distribution Licensee on the entity to whom the Open Access is granted, and shall indicate the following:*
>
> *(i) Wheeling Charges;*
>
> *(ii) Cross-Subsidy Surcharge;*
>
> *(iii) Additional Surcharge on the charges for wheeling;*
>
> *(iv) MSLDC fees and charges*
>
> ******
>
> *(v) Transmission Charges:*
>
> *Provided that a Partial Open Access Consumer, Generating Station or Licensee, as the case may be, shall pay the Transmission Charges to the Distribution Licensee instead of the Transmission Licensee for using a transmission network;*
>
> ***(vi) Any other charges, surcharge or other sum recoverable from the Consumer under the Act or any Regulation or Orders of the Commission."***

5.23 Further, Clause 16 of Annexure II of DOA Regulations, 2016 clearly states that the Distribution Licensee may provide PFI to Open Access consumers, in terms of the State Commission's orders. Clause 16 reads as under:

> *"16. Power Factor / Harmonics*
>
> *16.1. It shall be obligatory for the Applicant to maintain the average power factor of his load at levels prescribed by the Indian Electricity Rules, 1956 with such variations, if any, adopted both by the Distribution Licensee, in accordance with Rule 27 of the Indian Electricity Rules, 1956 and in accordance with the relevant orders of the Commission.*
>
> *16.2. It shall be obligatory for the Applicant to control harmonics of his load at levels prescribed by the IEEE STD 519-1992, and in accordance with the relevant orders of the Commission.*
>
> *16.3. The Distribution Licensee, may require the Applicant, within a reasonable time period, which shall not be less than 3 months, to take such effective*

measures so as to raise the average power factor or control harmonics of his installation to a value not less than the prescribed norm:

Provided that the Supply Distribution Licensee may charge penalty or provide incentive for low / high power factor and for harmonics, in accordance with relevant orders of the Commission."

From a bare reading of the aforementioned clauses it is evident that the DOA Regulations, 2016 clearly provided for application of PFI on Open Access consumers. This point is further strengthened by the latest amendment to the DOA Regulations, MERC (Distribution and Transmission Open Access) (First Amendment) Regulations, 2019.The State Commission in the Statement of Reasons for MERC (Distribution and Transmission Open Access) (First Amendment) Regulations, 2019 for has clarified that post implementation of kVAh based billing the issue of PFI would become redundant as consumer having high Power Factor will get automatically incentivized by reduction in kVAh in the electricity bills. The State Commission has sought to do away with PFI for Open Access consumer since it is enforcing implementation of kVAh billing. The relevant extract of the Statement of Reasons is as under:

"Further, the Commission would like to highlight that in the earlier MTR Orders, the Commission has already outlined plan to move towards kVAh based tariff regime in the next control period. Post implementation of kVAh based billing, the issue of PF incentive/penalty would become redundant."

Thus, it is clear that while the State Commission had provided PFI to Open Access consumers in its previous Tariff Orders and DOA Regulations, 2016 the same has now been discontinued by passing of MERC (Distribution and Transmission Open Access) (First Amendment) Regulations, 2019.

D. PFI is a legitimate charge payable to Open Access consumers

5.24 The Appellant has contended that paying PFI to MIAL and other Open Access consumers is unfairly burdening its Direct consumers. This contention of the Appellant is denied. From a bare reading of para 33 of the APTEL Judgment it is evident that the major beneficiary of high power

factor, maintained by consumers, is the distribution licensee's network. Relevant extracts of Para 33, of the APTEL Judgment, reads as under:

> *"33……..*
>
> *It is to be noted that current drawn an lower power factor also cause excessive voltage drop which would further increase the system losses.* ***Thus, it is proved that lower power factor causes higher system losses and loss to the distribution licensee. The very purpose of providing higher power factor incentive is to encourage the consumers to improve their power factor by providing shunt compensation and bring it as close as possible to unity so that the system losses are reduced to the minimum.*** *This is a pure technical and engineering principle and it does not distinguish as to whether the power has been drawn from the licensee or on availing the 'open access'."*(Emphasis Supplied)

5.25 High power factor, maintained by Open Access consumer, in addition to distribution licensee's network also benefits the Direct consumers of the distribution licensee and transmission lines. Further, direct consumers such as MIAL, after fulfilling conditions stipulated under DOA Regulations, 2016, procure power through Open Access. This also benefits Direct consumer as it lowers the power procurement cost, incurred by distribution licensee, during peak hours when the rate is very high. Thus, the Appellant is incorrectly and wrongly submitting that PFI is an additional benefit provided to Open Access consumers at the cost of Direct consumers.

5.26 The Appellant has also argued that MIAL, as a direct consumer, has received INR 33.24 Crore, towards PFI, against an investment of INR 4.50 Crore incurred for installation of Power Factor correction equipment. The Appellant further argued that Open Access consumers, such as MIAL, are benefitted by reduction in cost on account of reduction in quantum of power purchased by the generators and thus, do not deserve any additional benefit in the form of PFI. It is submitted that MIAL has received the aforementioned sum, because it maintained a high Power Factor which benefitted the Appellant's network and its other consumers. The amount received by MIAL as a Direct consumer can have no bearing on the

incentive it is entitled to receive as an Open Access consumer. It is submitted that once a legal provision provides for a certain incentive/penalty to be passed on to the consumer the same cannot be denied unless the said legal provision is amended. It is not out of place to mention that as a distribution licensee, even the Appellant has benefitted by reduction in cost due to line losses, maintenance cost and better infrastructure maintained by MIAL.

5.27 Further, MIAL as an Open Access consumer has been paying, the Appellant, requisite Open Access charges such as transmission charges, wheeling charges, Regulatory Asset Charges, Cross subsidy surcharge ("CSS") and additional surcharge as per the tariff orders issued by the State Commission.

E. Non-consideration of Open Access sales in Tariff Orders

5.28 The Appellant has contended that the State Commission did not consider Open Access sales while passing MYT Order dated 21.10.2016 and Truing-up the Supply Annual Revenue Requirement for FY 2014-15. As per the Appellant only sales to direct consumers were considered by the State Commission. It is submitted that the Appellant is trying to mislead the Tribunal by raising the said issue. The Appellant was providing PFI to MIAL, as an Open Access consumer, much before the passing of MYT Order dated 21.10.2016.It is reiterated that the Appellant was providing PFI to MIAL, on a component of Open Access charges, ever since it started procuring power through open access i.e. 01.11.2015. In February, 2016, the Appellant assured MIAL that it will provide PFI on total units billed by the Appellant i.e. both direct and open access units. Evidently, the Appellant was aware of its obligation to provide PFI to all its consumers irrespective of source of power consumed by them.

5.29 Further, the Appellant did not raise the issue of Open Access sales not being considered, before the State Commission during subsequent tariff

proceedings. In fact the Appellant in its tariff submissions, recorded in Order dated 12.09.2018, passed in Case No. 69 of 2018 relied upon the Impugned Order to push for KVAh billing. The relevant extract of Tariff Order dated 12.09.2018 passed for approval of Truing-up of FY 2015-16, Truing up of FY 2016-17, provisional Truing up of FY 2017-18 and ARR and Tariff for 2018-19 and 2019-20 are as under:

> *"Introduction of kVAh Billing*
>
> *The Commission introduced the Power Factor (PF) incentive system with an aim to get support from consumers to improve system conditions and at the same time, for the consumer to recover the cost of PF correction equipment through incentives. TPC-D submitted that in the present scenario, it is not necessary to get reactive energy support from the consumer on a continued basis throughout the day, and PF incentive provided to such consumers on a continued basis for the improved system conditions is actually burdening the other low-end consumers. TPC-D proposed that the consumers who contribute for improving the PF of the system should have inbuilt mechanism for incentivizing their efforts.* ***TPC-D further submitted that to ensure the automatic monetary discipline with regard to maintaining PF and to make PF incentive/penalty redundant, kWh based billing should be replaced by kVAh billing.*** *TPC-D proposed that the base PF for conversion of kWh to kVAh should be considered as 0.95, which is currently the base for deciding PF incentive.*
>
> ***TPC-D submitted that in Case No. 110 of 2017 filed by MIAL regarding applicability of PF incentive to OA consumers, the Commission has issued the Order on the same in which it has stated as under:***
>
> > *"With reference to Regulation 21 of the DOA Regulations, 2016, TPC-D has raised the issue of levying a Reactive Energy Charge on Open Access consumers. As present, in the MYT Orders in respect of TPC-D and other Distribution Licensees, the Commission has not determined any Reactive Energy Charge. In its forthcoming Mid-Term Review Petition, TPC-D is at liberty to propose such determination."*
>
> *TPC-D proposed that in the first phase, the kVAh billing is to be made applicable to all the consumers, who are currently under the purview of PF incentive / Penalty scheme and have existing electronic meters suitable for KVAh recording. The kWh billing will continue for others till their meters are replaced with suitable meter for KVAh recording."* (Emphasis supplied)

5.30 If the Appellant was truly aggrieved, by payment of PFI to MIAL and other Open Access consumers, then it would have raised the issue of non-

consideration of Open Access sales in the subsequent tariff proceedings. The Appellant would have raised a claim for the amount paid as PFI to MIAL and other Open Access consumers informing the State Commission that due to non-consideration of Open Access sales the Annual Revenue Requirement, approved by the State Commission, was incorrect/ insufficient. The Appellant, however, did not raise any such claim before the State Commission. The State Commission by Tariff Order dated 12.09.2018, again made PFI applicable to the entire monthly electricity bill excluding duties and taxes. The relevant extract of the Tariff Order is as under:

*"**Power Factor Penalty***

Applicable for HT-I -Industry, HT II – Commercial, HT-IV : PWW, HT V- Railways, Metro & Monorail, HT-VI: Public Services [HT VI (A) and HT VI (B)], HT VII – Temporary Supply, HT VIII-Electric Vehicle Charging Stations, LT II: Non- Residential/Commercial [LT II (B), LT II (C)] (for Contract Demand/Sanctioned Load above 20 kW), LT III (B): Industry above 20 kW, LT IV- PWW, LT VII (B) – Temporary Supply (Others), and LT IX : Public Service [LT IX (A) and LT IX (B)] having contract demand/sanctioned load above 20 kW and LT XI- Electric Vehicle Charging Stations.

