

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 36 of 2011

Dated: 28th July, 2011

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam,
Chairperson
Hon'ble Mr. V J Talwar, Technical Member,**

In the matter of

**Maharashtra State Electricity Distribution Company Limited.
Plot No.G-9, Prakashgad,
Bandra (East)
Mumbai-400 051**

... Appellant(s)

Versus

- 1. Maharashtra Electricity Regulatory Commission,
Centre-1, 13th Floor,
World Trade Centre,
Cuffe Parade,
Mumbai-400 005**
- 2. Indo Rama Synthetics (India) Ltd.
A-31, MIDC Industrial Area,
Butlibori, Nagpur-441 122**
- 3. Indian Energy Exchange Limited,
100A/1, Ground Floor,
Capital Court, Olof Palme Marg,
Munirka,
New Delhi-110 67**

....Respondent(s)

Counsel for Appellant(s): Mr.Vikas Singh, Sr. Advocate
Ms.Deepa Chavan
Mr. Abhishek Mitra,
Ms. Amrita Narayan,
Ms. Puja Priyadarshini
Mr. Rahul Singh
Mr. Varun Pathak
Mr. Ravi Prakash

Counsel for Respondent(s): Mr. Jayant Bhushan, Sr Advovcate
Mr. Buddy A. Ranganadhan
Mr. Arijit Maitra for R-1
Mr. Sugam Seth for R-1
Mr. G. Umpathy for R-2
Ms. Surbhi Sharma for R-2
Mr. Ramji Srinivasan,
(Sr. Advocate, for R-3)

JUDGMENT

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

1. Maharashtra State Distribution Company Limited
(Distribution Company) is the Appellant herein.
2. 1st Respondent is Maharashtra Electricity Regulatory
Commission (State Commission). The State Commission.
by the impugned order dated 1.3.2011, directed the
Appellant to grant Open Access in favour of Indo Rama

Synthetic Limited, (the 2nd Respondent herein). Aggrieved by the said order, the Appellant has filed this Appeal. The short facts are summarized as under:

(a) The Appellant is a Distribution Licensee engaged in the business of distribution of electricity to its consumers situated over the entire State of Maharashtra except the areas of supply serviced by other distribution licensees in the State of Maharashtra.

(b) M/S. Indo Rama Synthetic Limited, the 2nd Respondent is one of the industrial consumers of the Appellant. Its factory is situated at MIDC Nagpur. It has captive power generation capacity of 87.25 MW which is sufficient to meet its requirement. Indian Energy Exchange is the 3rd Respondent.

(c) Indo Rama Synthetic Limited, the 2nd Respondent requested the Appellant to grant open access to its distribution network for conveyance of 10 MW of power to be procured from Indian Energy Exchange (3rd Respondent) for one year i.e. from 24.9.2009 to 31.8.2010. Accordingly,

on 24.9.2009, the Appellant granted open access to the second Respondent to procure 10 MW of Power from Indian Energy Exchange for a period of one year ending 31st August, 2010. During the said period, the Respondent-2, utilized the open access only for 9 days when the emergency occurred in its generating station to fulfill captive requirements.

(d) Even before the expiry of the period, i.e. on 31.8.2010, the 2nd Respondent requested the Appellant through its application dated 3.7.2010, to renew grant of open access for another year. There was no reply. Several reminders were sent till November, 2010 namely 27.8.2010, 21.9.2010, 28.10.2010 and 1.11.2010. There was no positive response. Therefore, the 2nd Respondent Company filed a Petition on 10.2.2011 before the State Commission under Section 142 of Electricity Act 2003 seeking for the direction to the Appellant to grant the open access in favour of the 2nd Respondent Company.

- (e) The State Commission, after hearing the parties passed the impugned order dated 01.3.2011 holding that the Appellant had responded to the Respondent's application with respect to the said Open Access within a period of thirty (30) days from the date of receipt of application for Open Access in accordance with the time limit specified in Regulation 4.4.1 of Open Access Regulations 2005. Accordingly, the State Commission did not pass any order on penalty under Section 142 of the Electricity Act 2003.
- (f) Consequently, in the impugned order dated 1.3.2011, the State Commission directed the Appellant to grant Open Access in favour of the 2nd Respondent Company for purchase of 10 MW of Power from Indian Power Exchange, the 3rd Respondent. Aggrieved by this direction in the impugned order, the Appellant, the Distribution Licensee, has presented this Appeal before this Tribunal.
3. The Appellant, in this Appeal mainly raised the question of jurisdiction of the State Commission which passed the

impugned order. The gist of the submissions made by the Appellant with regard to the question of jurisdiction is as follows:

