

APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 195 OF 2019 &

IA NOs. 1044 & 1043 of 2019

Dated : 04th October, 2019

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

IN THE MATTER OF :

The Tata Power Company Limited.

'A' Wing, Carnac Receiving Station, 34,
Sant Tukaram Rd.

Carnac Bunder, Mumbai 400 009.

Through its authorized signatory ... Appellant(s)

VERSUS

1. Maharashtra Electricity Regulatory Commission

Through its Secretary
13th Floor, World Trade Centre,
Centre No. 1, Cuffe Parade,
Colaba, Mumbai 400 005

2. Adani Electricity Mumbai Limited (Distribution)

Through its Managing Director
CTS 407/A (New), 408 Old Village,
Eksar Devidas Lane,
Off SVP Road,
Borivali West, Mumbai – 400 103

3. Netmagic IT Services Pvt. Ltd.

Lighthall 'C' Wing, Hiranandani Business Park,
Saki Vihar Road,
Chandivali,
Mumbai 400 072

... Respondent(s)

Counsel for the Appellant (s) : Mr. Basava Prabhu S.Patil, Sr.Adv.
Mr. Kunal Kaul
Mr. Samikrith Rao

Counsel for the Respondent(s) : Mr. Sajan Poovayya, Sr. Adv.
Mr. Hemant Singh
Mr. Tushar Srivastava
Mr. Sharif Ahamed
Mr. P.S. Kharola for R-2

Mr. Aniket Prasoon
Mr.Pratik Das for R-3

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 ("**Tata Power**"/ "**Appellant**") under Section 111 of the Electricity Act, 2003 ("**Electricity Act**"), challenging the legality, validity and propriety of the Maharashtra Electricity Regulatory Commission's ("**MERC**") Order dated 13.05.2019 in Case No. 97 of 2019 ("**Impugned Order**").
 - 1.1 Case No. 97 of 2019 ("**Petition**") was filed by Tata Power, seeking a declaration that Adani Electricity Mumbai Distribution ("**AEML**"), contrary to MERC's Order dated 12.06.2017 in Case No. 182 of 2014 and 40 of 2015 ("**Order dated 12.06.2017**"), is laying distribution network for connecting Netmagic IT Services Pvt. Ltd. ("**Netmagic**") (an existing consumer of Tata Power). The actions of AEML is in defiance of MERC's Order dated 12.06.2017 and is an indirect attempt to do what is not permitted by the Order dated

12.06.2017. In other words, in the garb of laying an alleged 'service line', AEML is developing network in a manner which is not permitted by the Order dated 12.06.2017.

1.3 In terms of MERC's Order dated 12.06.2017, switchover of consumer is permitted only under Scenario 53(b) [i.e. the area which is 'completely covered' by both the distribution licensee]. If a consumer falls in Scenario 53(a) [i.e. an area which is 'completely covers' by one licensee], he may opt for supply from another licensee on changeover mode only. The Order dated 12.06.2017 in Scenario 53(a) does not permit switchover of consumer and the consumer can seek supply of electricity from the other distribution licensee on changeover mode only. The underlying principle being if cost of laying network is to be incurred, which is going to be passed on to the consumers where there already exist a reliable network connecting to the consumers, then the consumer's choice of supply triumphs over the choice of network . In the instant case, for an existing consumer, the choice of changeover is available and not of switchover. It is Tata Power's contention that, MERC has, contrary to its own Order dated 12.06.2017, classified Netmagic under Scenario 53(b) instead of scenario 53(a), thereby permitting undue burden being passed on to the consumers at

large. In this regard, the Appellant/TPC is aggrieved by the Impugned Order alleging o have been passed without considering following :-

- (a) For determining whether an area or location falls in one Scenario or another, the unit of reference would be the consumer to whom connection is to be provided.
- (b) Netmagic falls under Scenario 53(a), as Tata Power is already connected to the existing consumer, while AEML under the garb of laying alleged 'service line', is incurring exorbitant expenditure (to be passed on to the other consumers) for connecting to the said consumer, which in terms of the Order dated 12.06.2017 is impermissible.
- (c) MERC has, without conducting any inquiry, whatsoever (despite situation being disputed by Tata Power), wrongly held that the line proposed to be laid by AEML is a 'service line'. Admittedly, AEML intends to use such 'service line' to connect to other consumers in future. In other words, the alleged 'service line' is nothing but an augmentation/ extension of distribution network, which does not qualify as a 'service line' in terms of the applicable governing framework. Hence, Scenario 53(b) was not applicable in the instant case.

1.4 It was Tata Power's case that Netmagic falls under Scenario 53(a), whereas AEML had merely stated that Netmagic would fall under Scenario 53(b) [without providing any documentary evidence to substantiate the same]. However, by the Impugned Order, MERC has without conducting any inquiry/ investigation of any sorts, merely relied upon the statements made by AEML to, inter-alia, hold as under:-

- (a) HT connection could be released by loop-in loop-out of an existing HT cable or by laying a new HT cable from nearby Consumer Sub-Station (11/0.415 kV CSS) or DSS (33/11kV).
- (b) The proposed 11kV lines intended by AEML to connect to Netmagic from its Nahar/Saki DSSs are 'service lines' as per the definition under the Electricity Act. Since AEML is in a position to supply to Netmagic by laying a service line and not augmenting or extending distribution mains, the applicable scenario is 53(b). Therefore, Netmagic is entitled to a switchover from Tata Power's network to AEML's network.
- (c) As per Order dated 12.06.2017, under recovery/ over

recovery through Schedule of Charges cannot be the criteria for deciding whether switchover is possible. This is in line with the principles of determination of Schedule of Charges, wherein consumers are required to pay the approved normative charges irrespective of the actual expenses incurred by the Distribution Licensee for laying of service lines. It may so happen that the actual expenses are more than the charges recovered from the consumer, which then becomes the infrastructure cost of the Distribution Licensee and then gets recovered through its Annual Revenue Requirement, if it could not be balanced with the excess amount recovered on such connections. Hence, under recovery of cost of laying service lines to Netmagic cannot be the ground for denying the proposed switchover of Netmagic.

1.5 TPC has submitted that, while passing the Impugned Order, MERC erred in:-

(a) Holding that Netmagic falls under Scenario 53(b). In this regard, it is stated that, . MERC has returned the said findings merely on the basis of AEML's averments without any evidence being produced to support the said contention or an independent inquiry

being conducted by MERC. In any case, MERC has not acted in a just and transparent manner. In terms of Section 86(3) of the Electricity Act, MERC is duty bound to act in a just and fair manner.

- (b) MERC failed to appreciate that the intent and purpose of MERC's Order dated 12.06.2017, was to disallow network duplication, so that no additional cost is being passed on to the consumers at large. This principle is applicable in all the scenarios, including Scenario 53 (a) and 53(b). However, in the facts of the present case, in the garb of laying of service line, an approximately cost to the tune of Rs. 6.5 Crores would be passed on to the other consumers. In any case, AEML is engaged in augmentation/extension of distribution network and the said consumer falls under Scenario 53(a) and not in 53(b).

- 1.6** TPC has alleged that the goal posts set out in MERC's Order dated 12.06.2017 are being varied by MERC on all possible occasions. MERC has, in an arbitrary manner, without getting into the facts and details alleged by Tata Power and merely on AEML's statements (which had no documentary backing), hurriedly disposed of the matter in favour of AEML. The said decision of AEML is contrary to its earlier Order dated 12.06.2017.

1.7 Tata Power's submissions in the present Appeal are without prejudice to its rights, claims and contentions in Appeal Nos. 195 of 2017, 243 of 2017, 250 of 2017, 279 of 2017 and 142 of 2019, which are pending adjudication before this Tribunal.

2. Brief Facts of the Case:-

2.1 Tata Power is a Distribution Licensee supplying electricity in the Island City of Mumbai and Suburban Area of Mumbai in terms of various licences granted to it from time to time. By virtue of its Distribution Licence No. 1 of 2014, Tata Power is authorized to supply electricity to consumers in:-

- (a) The Island City of Mumbai, where Brihanmumbai Electric Supply and Transport Undertaking ("**BEST**") and MSEDCL are also licensed to distribute and supply electricity.
- (b) Suburban Mumbai and the area under Municipal Corporation of Mira Bhayander, where AEML and MSEDCL are also licensed to distribute and supply electricity.

Hence, Tata Power's status is that of a parallel Distribution Licensee in the Island City of Mumbai, as also the Suburban Area of Mumbai.

2.2 Respondent No. 1, MERC, 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 MERC, amongst others, include the power to grant a licence for distribution of electricity, regulate the tariff of distribution companies etc.

2.3 Respondent No. 2, AEML (previously known as Reliance Infrastructure Limited), is a parallel Distribution Licensee, who along with the Tata Power, is authorized to supply electricity in the Suburban Area of Mumbai, including the villages of Chene and Vesave.

2.4 Respondent No. 3, Netmagic IT Services Pvt. Ltd., is an IT service provider having its office in Suburban Mumbai.

3. Questions of Law:

The Appellant has raised followed questions of law:

3.1 In light of the facts and circumstances of the present case, whether MERC could have returned the finding that proposed 11 KV feeder is a 'service line' in the absence of any information/ documents being provided by AEML and/ or independent enquiry being carried out by MERC?

3.2 Whether the switchover of Netmagic is permissible in terms of the letter and spirit of MERC's Order dated 12.06.2017 in Case No. 182 of 2014?

4. Shri Samikrith Rao, learned counsel appearing for the Appellant has filed the written submissions for our consideration as under:-

4.1 Tata Power had filed the present Appeal, challenging the legality and validity of the Maharashtra Electricity Regulatory Commission's ("**MERC**") Order dated 13.05.2019 in Case No. 97 of 2019.

A. The 11 KV feeders/ lines laid by AEML for Netmagic do not qualify as 'service lines' in law and even in terms of AEML's own understanding

4.2 Tata Power has time and again stated that, AEML is laying/ augmenting/ extending its distribution network in the garb of merely laying service lines, for supplying power to Netmagic. Admittedly, AEML has laid 8 to 10 feeders/ lines from Vihar and Nahar DSS to connect to the consumers, which amounts to augmentation/ extension of distribution mains, since, *inter alia*, there would be enough redundant capacity after supplying electricity to Netmagic. In other words, these feeders are intended to be used in future to connect to the other consumers and therefore does not fall within the meaning of the term 'service line' under the provisions of the Electricity Act.

4.3 In order to appreciate Tata Power's submissions, it is pertinent to note Sections 2(42), 2(18) and 2(61) of the Electricity Act, which defines 'distribution mains', 'mains' and 'service lines' as follows:-

*"2(42) "Main" means any **electric supply-line** through which electricity is, or is intended to be, supplied;*

*2(18) "Distributing main" means the **portion of any main with which a service line** is, or is intended to be, **immediately connected**;*

*2(61) "Service line" means any electric supplyline through which electricity is, **or is intended** to be supplied-*

*(a) to a single consumer either from a distributing main or **immediately from the Distribution Licensee's premises**; or*

(b) from a distributing main to a group of consumers on the same premises or on contiguous premises supplied from the same point of the distributing main;...."

4.4 On a perusal of the aforesaid definitions, it is to be noted that:-

(a) 'Mains' is the entire electric supply line through which electricity is or intended to be supplied. Typically, 'mains' constitutes both the 'distribution mains' and the 'service line'.