*Whenever the average **PF is less than 0.9 (lag or lead), penal charges shall be levied at the rate of the following percentages of the amount of the monthly electricity bill, excluding Taxes and Duties***:

Sr. No.	*Range of Power Factor*	*Power Factor Level*	*Incentive*
1	*0.895 to 0.900*	*0.90*	*0.0%*
2	*0.885 to 0.894*	*0.89*	*1.0%*
3	*0.875 to 0.884*	*0.88*	*1.5%*
4	*0.865 to 0.874*	*0.87*	*2.0%*
5	*0.855 to 0.864*	*0.86*	*2.5%*
6	*0.845 to 0.854*	*0.85*	*3.0%*
7	*0.835 to 0.844*	*0.84*	*3.5%*
8	*0.825 to 0.834*	*0.83*	*4.0%*
9.	*0.815 to 0.824*	*0.82*	*4.5%*
10	*0..805 to 0.814*	*0.84*	*5.0%*

Note: Power Factor shall be measured/computed upto 3 decimals, after universal rounding off. "

5.31 The Appellant has failed to show that it asked the State Commission for consideration of Open Access sales. Further, if the Appellant was dissatisfied by the MYT Order then it should have challenged the same by way of review or appeal. The Appellant cannot now assail the same through the instant appeal.

5.32 The Appellant is wrongly contending that the PFI amount to be paid, as mandated by the State Commission in the Impugned Order, is retrospective in nature and has led to a huge burden on the Appellant. It is denied that the PFI given to MIAL and other Open Access consumers is retrospective in nature. The regulatory position of providing PFI to Open Access consumer was clear as on 01.11.2015, when MIAL became partial open access consumer, on account of the MTR Order dated 26.06.2015. The Appellant, on its own accord, stopped making the payments due towards the PFI forcing MIAL to approach the State Commission seeking clarification. Thus, the payments directed to be made towards PFI, unlawfully withheld by the Appellant, do not amount to being retrospective in nature.

F. Power Factor incentive is payable by Supply Distribution Licensee

5.33 The Appellant has contended that from Clause 16.3 of Annexure II to DOA Regulations, 2016 it is clear that in case of Open Access consumers the PFI has to be paid by the Supply Distribution Licensee. The Appellant argues that since it does not supply power to MIAL under open access it is not the supply distribution licensee, in terms of Clause 16.3, and thus, cannot be saddled with the burden of paying PFI on open access charges.

5.34 This contention of the Appellant is denied. It is submitted that MIAL is seeking PFI only with respect to open access charges that are collected by the Appellant as a distribution licensee. MIAL is not claiming any PFI on energy charges of open access which are paid to generator/trader. The

table below shows the open access charges, paid to the Appellant, on which MIAL is seeking PFI:

TABLE 1

Components of Energy Charges	**Direct Units**			**Open Access Units**		
	Distribution Licensee	Charges Collected by Whom	Power Factor Incentive Required from DL	Open Access Units	Charges Collected by Whom	Power Factor Incentive required from DL
Energy Charge	Yes	TPC-D	Yes	**Yes***	**Generator**	**NO**
TOD-A - 22 hrs to 6 hrs- Energy Charge	Yes	TPC-D	Yes	NO	NA	NA
TOD-C - 9 hrs to 12 hrs- Energy Charge	Yes	TPC-D	Yes	NO	NA	NA
TOD-D - 18 hrs to 22 hrs- Energy Charge	Yes	TPC-D	Yes	NO	NA	NA
Fixed / Demand Charge	Yes	TPC-D	Yes	NO	NA	NA
Fuel Adjustment Charge	Yes	TPC-D	Yes	NO	NA	NA
RAC	Yes	TPC-D	Yes	**Yes**	**TPC-D**	**Yes**
Wheeling Charges	Yes	TPC-D	Yes	**Yes**	**TPC-D**	**Yes**
CSS	NO	NA	NA	**Yes**	**TPC-D**	**Yes**
Electricity Duty	Yes	TPC-D	NO	Yes	TPC-D	NO
Tax on Sale of Electricity	Yes	TPC-D	NO	Yes	TPC-D	NO
PFI	Yes	TPC-D	-	Yes	TPC-D	-
Transmission Charges	NO	NA	NA	Yes	TPC-D	No
SLDC Charges	NO	NA	NA	Yes	TPC-D	No
Operating Charges	NO	NA	NA	Yes	TPC-D	No
* Agreed Rate with Trader/ Generator						

5.35 Evidently, MIAL is seeking PFI only on those open access charges which it pays the Appellant for being the distribution licensee. MIAL is also using the Appellant's system for wheeling of power and thus, contributes to minimization of system losses by maintaining Power Factor near to Unity. High Power factor is increasing the existing line capacity to carry maximum rated power with almost nil losses. This is not only beneficial to Distribution licensee as it reduces additional capex for new lines and also other miscellaneous costs like maintenance of ROW Space requirement etc. Evidently the major beneficiary of high Power Factor, maintained by MIAL, is the network i.e. the wheeling licensee and hence, the Appellant being the

distribution licensee is the one who has to levy PFI/Penalty on the network charges levied by it on the Open Access consumers.

5.36 It is important to mention that no such distinction is made, between distribution licensees, in the APTEL Judgment which clearly states that PFI must be paid irrespective to source of power. Thus, the Appellant ought to pay the PFI to MIAL. It is germane to mention that in the present case the Appellant is the only Supply Distribution Licensee and there is no other Supply Distribution Licensee. The Appellant's hypothesis of a case where there are two Supply Distribution Licensees is not applicable in the present case.

G. Subsequent Orders passed by the State Commission

5.37 The Appellant has argued that since passing of the Impugned Order the State Commission has passed multiple orders for another distribution licensee i.e. MSEDCL holding that no PFI is payable to Open Access consumers. The Appellant has contended that passing of such orders by the State Commission amounts to discrimination and thus, the Impugned Order merits to be set aside.

5.38 This contention of the Appellant is baseless and merits to be set aside. It is submitted that the Impugned Order was passed by the State Commission in the petition filed by MIAL and upon consideration of facts submitted therein. The subsequent orders of the State Commission, passed for a different distribution licensee and Open Access consumers, cannot be a ground for setting aside the Impugned Order. Further, the subsequent orders of the State Commission have been challenged by the concerned Open Access consumers before the Tribunal and are currently pending adjudication.

5.39 In light of the submissions made above it is prayed that the present appeal be dismissed. The Appellant is merely re-agitating the issues that have already been settled by this Tribunal by a previous judgment and has attained finality.

6. Ms. Nikita Choukse, Learned Counsel for the Respondent No. 3 has filed the following Written Submissions for our consideration :

6.1 HPCL, like the Respondent No. 2 draws only Active Energy and the drawl of Reactive Energy by HPCL is zero, therefore no reactive energy charges are leviable on HPCL. The Respondent has been given benefit of PFI in the past, and till date HPCL has received INR 74.83 lacs from the Appellant on account of PFI in Open Access, and is entitled to a balance of INR 1.70 Crores. The total entitlement of HPCL is INR 2.45 Crores. Respondent No. 3/HPCL was impleaded by way of order of this Tribunal dated 03.04.2018.

6.2 The main issue under consideration is whether the Power Factor Rebate provided for in the MYT Order dated 21.10.2016 and Mid-Term Review Order dated 26.06.2015 ("***MTR Order***")is applicable to the Impleader-Respondent No. 3 for the quantum of the power taken from the Appellant on Open Access? Further, whether reactive energy charge is payable or not, and whether the PFI is a standalone incentive, which is payable based on the MYT order is not an issue before the Tribunal, because the Impugned Order itself does not issue any order on the same.

6.3 It is further important to note that this Tribunal in the interim order dated 23.04.2018 in I.A. No. 192 of 2018 ("***Interim Order***") i.e. the stay application filed in the instant appeal had gone through all provisions of the Electricity Act 2003, DOA Regulations, 2014/2016, MYT Orders of the Appellant issued by the State Commission, MYT Regulations, State Grid Code etc. and thereafter observed that there were similar situations in present case as well as in Jindal Case with respect to the Regulations & MYT orders. Relevant portion of the Interim Order is as below:

> *"15…On perusal of the Jindal Case judgement, it is appears that there were similar situations in present case as well as in Jindal Case with respect to the Regulations & MYT orders. This Tribunal in the Jindal Case based on technical and engineering principles has held that Power Factor Incentive is to be made*

available to the OA consumer sourcing partly/fully power from other sources apart from the distribution licensee. We observe prima facie that this was an independent conclusion arrived at by this Tribunal irrespective of the other issues including that related to Reactive Energy Charges raised in that appeal.