- (a) The State Commission, after holding that the Appellant had acted in accordance with the provisions of Open Access Regulations 2005 and did not commit any fault, cannot issue direction to the Appellant to grant open access to the Respondent. Further, State Commission has no jurisdiction to resolve the dispute between a consumer and distribution licensee.
- (b) The Electricity Act, 2003 provides in suitable details, setting out the adjudicating/disputes resolution powers of the State Regulatory Commission. Section 9 of the Act empowers the Commission to adjudicate on the dispute relating to the availability of the transmission facility to a captive generating plant for wheeling the energy to the destination of its use. Under Section 33 (4) of the Act, the Commission adjudicates on the disputes on the subject of quality of electricity, safe,

secure and integrated operation of the State Grid. Section 35 of the Act vests in the Commission the powers of resolving dispute regarding the extent of surplus capacity available with the licensee. Under Section 67, the Commission is to determine the dispute relating to the subject matter under the same Section. Section 86 (1) (f) vests in the Commission the Power to adjudicate on the dispute arising between the licensee and the Generating Companies. These provisions are exclusive provisions containing the dispute resolution powers of the Commission. These provisions do not indicate that the State Commissions have been vested with the power to adjudicate the dispute between a consumer and a distribution licensee. On the other hand, the powers of dispute resolution between a consumer and distribution licensee is entrusted to Consumer Grievance Redressal Forum established under the MERC (Consumer Grievance Redressal Forum and

Ombudsman) Regulations 2006. As such, the Commission has no jurisdiction to deal with the dispute between the Appellant Distribution Licensee and the 2nd Respondent being a consumer.

- (c) Section 42 of the Act deals with the duties of Distribution Licensee and Open Access. Provisions regarding Open Access in distribution are contained in Section 42 (2), 42(3) and 42(4) of the Act. Sub-Section 5 of Section 42 mandates distribution licensee to establish Consumer Grievance Redressal Forum (CGRF). Since provisions related to open access in distribution and establishment of CGRF are contained in same Section of the Act, it is obvious that all disputes related to open access shall also be resolved by the dispute resolving mechanism viz., Consumer Grievance Redressal Forum established under the same Section

- (d) By virtue of the provisions under Section 42 (5) of the Electricity Act, 2003, the State Commission had framed the MERC (Consumer Grievance Redressal Forum and Electricity Ombudsman) Regulations 2006. (CGRF Regulations,2006). In accordance with these Regulations, the Appellant has established Consumer Grievance Redressal Forums in its area of supply. In this regard, Regulation 18 of MERC (Distribution Open Access) Regulations, 2005 is quite relevant. Regulation 18 provides as follows:

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

2. Any dispute under these Regulations between a Distribution Licensee and a Supplier shall be referred to the Commission for adjudication or to such other forum as may be specified”.

- (e) Above provision relating to open access Regulations contemplate only two classes of disputes:

- (i) between a consumer and a Distribution Licensee and
 - (ii) between a Supplier (Generating Company) and a Distribution Licensee
- (f) The Consumer Grievance Redressal Forum and the Electricity Ombudsman established under Sections 42 (5) and 42 (6) of the Act, respectively are mandated to adjudicate on the disputes between the consumers and the licensee. On the other hand, Section 86 (1) (f) empowers the State Commission to adjudicate the disputes only between the licensee and the Generating Company. When there are specific provisions providing powers to Consumer Grievance Redressal Forum to resolve the dispute between the Consumer and Licensee, the State Commission cannot invoke its inherent powers to resolve the said disputes.
- (g) Regulation 6.8 of CGRF Regulations,2006 provide a list of disputes which are excluded from the jurisdiction of Consumer Grievance Redressal Forums

(CGRF). That list does not exclude the matters relating to open access from the jurisdiction of that Forum. Therefore, the present matter relating to dispute between a consumer and Distribution Licensee lies squarely within the jurisdiction of the concerned CGRF.

- (h) Further, Regulation 18 of the Distribution Open Access Regulations 2006 provides the express mechanism for settlement of disputes of consumers relating to open access. Therefore, all disputes of a consumers related to open access, irrespective whether such disputes relates to the distribution system or the transmission system, are to be considered as a consumer dispute. Therefore, the Consumer Grievance Redressal Forum alone has got the jurisdiction to resolve the dispute in question and not the State Commission. Hence, the impugned order is without jurisdiction.

4. In reply to the above grounds, the Learned Counsel for the State Commission as well as the other Respondents have made the following submissions:

- (a) The State Commission has got the statutory powers under Section 129 Electricity Act 2003 to give directions as may be necessary for the purpose of securing compliance of licence conditions and any of the provisions of the Act. In accordance with the provisions of Section 42(2) read with fifth proviso to this sub-Section, the State Commission has framed the Open Access Regulations, 2005 to facilitate open access in distribution. Power of securing compliance of provisions of Open Access Regulations, 2005 lies with the State Commission under Section 129 of the Act. This power cannot be curtailed on the ground that Consumers Grievance Redressal Forum has the jurisdiction to entertain and decide the issues relating to Open Access.