(b) Further, the nature of an electricity supply line, whether to be treated as a 'distribution mains' or 'service lines' depends on the intent and the purpose for which such line is used and the bearing of cost of such line. If the line is intended or used to connect to more than one consumer in different/ non-contiguous premises where the cost is borne by the consumers at large, than the said line is considered as a distribution mains and the same cannot be considered as a 'service line'. Service line is the line connected to

a single consumer/ group of consumer in one premises or contiguous premises whereby the cost of the entire service line is borne by that consumer/ group of consumers.

4.5 MERC and AEML have also understood the definition (as regards HT consumers) in this manner alone. This is evident from AEML's [earlier known as Reliance Infrastructure Limited ("**R-Infra**")] submissions and MERC's findings in its Order dated 28.12.2012 in Case No. 73 of 2012 , whereby MERC had approved the Schedule of Charges to be recovered by AEML from its consumers.It is in this context, AEML has, after considering the definition of 'service line' and the factual position qua its network presence, given a normative length of service line to be around 15 meters.

4.6 In terms of MERC's Order dated 28.12.2012 and AEML's submissions, the following is noteworthy (as regards HT supply):-

(a) The service line starts from the T-off point of the RMU (switchgear) and is considered as the portion between this T-off point and the CT-PT unit (i.e. metering arrangement). Further, any cable being laid from AEML's Distribution Sub-Stations ("**DSS**") to T-off point of the RMU is to be considered as a part of distribution network. Accordingly, the cost of the cable from AEML's DSS to T-Off point is passed on the other consumers as a network development cost.

Thus, this understanding of AEML and MERC is in consonance with the definition of 'service lines' and 'distribution mains', since the line from the DSS to T-off point is to be used for connecting it to the other consumers.

- (b) The service connection charges, which are payable by the concerned consumer availing power supply, includes the cost of the above cable between RMU and CT-PT metering unit, the cost of the CT-PT unit and 1/3rd cost of the RMU.
- (c) The RMU (switchgear) is normally located in the consumer premises along with the metering point.
- (d) In terms of the said understanding and after considering its network presence, AEML has considered that, an HT service line (ordinarily) would be around 15 meter long.
- (e) Multiple consumers can be connected to the RMU and hence only one third of the cost is loaded on to the consumer (1 + 2 type RMU).

4.6 Further, in a case where 1.5 Km of 11 KV feeder is to be from the distribution licensees' premises to the consumer premise, a switchgear/ RMUis to be installed for practical and safety purposes in law and also as a matter of prudent industry practice. This is

also evident from Regulation 14 of the Central Electricity Authority (Measures relating to Safety and Electric Supply) Regulations, 2010, extracted hereinbelow for ease of reference:

“14. Switchgear on consumer’s premises- (1) The supplier shall provide a suitable switchgear in each conductor of every service line other than an earthed or earthed neutral conductor or the earthed external conductor of a concentric cable within a consumer’s premises, in an accessible position and such switchgear shall be contained within an adequately enclosed fireproof receptacle:

Provided that where more than one consumer is supplied through a common service line, each such consumer shall be provided with an independent switchgear at the point of rigid junction to the common service.

(2) Every electric supply line other than the earthed or earthed neutral conductor of any system or the earthed external conductor of a concentric cable shall be protected by a suitable switchgear by its owner.”

4.7 During the hearings held on 28.05.2019 and 26.06.2019, Tata Power had specifically stated that AEML is installing a switchgear to connect to the consumer, which has not been denied by AEML.

4.8 Thus, in terms of the definitions of the ‘distribution mains’, ‘mains’ and ‘service lines’ provided under the Electricity Act and as understood by AEML and MERC in its Order dated 28.12.2012, it is clear that, 8 to 10 (11 KV) feeders being laid down by AEML cannot be considered as a mere ‘service lines’ alone. In fact, the feeders from the AEML’s DSS to switchgear/ RMU is to be considered as a part of distribution mains and the feeders from the switchgear/ RMU to the consumer premises is to be treated as

service lines. In other words, AEML has augmented/ extended its distribution mains to connect to Netmagic, which is not permissible in terms of MERC's Order dated 12.06.2017.

4.9 As regards the interpretation of 'service line', AEML has, during the hearing held on 01.07.2019 and its Written Submissions tendered on 01.07.2019, submitted that Tata Power's aforesaid submission qua 'service line' is contrary to the submissions made by Tata Power's in Appeal No. 243 of 2017, since the diagram of Distribution System, Distribution Mains and Service Line clearly shows that Service Line can be connected with HT Bus Bar of Voltage of 110 KV, 33 KV, 11 KV et al. In this regard, Tata Power's submits that, it is not Tata Power's case that, a Service Line cannot be of 110 KV, 33 KV and 11 KV Voltage.

4.10 Even otherwise, the submissions relied upon by AEML were made by Tata Power depicting a generic scenario and not in the facts of the present case. Hence, reliance by AEML on these submissions is misplaced.

4.11 As regards AEML's submission in Para 8 of its Written Submissions that installation of switchgear cannot be considered as augmentation as the same would mean that there cannot be

any switchover of HT consumer, it is submitted that, AEML has misconstrued Tata Power's submissions. An HT consumer can be switched over if the distribution licensee has distribution mains in the consumers' premises and connection can be effected only by merely laying a service line (e.g. how presently electricity is being provided by Tata Power to Netmagic). In other words, where the existing infrastructure is already available and the existing switchgear has an additional outlet available for laying a service line from such outlet. However, in the facts of the present case, AEML has installed 11 KV feeders, switchgear and service lines to connect to Netmagic. The said actions of AEML is nothing but augmentation/ extension of distribution mains. This is evident from the fact that the said situation falls under Level 4 and not under Level 1. The relevant part of the Order dated 12.06.2017 is reproduced hereinbelow :-

"... Level 4 - The LT / HT consumer connection is possible only after laying or augmenting HT cable/mains and associated switchgear...."

In the facts of the present case, HT cable along with switchgear is being installed by AEML. Thus, the present situation cannot be considered under Level 1 (which deals with installation/ laying of service line alone).

4.12 Even otherwise, the mischief of AEML to use these 8 to 10(11 KV) feeders to connect to the other consumers is also evident from the fact that spare capacity is being created on these feeders while connecting it to AEML. In this regard, it is pertinent to note that, typically, an underground cable used for HT Network is 400 Sq. mm. Such a feeder can evacuate a load of up to 6,500 kVA. Considering AEML's proposal to lay 8 to 10 feeders to cater to existing 8 to 10 major metering points, it is estimated that spare capacity of about 30,200 KVA will be available across the feeders laid after the connections for Netmagic are released.

4.13 This further demonstrates that, the 10 (11 KV) feeders laid for Netmagic would be used to connect to the other consumers and therefore they cannot be treated as a mere service line. In this regard, it is to be noted that MERC (Standards of Performance of Distribution Licensees, Period for Giving Supply and Determination of Compensation) Regulations, 2014 provides that, for 11 KV feeders, the limit of contract demand is 5000 KVA whereas the AEML has laid network of more than 6,500 KVA. This demonstrates that these feeders would be used to connect to the other consumers. The relevant part of MERC (Standards of Performance of Distribution Licensees, Period for Giving Supply

and Determination of Compensation) Regulations, 2014 is reproduced hereinbelow for ease of reference:-

5. Quality of Supply and System of Supply

5.3 Except where otherwise previously approved by the Authority, the classification of installations shall be as follows :—

(iii) Three phase, 50 cycles, 11 kV – all installations with contract demand above the limit specified in the clause (ii) and up to 3000kVA :

Provided that in Mumbai Metropolitan Region or in case of supply to an installation through an express feeder in other area, the contract demand limit would be 5000 kVA....”

4.14 Further, during the hearings held on 28.05.2019 and 26.06.2019, AEML has, before this Tribunal, verbally stated that the 8 to 10 (11 KV) feeders laid for Netmagic would be used for Netmagic only and no other consumer would get power supply from it. As a distribution licensee, AEML can only make such submissions only if the same is required by Netmagic. If these 8 to 10 (11 KV) feeders are set up with the intent of exclusively providing supply of electricity to Netmagic alone, then these 8 to 10 (11) KV feeders are to be treated as dedicated lines for which the entire cost is to be borne by the consumer.

4.15 Thus, in terms of MERC's Order dated 28.12.2012, Netmagic is required to pay the entire cost (Approximately Rs. 7 Crores) for setting up of these 8 to 10 (11 KV) feeders. Accordingly, no such

costs can be passed onto other consumers, as being sought to be done by AEML. This is evident from the following:-

- (a) Regulation 3.3.3 of the MERC (Electricity Supply Code), 2005 provides that:-

“3.3.3 Where the provision of supply to an applicant entails works of installation of Dedicated distribution facilities, the Distribution Licensee shall be authorized to recover all expenses reasonably incurred on such works from the applicant, based on the schedule of charges approved by the Commission under Regulation 18.”

In terms of the above provision, AEML had in its submissions before MERC in Case No. 73 of 2012 had contended that the consumer wishing to have dedicated lines, would be required to bear the actual cost of such infrastructure. This submission was approved by MERC in its Order dated 28.11.2012.

- (b) MERC in its Order dated 12.06.2017 had again stated that, the entire cost of the DDF is to be paid for by the consumer as mentioned below:

“130.10 The Commission is of the view that the network developed under DDF is for the exclusive use of that particular consumer. For such exclusive network, the consumer bears all the infrastructure costs and also provides space for the consumer end substation. That being the case, it would not be appropriate to ask such consumer to share the space/network, which is for his exclusive use, with other consumers. Since the consumer is paying for the DDF, the cost would not be included in the Licensee’s ARR and hence would not affect the tariff of its consumers. Thus, the Licensee’s other consumers will not be adversely affected by the capital expenditure, which is incurred only by the consumer opting for DDF.

130.11 In view of the above, the Commission holds that, where the consumer is willing to bear the entire cost of the distribution system

required to enable supply to his premises under a DDF arrangement, he would be allowed to source power from the Distribution Licensee of his choice.”

4.16 In view of the above, it is clear that, the network laid by AEML is nothing but augmentation/extension of distribution mains (and not service lines as contended by AEML), which is ex-facie illegal. Without prejudice to the above, as admitted by AEML, since the said network is being built for the exclusive/ dedicated use of Netmagic, the entire cost for setting up the infrastructure is to be borne by Netmagic (Approximately Rs. 7 Crores) and no such cost of laying network can be passed onto consumers at large.

B. Impugned Order is contrary to MERC’s Order dated 12.06.2017 and MERC wrongly held that Netmagic falls under Scenario 53(b)

4.17 The MERC has, divided Suburban area of Mumbai where Tata Power and AEML are licensed to supply electricity into the four scenarios (created under MERC’s Interim Order dated 09.11.2015 in Case No. 182 of 2014) and provided the rules regarding laying of network and connecting existing and new consumers in these four scenarios. It is to be noted that, switchover of consumers is permitted only in Scenario 53(b).