16. We have also gone through the provisions of the Act, DOA Regulations, 2014/2016, MYT Orders of the Appellant issued by the State Commission, MYT Regulations, State Grid Code etc. as contended/relied by the Appellant and the Respondents. The same are not being discussed/ reproduced for the sake of brevity. Prima facie, we do not find any provision that inhibits the State Commission in applying the Power Factor Incentive/ Penalty on the Respondents and other OA consumers."

Hence, the Tribunal appreciated the issue while issuing the Interim Order.

6.4 Power factor represents the ratio between True Power and Apparent Power. The term defined in Supply Code Regulations is '**Average Power Factor**' and the same reads as under:

***"(d) "Average Power Factor**" means-*

(i) the ratio of kilowatt hours consumed in the month to root of sum of squares of kilowatt hours consumed in the month & reactive kilo-volt ampere hours consumed in the month; or

(ii) the ratio of kilowatt hours consumed in the month to kilo-volt ampere hours consumed in the month

as may be recorded by the consumer's meter and shall be rounded off to two decimal places"

6.5 The Tribunal in its order dated 14.11.2013 passed in Appeal No. 231 of 2012, *Jindal Stainless Ltd. Vs. Dakshin Haryana Bijli Vitran Nigam & Anr.* ("*Jindal Case*") noted the working of the actual power and apparent power to state the understanding of how power factor is deduced in engineering terms, and also conclude on the issue pending before this Tribunal, that there cannot be any distinguishing factor between an open access consumer / or a consumer for the incentive. Following which, the Tribunal noted / observed as under:

39. We have carefully considered the submissions of the parties on this issue. High Power Factor reduces the system loss and vice-versa. This is purely a technical and engineering principle. ***It has universal application irrespective. of source of power. If a consumer sources power from other sources through open access ·at high power factor the system loss would be less as in the case of his. drawl of power from the distribution licensees."***

…

56. Summary of the findings:- …….. II. The very purpose to provide higher power factor rebate is to encourage the consumer to maintain high power factor and to minimize the system losses. Any loss before the meter installed at consumer's premises is on account of the distribution licensee. In order to reduce these losses, the State Commission has incentivized high power factor based on pure technical and engineering principle. It has nothing to do with the source of power. Accordingly, power factor rebate is payable to the consumer who also avails Open Access."

6.6 Hence, the Tribunal not only explains the concept but also notes the reasoning of incentivizing consumers (including open access consumers), as the same aid the distribution licensee, and reduces 'system losses'. The Appellant has raised reasons to distinguish the Tribunal's Order in Jindal Case on various grounds, however, it has failed to demonstrate any contrary technical / engineering principles which may reflect why there is a distinction between a direct consumer and open access consumer for maintaining power factor.

6.7 Power Factor Incentive is applicable in the case of all consumers including Open Access Consumers and Respondent No. 3 is entitled to the benefit of the same. As far as MERC (Distribution Open Access) Regulations, 2016 ("*DOA Regulations*") are concerned, the Appellant has wrongly claimed that the DOA Regulations, 2016 do not provide for Power Factor incentive to Open Access consumers. It is the Appellant's contention that charges applicable to Open Access consumers are mentioned in the DOA Regulations, 2016 and only the quantum of such charges is determined by State Commission through its orders. This submission of the Appellant is denied.

6.8 Regulation 14 of the DOA Regulations, 2016 which deals with billing, clearly provides, under sub-clause (vi) of Regulation 14.1, that the bill for use of the Distribution System for wheeling of electricity in its network raised by the Distribution Licensee on the entity to whom the Open Access is granted

may include "*any other charges, surcharge or other sum recoverable from the Consumer under the Act or any Regulation or Orders of the Commission.*"

6.9 Further, Clause 16 of Annexure II of the DOA Regulations specifically provide that the Supply Distribution Licensee may provide incentive for low/high Power Factor in accordance with relevant Orders of the Commission: (reproduced supra)

6.10 The State Commission in MYT Order dated 21.10.2016, clearly provided for Power Factor incentive while noting as under:

> *"**Power Factor Incentive Applicable for HT-I** :Industry, HT II - Commercial, HT-IV : PWW, HT V- Railways, Metro & Monorail, HT-VI: Public Services [HT VI (A) and HT VI (B)], HT VII - Temporary Supply, LT II: Non-Residential/Commercial [LT II (B), LT II (C)] (for Contract Demand/Sanctioned Load above 20 kW), LT III (B): Industry above 20 kW, LT IV- 8 PWW, LT VII (B) – Temporary Supply (Others) , and LT IX : Public Service [LT IX (A) and LT IX (B).*
>
> ***Whenever the average Power Factor is more than 0.95, an incentive shall be given at the rate of the following percentages of the amount of the monthly electricity bill, excluding Taxes and Duties:***

Sr. No.	*Range of Power Factor*	*Power Factor Level*	*Incentive*
1	*0.951 to 0.954*	*0.95*	*0%*
2	*0.955 to 0964*	*0.96*	*1%*
3	*0.965 to 0.974*	*0.97*	*2%*
4	*0.975 to 0.984*	*0.98*	*3%*
5	*0.985 to 0.994*	*0.99*	*5%*
6	*0.995 to 1.000*	*1*	*7%*

> ***Note**: Power Factor shall be measured/computed upto 3 decimals, after universal rounding off. "*

6.11 Similar provision is also made in MTR Order, dated 26.06.2015, providing that whenever the average Power Factor is more than 0.95, an incentive shall be given at the rate of the following percentages of the amount of the monthly bill including Energy Charges, Wheeling Charges, RAC, FAC and Fixed/Demand Charges but excluding Taxes and Duties.

Sr. No.	*Range of Power Factor*	*Power Factor Level*	*Incentive*
1	*0.951 to 0.954*	*0.95*	*0%*
2	*0.955 to 0964*	*0.96*	*1%*
3	*0.965 to 0.974*	*0.97*	*2%*
4	*0.975 to 0.984*	*0.98*	*3%*
5	*0.985 to 0.994*	*0.99*	*5%*

6	*0.995 to 1.000*	*1*	*7%*

***Note**: PF shall be measured/computed upto 3 decimals, after universal rounding off. "*

Hence, Power Factor Incentive is applicable in the case of all consumers including Open Access Consumers.

6.12 The MERC in the MTR Order has prescribed the category of consumers who will be entitled for PFI and Respondent No. 3 falls in one of those categories. The Electricity Act, 2003 defines the term 'consumer' as under:

> *"consumer" means any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person, as the case may be;*

6.13 The terms 'Open Access Consumer' and 'Partial Open Access Consumer' has also been defined under Regulation 2 (29) and 2 (30) of the said regulations. These definitions too, provide for a meaning, that suggests that a consumer for all purposes includes these categories of consumers too.

6.14 Further, under the DOA Regulations, in Regulation 2 (15), the term 'Consumer' shall carry the meaning as provided under the Act and shall be restricted to such consumers within the State of Maharashtra. Hence, for all purposes, a consumer under the DOA Regulation includes Open Access Consumers particularly, without exclusions. Additionally, under Regulation 1.2 of the DOA Regulations, it has been provided:

> "*1.2 These Regulations shall apply for Open Access to and use of the Distribution System of the Distribution Licenses in the State of Maharashtra and where the network of the Distribution License is not being used but supply to an Open Access Consumer is being provided within the distribution area of the Distribution Licensee."*

6.15 Therefore, all regulations / provisions set out under DOA Regulations are applicable to Open Access consumers, more particularly. Hence, the

definition of the word 'consumer', read with the provisions of Regulation 14 of the DOA Regulations and the order issued by the MERC, directing to pay incentives and levy penalties alike, apply to Open Access consumer, without any distinction, that the Appellant seeks to draw (without any basis in law). It is submitted that the Regulations do not preclude the Power Factor Incentive to consumers availing open access.

6.16 Therefore, it is submitted that for entitlement of PFI, it is immaterial that whether an entity is open access consumer or not. Rather, to claim the benefit of PFI, it is essential that the said entity should relate to the distribution system of a licensee irrespective of the source of power and is maintaining high power factor.

6.17 The instant Appeal is not maintainable as the only issue involved regarding applicability of Power Factor Incentive/ Penalty on Open Access Consumers has been covered vide Judgment of this Tribunal in *Jindal Case*. The Tribunal in the Jindal Case has categorically held that the Power Factor Incentive is based on technical and engineering principles and is unrelated with the source of power whatsoever.

6.18 In this regard, it is noteworthy that in the Jindal Case, this Tribunal while answering the issue as to "*Whether the Power Factor Rebate provided for in the Tariff Order is applicable to the Appellant for the quantum of the power taken by the Appellant on Open Access?*" (Please see relevant paras extracted in paragraphs above). A bare perusal of the findings of the Tribunal as reiterated above would reflect unambiguously that Power Factor Incentive must be given to all consumers, including Open Access Consumers as they equally contribute for system losses of the Distribution Licensee.