- (b) Section 129 of the Act clearly stipulate that when it is brought to the notice of the Commission that the licensee has contravened any of the provisions of the Act or the conditions of the licence, the Commission shall by an order give such directions as may be necessary for the purpose of securing compliance with such provision or conditions as the case may be.
- (c) The Open Access is defined in Section 2 (47) of the Act. As per this definition, the open access means non discriminatory provision for the use of transmission lines or distribution system by any licensee or consumer or person engaged in generation in accordance with the Regulations specified by the Commission.
- (d) In terms of Section 42 read with Section 39 (2) (d) of the Act, there could be at least six possible combinations of open access. A situation where a consumer seeks open access from a distribution

licensee is only one of the six possibilities. Acceptance of the Appellant's contention would lead to an anomalous situation. One of the six possibilities related to open access i.e. a dispute between consumer and distribution licensee is to be dealt with by CGRF and in all other possibilities, the dispute is to be adjudicated by State Commission.

- (e) It is contended by the Appellant that under the scheme of the Act, the Consumer Grievance Redressal Forums set-up by the Distribution Licensee alone has jurisdiction to decide the issue on refusal to grant open access. The Appellant's contention was mainly on the basis of the Regulation 18 of the Open Access Regulation 2005. Regulation 18 provides mechanism for resolution of dispute between a distribution licensee and person availing open access. In the present case the Appellant has denied open access to the 2nd Respondent. Therefore the 2nd Respondent cannot be said to be a person availing

open access. Thus Regulation 18 would not apply to the present case. As per Regulation 18 downstream issues related to billing , payment etc. arising after granting open access can be dealt with by the Consumer Grievance Redressal Forum.

- (f) The definition of “Grievance” as provided in the CGRF Regulations 2006 dealing with consumer’s grievances would give a clear meaning that the ‘Grievance’ means with reference to the Consumer Grievance regarding the fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance, etc. by the Distribution Licensee. CGRF established under CGRF Regulations 2006 have jurisdiction only over the consumer’s grievance as defined in CGRF Regulations 2006.
- (g) The Commission on whom the mandate is vested by Parliament under the 2003 Act to provide open access must ensure the fulfillment of the said mandate to provide open access which would include issuing

directions to grant open access. This jurisdiction cannot be taken away by the Consumer Grievance Redressal Forums. Therefore, upon refusal to grant open access which the distribution licensee is bound to grant, the Respondent is well within its right to approach the Commission and the Commission is well within its power to decide the question whether such a refusal to grant open access is proper or not. As such, the Commission alone has got the jurisdiction and not the Consumer Grievance Redressal Forum.

5. We have carefully considered the rival contentions urged by the Appellants as well as by the Respondents.
6. In the light of the submissions made by the parties, two questions that arises for our consideration is as to
 - I. Whether the State Commission is right in directing the Appellant to grant open access in the proceedings related to Section 142 of the Act,

particularly when the State Commission had held that the Appellant had not faulted on that count.

II. Whether, the State Commission has got the jurisdiction to adjudicate on the dispute in question?

7. We shall now deal with each of the above questions one by one.
8. We would consider the 2nd question first as this question is of importance and has large ramifications. The question to be decided as to whether the State Commission has got the jurisdiction to adjudicate on the dispute in question?
9. Let us discuss over this question.
10. The Section 129 of the Act specifically provides that in the event the State Commission is satisfied that the Distribution Licensee is contravening or is likely to contravene any of the conditions of its licence, or the provisions of the Act, the State Commission is empowered to pass the orders giving such directions to the Distribution Licensee as may be necessary for the purpose of securing compliance with the

said conditions or the provisions. In this connection, we will quote Sec 129, which is extracted as under:

“Section 129:Orders for securing compliance:

(1) Where the Appropriate Commission on the basis of material in its possession, is satisfied that a licensee is contravening, or is likely to contravene, any of the conditions mentioned in his licence or conditions for grant of exemption or the licensee or the generating company has contravened or is likely to contravene any of the provisions of this Act, it shall, by an order, give such directions as may be necessary for the purpose of securing compliance with that condition or provision.

(2) While giving direction under sub-Section (1), the Appropriate Commission shall have due regard to the extent to which any person is likely to sustain loss or damages due to such contravention”.

11. The perusal of this Section would make it clear that the State Commission is mandated to give such directions to the licensee for ensuring compliance of the provisions of the Act or the conditions of the licence. The Appellant has contravened provisions of Section 42 and conditions of licence. Clause 8.2 of MERC (General Conditions of Distribution Licensee) Regulations 2006 provides that the licensee shall comply with the provisions of the Act, Rules,

Regulations Orders and Directions issued by the Commission from time to time.