4.18 On a perusal of the aforesaid Order dated 12.06.2017, the following is noteworthy:-

- (a) Scenario 53(a) consists of areas or locations which are completely covered by one Licensee since it has distribution mains there but the other Licensee does not have its distribution mains there.
- (b) Scenario 53(b) consists of areas or locations which are completely covered by both Licensees, and where a connection can be given through a mere service line without augmenting or extending its distribution mains.
- (c) For determining whether a location falls under one scenario or another, the reference point would be the consumer to whom a connection is to be provided. In other words, if the consumer can be connected without extending or augmenting its distribution mains, then the said consumer is said to be completely covered by the said licensee.
- (d) The interests of an individual consumer are subject to the interest of consumers at large. Thus, allowing individual consumers the choice of network in the common Licence area may result in unnecessary duplication at the cost of the wider set of electricity consumers.
- (e) The choice of the individual consumer is restricted to select the supplier of electricity and the same does not extend to selecting the network. The consumer will have the choice of the network

only:-

- (i) The said consumer falls under Scenario 53(b), i.e. the area which is completely covered by both the licensees; or
 - (b) The consumer is willing to pay for the DDF arrangement required.
- (f) Scenario 53(a) comprises areas or locations which are completely covered by one Licensee since it has its distribution mains there but the other Licensee does not. Therefore, under such scenario, network development (for all the levels i.e. level 1 to level 5) the existing consumer can seek supply of electricity from the distribution licensee who completely covers the area. No question arises of the other Licensee developing its parallel distribution network in such scenario since this would result in network duplication which is against the objective of Order dated 12.06.2017. If any existing consumer wishes to get supply from the other licensee, then the other licensee would supply to the consumers on changeover mode alone.

4.19 In the facts of the present matter, Tata Power already has a Distribution Sub-Station within the premises of Netmagic, whereas, admittedly AEML's distribution network is at a distance of about 1.5 Kms from the consumer premises. Further, in any case, AEML

can only connect to the said consumer by augmenting/ extending its distribution network and not by merely laying service line. Thus, Netmagic falls under Scenario 53(a) and Netmagic can seek supply of electricity from AEML on changeover mode only. Thus, the network laid down by AEML is contrary to the Order dated 12.06.2017 and ought to be removed and no consumer should be connected to the said network.

4.20 During the course of the hearing, Netmagic had submitted that, the consumer has a choice of both the supplier and network. Accordingly, consumer has exercised its choice and is seeking to switchover from Tata Power to AEML. In this regard, as stated above, in terms of the Order dated 12.06.2017 the consumers' choice of supply triumphs over its choice of network. The consumer only has a choice of network if the such consumer falls under Scenario 53(b) [i.e. by merely laying service line] or by seeking a dedicated distribution facility. Thus, unless Netmagic is willing to bear the entire cost of the network laid down by the AEML (approximately Rs. 7 Crores), then Netmagic only has choice of supply from AEML i.e. on changeover mode and has no choice of network (i.e. switchover) in terms of MERC's Order dated 12.06.2017.

4.21 The Impugned Order is also contrary to the position taken by Mumbai-Distribution Network Assessment Committee's ("**M-DNAC**") [a committee set up by the Order dated 12.06.2017 assess and evaluate capex proposals to lay network to connect to 'new consumers', so that minimal additional capital cost is being passed on to other consumers of the distribution licensee] as regards taking distance and cost as a criteria for deciding the distribution licensee which should connect the consumer. In this regard, the following is noteworthy:-

- (a) M-DNAC in its Order dated 26.03.2019 regarding Tejal Minerals had stated that, the Tejal Minerals falls under Scenario is 53(a) or 53(d) on the basis that AEML's distribution mains are within Tejal Mineral's premises, whereas Tata Power's distribution mains were at some distance away (i.e. 3 Kms). In fact, M-DNAC has rejected Tata Power's contention that it is present merely on the basis that Tata Power's HT distribution mains are at a distance of 3 Kms, whereas in the present case, MERC has held that AEML completely covers Netmagic even when AEML's HT distribution mains are at a distance of 1.5 kms. The relevant portions of M-DNAC's Order dated 26.03.2019 are reproduced below for ease of reference:

“1. Mumbai Distribution Network Assessment Committee (M-DNAC) received a letter dated 19 February, 2019 from AEML-D seeking clearance for proceeding ahead with providing supply to M/s. Tejal Minerals and Grinders Pvt. Ltd. Bandra (W) claiming that the location belongs to scenario 53(a) as per the Commission’s Order in Case No. 182 of 2014. AEML-D in its letter stated that its HT Distribution mains is present within the said premises whereas that of TPC-D’s, as per AEML-D’s knowledge, is located around 3 km from the said premises.

4. After going through the letters received from both the parties, the Committee notes that AEML-D has stated that TPC-D’s HT distribution mains is located around 3 km from the applicant premises. TPC-D, while claiming that its distribution network is also present in vicinity, has not expressly denied the AEML-D’s submissions that it is 3 km away. The Committee, therefore presumes that TPC-D’s network is around 3 km from the applicant’s premise.

7. The Committee is of the opinion that although, distance is not the criteria for scenario classification as per the Commission’s Order, TPC-D’s claim that its distribution network is also present in vicinity doesn’t have merit presuming TPC-D’s network spread (as claimed by AEML-D which is not objected by TPC-D) in present case which would mean that the location may be classified as ‘scenario 53(d) with only one licensee present’.

8. In light of the above, the Committee is of the view, in either of the scenarios i.e. ‘53(a)’ as claimed by AEML-D’ or ‘53(d) with only one licensee present’, it would be AEML-D only which can proceed with releasing the connection to the applicant under present matter.”

- (b) Therefore, the present case of Netmagic is no different from Tejal Mineral’s, as Tata Power’s distribution mains are in the premises of Netmagic while AEML’s distribution mains are at a distance of 1.5 Kms. It is to be noted that although Tejal Minerals case was an LT supply case whereas Netmagic is a HT supply case, the distribution mains in both cases is at 11 kV voltage level and hence the cases are similar and comparable in nature.

(c) M-DNAC has vide its Orders have denied consumer choice merely on the difference of few Lakhs being passed on to the other consumers. This is evident from the table below:-

S. No.	Consumer Name	Difference In Estimates Submitted
1.	Parinee Realty Pvt. Ltd.	Rs. 25.47 Lakhs [M-DNAC's decision dated 08.09.2018].
2.	Medinee Niketan CHS	Rs. 89.36 Lakhs [M-DNAC's decision dated 12.12.2018]

(d) Thus, it is seen that consumer choice was subject to the above differences in capital proposals submitted by the distribution licensees. However, MERC vide the Impugned Order, has allowed passing through of over Rs. 6.5 Crores of capital expenditure in the name of consumer choice, while the consumer concerned (i.e. Netmagic) is only paying a fraction of such amount i.e. around Rs. 32 Lakhs. This is not only contrary to its earlier Orders, it is also not in tune with the letter and spirit of Order dated 12.06.2017

4.22 Accordingly, in view of the above, MERC erred in holding that the Netmagic falls under Scenario 53(b).

C. Impugned Order is a non-speaking Order

4.23 Tata Power had filed Case No. 97 of 2019 averring that AEML is in the process of switching over the consumers in a manner which would defeat the letter and spirit of MERC's Order dated 12.

06.2017. It is Tata Power's case that the said consumer falls under Scenario 53(a) [i.e. the area which is completely covered by one distribution licensee], whereas it is AEML's case that the present consumer falls under Scenario 53(b) [i.e. the area which is completely covered by both the distribution licensee]. In this context, Tata Power had made the following factual averments:-

- (a) The consumer Netmagic is being presently supplied electricity by Tata Power. Tata Power has constructed a Distribution Sub Station ("**DSS**") in the premises of the consumer itself for supplying electricity to it. The capital expenditure so incurred by Tata Power was tried up and approved by MERC in its MTR Order dated 12.09.2018 in Case No. 69 of 2018.
- (b) As per Tata Power's understanding, switchover would be effected by laying a distribution network by AEML from its DSS situated at Nahar and/or at Saki which is, approximately at a distance of 1.5 kms from the consumer's premises.
- (c) In order to provide connection to Netmagic, AEML is required to lay down about eight to ten (8 to 10) 11KV feeders directly from the outlets of its DSSs situated at Nahar and/ or Saki. AEML is also introducing certain elements which amounts to augmentation/ extension of distribution network.

- (d) These feeders would be drawn at a total cost of Rs. 7 Crores out of which on or about Rs. 32 lakhs only will be recovered by AEML from Netmagic and the remaining cost of around Rs. 6.5 Crores would be borne by the consumers at large.
- (e) AEML is going to use the said feeders to further develop/augment its network and/or connect to other consumers in future. In terms of the governing framework, the work which is being carried out by AEML does not amount to laying of service line under the applicable governing framework.

4.24 AEML had, neither in its Reply dated 23.04.2019 nor in its Written Submissions dated 07.05.2019, specifically denied the factual averments made by Tata Power or provided any documentary proof to the contrary. AEML had merely stated Netmagic falls under Scenario 53(b) and the connection would be provided to Netmagic by laying any service line. In this context, no information was provided by AEML as to how only a service line is being laid by it, despite repeated requests by Tata Power during the hearings before MERC. In other words, AEML has failed to establish that the said feeders are in fact service lines, and the whole arrangement is in consonance with the principles laid down by MERC.

4.25 It is pertinent to note that, the issue before MERC was whether the electricity is being supplied by AEML to Netmagic by merely laying a service line or AEML is also engaged in extension/ augmentation of its distribution network and consequentially whether the said consumer falls under Scenario 53(a) or Scenario 53(b). However, instead of investigating whether the proposed 11 KV feeders were service lines or not, MERC has held that proposed 11 KV feeders are service line merely on the basis of statements made by AEML and without assigning any reasons. In this regard, the relevant part of the Impugned Order is reproduced hereinbelow for ease of reference:-

"..

15. It becomes therefore necessary to decide as to whether the proposed HT Lines from AEML-D's DSS to the consumer, Netmagic amount to extension of Distribution mains or these are services lines as claimed by AEML-D.

16. The Commission notes that HT connection could be released by loop-in loop-out of an existing HT cable or by laying a new HT cable from nearby Consumer Substation (11/0.415 kV CSS) or Distribution Substation (33/11kV DSS)....

18. The proposed 11kV Lines are intended to be connected to Netmagic from the Nahar/Saki DSS of AEML-D. Accordingly, the Commission is of the view that these proposed 11kV Lines are service lines as defined under EA. Since, AEML-D is in a position to supply to the consumer, Netmagic by laying merely the service lines and no augmentation or extension of its Distribution mains is necessitated, the Commission is of the view that the applicable scenario is 53(b) and the consumer, Netmagic is entitled to get switchover from its existing Distribution Licensee, TPC-D to the another parallel Distribution Licensee, AEML-D..."

4.26 In other words, the Impugned Order is a non-speaking order and ought to be set aside on this ground alone. In this regard, the

following Judgments are noteworthy:-

- (a) *S.N. Mukherjee v. Union of India* reported at (1990) 4 SCC 594
- (b) This Tribunal's Judgment dated 04.04.2006 in Appeal No. 190 of 2005.

4.27 Without prejudice to the above, it is submitted that, considering the fact in issue being raised by the parties before MERC, ought to have sought relevant information and documents from AEML and then independently decided whether the laying of said feeder constitutes a service line. Thus, it is most respectfully submitted that, not only that the Impugned Order is a non-speaking order and violates the principles of natural justice, MERC has also has abdicated/ failed to exercise its powers under Section 94 of the Electricity Act.

