

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No.31 of 2012

Dated: 1st October, 2012

**Present : HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM,
CHAIRPERSON
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER**

In the Matter of:

**PTC India Limited,
2nd Floor, NBCC Tower,
15, Bhikaji Cama Place,
New Delhi-110 066**

...Appellant

Versus

**1. Gujarat Electricity Regulatory Commission
1st Floor, Neptune Tower,
Opp Nehru Bridge
Ashram Road, Ahmedabad
Gujarat, PIN-380 009**

**2. Gujarat Urja Vikas Nigam Limited,
Corporate Office,
Sardar Patel Vidhyut Bhavan,
Race Course, Vadora-390 007
Gujarat**

...Respondent(s)

**Counsel for the Appellant(s) : Mr. Parag Tripathi, Sr Adv
Mr. Varun Pathak
Ms. Swati Sharma
Mr. A Ganguly,
Mr. Ravi Prakash
Mr. S. Farasat**

Counsel for the Respondent(s):Mr. Hemant Singh for R-1
Ms. Shikha Ohri
Mr. M.G. Ramachandran for R-2
Mr. Anand K Ganesan
Ms. Swapna Seshadri
Ms. Surbhi Sharma

J U D G M E N T

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

1. PTC India Limited is the Appellant. Gujarat State Commission is the First Respondent. Gujarat Urja Vikas Nigam Limited (Gujarat Urja) is the Second Respondent.
2. Gujarat Urja Vikas Nigam Limited (R-2), filed a Petition before the State Commission seeking adjudication upon a dispute raised against the Appellant, the PTC. Since PTC raised a preliminary objection to the jurisdiction of the State Commission to adjudicate upon the dispute, the State Commission heard the parties on the issue of preliminary objection and passed the impugned order dated 30.1.2012 holding that it has got the jurisdiction.
3. Challenging this order rejecting the preliminary objection raised by the PTC and holding that it has the jurisdiction, the Appellant PTC has filed this Appeal. The short facts are as under:

- (a) The Gujarat Urja (R-2) carries out the function of bulk purchase and supply of power for the distribution licensees in Gujarat. PTC, the Appellant is a licensee to undertake the inter State Trading activity in electricity. The said licence was granted to PTC by the Central Electricity Regulatory Commission.
- (b) On 23.11.2009, the Gujarat Urja (R-2), issued the invitation offering for the sale of 200 MW electricity for the period from December, 2009 to February, 2010. In response to the same, the PTC, the Appellant submitted its offer for the purchase through its letter dated 25.11.2009.
- (c) Thereupon, the Gujarat Urja (R-2) by its letter dated 27.11.2009 conveyed its willingness to sell 200 MW of power during the period from 16.12.2009 to 28.2.2010 at the rates quoted by the Appellant.
- (d) The Appellant by its letter dated 30.11.2009, accepted the conditions contained in the letter dated 27.11.2009 sent by Gujarat Urja.
- (e) The Appellant and Gujarat Urja (R-2) agreed that the sale/purchase during the said period shall be

with 'Take or Pay' obligation. Accordingly, the agreement was entered into. Through this Agreement, it was agreed by the parties that if the PTC, the Appellant fails to off take 80% of the contracted quantum, the PTC shall have to pay the Gujarat Urja (R-2) @ Rs.1.96 per unit for the quantum that falls short of 80% of the contracted quantum. Similarly, in case of default by the Gujarat Urja (R-2) to supply the Power to PTC, Gujarat Urja(R-2) shall pay @ Rs.2.00 per unit to the Appellant for the quantum of supply that falls short of 80% of the contracted quantum.

- (f) During the said period, the Appellant failed to off take the power. Therefore, the Gujarat Urja (R-2) issued invoices and sent letters to the Appellant claiming compensation from the Appellant on the ground that the Appellant breached its contract by failing to offtake the power from the Gujarat Urja (R-2). However, the Appellant sent a reply denying its liability to pay compensation.
- (g) Under those circumstances, the Gujarat Urja(R-2) filed a Petition on 7.2.2011 before the State Commission seeking for adjudication upon the

dispute with regard to its claim for compensation from the Appellant to the tune of Rs.41 Crores.