12. Section 42 of the Act provides for the duties of the distribution licensee and open access. The same is extracted below:

“Section 42-Duties of distribution licensee and open access

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

(2) The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross subsidies, and other operational constraints:

PROVIDED that [such open access shall be allowed on payment of a surcharge] in addition to the charges for wheeling as may be determined by the State Commission:

FURTHER PROVIDED that such surcharge shall be utilized to meet the requirements of current level of

cross subsidy within the area of supply of the distribution licensee:

*PROVIDED also that such surcharge and cross subsidies shall be progressively reduced [***] in the manner as may be specified by the State Commission:*

PROVIDED also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use:

PROVIDED also that the State Government shall, not later than five years from the date of commencement of the Electricity (Amendment) Act, 2003, by regulations, provide such open access to all consumers who require a supply of electricity where the maximum power to be made available at any time exceeds one megawatt.

(3) Where any person, whose premises are situated within the area of supply of a distribution licensee, (not being a local authority engaged in the business of distribution of electricity before the appointed date) requires a supply of electricity from a generating company or any licensee other than such distribution licensee, such person may, by notice, require the distribution licensee for wheeling such electricity in accordance with regulations made by the State Commission and the duties of the distribution licensee with respect to such supply shall be of a common carrier providing non-discriminatory open access.

(4) Where the State Commission permits a consumer or class of consumers to receive supply of

electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply.

(5) Every distribution licensee shall, within six months from the appointed date or date of grant of licence, whichever is earlier, shall establish a forum for redressal of grievances of the consumers in accordance with the guidelines as may be specified by the State Commission.

(6) Any consumer, who is aggrieved by non-redressal of his grievances under sub-Section(5), may make a representation for the redressal of his grievance to an authority to be known as Ombudsman to be appointed or designated by the State Commission.

(7) The Ombudsman shall settle the grievance of the consumer within such time and in such manner as may be specified by the State Commission.

(8) The provisions of sub-Sections (5), (6) and (7) shall be without prejudice to right which the consumer may have apart from the rights, conferred upon him by those sub Sections.....”

13. The perusal of Section 42 of the Act would indicate following aspects:

- (i) Sub-section (1) to Section 42 casts duty upon the Distribution Licensee to develop and maintain an efficient, co-ordinated and economical distribution system.
- (ii) Sub-Section (2) of this Section requires the State Commission to introduce open access in distribution in phases and subject to certain conditions as may be specified by 9th June 2004. The fifth proviso to sub-Section (2) of Section 42 of the 2003 Act mandates the Respondent State Commission to provide open access to all consumers who require a supply of electricity where the maximum power to be made available at any time exceeds one megawatt. There is a mandate under the law to provide such open access not later than five years from the date of commencement of the Electricity (Amendment) Act, 2003.

- (iii) Sub-Section (3) of Section 42 mandates a distribution licensee to grant open access to its distribution system as and when any person applies for the same, in accordance with the provisions of the regulations framed by the State Commission. The duties of distribution licensee with respect to such supply would be that of a common service provider. Bare reading of this sub-Section make it clear that once the State Commission has notified the Open Access Regulations, the distribution licensee has no choice but to provide.
- (iv) The Commission on whom the mandate is vested by the Parliament under the 2003 Act must ensure fulfilment of the said mandate to provide such open access. If such a mandate is not being fulfilled then, on first principles, it is only the Commission which will have the jurisdiction to entertain and decide a case where an issue has

been raised in regard to the refusal to grant Open Access.

- (v) Sub-Section (4) to Section 42 provides that where open access has been permitted by the State Commission in accordance with Section 42(2), Such consumer(s) availing open access is/are liable to pay additional surcharge to meet fixed costs of distribution licensee.
- (vi) Section 42(5) casts duty upon the distribution licensee to establish the Consumer Grievance Redressal Forums within its area of supply in accordance with the guidelines as specified by the State Commission.
- (vii) Sub-Sections (6) and (7) of Section 42 requires the State Commission to appoint Ombudsman as appellate authority to settle appeals arising out of orders made by the CGRF established under Section 42(5).

(viii) Sub-Section (8) of Section 42 makes it clear that any right that a consumer may have under Sections (5), (6) & (7) of Section 42 would be in addition to and not in derogation of any other right under the Act.

14. Thus, a bare reading of the various provisions of Section 42 would show that each of the sub-Sections of Section 42 encompass an individual and distinct subject. Each sub-Section of which is an independent “duty” of the Distribution Licensee.
15. The Appellant’s contention that since provisions related to open access and consumer’s grievances are covered under same Section of the Act, dispute resolution power arising out of open access would lie only with CGRF is, therefore, totally misplaced. Sub-Sections (5) and (6) of Section 42 of the Act do not cover disputes relating to non-grant of open access to a consumer by a distribution licensee. These sub-Sections apply to grievances of consumers arising out of deficiency in service and may

include grievances relating to such issues arising after availing open access.