4.28 In fact, MERC has prejudged the entire issue and has not acted in a just, fair manner and transparent manner in terms of Section 86(3) of the Electricity Act. It is also not clear as to how MERC has returned the findings that the network being laid by AEML is merely a service line when no such information was divulged by AEML either in its Affidavits or during the course of the hearing.

4.29 Moreover, MERC has failed to appreciate the following fundamental principles, being:-

- (a) When any fact is within the knowledge of any person, the burden of proving such fact is upon such person [**Section 106 of the Evidence Act, 1872**]. The exact details of network laying for connecting to Netmagic are only with AEML, and hence the burden of proving that the said feeders constitute a service line is upon AEML, which it has failed to prove. This aspect has been completely ignored by MERC.
- (b) Given the fact no information has been provided by AEML and Tata Power's submissions have not been denied by AEML, MERC ought to have presumed the facts in favour of Tata Power and adverse inference ought to have been drawn against AEML. '*Omnia praesumuntur contra spoliatores*' is a well-known maxim which means that if a person wrongfully withholds evidence, presumption to his disadvantage consistent with the facts admitted ought to be adopted.

However, contrary to these settled principles, MERC has relied upon these judgments to the contrary to fasten the burden of proof upon Tata Power, even as only AEML can provide details about its distribution network or its proposed network laying.

4.30 Thus, in the instant case, MERC ought to have presumed that AEML has consciously withheld the information available with it

(regarding the subject connection) as it is unfavorable to AEML [i.e. the said consumer does not fall under Scenario 53(b)]. In this regard, the following judgments are noteworthy:

- (a) *Ramdas Oil Mills v. Union of India* reported as 1977 1 SCC 592 [Para 10]:
- (b) *Union of India v. Sugauli Sugar Works Pvt. Ltd.* reported as 1976 3 SCC 32 [Para 12]:
- (c) *Pradip Buragaohain v. Pranati Phukan*, reported as 2010 11 SSC 108 [Paras 28-29]:
- (d) *Sahara India Real Estate Corporation Ltd. v. SEBI & Anr.* reported as 2013 1 SCC 1 [Para 238]:

4.31 In view of the above, the Impugned Order is an unreasoned order and the same ought to be set aside on this ground alone.

D. Contradictory positions taken by MERC in various Orders qua laying of network and connecting it to the consumer

4.32 After passing of the Impugned Order, time and again various orders have been passed by MERC taking contradictory position thereby shifting/ changing the goal posts for the benefit of one distribution licensee and to the detriment of the other distribution licensee.

4.33 Thus, it is evident that MERC has stated that interest of larger set of consumers is to triumph over individual consumers' benefit in Order dated 12.06.2017. However, subsequently, MERC has been changing stances and has now even allowed Rs. 6.5 Crores to be

passed onto consumers at large for a single consumer's benefit.

E. Specific rebuttal to various misleading statements/submissions made by AEML and Netmagic

4.34 It is submitted that AEML and Netmagic have made various misleading/ vacuous statements/submissions during the proceedings of the current Appeal. Each of these submissions are incorrect and the same have been responded by Tata Power from time to time.

4.35 In light of the above, the present Appeal be allowed, and the reliefs sought by Tata Power be granted. Further, Tata Power had time and again sought for interim reliefs, which were not considered by the Tribunal. Thus, in terms of the undertaking given by AEML on 28.05.2019, the network laid down by AEML ought to be removed and Tata Power is to be compensated for the consequential revenue loss caused to Tata Power on account of illegal switchover of Netmagic.

5. Shri Hemant Singh, learned counsel appearing for the Respondent No.2 /AEML has filed the written submissions for our consideration as under:-

5.1 At the outset, it is submitted that the submissions being made by AEML in the present Appeal are without prejudice to the

submissions made in Appeal Nos. 195 of 2017 & batch and Appeal No 142 of 2019, which are pending adjudication before this Tribunal.

5.2 TPC has essentially raised following two issues in the present Appeal. However, it has interlinked the submissions on the two issues to mislead the Hon'ble Tribunal:

- a. AEML is laying distribution mains under the garb of service line which is not permitted as per order dated 12.06.2017 in Case No 182 of 2014. Accordingly, this situation does not fall under Scenario 53(b), but falls under Scenario 53(a) and therefore, AEML can only supply Respondent No. 3/ Netmagic under change-over mode.
- b. AEML will incur cost of Rs. 7 Crore and would be collecting around Rs. 32 lacs from Respondent No. 3, thereby passing remaining costs to other consumers.

Re: Issue (a)

5.3 The proposition of the Appellant/ TPC is as follows:

- a) the Respondent No. 3 falls within Scenario 53 (a);
- b) by virtue of Scenario 53 (a), the connection to Respondent No. 3 can only be provided by TPC; and

- c) in the event the Respondent No. 3 desires to avail connection from any other distribution licensee, i.e. the Respondent No. 2/ AEML, then the same can be availed only by “change-over” i.e. by obtaining open access by utilising network of TPC and not through switch-over by migrating to the network of AEML.

5.4 The above contentions of TPC are fundamentally flawed and fall foul of the final order dated 12/06/2017 passed by the Commission in Case Nos. 182 of 2014 & 40 of 2015. This is because of the following:-

- a) the consumer Levels, and Scenarios, are provided in the final order dated 12/06/2017 of the Commission
- b) the definition/ meaning of a Level-1 consumer was amended in the above order, so as to also include an HT consumer
- c) under Scenario 53(b), both the licensees are completely covering the area in which the consumer is situated. This specifically means that the consumer connection can be provided by simply extending an LT or HT “service line”, i.e. without “augmentation” of the distribution mains;
- d) the option of “switch-over”, i.e. complete migration of the consumer to the network of another licensee, is only

provided to an “existing Level-1 Consumer” under Scenario 53(b) ;

- e) the Respondent No. 3 is an existing HT consumer falling under “Scenario 53(b)”, since the consumer connection can be provided by AEML through merely laying an HT “service line”, without augmenting the HT distribution mains;
- f) as such, AEML has every right to “switchover”/ “migrate” the Respondent No. 3 by providing connection simply through laying an HT “service line”, without augmenting the distribution mains.

5.5 While adjudicating the present appeal, it has to be specifically considered that the “only” test as to whether a consumer falls under Scenario 53(b) is that the consumer connection can be provided by both Licensees by only laying a “service line”, without augmenting their distribution mains. Apart from the same, there is no other test which exists qua a consumer falling under Scenario 53(b).

5.6 The final order dated 12/06/2017 specifically mandates that consumer choice is “supreme” in areas which are completely covered as per Scenario 53 (b). The above order further specifically holds that an “existing” consumer of a Distribution

Licensee may switch-over to the other Distribution Licensee if the latter also has its distribution mains there and the consumer connection can be provided by the said other Distribution Licensee by “merely laying a service line”. The Respondent No. 3 is a consumer which AEML can migrate to its network by merely laying a service line from its distribution mains, without extension or augmentation of such mains.

5.7 It is a fact that AEML has laid 8 HT “service lines”, for providing connectivity to 8 consumer connections of the Respondent No. 3, from its HT distribution mains in the area, which distribution mains were commissioned on 11.12.2007 and 30.03.2017 i.e. prior to the final order dated 12.06.2017. The above lines are service lines, on account of the following:

a) *Section 2 (61) of EA03 defines a “Service line” as follows:*

“service-line” means any electric supply-line through which electricity is, or is intended to be, supplied –

(a) to a single consumer either from a distributing main or immediately from the Distribution Licensee’s premises; or

(b) from a distributing main to a group of consumers on the same premises or on contiguous premises supplied from the same point of the distributing main;

- b) Clearly, a Service Line is an electric supply line which is laid from a distribution mains (an existing main line or Pillar) or directly from licensee's premises (i.e. a Sub-station or a Receiving Station, as the case may be) to supply power to a consumer. It has to be noted that a distributing mains is not a last-mile connection laid to supply power to a consumer, but it is a portion of mains interconnecting the distribution system;
- c) In case of HT connections, such as that of the Respondent No. 3, such a Service Line is laid directly from a 33/11kV Receiving Station;

In view of the above, the objections raised by TPC that the lines put up by AEML are not service lines, have no legs to stand. This aspect that the consumer connection to the Respondent No. 3 can be provided through HT service lines, has been accordingly upheld by the Respondent Commission in the impugned order.

5.8 TPC, in its note handed over on 26.06.2019, has sought to contend that 11kV cables laid by AEML over 1.5 km can only qualify as distribution mains and not Service Line, as Service Line is the line extending from Breaker installed at consumer premises to the CT/PT unit. TPC has further gone on to reproduce the submissions of AEML (then RInfra) made during the proceedings for determination of Schedule of Charges to make its case that Service Line can only be the line from T-off point of the Breaker/ Ring Main Unit (RMU), upto the CT/PT Unit and before that the cable laid from Distribution Sub-station upto the T-off point cannot be considered as part of service line, but is an extension of distribution mains upto the RMU.

5.9 In para 10 of TPC's note dated 26/06/2019, TPC alleged that the Service Lines laid by AEML are distribution mains since the same can be used to supply other consumers at large in view of the alleged spare capacity in the said lines. In respect of this specific contention of TPC, it is submitted that as per prudent technical planning, the Service Line laid for a consumer can always have spare capacity/ margin, in order to meet any eventuality of a consumer over-shooting its contracted demand, which the Line should be able to handle.

5.10 If a distribution licensee lays service line of the same capacity as per contract demand demanded by consumer, it will lead to tripping or fault in the cable in case demand exceeds the contract demand. It is therefore, submitted that to contend that Service Line is distribution mains in view of spare capacity, is absurd and completely contrary to all the technical principles/ planning of laying Service Line. Further, the definition of Service Line as per Section 2(61) of the Act simply specifies that a Service Line can be *“from a distributing main to a group of consumers on the same premises or on contiguous premises supplied from the same point of the distributing main”*. Hence, TPC’s contentions have no merit at all.

Re: Issue (b)

5.11 TPC has argued that AEML will incur approximately Rs. 7 Crore to connect Respondent No. 3/ Netmagic, whereas AEML will recover only Rs 32 lakhs as Service Connection charges as per approved Schedule of Charges, and therefore, the switch-over should not be allowed/ permitted. TPC has further argued that the balance cost would be passed on by AEML on to the rest of the consumers, which should not be allowed.

5.12 The aforementioned argument of TPC is misleading, as well as fundamentally flawed, for the following reasons:

- a) in order to discharge universal supply obligation (USO) as per Section 43 of the Act, a distribution licensee has to provide connection to a consumer within one month of the request;
- b) the charges which can be recovered by a distribution licensee from a consumer, to provide the above connection, are regulated. A licensee can only levy normative charges (as per the approved Schedule of Charges) for providing the said connection, while the balance is passed on to the rest of the consumers through Aggregate Revenue Requirement (ARR). This protocol has been provided by the Commission, for both TPC and AEML, through the following orders:
 - i) vide order dated 28/12/2012, in Case No. 47 of 2012, the Commission approved the Schedule of Charges for TPC, wherein it has been specifically recorded that the entire cost cannot be passed on to the consumers, and the balance legitimate cost would be recovered through the Aggregate Revenue Requirement (ARR).