6.19 Further, as regards the Appellant's contention of Respondents not raising any issue of applicability of PFI to Open Access consumer in public hearing in MTR order, it is quite clear from the chain of events that there was no such

issue at the time of the public hearing or the MTR order considering that the Appellant stopped giving PFI for Open Access consumption to the Respondent only from May 2017. Hence, the position on applicability of PFI on Open Access consumption was clear before 2017 and accordingly no such issue was raised before. It is incorrect for the Appellant to state that the MTR and the MYT Order did not provide for the applicability of the PFI to Open Access consumers. There is no mention of Open Access charges in the exclusion list as provided in the MYT Order for calculating PFI. It only excludes “taxes and duties”. The tariff fixed in the MYT order is also same for both categories of consumers. Had it been the intention of the Commission to exclude Open Access consumption from calculation of PFI, it would have been stated so in the MYT/ MTR Order. It is further submitted that MERC in the MTR Order (at page 10 of the appeal) has prescribed the category of consumers who will be entitled for PFI and Respondent No.3 falls in one of those categories.

6.20 Therefore, it is submitted that for entitlement of PFI, it is immaterial that whether an entity is Open Access consumer or not. Rather, in order to claim the benefit of PFI, it is essential that the said entity should be connected with the distribution system of a licensee irrespective of the source of power and is maintaining high power factor.

6.21 The Order dated 03.01.2013passed in Case No.8 of 2012 & Batch (Indian Wind Power Association vs. MERC &Ors.) has been wrongly relied by the Appellant considering that the same is prior to the Jindal Case decided by the Tribunal. The MYT Order did not distinguish between a direct consumer and an Open Access consumer.

6.22 So far as the contention of mandatory obligation of the Respondents to maintain high power factor is concerned, it is submitted that the said obligation has been casted in the relevant rules and CEA Regulations upon

all the consumers irrespective of the source of power. Therefore, in terms of the MYT Order and MTR Order, PFI is applicable to all consumers including Open Access. However, the Appellant is creating this illusionary difference between direct consumer and Open Access consumers so far as applicability of PFI is concerned.

6.23 In relation to averment of the Appellant regarding applicability of reactive energy charges instead of PFI as per the DOA Regulations 2016 and the alleged difference in metering arrangement of Haryana and Maharashtra, it is submitted that the same has adequately been answered by MERC in the Impugned Order. MERC has appreciated the fact that in spite of appropriate/ suitable ABT metering arrangement, it would not be possible to measure reactive energy consumption for the Open Access consumer through a single meter as it is not possible to differentiate reactive energy consumption for Open Access consumption and direct consumption. However, as reactive energy charges have not been decided yet, it would not be possible to levy reactive energy charges. The MERC in the Impugned Order noted thus:

> *"12. With reference to Regulation 21 of the DOA Regulations) 2016, Appellant has raised the issue of levying a Reactive Energy Charge on Open Access Consumers. As present, in the MYT Orders in respect of Appellant and other Distribution Licensees, the Commission has not determined any Reactive Energy Charge. In its forthcoming Mid-Term Review Petition, Appellant is at liberty to propose such determination. "*

6.24 Hence, it is submitted that question of applying Reactive Energy Charges does not arise as the MERC had not even decided the methodology of Reactive Energy Charges in any Order. Therefore, there is no difference in the case of Haryana and Maharashtra.

6.25 The contention of the Appellant that Open Access Consumer will get additional benefit by applicability of Power Factor Incentive is baseless as PFI with respect to an Open Access Consumer is being sought only on the

charges collected by the Appellant i.e. Wheeling Charges, RAC and CSS. The same is not being claimed on Energy charges of Open Access, as the same is collected by Generator/ Trader. Open Access Consumers use the system of distribution licensee for wheeling of the power and thus contribute to system losses. Thus, providing PFI would encourage consumers, such as the Respondents, to maintain the Power Factor at a level to minimize system losses benefitting consumers across the State.

6.26 There is no retrospectivity in the Impugned Order as the Respondents were eligible for Power Factor Incentive and therefore, the Appellant had been applying incentive on RAC charges for Open Access till 2017. The same has been catered by MERC while determining the Annual Revenue Requirement of the Appellant considering that a DISCOM is a revenue neutral entity appropriately regulated and provided for by the State Commission.

6.27 The Appellant's contention that since it is a wheeling licensee and not a supply distribution licensee, it is not liable to give PFI to open access consumers is misconceived. It may be noted that in case of change-over consumers, the supplier collects all charges (i.e. supply+ Network) and as a result, in such cases the supplier or the supply distribution licensee is liable to pay PFI to the change-over consumer. Whereas in case of Open Access, the network charges are collected by the wheeling licensee which in this case is the Appellant. Therefore, the Appellant is liable to pay PFI to the Open Access consumers maintaining high power factor since the Appellant charges the Open Access consumer for use of its network.

6.28 The Appellant has wrongly alleged that the Commission has differentiated between MSEDCL and the Appellant so far as applicability of PFI on Open Access consumers is concerned. The reliance placed on Order dated 23.07.2018 in case No. 136 of 2018 and batch is misconceived in as much

as the Commission has provided the adequate reasoning for the difference in the Case of MSEDCL and that of the Appellant. MERC in the Order dated 23.07.2018 has stated that unlike the Appellant, MSEDCL never provided PF Incentive or levied any penalty on Open Access consumption. In any case, the benefit of PFI to the Respondents is being given in terms of the Jindal Case, which appropriately mandates that PFI is arrived at on the basis of a purely technical and engineering principle and the source of power has no significance whatsoever. It is noteworthy that the Order passed by MERC in dated 23.07.2018 in case No. 136 of 2018 has also been challenged by the consumers of MSEDCL and the same is pending adjudication before this Tribunal.

6.29 As regards the DOA Regulation 2019 and the MYT Order dated 30.03.2020, it is submitted that the DOA Regulation 2019 and the MYT Order dated 30.03.2020 will be applicable prospectively from the date of its notification i.e. 07.06.2019 and 30.03.2020. Therefore, it would not affect the period in question in the instant appeal i.e. 2013 to 6th June 2019. The period in question in the instant appeal will be governed by the erstwhile DOA Regulations 2016 which did not prohibit applicability of PFI on Open Access Consumer. Moreover, the Commission has not overruled the Impugned Order.

6.30 In view of the forgoing facts and circumstances, it is submitted that the issue regarding applicability of PFI on Open Access consumers is no longer res-integra and therefore the present appeal is devoid of any merit, hence liable to be rejected.

7. We have heard learned counsel appearing for the Appellant and learned counsel for the Respondents at considerable length of time and we have gone through carefully their written submissions/arguments and also

taken note of the relevant material available on records during the proceedings. On the basis of the pleadings and submissions available, the following issue emerges in the instant Appeal for our consideration:-

- **Whether in the facts and circumstances of the case, the State Commission was justified in holding that PF Incentives will apply to the power sourced through open access and the same shall be provided to MIAL and other similarly placed consumers retrospectively with applicable interest.**

8. Our Analysis and Findings:

8.1 The Learned Counsel for the Appellant submitted that the issue at hand relates to the liability of a Distribution Licensee to provide PF Incentive (PFI) on power sourced through Open Access during the period 01.11.2015 to 08.06.2019. He further submitted that the MIAL has been direct/ retail consumer of Tata Power – D since 01.11.2009 and being directly connected to the wires of TPC-D and an embedded consumer, it was availing PF Incentive on the power sourced through TPC-D. However, on and from 01.11.2015, MIAL started availing part of its demand through open access. Accordingly, in terms of the Tariff Orders passed by MERC, PF Incentive/ Penalty was not applicable to energy procured through Open Access by consumers. In fact, MERC vide its Order dated 03.01.2013 passed in Case No.8 of 2012 & Batch*(Indian Wind Power Association vs. MERC & Ors.*) has categorically held that, PF Incentive / Penalty is to be made applicable to Open Access consumers only on the Net Energy supplied (as a Direct Consumer) by the Distribution Licensee, after deducting the power procured by such consumers through Open Access. This Order of the State Commission has not been challenged and has attained finality. Furthermore, this Order has been relied upon by State Commission in its subsequent Orders dated 23.07.2018 and 28.11.2018 passed in the case of a competing Distribution Licensee – Maharashtra State Electricity Distribution Company Limited ("**MSEDCL**"),

where MERC has held that PF Incentive/ Penalty is not applicable on power sourced through Open Access.

8.2 Learned Counsel for the Appellant vehemently submitted that the difficulty arose in May 2017, when TPC-D discovered that due to an error in its computerised billing system (a software glitch), adjustment for PF Incentive was wrongly applied in the monthly bills of Open Access during July 2013 to April 2017.Upon discovering the said error, in May 2017, TPC-D rectified the software glitch and validly stopped applying PF Incentive on RAC of the Open Access quantum in the monthly bills of all Open Access users. Agrieved by the aforesaid correction of TPC-D, MIAL filed a Petition (Case No.110 of 2017) before State Commission on 04.07.2017 seeking clarification regarding applicability of Power Factor Incentive to Open Access power consumption by HT consumers.In this case, the Impugned Order was passed to make PF Incentive applicable to Open Access Consumers of TPC-D, alone. Learned Counsel submitted that pursuant to the Impugned OrderTPC-D has been providing PF Incentive on the power sourced by its consumers on Open Access.