16. According to the Appellant, when there is a grievance of the consumer it has to approach only to the Consumer Grievance Redressal Forum set-up under Section 42(5) and not the Commission as that Forum alone will have the jurisdiction to consider and resolve the same. This contention, in our view is not tenable. In this case, it is not the grievance as defined under the CGRF Regulations but it is a dispute over the entitlement of the 'Open Access'.

17. In this context, the definition of grievance as contained in Regulation 2.1(c) of the Consumer Redressal Grievance Forum and Electricity Ombudsman Regulation, 2006 is to be taken note of. This is as follows:

“Grievance” means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which has been undertaken to be performed by a Distribution Licensee in pursuance of a licence, contract, agreement or under the

Electricity Supply Code or in relation to standards of performance of Distribution Licensees as specified by the Commission and includes inter-alia (a) safety of distribution system having potential or endangering of life or property, and (b) grievances in respect of non-compliance of any other of the Commission or any action to be taken in pursuance thereof which are within the jurisdiction of the Forum or Ombudsman, as the case may be”.

18. The reading of this definition would make it clear that a grievance would arise only when there is any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which has been undertaken to be performed by a Distribution Licensee in pursuance of the licence, contract, agreement or under the Electricity Supply Code or in relation to standards of performance of Distribution Licensees as specified by the Commission. When there is a grievance as defined above, only then the consumer may approach the Consumer Grievance Redressal Forum established under Section 42 (5). Thus, the jurisdiction of the Consumer Grievance Redressal Forum comes into play only on the non-performance of a service or obligation by the distribution

licensee pursuant to any arrangement under a license or contract or agreement inter alia for providing open access. In other words, it does not come into effect at a threshold stage when a consumer has simply applied for open access which has been denied.

19. These Regulations would come into effect during the term of agreement of a contract or arrangement for open access and not before or when open access has been refused by the Distribution Licensee when there is an element of service being provided in the open access.
20. In the event of such refusal by the Distribution Licensee the affected consumer has no other option than to invoke the jurisdiction of the Commission which will have jurisdiction under Section 129 of the Act.
21. As pointed out by the learned counsel for the Respondent, the Hon'ble Supreme Court in the case of MERC vs Reliance Energy Ltd and Ors reported in (2008) 8 SCC 381 has held that it is the State Commission which is empowered with all the powers right from the granting of

license to laying down conditions of license and to frame regulations in this regard. The relevant portion is quoted below:-

“14. A comprehensive reading of all these provisions leaves no manner of doubt that the Commission is empowered with all powers right from granting license and laying down the conditions of licence and to frame regulations and to see that the same are properly enforced and also power to enforce the conditions of licence under Sub-Section (6) of Section 128”

“There can be no manner of doubt that the Commission has full power to pull up any of its licensee or distribution company to see that the rules and regulations laid down by the Commission are properly complied with. After all, it is the duty of the Commission under Sections 45(5), 55(2), 57, 62, 86, 28, 129, 181 and other provisions of the Act to ensure that the public is not harassed.”

22. It is therefore, the State Commission has got the supervisory and adjudicating jurisdiction to deal with the disputes pertaining to grant of open access and not the Consumer Grievance Redressal Forum established by the Appellant.
23. In this regard it would be pertinent to refer to the clause 22.2 of the Open Regulations, 2005 which reads as under:-

“22.2. Nothing in these Regulations shall be deemed to limit or otherwise affect the inherent power of the Commission to make such orders as may be necessary to meet the ends of justice or to prevent abuse of the process of the Commission”.

24. From the reading of the above clause, it is clear that the State Commission, in addition to the powers conferred under Section 129, 86 (1) (a) and 42 (8) of the Act has got inherent powers under clause 22.2 of Regulation as set out above to make such orders as may be necessary. In other words, there is nothing in the Act or the Regulations which affects or limits the inherent power of the Commission to make such orders as may be necessary to meet the end of justice or to prevent the abuse of process in this regard. In other words, the act of the Commission invoking the inherent powers is not barred merely because, the other provisions are available. As a matter of fact, the conjoint reading of this Regulation 22.2 and the other relevant provisions and other regulations indicated above would provide the sufficient powers to the State Commission to

give suitable directions as may be necessary to prevent the abuse of process.

25. According to the Appellant, the Regulation 18 of the Open Access Regulations would give power only to Consumer Grievance Redressal Forum to resolve the dispute between the Appellant and the person who is claiming open access.
26. In order to deal with this contention, we would refer to Regulations 18 of Open Access Regulations, 2005 which is as under:

“18. Disputes

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

2. Any dispute under these Regulations between a Distribution Licensee and a Supplier shall be referred to the Commission for adjudication or to such other forum as may be specified”.