In fact, the above order of TPC further records that the Respondent Commission rejected the very argument of TPC for linking service charges with the length of the Service Line;

- ii) a similar order was passed on the same date, i.e. 28/12/2012 in Case No. 73 of 2012, for AEML;
- iii) thereafter, TPC filed another tariff petition, being Case No. 18 of 2015, in which it requested Commission to artificially lower its Service Charges/ Schedule of Charges, so as to match with AEML (then Rlnfra), as high Service Charges are a deterrent for exercising the option of switchover. Respondent Commission accepted the said proposal of TPC vide its order dated 26/06/2015.

From the above, it is crystal-clear and evident that Service Charges/ Schedule of Charges are not a reflection of the actual cost incurred in providing last mile connectivity to a consumer, and that the balance cost is necessarily passed on to the other consumers through ARR, as laid down in the above order dated 28/12/2012 of TPC.

5.13 By relying upon the principle contained in the orders dated 28/12/2012 and 26/06/2015, the Commission in the impugned order, in para 23, held that the excess differential cost becomes the infrastructure cost of the Distribution Licensee and gets recovered through its ARR.

5.14 The Schedule of Charges specified by the Commission for recovery of cost of providing connection are decided normatively and the same cannot be expected to match the cost of connection in every case. In certain cases, the charges recovered could be higher than the cost incurred by Licensee and in certain cases, it could be much lower. However, the charges are determined normatively, same for every consumer, so that there is no discrimination and the charges are not prohibitive which could discourage a consumer from seeking connection or make it onerous for him to do so. It is further submitted that a Distribution Licensee can only recover as much cost from the consumer for providing the new connection as is specified in the Schedule of Charges and no more.

Hence, TPC has no legs, whatsoever, to stand on the argument that the excess differential cost for laying the HT service line cannot be passed on to the other consumers through ARR. Surely,

the above “regulatory principle” of approval of ARR is not the subject matter of the present appeal. As such, the argument of TPC is completely misleading, and ought to be rejected.

5.15 As regards the argument of TPC that the cost of the Service Lines is allegedly Rs. 7 Crore, it is submitted that by switching over Respondent No. 3 would bring additional sales and revenue in the ARR of AEML. The net effect of the same is that AEML’s overall tariff will reduce for all other consumers, as demonstrated later in the present note.

5.16 In para 11 of TPC’s note dated 26.06.2019, TPC has sought to alternatively contend that since the feeders being laid are dedicated only to Respondent No 3, the entire cost is to be borne by the consumer as per Regulation 2(g) of the MERC (Electricity Supply Code) Regulations, 2005. In this regard, following is submitted:

- a) This contention of TPC is based on its flawed argument that AEML is laying Distribution Mains and dedicating the same to the Respondent No. 3/ Netmagic, when, as mentioned herein above, the 11kV lines being laid are Service Lines only. Accordingly, there is no question of collecting entire

cost from the consumer as against normative charges specified by the Respondent Commission;

- b) In any event, it is submitted that the figure of Rs. 7 crore corresponds to the capital investment, which itself does not form part of the ARR of AEML. Only the associated revenue expenses of depreciation, interest and return on equity form part of the ARR, which, put together, are less than 20% of the capital investment amount. Therefore, for a capital investment of Rs. 7 crores only about Rs. 1.4 crore. would be included in the ARR and that too will get spread over the entire set of approx. 30 Lakh consumers of AEML, including the Respondent No. 3/ Netmagic.
- c) Further, there would be no extra burden on the AEML consumers as alleged by TPC. In fact, after switchover of Respondent No 3 to AEML's network, any additional cost impact, over and above the normative charges being collected from the consumer by AEML, will be entirely offset by the sales to Respondent No. 3 on its network including the sales to consumers of AEML who are connected to the network TPC (changeover consumers).

5.17 In fact, there would be reduction in wheeling charges of AEML due to switchover of Respondent No 3. This will also benefit the changeover consumers taking supply from TPC on AEML network.

5.18 Hence, the switchover of Respondent No. 3 to AEML fulfils the very mandate of the judgment dated 28/11/2014 of this Tribunal in Appeal Nos. 229 & 246 of 2012, which provides that there should be benefit to consumers at large, and not only to the concerned consumer, as also recorded in para 130.4 of the final order dated 12/06/2017.

In view of the above submissions, the appeal filed by TPC ought to be dismissed. Hence, prayed accordingly.

6. Shri Aniket Prason, learned counsel appearing for the Respondent No.3 /Netmagic has filed the written submissions for our consideration as under:-

6.1 The Respondent No. 3/ Netmagic provides ITES services including Co-location, Cloud, Managed Hosting and related Data Centre Services at Lighthall C Wing, Chandivali in Mumbai. The dispute arose when the Netmagic applied to switch-over from TPC's distribution network to Adani Electricity Mumbai Distribution's(AEML) distribution network owing to lower wheeling charges offered by AEML in accordance with the Tariff Order for

FY 2019-20 as compared to that of TPC's. It is pertinent to note that the power consumption in the said building at Chandivali is very high and on 'Round the Clock (RTC)' basis and by switching over to AEML, Netmagic will save approximately Rs. 8 to 10 crores in its power cost, if power is purchased through open access. A switch-over to AEML's distribution network by Netmagic will significantly reduce the landed cost of electricity for it. Such a switch over to AEML's distribution network by Netmagic was affirmed and allowed by the MERC in the Impugned Order after properly and duly considering all the aspects and most significantly the legal framework as has been settled by it in its Order dated 12.06.2017 in Case No. 182 of 2014 & Case No. 40 of 2015 (**Order dated 12.06.2017**). The present Application by TPC is filed inter alia with an intent to prevent Netmagic from switching over and taking supply from AEML's distribution network.

- 6.2** The issue in the present Appeal and the Application seeking stay of the Impugned Order, is with respect to TPC's objection to the legal entitlement and ability of Respondent No. 2/ AEML to provide power connection to Netmagic through laying of HT service line from its Distribution Substation at Nahar/Saki (present only 1.5 km

away from the said premises) to supply electricity without augmenting or extending its distribution main.

6.3 TPC's contention, contrary to the MERC's view in the Impugned Order, is that Netmagic falls under Scenario 53(a) [i.e. an area which is completely covered by one licensee] and not Scenario 53(b) [i.e. the area which is completely covered by both the distribution licensees] as described under the Order dated 12.06.2017 and that AEML does not completely cover the said area where Netmagic is located and therefore, it cannot supply electricity by merely laying down service line. According to TPC, AEML can connect to Netmagic only by way of augmenting and extending its distribution mains which is not allowed under the Order dated 12.06.2017. TPC goes ahead to contend, that consumer is entitled to avail supply under the change-over mode only (i.e. Open Access u/s 42 of the Electricity Act, 2003, hereinafter, the '**Electricity Act**') by utilising the power distribution network of TPC and not through switch-over to the Respondent No.2/AEML's power distribution network because it falls under the Scenario 53(a). The aforesaid contentions of TPC/Appellant are fundamentally flawed and illogical. Moreover, such claims of TPC are based on erroneous interpretation of the facts and the policy

laid down under the Order dated 12.06.2017 and have been countered accordingly by Netmagic herein below.

6.4 At the outset, it is respectfully submitted that the switch-over application of Netmagic cannot be categorised as falling under Scenario 53(a) and that the Ld. MERC in its Impugned Order, in accordance with its Order dated 12.06.2017, has rightly upheld that Netmagic is an “existing” Level I consumer under Scenario 53(b) and therefore, the other distribution licensee i.e., AEML in the instant case, can provide connection by merely laying a service line from its distribution mains. This has been held in view of the specific findings at Para 136.2(a) of the Order dated 12.06.2017. Thus, the alleged claim of the Appellant/TPC that Netmagic falls under Scenario 53(a) is completely erroneous and without any legal basis.

6.5 The Order dated 12.06.2017 passed by the Respondent Commission has clearly specified the principles for switch-over and change-over of consumers between TPC and AEML for overlapping distribution license areas.

6.6 As specified in Para 133.7 of the Order dated 12.06.2017, ‘Level 1’ is applicable to a consumer, if LT or HT connection is possible by laying a service line from the existing LT/ HT distribution mains

without extension or augmentation of the LT/HT distribution mains.

The relevant excerpt of Para 133.7 is reproduced hereinbelow:

“133.7 ‘Level 1’ has been defined by the Committee as where the LT consumer connection is possible by laying a service line from the existing LT distribution mains without their extension or augmentation. The Committee has referred to HT consumer connections only at Levels 4 and 5. However, it may be possible to release a HT connection also by merely laying a service line (in that case, a HT cable/line) from the existing HT distribution mains without their extension or augmentation. ... Hence, if the HT connection can be released without extending or augmenting the HT distribution mains, the Commission is of the view that it ought to be considered at Level 1, as in the case of LT connections.Accordingly, in modification of the Committee’s recommendation, the Commission has defined Level 1 for the purposes of this Order as follows:

Level 1: The LT or HT consumer connection is possible by laying the service line from the existing LT or HT distribution mains, respectively, without their extension or augmentation.”

From a review the above, it is clear that Netmagic qualifies as Level 1 consumer.

6.7 At this stage, it is also pertinent to submit that the Respondent Commission at paragraph 123.7 read with paragraph 136.2 of its Order dated 12.06.2017, has permitted existing consumers to select both the network and the supply licensee, if other distribution licensee can provide connection by merely laying the service line from the existing distribution mains. The said paragraphs of the Order are reproduced below for reference:

“123.7 Therefore, an existing consumer of a Distribution Licensee may switch-over to the other Distribution Licensee if the latter also has its distribution mains there and the consumer connection can be provided by merely laying a service line. In other words, if both Licensees have their distribution mains in an area and consumers can be connected by merely

laying a service line, the consumer would have the option to select both the network and the Supply Licensee since both Distribution Licensees are 'completely covering' the area.

“136.2 Scenario 53 (b)

comprises areas or locations which are completely covered by both Licensees, i.e. both Licensees have their distribution mains there and the consumer connection can be given by laying a service line without augmenting or extending the distribution mains.

a. Level 1

A new consumer

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

An existing consumer

may continue with Licensee A

or

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

From a review of the above, it is clear that in terms of Para 136.2 (a) of the Order dated 12.06.2017, under Scenario 53(b), an existing consumer has the option to switch-over from the power distribution network of one licensee to the network of other licensee. The above excerpted findings of the Ld. MERC in its Order dated 12.06.2017 completely recognizes and carves out the right of a consumer which falls within Scenario 53(b) to switch-over to another distribution company's network.

- 6.8** On account of the unambiguous and unequivocal principles laid down in the Order dated 12.06.2017, it becomes apparent that the Respondent No. 3/Netmagic is an existing Level-1 HT consumer, falling under Scenario 53 (b), as connection can be provided by

the Respondent No. 2/AEML from its existing HT distribution mains by laying a HT service line without augmenting or extending such mains.