8.3 Learned Counsel for the Appellant further submitted that on 08.06.2019, MERC vide Regulation 14.11 of the MERC (Distribution Open Access) (First Amendment) Regulations, 2019 specified that, *"Entitlement to PF incentives or levy of PF penalty, as the case may be, as specified under Tariff Schedule of the Tariff Order issued from time to time has been applicable only for the net energy supplied by Distribution Licensee to the Open Access consumer and captive user after adjusting the banked energy and actual open access consumption during the month."* In fact, Regulation 14.11 is the same as MERC's finding in its Order dated 03.01.2013 passed in Case No.8 of 2012 & Batch. On 30.03.2020, the State Commission in the Multi-Year Tariff Order for the Distribution Licensees within the State, has approved Tariff based on 'kVAh billing' for all HT consumers. But the Commission has all together

discontinued PF Incentive / Penalty for HT Consumers on account of implementation of kVAh billing.

8.4 Learned counsel for the Appellant further submitted that through Open Access agreements consumers like MIAL and HPCL consume Active Power from their Open Access source and draw their quantum of Reactive Power from the Grid. Evidently, such Open Access consumers are provided Reactive Power for free, at the cost of all other consumers of TPC-D. Learned Counsel pointed out that the Grid Code specifically provides for Reactive Energy Charges ("**REC**") to be paid by such Open Access users to the Distribution Licensee, while the consumers like MIAL and HPCL are not bearing the costs towards drawl of Reactive Energy from the Grid for the Active Power drawn by them through Open Access. Therefore, PF Incentive on this quantum, thereby seeking a double benefit at the costs of the Direct Consumers of TPC-D. Learned Counsel submits that although appropriate ABT/ SEM meters capable of recording active/ reactive power amongst other parameters on 15 minute time block basis had always been installed at the Open Access consumers premises (in Mumbai City – being a pre-condition for grant of Open Access) and the fact that the MERC DOA Regulations, 2016 specifically provided for REC to be applicable to Open Access consumers, but the MERC has never determined the said reactive energy charges.

8.5 Learned Counsel for the Appellant pointed out that never before the Impugned Order did MERC provide for PF Incentive to be provided to Open Access consumers. PF Incentive specified under the Mid Term Review ("**MTR**") Order dated 26.06.2015 and Multi-Year Tariff ("**MYT**") Order dated 21.10.2016 was only applicable on the power sourced directly from the Distribution Licensee. It is only on 28.11.2017 by the Impugned Order that State Commission has retrospectively for TPC-D alone, provided PF Incentive on Open Access consumption. In fact, the State Commission in the MYT Order dated 21.10.2016 did not Consider Open Access supply while Truing-up the Annual

Revenue Requirement ("**ARR**") of TPC-D for FY 2014-15. Besides the Commission did not determine PF Incentive amount which is now directed to be paid by the Retail Supply Business of TPC-D to such Open Access consumers for the period FY 2015- 16 to FY 2019-20.

8.6 Learned Counsel for the Appellant advancing his arguments further submitted that it is settled law that, Tariff of a Distribution Licensee is determined after a thorough public consultation process, in terms of the MYT Regulations. Since a Distribution Licensee is a revenue neutral, regulated entity, the retrospective application of PF Incentive on power procured through Open Access along with interest directed by the MERC was passed on to the Direct Consumers of TPC-D. PF Incentive/ Penalty cannot be provided and/ or denied at the whims and fancies of a Distribution Licensee. The same has to be specifically determined and made leviable by the State Commission. Evidently, the Tariff Orders passed by State Commission no-where provided that PF Incentive/ Penalty was to be extended to power sourced through Open Access.

8.7 Learned Counsel pointed out that PF Incentive on Open Access quantum was never factored in the Tariff Orders and that PF Incentive was applicable only on the Net Energy supplied by the Distribution Licensee in terms of the aforesaid Order dated 03.01.2013, has been reiterated and reaffirmed by the MERC in its Orders dated 23.07.2018 and 28.11.2018 passed subsequent to the Impugned Order, in the case of MSEDCL. In fact, the Tariff Orders regarding applicability of PF Incentive/ Penalty for TPC-D and MSEDCL are the same. Therefore, there cannot be a situation where PF Incentive/ Penalty is to be provided by one Distribution Licensee (TPC-D) to Open Access consumers, while another Distribution Licensee (MSEDCL) is liable to provide PF Incentive/ Penalty only on the Net energy (actual energy) supplied by such Distribution Licensee.

8.8 Learned Counsel further contended that as a matter of fact, there has been no change either in the extant statutory framework or any other circumstances, except of passing of the Impugned Order, which is contrary to finding in its Order dated 03.01.2013, which has attained finality. Further, the MTR and MYT Orders passed for TPC-D where PF Incentive to be provided to Open Access consumers was never factored while determining tariff of TPC-D. Moreover, the subsequent Orders passed in the case of MSEDCL it has been felt that PF Incentive is to be provided only on the net energy supplied by the Distribution Licensee. Learned counsel further submitted that on 30.03.2020 the State Commission passed MYT order for the Distribution Licensees and has discontinued with PF Incentive/ Penalty. It is surprising that the respondents have not challenged this order. Hence, on one hand the Respondents claim that PF Incentive during the period 2014-2019 was to be provided purely on technical and engineering grounds, without reference to the source of power and on the other hand, they contend that they are not aggrieved by the MERC DOA Regulations, 2019 which specifically provides that PF Incentive is to be provided only on the Net energy supplied by the distribution licensees.

8.9 Learned counsel further submitted that the State Commission has erroneously related the findings of this Tribunal in Jindal Stainless Judgment without considering the factual position. In fact, in the Jindal Stainless Judgment, this Tribunal had among others considered two questions which are relevant namely whether an Open Access Consumer is obligated to pay Reactive Energy Charges for the quantum of power taken on Open Access; and whether the PFI provided for in the Tariff Order was applicable to the Appellant therein for the quantum of the power sourced on Open Access? Learned Counsel vehemently submitted that while taking note of the Judgement of this Tribunal, it is clear that an open access consumer is liable to pay the reactive energy charges. However, since appropriate metering

system (ABT meters) had not been provided, same could not be implemented. Only then, did this Tribunal venture into second and third questions.

8.10 Evidently, the ABT meters have already been provided in Maharashtra which were not there in the case of State of Haryana on which this Tribunal in the judgement set aside the order of HERC. Learned counsel reiterated that in the light of these facts this Tribunal's Judgement in the Jindal Stainless Ltd. Case is not applicable in the facts of the present case. Learned counsel highlighted that it is a settled position of law that a decision is only an authority of what it actually decides. Accordingly, every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there, is not intended to be exposition of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found.

Learned counsel in this regard emphasized that the above principles are also set out in the other judgements such as :

(a) Quinne v. Leathem: 1901 AC 495: HL (at pg. 506);
(b) Ambica Quarry Works v. State of Gujarat & Ors: (1987) 1 SCC 213 (Para 18);
(c) Krishna Kumar v. Union of India: (1990) 4 SCC 207 (Paras 19-20); and
(d) Arasmeta Captive Power Co. (P) Ltd. v. Lafarge India (P) Ltd.: (2013) 15 SCC 414 (Paras 31 to 41).

8.11 Learned counsel highlighted that maintaining of Power Factor is a mandatory obligation cast upon a consumer and the Respondents have installed the Power Factor equipment under the mandate of law, when they were purely Retail Consumers of TPC-D. In terms of Regulation 16.4 of the Grid Code, Open Access Consumers are statutorily mandated/ responsible for maintaining the grid parameters, specifically the system voltage within 97% to 103% range. Evidently, MIAL as a Direct Consumer of TPC-D has already recovered its investment for provided PF equipments and rather have received a benefit of manifold to the tune of 740% by way of PFI.

8.12 Learned Counsel reiterated that in the light of the above facts, the instant appeal be allowed and the Impugned order set aside. Further, it may kindly be held and declare that PFI was not applicable on power consumed through open access and TPC-D may be permitted to recover the amounts already paid by it to the open access consumers towards PFI pursuant to the Impugned Order alongwith applicable interest.