27. As correctly pointed out by the Learned Counsel for the Commission the Regulation 18 would clearly provide that

once a person has been granted open access and while availing the open access, when that person has raised some downstream issues/disputes relating to billing, payments etc. then it must go to the Consumer Grievance Redressal Forum. It is entirely inconceivable that the Consumer Grievance Redressal Forums established by the Distribution Licensees itself would grant open access to a consumer which has been refused the open access by the Distribution Licensee. On the other hand, as the name itself would suggest, the CGRF established by the distribution licensee would not have any jurisdiction over generators/licensees. Thus even downstream issues arising after availing Open Access by a generator or licensee would have to be adjudicated by the State Commission as provided under Regulation 18(2).

28. The Consumer Grievance Redressal Forums derive their powers from the CGRF Regulations 2006 framed by the State Commission in accordance with Section 42(5) of the Act which is reproduced as under:

“(5) Every distribution licensee shall, within six months from the appointed date or date of grant of licence, whichever is earlier, establish a forum for redressal of grievances of the consumers in accordance with the guidelines as may be specified by the State Commission”.

29. From this, it is clear that the Consumer Grievance Redressal Forum has jurisdiction only for redressal of grievance. The definition of the grievance as indicated above, related to the inefficiency of the distribution licensee or inadequacy in quality, nature and manner of performance undertaken by the distribution licensee. It would be clear from the plain reading from the definition of the ‘Grievance’ which has to be redressed by the Forum, there must be any fault, imperfection, shortcoming etc. The definition of the grievance does not include the refusal to grant open access. The issues given in the definition of the term grievance are downstream issues in relation to the quality, nature, manner of performance and the standard of performance etc., of the distribution licensee.

As per the 2003 Act, the Commission has been empowered to provide open access and to ensure open access which includes the issuance of direction to grant open access. This jurisdiction cannot be taken away by the Consumer Grievance Redressal Forums. The body on which the mandate has been vested to provide open access must ensure that such open access is provided to the person who claims open access.

30. The Open Access is defined in Section 2 (47) of the EA 2003. The said definition reads as under:-

“2. (47) “Open Access” means the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the Regulations specified by the Appropriate Commission”.

31. As per this definition, there are three entities which are entitled to open access in distribution. They are:-

- (i) Licencees;
- (ii) Consumers'
- (iii) Persons engaged in generation;

32. If the Appellant's contention is accepted, the Licensees and the persons engaged in generation would have to approach the State Commission for open access, whereas the consumer alone has to go to the Consumer Redressal Forum. This would create an anomalous situation.

33. Further, under Section 42 read with Sec 39 (2) (d), of the Act, there could be at least six possible combinations of open access transactions, they are:-

- (a) A Consumer seeking open access from a Distribution Licensee;
- (b) A Distribution Licensee or a Trading Licensee seeking open access from a Distribution Licensee;
- (c) A Generator seeking open access from a Distribution Licensee;

(d) A Consumer seeking open access from a Transmission Licensee;

(e) A Distribution Licensee or trading licensee seeking open access from a Transmission Licensee;

(f) A Generator seeking Open Access from a Transmission Licensee.

34. If the Appellant's contention is accepted, only one of the above six combinations, a consumer seeking open access to distribution system, would have to approach the Consumer Grievance Redressal Forum whereas the other five combinations would have to approach the state Commission. If this is the situation, this would lead to an anomalous situation as explained below:

35. For example, let us consider a situation where a consumer seeks open access from the transmission licensee and the distribution licensee. If the transmission licensee refuses to grant open access, then the consumer would have to approach the State Commission, as CGRF set-up by the distribution licensee

under Section 42 (5) of the Act has no jurisdiction over transmission licensee. On the other hand if the distribution licensee refuses open access, consumer applicant would have to go to CGRF. Such a proposition cannot be accepted.

36. Let us consider another example involving one open access transaction between a generator and a consumer. There may be a situation when the generator is seeking open access to sell the power to the consumer. In that case, a generator would have to approach the Commission in a dispute when seeking open access whether from the distribution licensee or from the transmission licensee and such open access is denied. In the very same open access transaction, i.e. between the generator and the consumer, if the consumer is seeking open access to buy from generator, the consumer has to approach the CGRF when there is a dispute with the Distribution Licensee, whereas he has to approach the Commission when there is dispute relating to grant of Open Access with the

transmission licensee. This cannot be the situation. If the Appellant's argument is accepted, it would amount to accepting the concept that one of the parties would have to approach the CGRF for one portion of the transaction with one portion of the contracting parties and the party in the very same open access transactions has to approach the Commission for the other portion of transaction with another portion of the contracting parties. This could not have been the intention behind the Act.