6.9 In this context, for a better appreciation, it is pertinent to mention the meaning of 'service line' as per section 2(61) of the Act as produced below for reference:

*"2(61) "service-line" means any electric supply-line through which electricity is, or is intended to be, supplied -
(a) to a single consumer either from a distributing main or immediately from the Distribution Licensee's premises; or
(b) from a distributing main to a group of consumers on the same premises or on contiguous premises supplied from the same point of the distributing main;"*

From the review of the definition of 'service line', it is clear that the said definition is not limited by the length of such a line and/or expenditure to be incurred on such line i.e. there is no prerequisites of length or cost.

6.10 The Respondent No. 3/ Netmagic is an existing HT consumer, who is supplied power on 11 kV line by the Appellant/TPC from an HT distribution main from its premises, which as per the definition referred to above is termed as a 'Service Line. Similarly, AEML also proposes to supply power from its distribution mains through a 'Service Line' as defined in the Electricity Act considering the same is absolutely allowed under Scenario 53(b). Therefore, AEML

cannot be barred to supply electricity to Netmagic when it is merely laying a 11 kV 'Service Line' in the instant case from its distribution mains. Hence, the allegation of TPC has no merit and is legally untenable.

6.11 Moreover, as per the direction/ provisions in the Impugned Order, Netmagic initiated discussions with AEML wherein it has been assured that AEML will lay only service line from their existing distribution mains in compliance with the orders of the MERC.

6.12 The Respondent Commission in its Order dated 12.06.2017 has neither limited the scope of the 'Service Line' by restricting its length for the purpose of connecting to the consumers under switch-over mode under Scenario 53(b) nor has stipulated any restriction on the quantum of expenditure required to establish such line. Moreover, as mentioned above at para 11, no such restrictive prerequisites of the length and/or expenditure are envisaged as part of the definition of the term 'Service Line' under the Electricity Act. Thus, the Appellant/TPC is attempting to prevent the Respondent No. 3/Netmagic from switching over to Respondent No. 2/AEML network by attempting to bring superfluous issues such as length and expenditure required for laying the said Service Line.

6.13 In view of the foregoing, it is respectfully submitted that since Netmagic falls under the Scenario 53(b) and is Level 1 consumer as per the Order dated 12.06.2017, it is entitled to switch-over from one distribution licensee to another and the same has been decorously upheld in the Impugned Order. Accordingly, it is prayed that the Respondent No. 3/ Netmagic should be allowed to disconnect from the distribution network of Appellant/TPC, in order to connect to the distribution network of Respondent No. 2/AEML.

6.14 Contrary to the legal provisions, TPC is attempting to prevent and delay Netmagic from taking supply on the distribution network of AEML. As per the protocol and process for switch-over, the Respondent No. 3/ Netmagic had applied for Permanent Disconnection for two Consumer Accounts, A/C No. 9000 0090 4163 & A/C No. 9000 0090 0597 on 15.05.2019 for switch-over to AEML network in accordance with the Respondent Commission's Regulations and Orders. However, TPC has rejected the said applications without assigning any valid reasons whatsoever.

6.15 The alleged meeting with Netmagic officials on 22.05.2019 as quoted by Appellant/TPC in their email dated 24.05.2019 was on a different matter (i.e., charging of a spare service line of TPC) and

there was no discussion regarding change in Consumer Account number for the said permanent disconnection application. By referring to the said meeting, TPC is trying to delay the process of permanent disconnection.

6.16 It is pertinent to mention here that the documents submitted by the Respondent No.3/Netmagic for permanent disconnection were complete in all respects and that the Appellant/TPC rejected the applications on the grounds of inadequacy of application without checking the details in the documents. The Appellant/TPC had rejected the applications citing reasons that the board resolution for authorised signatory did not mention the date and was currently invalid, whereas, the Board Resolution dated 28.06.2012 for authorised signatory clearly recorded that the same is valid and is “in effect on current date” i.e., on the date of submission. TPC had rejected the earlier application referring to the issue of validity of board resolution for authorised signatory, thereafter, Netmagic submitted the same documents and TPC accepted the applications for permanent disconnection with same documents without any objection.

6.17 It is humbly submitted that TPC rejected the applications for permanent disconnection of Netmagic only with a purpose of

delaying the process of Netmagic's witch-over to the network of AEML. This present Application is also an extension of the similar conduct of TPC which only wants to thwart the Netmagic's right to connect with AEML's network under switch-over mode on account of being squarely covered under Scenario 53(b) of the Order dated 12.06.2017.

6.18 In view of the foregoing, it is evident that present Application filed by TPC is an attempt to restrict, prevent and create an artificial roadblock for switching over to the AEML's power distribution network and moreover, is completely untenable and misconceived. Therefore, this Hon'ble Tribunal may be pleased to dismiss this Application with cost.

7. We have heard learned counsel appearing for the Appellant, learned counsel for the Respondent Commission 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 principal issues emerge in the instant Appeal for our consideration:-

Issue No.1: Whether the State Commission is justified in holding that request for switchover of Netmagic falls under Scenario 53 (b) and not Scenario 53 (a) and line laid by the Respondent No 2 for switchover is a Service Line?

Issue No. 2: Whether the State Commission has taken a judicious decision in passing on the cost of almost Rs 6.5 crore to be incurred by the Respondent No 2 to the remaining consumers?

OUR FINDINGS AND ANALYSIS: -

8. At the outset, it is essential to point out and as fairly submitted by the parties that the order of the State Commission dated 12.06.2017 in Case No 182 of 2014 approving the network roll out plan of the Appellant (“182 order”) is challenged by the Appellant as well as Respondent No 2 before this Tribunal and the said appeals are pending. The present appeal has arisen in view of the impugned order passed by the State Commission wherein it has given its findings considering the fact that Case 182 order is not stayed by this Tribunal and the Case 182 order is governing the field between the parties. Our ruling in the present matter is also based on the same principle that Case 182 order governs the field between the parties pending appeals against the said order. We would like to make it clear that our findings in this appeal are based on the facts of the case and will have no bearing on the pending appeals against 182 order.

8.1 Issue No 1:-

8.2 The Learned Counsel for the Appellant has contended that 10 (11kV) feeders / lines laid down by the 2nd Respondent from Vihar and Nahar DSS is not Service Line and the same amounts to augmentation/extension of Distribution Mains. Accordingly, the said Consumer – Netmagic falls under Scenario 53 (a) and not under Scenario 53(b). To further support the said argument, Appellant has made following submissions:

- a. The Appellant has its Distribution Mains within the premises of the consumer whereas 2nd Respondent's Distribution Mains are at an approximate distance of 1.5 Kms. Thus, Netmagic can seek supply from the 2nd Respondent on Changeover mode alone.
- b. The 2nd Respondent under the garb of laying/extending Service Line, augmented/extended its Distribution Mains to connect to Netmagic. Further, in view of enough redundant capacity even after supplying electricity to Netmagic, these feeders are intended to be used in future to connect to the other consumers and therefore does not fall within the meaning of the term 'Service Line' under the provisions of Electricity Act, 2003. The Appellant has relied upon the definitions of 'Mains', 'Distribution

Mains' and 'Service line' to contend that whether the supply line is to be treated as 'Distribution Mains' or 'Service Line' depends on the intent and purpose for which such line is used and bearing of cost of such line.

- c. The Appellant has further relied upon the order dated 28.12.2012 in Case No 73 of 2012 of the State Commission whereby it has approved the Schedule of Charges to be recovered by the 2nd Respondent from its consumers. In the said order, the 2nd Respondent has given the normative length of Service Line to be around 15 meters. It is also submitted by the Appellant that Service Line starts from the T-off point of the RMU (Switchgear) and is considered as the portion between the T-off point and CT-PT unit (i.e. metering arrangement) and any cable laid from the Distribution sub-station of the Appellant to T-off point is to be considered as a part of the distribution network.
- d. The Appellant has further submitted that impugned order is contrary to Case 182 order as well as contrary to the position taken by M-DNAC with regard to release of new connection to Tejal Minerals wherein M-DNAC has held that 2nd Respondent's Distribution Mains was within the Tejal Mineral's premises whereas Appellant's network is 3 Kms away and accordingly

held that application of Tejal Minerals falls under Scenario 53(a) or 53(d). However, in the impugned order the State Commission has held that 2nd Respondent completely covers the Netmagic even when 2nd Respondent's network is at a distance of 1.5 Kms and allowed switchover.

e. The State Commission has held that Netmagic falls under Scenario 53(b) merely on the basis of the averments of 2nd Respondent without any evidence being produced to support the said contention or an inquiry being conducted.

8.3 The Appellant has contended that the impugned order passed by the State Commission is a non-speaking order and has relied upon the judgment of the Hon'ble Supreme Court S. N. Mukerjee vs. Union Of India reported in (1990) 4 SCC 594 and this Tribunal's judgment dated 04.04.2006 in Appeal No 190 of 2005 to support its case.

8.4 The Appellant has further contended that the State Commission has taken contrary positions in Case 182 order, impugned order and its order in Case No 345 of 2018 thereby shifting the goal posts to benefit one of the distribution licensee and to the detriment of the other distribution licensee.

8.5 *Per Contra*, the learned counsel for the Respondent No 2 has submitted that the contentions of the Appellant are fundamentally flawed and fall foul of the Case 182 order. It was further submitted that as per consumer levels, scenarios as specified in the Case 182 order, the option of switchover, i.e. complete migration of the consumer to the network of another licensee, is only provided to an “existing Level-1 Consumer” under Scenario 53(b). The Netmagic is an existing HT consumer falling under scenario 53(b), since the consumer connection can be provided by the 2nd Respondent through merely laying an HT “Service Line”, without augmenting the HT distribution mains and 2nd Respondent has every right to switchover/migrate the Respondent No. 3 by providing connection simply through laying an HT Service Line, without augmenting the distribution mains.

8.6 The 2nd Respondent submitted that it has laid 8 HT Service Lines, for providing connectivity to 8 consumer connections of the Respondent No. 3, from its HT distribution mains in the area, which distribution mains were commissioned on 11.12.2007 and 30.03.2017 i.e. prior to the Case 182 order.

8.7 The 2nd Respondent countered the arguments of the Appellant with regard to augmentation/extension of distribution mains by relying

on the definition of Service Line as per Electricity Act, 2003 and submitted that Service Line is an electric supply line which is laid from a distribution mains (an existing main line or Pillar) or directly from licensee's premises (i.e. a Sub-station or a Receiving Station, as the case may be) to supply power to a consumer. Accordingly, in case of HT connections, such as that of the Respondent No. 3, such a Service Line is laid directly from a 33/11kV Receiving Station. This aspect that the consumer connection to the Respondent No. 3 can be provided through HT service lines, has been accordingly upheld by the State Commission in the impugned order

- 8.8** The learned counsel for the 2nd Respondent has made following submissions with regard to Appellant's contention that Service Line can only be the line from T-off point of the Breaker/ Ring Main Unit (RMU), upto the CT/PT Unit and before that the cable laid from Distribution Sub-station upto the T-off point cannot be considered as part of service line, but is an extension of distribution mains up to the RMU:
- (a) The submission of Appellant is completely contrary to its own submission in its note handed over in Appeal No. 243 of 2017 before this Tribunal. The Annexure attached to the said note

clearly shows that it was Appellant's own interpretation of HT Service line that the same extends from HT Mains Busbar/ Cables (11kV) to HT Consumer Installation.