8.13 Per contra, Learned counsel for the second Respondent/MIAL submitted that the contentions of the Appellant that the State Commission has historically never provided PFI for open access consumers is totally wrong. In fact, the State Commission in its MTR Order dated 26.06.2015 and the subsequent MYT Order dated 21.10.2016 clearly provided that PFI is payable on power sourced through Open Access. Evidently, the State Commission in the MTR and MYT Orders clearly mentioned that:

> MTR Order dated 26.06.2015
>
> "*Power Factor Incentive*
>
> *Applicable for HT-I :Industry, HT II - Commercial, HT-V (A)- Railways, HT-V(B)- Metro & Monorail, HT-VI(A): Public Services Government Educational Institutions and Hospitals, HT VI (B)- Public Service Others, LT II: Non-Residential/Commercial LT II (B), LT II (C)] (for Contract Demand/Sanctioned Load above 20 kW), LT IV: Industry, and LT IX: Public Service LT IX (A) and LT IX (B].*
>
> ***Whenever the average Power Factor is more than 0.95, an incentive shall be given at the rate of the following percentages of the amount of the monthly bill including Energy Charges, Wheeling Charges, RAC, FAC and Fixed/Demand Charges but excluding Taxes and Duties"***(Emphasis Supplied)
>
> (Annexure A-4 at page 106 of the Appeal Paperbook)
>
> MYT Order dated 21.10.2016
>
> "*Power Factor Incentive*
>
> *Applicable for HT-I :Industry, HT II - Commercial, HT-IV : PWW, HT V- Railways, Metro & Monorail, HT-VI: Public Services [HT VI (A) and HT VI (B)], HT VII - Temporary Supply, LT II: Non-Residential/Commercial [LT II (B), LT II (C)] (for Contract Demand/Sanctioned Load above 20 kW), LT III (B): Industry above 20 kW, LT IV- PWW, LT VII (B) – Temporary Supply (Others) , and LT IX : Public Service [LT IX (A) and LT IX (B).*
>
> ***Whenever the average Power Factor is more than 0.95, an incentive shall be given at the rate of the following percentages of the amount of the monthly electricity bill, excluding Taxes and Duties:***

Sr. No.	Range of Power Factor	Power Factor Level	Incentive
1	0.951 to 0.954	0.95	0%
2	0.955 to 0.964	0.96	1%
3	0.965 to 0.974	0.97	2%
4	0.975 to 0.984	0.98	3%
5	0.985 to 0.994	0.99	5%
6	0.995 to 1.000	1	7%

Note: Power Factor shall be measured/computed upto 3 decimals, after universal rounding off. " (Emphasis Supplied)

8.14 Learned counsel submitted that Regulatory Asset Charges (RAC) are components of Open Access charges paid by the MIAL as an Open Access consumer of the Appellant and MIAL continued to get PFI on these charges as direct as well as access consumer till April, 2017. Subsequently, MIAL vide its email dated 17.04.2017 requested the Appellant to give PFI on other Open Access charges, such as CSS and Wheeling Charges as well. However, instead of giving PFI, as requested by MIAL, the Appellant stopped giving PFI even on RAC.

8.15 Learned counsel for the second Respondent placed reliance on the Judgement of this Tribunal which has categorically held that PFI **is based on technical and engineering principles and is unrelated to the source of power.** The Tribunal further held that there is no basis whatsoever for making any distinction between Open Access consumers and Direct consumers while giving PFI. Learned counsel for the second Respondent pointed out that the Appellant has tried to distinguish the Judgment of this Tribunal from the matter at hand by pointing out superficial differences in regulatory and metering scenario. Regarding non availability of ABT meters and non measurement of Reactive Energy Charges, etc. as contended by the Appellant to distinguish the judgement from the case in hand, he submitted that from the APTEL Judgment, it is evident that REC is applicable on drawl of reactive energy by the consumer, which in MIAL's case is 0 (nil).Further,

even though MIAL has installed the ABT compliant meters, the State Commission is yet to calculate REC. Hence, in such a scenario where the REC is not even calculated by the State Commission, the Appellant' contention of applying REC to MIAL is irrelevant. In fact, the Appellant was clearly at liberty to approach the State Commission and propose determination of REC. Since it has chosen not to approach the State Commission for the same, it is not open to the Appellant to now argue that REC should be applied on MIAL.

8.16 Learned counsel brought out that REC and PFI are two distinct charges and cannot be applied interchangeably and the Appellant has failed to give any reason for its assertion that PFI is not applicable if REC can be calculated. As such in the instant case, REC has not been calculated by the State Commission and thus, only PFI has been applied to MIAL and other open access consumers.

Learned counsel further cited the findings of this Tribunal in Jindal case to contend that PFI would be applicable irrespective of the source of power and its findings on PFI are completely independent and separate from findings on REC. This is thus a settled position of law. Learned counsel further submitted that the APTEL's Judgement has not been challenged has attained finality and is thus, now binding on this Tribunal by law of precedent. To substantiate its contentions, learned counsel placed reliance on the Judgements of the Hon'ble Supreme Court in the case of Sant Lal Gupta and Ors. v. Modern Co-operative Group Housing Society Ltd. and Ors.

8.17 Learned counsel for the second Respondent also pointed that DOA Regulations, 2016 provide that PFI apply to open consumer contrary to the averments of the Appellant otherwise. It is further submitted that while Regulation 21 provides for REC, it nowhere excludes applicability of PFI on Open Access consumer. Furthermore, in the instant case, the State

Commission has not even calculated REC and thus, the same cannot be applied to MIAL and other Open Access consumers. Further, Regulation 14.1 of the DOA Regulations, 2016 clearly provides, under sub-clause (vi), that the bill for use of the Distribution System for wheeling of electricity in its network raised by the Distribution Licensee on the entity to whom the Open Access is granted may include any other charges, surcharge or other sum recoverable from the Consumer under the Electricity Act 2003 or any Regulation or Orders of the Commission.

8.18 Learned counsel for the second Respondent refuted the contentions of the Appellant that paying PFI to MIAL and other Open Access consumers is unfairly burdening its Direct consumers. From a bare reading of para 33 of the APTEL Judgment it is evident that the major beneficiary of high power factor, maintained by consumers, is the distribution licensee's network. Relevant extracts of Para 33, of the APTEL Judgment, reads as under:

> *"33……..*
>
> *It is to be noted that current drawn an lower power factor also cause excessive voltage drop which would further increase the system losses.* ***Thus, it is proved that lower power factor causes higher system losses and loss to the distribution licensee. The very purpose of providing higher power factor incentive is to encourage the consumers to improve their power factor by providing shunt compensation and bring it as close as possible to unity so that the system losses are reduced to the minimum.*** *This is a pure technical and engineering principle and it does not distinguish as to whether the power has been drawn from the licensee or on availing the 'open access'."*(Emphasis Supplied).

8.19 Regarding the contentions of the Appellant that MIAL as a direct consumer has received manifold benefits over its investment for PFI, learned counsel submitted that MIAL has received aforementioned sum because it maintained a high power factor which benefitted the Appellant' network and in turn its other consumers. In fact, MIAL is an open access consumer and has been paying the Appellant the prescribed open access charges such as Energy Charges, Wheeling Charges, Regulatory Asset Charges, FAC and

CSS etc. as per the Tariff Order issued by the State Commission from time to time. Learned counsel contended that the averment of the Appellant that the State Commission did not consider open access sales while passing MYT order dated 21.10.2016 and true up order approving the ARR of FY 2014-15 is out of context. Learned counsel submitted that the Appellant is trying to mislead the Tribunal by raising the said issue. The Appellant was providing PFI to MIAL, as an Open Access consumer, much before the passing of MYT Order dated 21.10.2016. In February, 2016, the Appellant assured MIAL that it will provide PFI on total units billed by the Appellant i.e. both direct and open access units. Evidently, the Appellant was aware of its obligation to provide PFI to all its consumers irrespective of source of power consumed by them. If the Appellant was truly aggrieved, by payment of PFI to MIAL and other Open Access consumers, then it would have raised the issue of non-consideration of Open Access sales in the subsequent tariff proceedings by the State Commission. The State Commission by its Tariff Order dated 12.09.2018, again made PFI applicable to the entire monthly electricity bill excluding duties and taxes. As such the Appellant has repeatedly failed to show that it asked the State Commission for consideration of open access sales and it cannot now assail the same through the instant appeal.

8.20 Learned counsel further contended that MIAL is seeking PFI only with respect to open access charges that are collected by the Appellant as a distribution licensee. MIAL is not claiming any PFI on energy charges of open access which are paid to generator/trader. Evidently, MIAL is seeking PFI only on those open access charges which it paid the Appellant for being the distribution licensee. As also MIAL is using the Appellant's system for wheeling of power and thus, contributes to minimization of system losses by maintaining Power Factor near to Unity.

8.21 Learned counsel for the second Respondent summing up his arguments reiterated that the Impugned Order has been passed by the State Commission in the petition filed by MIAL and upon consideration of facts submitted therein. The subsequent orders of the State Commission, passed for a different distribution licensee and Open Access consumers, cannot be a ground for setting aside the Impugned Order. Further, the subsequent orders of the State Commission have been challenged by the concerned Open Access consumers before the Tribunal and are currently pending adjudication. In light of the submissions made above, it is prayed that the present appeal deserves to be dismissed as the Appellant is merely re-agitating the issues that have already been settled by this Tribunal by a previous judgment and has attained finality.

8.22 Learned counsel for the Respondent No. 3/HPCL submitted that like second Respondent it has also drawn only active energy and the drawl of reactive energy is zero. Therefore, no reactive energy charges are leviable for HPCL. Learned counsel further submitted that HPCL has been given benefit of PFI in the past, in Open Access, and is entitled to get its balance entitlements. Learned counsel for the Respondent No. 3 in general adopted the submissions of the second Respondent and pleaded the additional points wherever applicable.