37. This could be viewed from yet another angle. Under the CGRF, 2006 there is a specified procedure to undergo before approaching the Consumer Grievance Redressal Forum. As per the procedure, the consumer has to first go through the Internal Consumer Grievance Redressal Cell of the distribution licensee. Regulation 2.1 (d) of the CGRF Regulations, 2006 provides for internal grievance redressal cell. This is the first authority to be contacted by the consumer for redressal of his grievance as notified by the distribution licensee. Thus, it is mandatory on the part of

the consumer to approach the internal grievance redressal cell first. Only after the disposal of his claim, he could thereafter, report his grievance before the Consumer Grievance Redressal Forum. The relevant regulations would say that the consumer can approach the Consumer Forum only when the Internal Grievance Redressal Cell failed to redress the said grievance within a period of two months within the date of intimation under Regulations 6.2, 6.4, 6.5 and 6.7 of the CGRF Regulations, 2006. This time consuming process would frustrate the whole scheme of open access.

38. Further, the Appellant has setup as many as 14 CGRF(s) in its area of supply. There could be a situation where supplier lies in area of jurisdiction of one CGRF and consumer premises lies in area covered by another CGRF. Which of the concerned CGRF, the consumer would have to approach? Such a situation would defeat the very purpose of Open Access.

39. The Open Access for purchasing or selling power from a source outside the State also entails seeking Open Access on the distribution system of the Appellant. Thus, it involves “inter-state transmission system”. The term inter-State transmission system” has been defined in Sec 2 (36) of the Act which provides as under:

“(36) “Inter-State transmission system” includes (i) any system for the conveyance of electricity by means of main transmission line from the territory of one State to another State; (ii) the conveyance of electricity across the territory of an intervening State as well as conveyance within the State which is incidental to such inter-State transmission of electricity; (iii) the transmission of electricity within the territory of a State on a system built, owned, operated, maintained or controlled by Central Transmission Utility”.

40. Thus, the Open Access Regulations notified by the Central Commission includes “conveyance within the State which is incidental to such inter-State transmission of electricity”. These Regulations provide that the State Load Despatch Centre shall convey its concurrence to the applicant by e-mail or fax in addition to normal means of communication, within three (3) working days of receipt of the application.

In view of the time frame an applicant for open access cannot be made to wait to first file his complaint before the Internal Grievance Redressal Cell and thereafter file his complaint before the Consumer Grievance Redressal Forum. Under such conditions acceptance of the Appellants contention would make Open Access impossible and is liable to be rejected.

41. Next question for our consideration as to Whether the State Commission is right in giving direction to the Appellant to grant open access in the proceedings related to Section 142 of the Act, particularly when the State Commission had held that the Appellant had not faulted on that count.
42. In order to answer this question, let us examine the relevant portion of the impugned order. The relevant portion of impugned order is reproduced below:

“10. Having heard the parties, the Commission is of the view that processing of applications for distribution open access as specified in Regulation 4 of the Maharashtra Electricity Regulatory Commission (Distribution Open Access) Regulations, 2005, inter alia requires that the requisition for information/ particulars/ documents for processing application

shall be “reasonable” having regard to the requirement of the applicant. Regulation 4.4.1 requires MSEDCL to intimate to a Generating Company of the technical requirements within a period of thirty (30) days from the receipt of application for open access. IRSL submitted its application seeking open access vide letter dated December 24, 2010. **MSEDCL has examined IRSL’s open access application and has pointed out certain specific requirements which according to MSEDCL are required to be complied with by IRSL before MSEDCL could grant open access to IRSL. MSEDCL has confirmed that IRSL’s application would be processed after compliance of the aforesaid requirements. The Commission’s views with respect to the said requirements as well as consequent directions are provided below.**

11. (i) Regarding submission of single line diagram, IRSL clarified that when the bids are placed on the power exchanges the standing instructions are issued by SLDC, which take care of corridor availability or possibility of congestion etc. The Commission directs that as soon as IRSL gets the intimation from the power exchange they should inform MSEDCL on daily basis.

(ii) Regarding the LOA/MoU/PPA entered between the Buyer/Seller/Trader, the Commission is satisfied by the document produced (the copy of offer of Grid connected Client Registration in IEX/PXIL from GMR Energy Trading Ltd) during the hearing.

12. The Respondent MSEDCL has filed a Miscellaneous Application in the matter on 14th February, 2011, after the hearing in the matter has been concluded, inter alia praying for the stay on this Order for the period of 45 days from the date on which the copy of this Order is made available to the MSEDCL. The Commission is not inclined to allow such prayer as the same would cause further delay to the rights of the Petitioner, which it is entitled to under the Electricity Act, 2003. Accordingly, the Commission directs MSEDCL to grant open access so that the Petitioner IRSL can purchase 10MW of power from IEX through Open Access. The direction is to be adhered to immediately

13. Open access application was filed by IRSL vide letter December 24, 2010. MSEDCL responded to IRSL with respect to the said Open access application on January 20, 2011 i.e., stating the requisite technical requirements, within a period of thirty (30) days from the receipt of application for open access in accordance with the time limit specified in Regulation 4.4.1 as aforesaid. On this count, MSEDCL cannot therefore be faulted. Consequently, no order of penalty is required as prayed for by IRSL. In view of the aforesaid directions at para 13, no interim order is required. (Emphasis supplied).