- (h) The State Commission entertained this Petition and issued notice to PTC, the Appellant.
- (i) On receipt of the notice issued by the State Commission, the Appellant filed the interim reply on 3.4.2011 raising preliminary objection to the jurisdiction of the State Commission to adjudicate upon the dispute in question and reserving its right to file a separate reply in regard to the merits of the matter subject to the decision of the State Commission with reference to the jurisdiction.
- (j) The State Commission thereupon, allowed the parties to argue on the question of jurisdiction.
- (k) After hearing the parties, the State Commission passed the impugned order on the preliminary objection on 2.6.2011 holding that it has got the jurisdiction and adjourned the matter for hearing the arguments on merits of the dispute raised. This order was originally challenged by this Appellant in this Tribunal in Appeal No.88 of 2011 mainly contending that the said order was passed by the State Commission without fully hearing the

Appellant and as such, the same has got to be set aside and the opportunity be given to the Appellant to have its full say in the matter by remanding the matter to the State Commission for fresh consideration in respect of the issue relating to the jurisdiction.

- (l) On finding from the records and having convinced that the Appellant had not been given reasonable opportunity of being heard, this Tribunal by the order dated 27.9.2011 set aside the order of the State Commission dated 2.6.2011 and directed the State Commission to hear the parties afresh by giving full opportunity to both the parties on the question of jurisdiction and pass the order in accordance with law uninfluenced by the findings already given in the earlier order passed by the State Commission.
- (m) Accordingly, the State Commission heard both the parties again on 3.12.2011 by giving full opportunity to put forward their arguments. They were permitted to file their written submissions. Accordingly, both of them filed the same before the State Commission. The State Commission after considering the submissions made by both

the parties and perusing the written submissions filed by the parties, passed the impugned order dated 30.1.2012 holding that it has got the jurisdiction by rejecting the preliminary objection raised by the PTC. Then the matter was adjourned for hearing the case on merits.

(n) At that stage, the PTC, the Appellant has filed this Appeal challenging the impugned order.

4. The Learned Senior Counsel for the Appellant has urged the following contentions:

(a) The Gujarat Urja (R-2) is neither a licensee nor a deemed licensee within the meaning of Section 14 of the Electricity Act, 2003. Firstly, because the deemed licensees are not covered under Section 86 (1) (f). Secondly, because the Gujarat Urja cannot be the licensee under the Electricity Act, 2003 in view of Section 131(2) of the Act which does not recognise a trading licensee. The State Commission could exercise its jurisdiction only in respect of licensees to whom the actual licence was granted by the State Commission. In this case, the licence has not been granted to the Gujarat Urja by the State Commission.

(b) Section 86 (1) (f) relates to the dispute between a generating Company and the licensee. Even assuming that Gujarat Urja is a deemed licensee, the dispute under Section 86(1)(f) could be adjudicated by the State Commission only with regard to those disputes arising between a generating company and a licensee and not between the two licensees. The dispute in the present case is between two licensees. This is outside the purview of the Act. Therefore, the State Commission has no jurisdiction to go into the dispute raised by Gujarat Urja which claims to be the deemed licensee as against the Appellant, PTC, a trading licensee.

(c) The State Commission does not have any jurisdiction over any dispute involving the Appellant who is an interstate Trading licensee to whom the licence was granted by the Central Commission.

5. In reply to the above contentions, the Learned counsel for the Gujarat Urja (R-2) has made the following submissions:

(a) The Gujarat Urja (R-2) is a deemed licensee under the Fifth Proviso of the Section 14 of the Electricity Act. The Gujarat Urja has been

incorporated as a successor entity to the erstwhile Gujarat Electricity Board pursuant to a Transfer Scheme Notification issued under the relevant provisions of the Gujarat Electricity Industry (Re-organisation and Regulation) Act, 2003 and the Electricity Act, 2003.

- (b) In terms of Section 185(3) of the Electricity Act, the provisions of the Gujarat State Act would continue to be applicable even after 10th December, 2003, so long as the same are not inconsistent with the provisions of the Electricity Act, 2003. There is no restriction under Section 28(2) of the Gujarat State Act or under its relevant rules to transfer the assets and functions of the Gujarat Electricity Board under the Gujarat State Act. The transfer and vesting of bulk purchase and bulk supply functions were conferred on the Gujarat Urja by the amendment notification dated 29.3.2005. The Transfer Scheme issued by the Gujarat Government on 24.10.2003 provides for transfer and vesting of assets etc., to Gujarat Urja from the date of transfer. Accordingly, the transfer had been effected validly in favour of Gujarat Urja. Therefore, Gujarat Urja is a deemed of the Electricity Act.