8.23 Learned counsel was quick to point out that this Tribunal in the Interim Order dated 23.04.2018 in I.A. No. 192 of 2018 ("***Interim Order***") had gone through all provisions of the Electricity Act 2003, DOA Regulations, 2014/2016, MYT Orders of the Appellant issued by the State Commission, MYT Regulations, State Grid Code etc. and thereafter observed that there were similar situations in present case as well as in Jindal Case with respect to the Regulations & MYT orders and accordingly this Tribunal did not allow the stay of the Impugned Order passed by the State Commission.

8.24 The Learned counsel emphasised that PFI is applicable in the case of all consumers including open access consumers including Respondent No.3. As far as MERC DOA Regulations 2016 are concerned, the Appellant has wrongly claimed that this Regulation did not provide for PFI to open access consumers. Regulation 14.1 of the DOA Regulations, 2016 which deals with billing clearly provides, under sub-clause (vi), that the bill for use of the Distribution System for wheeling of electricity in its network raised by the Distribution Licensee on the entity to whom the Open Access is granted may include any other charges, surcharge or other sum recoverable from the Consumer under the Act or any Regulation or Orders of the Commission.

8.25 Further the Clause 16 of Annexure II of the DOA Regulations, 2016 had specifically provided that, a 'Supply' Distribution Licensee may charge penalty or provide incentive for low/ high Power Factor, in accordance with relevant orders of the Commission. Learned counsel further submitted that the terms 'Open Access Consumer' and 'Partial Open Access Consumer' has also been defined under Regulation 2 (29) and 2 (30) of the said regulations. These definitions too, provide for a meaning, that suggests that a consumer for all purposes includes these categories of consumers too.

8.26 Learned counsel for the Respondent No. 3 contended that so far as the contention of mandatory obligation of the Respondents to maintain high power factor is concerned, the said obligation has been casted in the relevant Rules and CEA Regulations upon all the consumers irrespective of the source of power. Therefore, in terms of the MYT Order and MTR Order, PFI is applicable to all consumers including Open Access. However, the Appellant is creating this illusionary difference between direct consumer and Open Access consumers so far as applicability of PFI is concerned. Regarding differentiation between Appellant and the MSEDCL so far as applicability of PFI on Open Access consumers is concerned, the learned counsel for the Respondent No. 3 pointed out that the reliance placed on

Order dated 23.07.2018 in case No. 136 of 2018 and batch is misconceived in as much as the Commission has provided the adequate reasoning for the difference in the Case of MSEDCL and that of the Appellant. The Commission in the Order dated 23.07.2018 has stated that unlike the Appellant, MSEDCL never provided PF Incentive or levied any penalty on Open Access consumption. Moreover, the benefit of PFI to the Respondents is being given in terms of the Jindal Case judgement. As regards the DOA Regulation 2019 and the MYT Order dated 30.03.2020, it is submitted that the DOA Regulation 2019 and the MYT Order dated 30.03.2020 will be applicable prospectively from the date of its notification i.e. 07.06.2019 and 30.03.2020. Therefore, it would not affect the period in question in the instant appeal i.e. 2013 to 6th June 2019. The period in question in the instant appeal will be governed by the erstwhile DOA Regulations 2016 which did not prohibit applicability of PFI on Open Access Consumer.

8.27 In view of the forgoing submissions, learned counsel submitted that the issue regarding applicability of PFI on Open Access consumers is no longer res-integra and therefore the present appeal is devoid of any merit, hence liable to be rejected.

9. Our Findings :

9.1 We have critically analysed the rival submissions of learned counsel for the Appellant and learned counsels for the second and third Respondents and also perused the relevant provisions under the open access regulations. Vide Impugned Order dated 28.11.2017 the State Commission held that PF Incentive / Penalty for consumers sourcing power directly from TPC-D in terms of the Multi-Year Tariff Order dated 21.10.2016 shall also apply to Open Access power sourced by such consumers applicable from 01.11.2015 and also recovery of such charges for the past period must be adjusted by Appellant in the ensuing bills of MIAL and such other consumers with

interest. In fact, the issue at hand relates to the liability of a Distribution Licensee to provide PF Incentive on power sourced through Open Access during the period 01.11.2015 to 06.06.2019.

9.2 Learned counsel for the Appellant submitted that the second Respondent/MIAL has been a Direct/ Retail Consumer of Appellant since 01.11.2009 and from 01.11.2015 it started availing part of its demand through Open Access. It is the contention of the Appellant that all along, in terms of the Tariff Orders passed by State Commission, PF Incentive/ Penalty was not applicable to energy procured through Open Access by consumers. Learned counsel for the Appellant referred to the MERC Order dated 03.01.2013 passed in Case No.8 of 2012 & Batch(Indian Wind Power Association vs. MERC & Ors.) which had categorically held that, PF Incentive / Penalty is to be made applicable to Open Access consumers only on the Net Energy supplied by the Distribution Licensee, after deducting the power procured by such consumers through Open Access. Learned counsel further submitted that the difficulty arose in May 2017, when TPC-D discovered that due to an error in computerised billing system (a software glitch), adjustment for PF Incentive was wrongly applied in the monthly bills of Open Access during July 2013 to April 2017. By discovering of error in May 2017, TPC-D rectified the software glitch and stopped applying PF Incentive on RAC of the Open Access quantum in the monthly bills of all Open Access users. Aggrieved by this the second respondent/MIAL filed petition before the State Commission on 04.07.2017seeking clarification regarding applicability of PF Incentive to Open Access power consumption by HT consumers. After hearing the petition the State Commission passed the Impugned Order on 28.11.2017.

9.3 Learned counsel for the Appellant further submitted that pursuant to the Impugned Order TPC-D had been providing PF Incentive on the power sourced by its consumers through Open Access and once this Tribunal refused to grant stay on implementation of the Impugned Order, the

Appellant refunded the PF Incentive charges along with interest to Respondents and other similarly placed consumers. Learned counsel for the Appellant vehemently submitted that the power interchange as part of Open Access agreements is only Active Power, hence, consumers like second and third Respondents only consume Active Power from their Open Access source and draw their quantum of Reactive Power from the Grid for which they are not paying any charges. It is in this context that open access consumers like the Respondents are not bearing the costs towards drawl of Reactive Energy from the Grid for the Active Power drawn by them through Open Access, they are seeking an incentive in the form of PF Incentive on this quantum, thereby seeking a double benefit at the costs of the Direct Consumers of Appellant.

9.4 Learned counsel for the Appellant pointed out that although appropriate ABT/ SEM meters capable of recording active/ reactive power, amongst other parameters, on 15 minute time block basis have been installed at the Open Access consumers premises being a pre-condition for grant of Open Access in Mumbai city, but the State Commission has never determined the reactive energy charges. It is a peculiar situation that the Respondents do not pay for the Reactive Power but they are being rewarded with PF Incentive at the cost of the other consumers of the Appellant. Learned counsel alleged that never before the Impugned Order did MERC direct for PF Incentive to be provided to Open Access consumers. The PF Incentive specified under the Mid Term Review ("**MTR**") Order dated 26.06.2015 and Multi-Year Tariff ("**MYT**") Order dated 21.10.2016 was only applicable on the power sourced directly from the Distribution Licensee. It is only on 28.11.2017 by the Impugned Order that State Commission has retrospectively provided PF Incentive on Open Access consumption and that too, for TPC-D alone. Further, the PF Incentive on Open Access quantum was never factored in the Tariff Orders and that PF Incentive was applicable only on the Net Energy supplied by the

Distribution Licensee in terms of the aforesaid Order dated 03.01.2013. The State Commission has reiterated the findings of the aforesaid order dated 03.01.2013 in its Orders dated 23.07.2018 and 28.11.2018 passed subsequent to the Impugned Order, in the case of MSEDCL – another Distribution Licensee in the State of Maharashtra, which is placed on the same footing as Appellant as far as the law and Regulations are applicable in the State.

9.5 Learned counsel for the Appellant was quick to submit that the contentions of the Respondents as well as consideration by the State Commission have been based on this Tribunal Judgement dated 14.11.2013, in Appeal No. 231 of 2013 in the case of Jindal Stainless Ltd. vs. Dakshin Haryana Bijli Vitran Ltd. & Anr. Learned counsel reiterated that this judgement of this Tribunal is not applicable in the case at hand because there were no appropriate ABT complaint meters in the State of Haryana and hence there was no methodology to segregate reactive energy drawn from open access and that drawn from the distribution licensee. Among others, this Tribunal has held that such an open access consumer is liable to pay the reactive energy charges. However since appropriate metering system had not been provided, same could not be implemented. Only then did the Tribunal venture into the second and third questions. In the present case necessary ABT complaint meters have already been installed by MIAL, HPCL and all other open access consumers. Accordingly the Reactive Energy Charges could have been computed and ought to have been determined and applied to the Respondents as envisaged in the distribution open access regulations. Learned counsel for the Appellant emphasised that in the light of these facts this Tribunal's Judgement in the Jindal Stainless is not applicable in the facts of the present case.

9.6 Learned counsel advancing his arguments further submitted that it is settled position of law that, a decision is only an authority for what it actually decides.