43. Bare reading of the above findings would reveal the following propositions:

- (a) The Appellant had confirmed that the 2nd Respondent's application would be processed after compliance of certain specific requirements which were required to be complied with by the 2nd Respondent in accordance with Regulation 4.4.1 of Open Access Regulations 2005.
- (b) The State Commission examined those specific requirements and found that such requirements had been met with by the 2nd Respondent. Accordingly, the State Commission directed to the Appellant to grant open access to the 2nd Respondent.
- (c) The Appellant, after hearings in the matter had concluded and before passing of impugned order, by an application, requested the State Commission to stay the operation of impugned order for 45 days from date copy of impugned order is made available to the Appellant.

44. From the above it is clear that the State Commission did not venture into any activity of dispute resolution between consumer and the Appellant, as alleged by the Appellant. During the proceedings under Section 142 of the act, the Appellant indicated that after fulfillment of certain specific requirements required to be complied with by the 2nd Respondent, it would grant open access. The State Commission examined the matter and after being satisfied that such requirements as indicated by the Appellant had been complied with, directed the Appellant to grant open access as confirmed by it during the proceedings. Thus there was no dispute at all. The Appellant itself had confirmed that application for open access would be processed after completion of certain specific requirement by the 2nd Respondent. Having those specific requirement been complied with by the Respondent, the Appellant was duty bound to grant open access without further delay. The Appellant has unnecessarily raised question of the State

Commission's jurisdiction just to delay the grant of open access to the 2nd Respondent.

45. Findings of the State Commission in para 12 of the impugned order would indicate the conduct of the Appellant towards adherence to the provisions of the Act and Rules and Regulations made there under. It appears from the conduct of the Appellant, as brought out in para 12 of the impugned order and in filing this appeal before us, is to forestall the Open Access in its area of supply.

Summary of Our Findings:

- 46. The dispute relating to the Open Access would be dealt only by the Commission as the Act clearly provides that the Commission must ensure fulfillment of the mandate to provide such Open Access which would include issuing directions to grant Open Access which**

has rightly been given in the impugned order. This, jurisdiction vested with the Commission can not be usurped or taken away by the Consumer Grievance Redressal Forum. In other words, the Consumer Grievance Redressal Forum established by the Distribution Licensee will have no jurisdiction to entertain or decide a dispute where the statutory mandate to provide Open Access has been violated by the Distribution Licensee. Therefore, the dispute in question can be resolved by the State Commission alone and not by the Consumer Grievance Forum. As such, there is no infirmity in the impugned order.

47. Before parting with this case, we are constrained to refer to one more aspect. Admittedly, the Appellant has not raised this question of jurisdiction before the Commission but has raised the said question for the first time only before this Tribunal in this Appeal. It is true that there is no bar for raising the question of jurisdiction of the authority which passed the impugned order in the Appeal proceedings also

as laid down by the Hon'ble Supreme Court in various judgments and in that event the Appellate forum has to consider the question of jurisdiction as it goes to the root of the matter. As per the said dictum we have dealt with the said question and given a finding in the earlier paragraphs to the effect that the State Commission has jurisdiction. But we could not but refer to the conduct of the Appellant who raised the question of jurisdiction belatedly which lacks bonafide.

48. As a matter of fact, the State Commission proceeded with the matter only on the basis of High Court's direction in the Writ Petition filed by one of the parties. Before the High Court also, the Appellant had never raised the question of jurisdiction of the State Commission. On the other hand, the order of High Court shows that the Appellant wanted to submit to the jurisdiction of the State Commission. It is also noticed from the impugned order as indicated above, the Appellant, before the Commission, had accepted to grant Open Access subject to some conditions. Therefore, the

circumstances shown in this case make us to feel that the issue of jurisdiction has been raised by the Appellant belatedly before this Tribunal, only to prolong the proceedings, thereby preventing the 2nd Respondent Company from getting the Open Access to enable him to purchase the power from the third party. Hence, while disposing this Appeal, we think it fit to express our displeasure over the conduct of the Appellant.

49. With these observations, the Appeal is dismissed as being devoid of merits.
50. Normally, we do not impose cost on the parties who have approached this Tribunal for getting the relief. But in this case we are constrained to impose cost on the Appellant in view of the improper conduct on the part of the Appellant as referred to in the earlier paragraphs. This will also show that we do not approve the conduct of the Appellant, which is State Utility. Accordingly, we impose the cost of 1 lakh on the Appellant, which in turn, is directed to pay the cost of Rs.1 lakh (one lakh) to Indo Rama Synthetics

(India) Ltd, the Second Respondent who has really become aggrieved over the conduct of the Appellant on or before 01st Sept.2011

(V J Talwar)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 28th July, 2011

REPORTABLE / ~~NON-REPORTABLE~~