- (b) Appellant's argument essentially implies that a Licensee can switchover an HT consumer only if it already/ before hand has lines drawn from its mains and corresponding RMU/ Breaker installed in the said consumer's premises. It further submitted that this is both absurd, as well as illogical, as such a last-mile connection network will only be laid upon receipt of a consumer's application for supply and not in anticipation/ beforehand.
- (c) By making such interpretation of Scenario 53(b), the Appellant wishes to make switchover option redundant for all HT consumers, as no Licensee can lay the cables and create RMU/ Breaker within consumer premises for last mile connectivity, without there being an application for supply from the said consumer.
- (d) RMU/ Breaker is always installed in an HT consumer premises where the Service Line/ cable, laid from the distributing mains, terminates. Therefore, clearly, the RMU/ Breaker installed in the consumer's premises, upon consumer's request, is a part and parcel of Service Lines drawn from the distribution mains. In this context, further reference may be made to Regulations 2(1)(zza) and 14 of the Central Electricity Authority (Measures relating to

Safety and Electric Supply) Regulations, 2010, which are set out herein below:

“2. Definitions.- (1) In these regulations, unless the context otherwise requires,

(zza) "switchgear" shall denote switches, circuit breakers, cut-outs and other apparatus used for the operation, regulation and control of circuits;

.....

14, Switchgear on consumer's premises.- (1) The supplier shall provide a suitable switchgear in each conductor of every service line other than an earthed or earthed neutral conductor or the earthed external conductor of a concentric cable within a consumer's premises, in an accessible position and such switchgear shall be contained within an adequately enclosed fireproof receptacle:

Provided that where more than one consumer is supplied through a common service line, each such consumer shall be provided with an independent switchgear at the point of rigid junction to the common service.”

From the above, it is evident that the definition of “switchgear” includes breakers, and the same are a part and parcel of a Service Line.

8.9 The learned counsel of the 2nd Respondent was quick to point out that Service Line is already defined in the Electricity Act, 2003, as also re-iterated in the impugned order, without any qualification of distance or cost.

8.10 In respect of the specific contention of TPC with regard to spare capacity to justify the laying of electric supply line as Distribution Mains, it is submitted that as per prudent technical planning, the

Service Line laid for a consumer can always have spare capacity / margin, in order to meet any eventuality of a consumer overshooting its contracted demand, which the Line should be able to handle. If a distribution licensee lays service line of the same capacity as per contract demand demanded by consumer, it will lead to tripping or fault in the cable in case demand exceeds the contract demand. It is therefore, submitted that to contend that Service Line is distribution mains in view of spare capacity, is absurd and completely contrary to all the technical principles/ planning of laying Service Line

8.11 It is clear that in absence of any stay by this Tribunal against the Case 182 order, principles laid down by the State Commission in the said order will be applicable and the present matter has to be adjudicated considering the said principles.

OUR FINDINGS:-

8.12 Considering the contentions of the rival parties, it would be essential to examine the findings of the State Commission in Case 182 order with regard to Scenario 53 (a), 53 (b) and when the switchover is permissible. Let us examine the findings of the State Commission in the impugned order:

Commission's Analysis and Ruling:

12. The issue to be decided in the present Petition is whether or not the consumer, Netmagic is entitled for switchover from its existing Distribution Licensee i.e. TPC-D to another parallel Distribution Licensee i.e. AEML-D as per principles laid down in the Order dated 12 June, 2017 in Case No. 182 of 2014. It is therefore important to examine the Commission's ruling in the Order on the issue of switchover. The relevant extracts of the Order dated 12 June, 2017 are reproduced as follows:

" 86. Commission's view Switch-over can be permitted only in Scenario 53 (b). The Committee's recommendation to freeze the list of consumers eligible for switch-over follows from its recommendation that only those consumers who already have service wires from both Distribution Licensees should be allowed to switch-over. However, in Chapter 5 of this Order, **the Commission has not accepted this recommendation and ruled that the Distribution Licensee can lay its service line from its existing distribution mains for switching over consumers. Thus, the consumers in the area where the Distribution Licensee has distribution mains and to whom connection can be given by laying service lines would become eligible for switch-over.** In these circumstances, drawing up and freezing the list of consumers eligible for switchover is neither justified nor practicable.

.....

123. Meaning of area 'completely covered' by a Distribution Licensee, and of a Licensee being 'present' in the Licence area common to TPC-D and Rlnfra-D

123.6 In view of the foregoing, the Commission rules that a Distribution Licensee will be considered as 'completely covering' an area, locality or location, for the purposes of this Order, when it has its distribution mains in place there and the consumer connection can be given by laying a service line without augmenting or extending the distribution mains.

123.7 Therefore, an existing consumer of a Distribution Licensee may switch-over to the other Distribution Licensee if the latter also has its distribution mains there and the consumer connection can be provided by merely laying a service line. In other words, if both Licensees have their distribution mains in an area and consumers can be connected by merely laying a service line, the consumer would have the option to select both the network and the Supply Licensee since both Distribution Licensees are 'completely covering' the area.

123.8 As regards a Distribution Licensee being 'present' in an area, the Commission is of the view that, unless the Licensee is directly supplying HT consumers, the existence of backbone HT distribution mains would be the most relevant and appropriate identifying criterion because it is the primary requirement for the further spread of the distribution network in an area.

.....
131. Whether Switch-over should be permitted only under Scenario 53 (b), and whether the list of Switch-over Consumers should be frozen?

.....
131.2 ‘Switch-over’ refers to migration to the other Distribution Licensee for both power supply as well as the network. Since it envisages a consumer migrating entirely from one Licensee to another, it perforce refers only to existing consumers.

131.3 The option or otherwise of such switch-over from one Licensee to another in the area common to Rlnfra-D and TPC-D in each of the Scenarios listed at Para. 53 of the Interim Order is set out below:

a. **Scenario 53(a):** Location, Municipal Ward or other area which is completely covered by one Licensee, but consumers within such area still wish to shift from their existing provider to the other Licensee.

Scenario 53 (a) is an area which is completely covered by one Distribution Licensee (as defined in this Order) and the other Licensee does not have its own distribution network. Since switch-over to the other Licensee in such circumstances would require network duplication by the latter, such switch-over cannot be permitted considering the principles set out in the ATE Judgment.

At Para. 54 of its Interim Order, the Commission has already explained that, in Scenario 53 (a), it is only a question of wheeling of power to the consumer through the Licensee whose network is already available in the area. Thus, it is a matter of adjusting payments between such consumer and the concerned Licensee or between the Licensees. If the consumer wants a connection from the other Licensee instead, the existing Change-over Protocol provides the modality for doing so. In these circumstances, switch-over will not be permitted since that would require that the chosen Licensee also develop its network when one already exists, and would result in avoidable duplication.

b. **Scenario 53(b):** Location, Ward or other area which is completely covered by both Licensees, but consumers within such area wish to shift from their existing provider to the other Licensee

In Scenario 53(b), both Licensees have distribution mains from which a consumer can be connected by laying a service line without any extension or augmentation. Hence, an existing consumer of a Distribution Licensee would be entitled to switch-over entirely to the other Licensee since it would entail no further duplication, as the Commission has already ruled at Para. 55 of the Interim Order. The procedure for such switch-over is set out at Annexure C of this Order.

.....

131.4 In sum, the switch-over of consumers from one Licensee to another shall be permitted only in Scenario 53 (b), and the list of eligible switch-over consumers shall not be frozen.

.....

133.7 'Level 1' has been defined by the Committee as where the LT consumer connection is possible by laying a service line from the existing LT distribution mains without their extension or augmentation. The Committee has referred to HT consumer connections only at Levels 4 and 5. However, it may be possible to release a HT connection also by merely laying a service line (in that case, a HT cable/line) from the existing HT distribution mains without their extension or augmentation. The cost of the service line (LT or HT) is borne by new consumers. Hence, if the HT connection can be released without extending or augmenting the HT distribution mains, the Commission is of the view that it ought to be considered at Level 1, as in the case of LT connections. Consequently, such HT connection would also not be referred to the Institutional Mechanism, as would have been required had it been treated as being at Level 4 or 5 as recommended by the Committee. Accordingly, in modification of the Committee's recommendation, the Commission has defined Level 1 for the purposes of this Order as follows:

Level 1: The LT or HT consumer connection is possible by laying the service line from the existing LT or HT distribution mains, respectively, without their extension or augmentation.

.....

136. In the light of the considerations and rulings set out in this Order, the manner in which applications from existing and new consumers in areas in Scenarios (a) to (d) and at Levels 1 to 5 are to be dealt with by the Licensees and the Institutional Mechanism may be summarized as follows:

136.1 Scenario 53 (a)

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

a. Level 1

A New Consumer

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

or

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

An Existing Consumer

may continue with Licensee A

or

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

b. Levels 2 to 5

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

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

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

Institutional Mechanism

Since no comparative evaluation of the cost of network expansion of the Licensees is required, applications of new consumers need not be referred to the Institutional Mechanism. However, the Institutional Mechanism shall confirm the claim of the concerned Licensee that an application at Level 3 or higher is indeed from an area falling in Scenario 53(a).

136.2 Scenario 53 (b)

comprises areas or locations which are completely covered by both Licensees, i.e. both Licensees have their distribution mains there and the consumer connection can be given by laying a service line without augmenting or extending the distribution mains.

a. Level 1

A new consumer

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

An existing consumer

may continue with Licensee A

or

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

Additional load of existing and new consumers

b. Levels 2 to 5

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

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

Institutional Mechanism

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

....

136.6 As explained earlier in this Order, as a general principle for determining whether an area or location falls in one Scenario or another, the unit of reference would be the consumer to whom connection is to be provided. Thus, for instance, if a new connection cannot be provided by a Licensee without establishing, extending or augmenting its distribution mains, that location would not be considered as being completely covered by it. That same location may, however, be considered as being completely covered by the other Licensee if the latter can provide the connection through its existing distribution mains. ”

13. Thus, it can be seen from the above extracts that the switchover of consumers is permissible under scenario 53(b) i.e. areas or locations which are completely covered by both Licensees, i.e. both Licensees

have their distribution mains there and the consumer connection can be given by laying a service line without augmenting or extending the distribution mains.

14. In the instant case, it is quite clear that TPC-D is having its distribution mains in the area nearby to the consumer since the consumer is presently being supplied by TPC-D. TPC-D contends that the scenario is 53(a), i.e. TPC-D is the only Licensee completely covering the area/location. As per TPC-D, AEML-D does not have its own distribution mains as regards the consumer's location and it is required to extend its distribution mains from its DSSs located at Nahar/Saki which are at a distance of about 1.5 km from the consumer's location. However, AEML-D has stated that the switchover can be carried out by laying service line from its existing distribution mains without any extension or augmentation of distribution mains and the request for 'switchover' is thus within the meaning assigned to a 'switchover', as set out in the scenario at Scenario 53 (b) of the Order dated 12 June, 2017.

15. It becomes therefore necessary to decide as to whether the proposed HT Lines from AEML-D's DSS to the consumer, Netmagic amount to extension of Distribution mains or these are services lines as claimed by AEML-D.

16. The Commission notes that HT connection could be released by loop-in loop-out of an existing HT cable or by laying a new HT cable from nearby Consumer Substation (11/0.415 kV CSS) or Distribution Substation (33/11kV DSS).