What is of the essence in a decision is its 'ratio-decidendi' and not every observation found therein nor what logically follows from the various observations made in the judgment *"every observation found therein nor what logically follows from the various observations made in the judgment. Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there, is not intended to be exposition of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found".* In this regard learned counsel placed reliance on the several judgments of the Apex Court as brought out under their submissions. Learned counsel for the Appellant reiterated that in view of the above facts, the Impugned Order passed by the State Commission is erroneous as well as discriminatory. Accordingly it is prayed that the Impugned Order may be set aside.

9.7 Learned counsel for the second and third Respondents submitted that the contentions of the Appellant that the State Commission has historically never provided PFI for Open Access consumers is totally wrong and they cited the reference from MTR Order dated 26.06.2015 and the subsequent MYT Order dated 21.10.2016, wherein it was clearly provided that PFI is also payable on power sourced through Open Access.

9.8 Learned counsel for the Respondents further submitted that they are seeking PFI only with respect to the open access charges that are collected by the Appellant as a distribution licensee. The second and third Respondents are not claiming any PFI on energy charges of open access which are paid to generator/trader. Respondents are also using the Appellant's system for wheeling of power and thus, contribute to minimization of system losses by maintaining high Power Factor nearing to Unity. High Power factor is increasing the existing system capacity to carry maximum rated power with almost negligible losses and this is not only beneficial to Distribution licensee

as it reduces additional capex for new lines but also other miscellaneous costs like maintenance of ROW Space requirement etc. As such, the major beneficiary of high power factor maintained by the Respondents is the Appellant itself.

9.9 Learned counsel for the Respondents further submitted that this Tribunal in the Interim order dated 23.04.2018 in I.A. No. 192 of 2018 i.e. the stay application filed by the Appellant in the instant appeal had gone through all provisions of the Electricity Act 2003, DOA Regulations, 2014/2016, MYT Orders, MYT Regulations, State Grid Code etc. and thereafter observed that there were similar situations in present case as well as in Jindal Case and accordingly rejected the stay application of the Appellant. As such it is reiterated that the Jindal judgement is squarely applicable to the instant case in hand. Learned counsel further contended that this Tribunal in the aforesaid judgement had categorically held that CSS, payable by Open Access Consumers, has to be treated as part of electricity charges and has to be factored in while determining the rebate admissible for PFI. Further, the Tribunal has held that PFI would be applicable irrespective of the source of power. In fact, the findings of the APTEL in the Judgment, with respect to PFI are completely independent and separate from findings on REC and is thus a settled position of law. In the aforesaid judgment, it has been categorically held that PFI is purely a technical and engineering principle and has universal application, irrespective of source of power and as such it will also be applicable in the case of Open Access consumers.

9.10 After consideration and critical evaluation of the rival contentions made by the learned counsel for the Appellant and learned counsels for the Respondents, what thus transpires is that the core issue in the Appeal to be decided is whether the PFI/ Penalty is also applicable to open access consumers or not.

9.11 The Appellant is aggrieved due to the directions of the State Commission vide the Impugned Order to apply PFI/ Penalty for open access consumers also as applicable to direct consumers drawing power from distribution licensee in terms MYT Order dated 21.10.2016. It is the case of the Appellant that in terms of the various tariff orders passed by the MERC, the PFI / Penalty was not applicable to energy procured through open access consumers. In fact, MERC vide its order dated 03.01.2013 passed in Case No. 8 of 2012 & Batch had categorically held that, PF Incentive / Penalty is to be made applicable to Open Access consumers only on the Net Energy supplied (as a Direct Consumer) by the Distribution Licensee, after deducting the power procured by such consumers through Open Access. The Appellant has also alleged that the said order of 03.01.2013 which has attained finality has been relied upon by State Commission in its subsequent Orders dated 23.07.2018 and 28.11.2018 passed in the case of a competing Distribution Licensee namely Maharashtra State Electricity Distribution Company Limited ("**MSEDCL**"), where State Commission has held that PF Incentive/ Penalty is not applicable on power sourced through Open Access.

9.12 Learned counsel for the Appellant has drawn our attention towards various provisions of the Open Access Regulations, Grid Code, MYT Regulations 2011, MYT Regulations 2015, etc. to contend that never before the Impugned Order did MERC direct for PFI to be provided to open access consumers. It is only on 28.11.2017 that MERC by the Impugned Order has retrospectively for the Appellant alone has provided PFI on open access consumption. The learned counsel for the Appellant has also alleged that though the applicability of PF Incentive/ Penalty are the same for TPD -D and MSEDCL but as per the subsequent orders in respect of MSEDCL the Commission has held to provide PF Incentive/ Penalty only on the net energy (actual energy) supplied by the MSEDCL. It is nothing but discriminatory term

meted out by the State Commission to two similarly placed distribution licensees.

9.13 It is an admitted position that maintaining of high Power Factor is a mandatory obligation cast upon a consumer as per the provisions of Section 22 of Indian Electricity Rules 1956 as well as Regulations of CEA dated 21.02.2007. Under these provisions, it is mandatory for Distribution Licensees and Bulk Consumers such as MIAL, HPCL etc. to maintain Power Factor above 0.95, so as to provide sufficient reactive compensation to their inductive loads. It is also relevant to note from the regulation 16.4 of the Grid Code, Open Access Consumers are statutorily mandated/ responsible for maintaining the Grid parameters, specifically the system voltage within 97% to 103% range. It is not in dispute that the Electrical power in normal conditions consists of two components (i) Active Power or Real Power and (ii) Reactive Power. In case of open access consumer, the active power is drawn from the Generator/ Trader whereas Reactive Power is drawn from the Grid. In normal conditions alongwith measurement of active Power, the reactive power should also be measured as provided under the statute. It is contested that open access consumers like Respondents herein are not bearing cost towards drawl of reactive energy from the Grid relating to the active power drawn by them through open access. As per the Appellant in the form of PFI on this open access quantum, the Respondents are seeking double benefit at the cost of direct consumers of the Appellant.

9.14 We note that the Respondents as well as the State Commission have heavily relied upon the judgement of this Tribunal dated 14.11.2013 in Appeal No. 231 of 2013 (*Jindal Stainless Ltd. vs. Dakshin Haryana Bijli Vitran Ltd. & Anr.*). While the Appellant contends that the findings of this Tribunal in the aforesaid judgement do not apply to the case in hand, per contra, the Respondents reiterated that the findings of the Tribunal are squarely applicable to the present case.

9.15 We have perused the findings of this Tribunal in the aforesaid judgement dated 14.11.2013 and also notice that the Interim Application for the stay of Impugned Order was filed by the Appellant in the instant Appeal before this Tribunal. The Stay Application was rejected by this Tribunal vide its Interim Order dated 23.04.2018 in I.A. No. 192 of 2018 ("***Interim Order***") This Tribunal observed that there were similar situations in present case with respect to the Regulations & MYT orders as under :

> *"15…On perusal of the Jindal Case judgement, it is appears that there were similar situations in present case as well as in Jindal Case with respect to the Regulations & MYT orders. This Tribunal in the Jindal Case based on technical and engineering principles has held that Power Factor Incentive is to be made available to the OA consumer sourcing partly/fully power from other sources apart from the distribution licensee. We observe prima facie that this was an independent conclusion arrived at by this Tribunal irrespective of the other issues including that related to Reactive Energy Charges raised in that appeal.*
>
> *16. We have also gone through the provisions of the Act, DOA Regulations, 2014/2016, MYT Orders of the Appellant issued by the State Commission, MYT Regulations, State Grid Code etc. as contended/relied by the Appellant and the Respondents. The same are not being discussed/ reproduced for the sake of brevity. Prima facie, we do not find any provision that inhibits the State Commission in applying the Power Factor Incentive/ Penalty on the Respondents and other OA consumers."*

9.16 The other contentions of the Appellant are that in case of Jindal Stainless Ltd., the requisite metering system compliant with ABT were not installed in Haryana where as all such ABT/ SEM meters are well in place at the premises of the open access consumers. Hence, the above judgement is distinguishable from the facts of the State of Maharashtra.

9.17 Having regard to the submissions of the parties, relevant regulations Grid Code, various judgements relied upon by the parties, we are of the opinion that PF Incentive / Penalty has to be made applicable to all consumers whether availing power directly from distribution licensee or partially through open access. We further opine that this Tribunal's Judgement in Jindal Stainless Ltd. Case is squarely applicable to the present case in hand. Moreover, it is also relevant to note that the second and third Respondents

herein have categorically stated that they do not consume any reactive energy.

9.18 Without going into further details regarding measurement of reactive energy charges vis-a-vis PF Incentive/ Penalty applicable to open access consumers, we hold that the State Commission, after thorough evaluation of all factors and legal aspects, has passed the Impugned Order in accordance with law rendering cogent reasoning over all its findings. Accordingly, the Impugned Order does not warrant any interference of this Tribunal.

ORDER

In the light of the above, we are of the considered view that issues raised in the instant Appeal No. 36 of 2018 are devoid of merits and hence the Appeal is dismissed. The Impugned Order dated 28.11.2017 passed by Maharashtra Electricity Regulatory Commission in Case No.110 of 2017 is hereby upheld.

No order as to costs.

Pronounced in the Virtual Court on this **20th day of October, 2020**.

(S.D. Dubey)	**(Justice Manjula Chellur)**
Technical Member	**Chairperson**

REPORTABLE / ~~NON-REPORTABLE~~

mkj