17. Further, "Service Line" has been defined in EA as follows:

"(61) "service-line" means any electric supply-line through which electricity is, or is intended to be, supplied –

(a) to a single consumer either from a distributing main or immediately from the Distribution Licensee's premises; or

(b) from a distributing main to a group of consumers on the same premises or on contiguous premises supplied from the same point of the distributing main;"

18. The proposed 11kV Lines are intended to be connected to Netmagic from the Nahar/Saki DSS of AEML-D. Accordingly, the Commission is of the view that these proposed 11kV Lines are service lines as defined under EA. Since, AEML-D is in a position to supply to the consumer, Netmagic by laying merely the service lines and no augmentation or extension of its Distribution mains is necessitated, the Commission is of the view that the applicable scenario is 53(b) and the consumer, Netmagic is entitled to get switchover from its existing Distribution Licensee, TPC-D to the another parallel Distribution Licensee, AEML-D."

8.13 It is noticed that the State Commission in the impugned order has reproduced the relevant portion of the Case 182 order and as per the same, the State Commission has laid down the principle that consumer falls under Scenario 53 (b) only if consumer connection can be given only by laying Service Line without augmenting or extending the distribution mains.

8.14 From the definitions of the Service Line in the Act, it is clear that Service Line is an electric supply line through which electricity is intended to be supplied to a consumer from distribution main or immediately from Distribution Licensee's premises. The only criteria to be tested for the line to be qualified as a Service Line is whether it is laid directly from distribution main to consumer or immediately from premises of the Licensee. It is seen that in case of unavailability of space within the premises of the consumer, distribution mains are erected by the licensee on the streets of Mumbai and electric supply line is laid to connect the consumer. The said line as per the aforesaid definition qualifies as Service Line. Also, if the electric supply line is laid directly from distribution licensee's premises to connect the consumer, it will also qualify as Service Line. The said definition nowhere specifies any criteria of distance.

8.15 In light of the above findings, let us examine if the lines laid by the 2nd Respondent from its Vihar and Nahar sub-station qualify to be a Service Line. The line diagram submitted by the 2nd Respondent shows that electric supply line is being laid directly from its sub-station.

8.16 The Respondent No 3- Netmagic is HT consumer. To enable supply to such HT consumer, distribution licensee will lay HT electric supply line, install Switches/Circuit Breaker on consumer premises for operation, regulation and control of circuits as per Central Electricity Authority (Measures relating to Safety and Electric Supply) Regulations, 2010 and metering unit. The said CEA Regulations also specify that *supplier shall provide a suitable switchgear in each conductor of every service line other than an earthed or earthed neutral conductor or the earthed external conductor of a concentric cable within a consumer's premises*. The conjoint reading of the definition of the Service and Regulations 2(1)(zza) and 14 of the Central Electricity Authority (Measures relating to Safety and Electric Supply) Regulations, 2010 completely negate the argument putforth by the Appellant that service line starts from the T-off point of the Breaker/ RMU and

cable laid from Distribution Sub Station or distribution mains upto the T-off point of the RMU is mains.

8.17 We have no hesitation to conclude that electric supply line drawn from the distribution mains or immediately from Distribution Licensee's premises and RMU/ Breaker installed in the consumer's premises is a part of Service Line. In fact, as pointed by the 2nd Respondent, the Appellant itself in Appeal No 243 of 2017 has submitted that HT Service line extends from HT Mains Busbar/ Cables (11kV) to HT Consumer Installation. In our view, the said submission made by the Appellant is the correct interpretation of what qualifies as Service Line. The submission made by the Appellant in the present Appeal appears to be afterthought and a deliberate attempt by the Appellant to restrict the consumer from switching over and exercising its choice of network as per Case 182 order.

8.18 As per our finding above, the electric supply line laid by the 2nd Respondent immediately from its premises to connect the consumer therefore qualifies to be Service Line.

8.19 However, it is also essential to examine that though lines laid by the 2nd Respondent qualify to be Service Line, whether the 2nd Respondent is doing the same by augmentation or extension of

existing distribution mains. If the same are being done by augmentation or extension, the application of Netmagic for switchover would not qualify under Scenario 53 (b) and switchover would not be permissible as per principles laid down in the Case 182 order. The 2nd Respondent has on affidavit submitted before this court that it is laying the HT lines from existing distribution mains commissioned on 11.12.2007 and 30.03.2017 without any augmentation/extension of the distribution mains. Also, it was not Appellant's case that 2nd Respondent is augmenting its distribution mains at its Vihar/Nahar substation. We have already held that 11 kV HT electric supply line laid from 2nd Respondents premises to consumer is nothing but Service Line and hence the same cannot be construed as distribution mains as contended by the Appellant.

8.20 The case of Tejal Minerals is with regard to laying of network for new consumers, whereas the present case is the switchover of existing consumer. Also, it is apparent from the submission of the Appellant that Tejal Minerals was the case of extension of HT distribution mains whereas the present case of Netmagic is laying of HT service line only. In our view, facts of the both the cases is different and accordingly the submissions of the Appellant would not be of any aid in the present Appeal.

8.21 In view of the above, we are inclined to agree with the findings of the State Commission in the impugned order that proposed 11kV HT lines are Service Lines as defined under Electricity Act, 2003. Hence, interference of this Tribunal on this issue is not called for.

9. Issue No 2:-

9.1 The Appellant has contended that the intent and purpose of the Case 182 order was to disallow network duplication so that no additional cost is passed on to the consumers at large. It is submitted by the Appellant that in the garb of laying the service line, an approximate cost to the tune of Rs 6.5 crore is being passed on to the other consumers.

9.2 The Appellant further contends that if the proposed 11kV feeders are to be used exclusively for the benefit of the Netmagic, then the same ought to be considered as 'Dedicated Distribution Facility' for which the entire capital expenditure incurred by the 2nd Respondent is to be borne by Netmagic and the same ought not to be passed on to other consumers.

9.3 The Appellant has submitted that the State Commission in Case 182 order has stated that interest of larger set of consumers is to triumph over individual consumers benefit whereas

subsequently it has allowed Rs 6.5 crore to be passed onto consumers at large for a single consumer's benefit.

9.4 *Per Contra*, learned counsel for the 2nd Respondent has contended that Schedule of Charges only represent an appropriate level of charges that are to be paid for by a consumer for release of connection. The Schedule of Charges Order does not, at any point, state that the charges represent the cost of Service Line. It was further submitted by the 2nd Respondent that the impugned order clearly recognizes that the actual cost of providing connection could vary from case to case and the balance cost, after recovery of charges, will be passed on in Annual Revenue Requirement (ARR) of the 2nd Respondent.

9.5 The learned counsel for the 2nd Respondent also submitted that it is regulatory protocol that excess cost of Service Lines becomes part of a licensee's ARR. The learned counsel also emphasized that by switching over Respondent No. 3 would bring additional sales and revenue in the ARR of 2nd Respondent. The net effect of the same is that 2nd Respondent's overall tariff will reduce for all other consumers and the working for the same is given in its written submissions. It was also pointed out by the 2nd Respondent that reduction in wheeling charges will also benefit changeover

consumers taking supply from Appellant using the network of 2nd Respondent.

OUR FINDINGS:-

9.6 Let us examine the findings of the State Commission in the impugned order:

23. The Commission further notes that TPC-D has submitted that AEML-D will incur approximately Rs. 7 Crore to connect Netmagic IT Services Pvt. Ltd. whereas AEML-D will recover only Rs 32 lakhs as Service Connection charges as per approved Schedule of Charges and therefore the switchover should not be allowed. The Commission is of the view that as long as both the licensees have their respective distribution mains in the concerned area/location, the consumers' choice cannot be curtailed on such an issue raised by TPC-D, because as per the Order dated 12 June, 2017, under recovery /over recovery through Schedule of Charges cannot be the criteria for deciding the consumers' entitlement for switchover. This is in line with the principles of determination of Schedule of Charges by the Commission, wherein the consumers are required to pay the approved normative charges irrespective of the actual expenses incurred by the Distribution Licensee for laying of service lines. It may happen (and in many cases it so happens) that the actual expenses are more than the charges recovered from the consumer in which cases, the excess differential cost becomes the infrastructure cost of the Distribution Licensee and gets recovered through its ARR (Aggregate Revenue Requirement) if the same could not be balanced from the excess amount rendered surplus if the costs incurred on connection are less than the normative charges recovered from the consumer. Hence, the under recovery from Netmagic through the Schedule of Charges Order cannot be the ground for denying the proposed switchover of the Netmagic IT Services Pvt. Ltd..

9.7 Thus the State Commission in the impugned order has held that the Schedule of Charges specified by the State Commission for recovery of cost of providing connection are decided normatively and the same cannot be expected to match the cost of connection in every case. In certain cases, the charges recovered could be

higher than the cost incurred by Licensee and in certain cases, it could be much lower. However, the charges are determined normatively, same for every consumer, so that there is no discrimination and the charges are not prohibitive which could discourage a consumer from seeking connection or make it onerous.

9.8 It is relevant to that the Service Line is the last mile connectivity in the entire distribution network in reaching the consumer. The licensee has to create the entire upstream network to enable supply to its consumer. However, the Licensee still recovers only the cost as per the Schedule of Charges approved by the State Commission from the respective customer and the balance cost is passed on to the network cost through ARR.

9.9 In view of the above, we find no infirmity in the view taken by the State Commission. Also, in light of the foregoing discussions the issue raised by the Appellant regarding the order of Schedule of Charges is not relevant to this case and thus not considered.

9.10 Having regard to the detailed and reasoned findings given by the State Commission allowing switchover of Netmagic, we are unable to appreciate the contentions of the Appellant that impugned order

is not a speaking order. Accordingly, judgments relied upon by the Appellant in this regard are of no aid to it.

9.11 We are of the opinion that the ruling given by the State Commission in the impugned order is as per principles laid down in the Case 182 order. It would be pertinent to mention that the Appellant has filed Appeal No 142 of 2019 against the order of the State Commission in Case No 345 of 2018 and the said appeal is presently pending. In view of the same, we are not inclined to comment on the same.

9.12 The Respondent 3 has also made elaborate representation stating that as per case 182 order gives the choice to consumer for opting supply from either Licensee if same can be given by just laying the service line. By exercising this choice, they made it clear that there will be huge saving to them.

10. SUMMARY OF FINDINGS:-

10.1 In view of the aforesaid findings, the rights available to consumer to choose the network as per Case 182 order cannot be prevented unless the said principles are set aside by this Tribunal in the pending appeals against Case 182 order.

10.2 In view of these facts, we are of the considered opinion that the findings of the State Commission in the Impugned Order do not suffer from infirmity or perversity and hence, any interference by this Tribunal is not called for.

ORDER

For the foregoing reasons, we are of the considered view that the instant Appeal being Appeal No. 195 of 2019 is devoid of merits and hence dismissed. The Impugned order dated 13.05.2019 passed by Maharashtra Electricity Regulatory Commission is hereby upheld.

In view of the disposal of the Appeal, the relief sought in the IA Nos.1044 of 2018 & 1043 of 2018 do not survive for consideration, accordingly stand disposed of.

No order as to costs.

Pronounced in the Open Court on this **04th day of October, 2019.**

(S.D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

REPORTABLE / NON-REPORTABLE

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