- (c) Section 86 (1)(f) covers adjudication of the dispute not only between the Generating Company on one hand and the Licensee on the other hand but also the adjudication of the dispute between two licensees or between two generating companies. The term used is “licensees” (in plural) as opposed to a ‘licensee’ (singular). The expression ‘between the licensees’ contained in Section 86 (1) (b) would clearly cover the dispute between the two or more licensees. Therefore, the dispute between two licensees can be gone into by the State Commission.
- (d) Mere fact that the PTC is an inter State Trading licensee to whom the licence was granted by the Central Commission would not oust the jurisdiction of the State Commission when the cause of action has taken place within the jurisdiction of State Commission. In this case, the Agreement was entered into within the State of Gujarat. The delivery point for supply of electricity by Gujarat Urja to PTC was at the periphery of Gujarat. The Letter of Intent leading to Agreement between the parties was issued in the State of Gujarat. In terms of the above, the sale by Gujarat Urja to PTC within the State would amount

to intra State sale. Therefore, it would fall within the territorial jurisdiction of the State Commission as part of the cause of action has taken place within the State of Gujarat.

6. In the light of the rival contentions referred to above, the following questions would arise for consideration:
 - (a) Whether the Gujarat Urja which is not issued a licence by the State Commission, could be construed to be a deemed licensee?
 - (b) Whether the State Commission has got the jurisdiction to adjudicate upon the disputes between the licensees inter-se?
 - (c) Whether the State Commission has the jurisdiction to adjudicate upon the dispute raised against the Appellant which is Inter State Trading Licensee to whom, the licence was granted by the Central Commission?
7. On these questions, we have heard the learned Counsel for the parties who argued the matter at length.
8. Now let us deal with each of the questions mentioned above.

9. The first question relates to the status of the Gujarat Urja Vikas Nigam Limited as a licensee or a deemed licensee applicable to Section 86 (1)(f) of the Act.
10. According to the Appellant, the Gujarat Urja is neither the licensee nor the deemed licensee for the purpose of Section 86(1)(f) and other provisions of the Act, 2003 for the following reasons:
 - (a) Section 14 of the Act specifies that Appropriate Commission may grant a licence to any person on an application filed by a person. Admittedly, the Gujarat Urja has neither made an application before the State Commission nor the State Commission granted a licence. The Gujarat Urja(R-2) seeks to bring its case under Fifth Proviso of Section 14 which deals with deemed licensee. As per this Section, the Gujarat Urja(R-2) can be construed to be a deemed licensee only when it is a Company as referred to in Section 131 of the Electricity Act, 2003 or a Company created in pursuance of the Act specified in the Schedule. Gujarat Urja cannot be construed to be a deemed licensee as it is neither a Government Company nor it is a Company covered under the Transfer Scheme.

- (b) The transfers under Section 28 of the Gujarat State Act, 2003 and as per the Transfer Scheme Rules issued therein, can be given effect to only during the period of 12 months from the date of the Notification of the Transfer Scheme Rules and not thereafter.
- (c) Vesting of functions is not contemplated U/S 131 of the Electricity Act or Under Section 28 of the Gujarat State Act. What can be transferred or vested are only assets, properties, liabilities, proceedings etc. In the present case, the functions and the activities of the trading etc. for which a licence is provided under Section 12 and 14 of the Electricity Act have not been vested. Therefore, the Gujarat Urja can neither be called to be a licensee nor a deemed licensee.

11. Before dealing with the above points raised by the Appellant relating to the 1st issue, we deem it appropriate to quote the relevant findings rendered by the State Commission in the impugned order on this issue.

12. The relevant discussion and finding contained in the impugned order passed by the State Commission on this question is quoted below:

6. As it can be seen from the paragraphs 4 and 5 above, comprehensive arguments have been put forward by both the Respondent and the Petitioner on the issue of whether the Petitioner is a Licensee/ deemed Licensee or not. We have carefully considered the arguments made by both the parties.

6.1 The learned Sr. Counsel for the Respondent has contended that the Petitioner is not a Licensee because he has not been granted a licence by the appropriate Commission under the provisions of Section 14 of the Electricity Act, 2003. There is no dispute on this aspect by the Petitioner. So the main issue is whether the Petitioner is a deemed Licensee under the provisions of Section 14 of the Electricity Act, 2003. The arguments of both the parties focus on this issue. Learned Sr. Counsel for the Respondent has argued that the Transfer Scheme which came into force on 24.10.2003 does not provide for setting up of GUVNL and that the same scheme became final by 23.10.2004. In other words, the creation of GUVNL in 2005 was by an administrative order without legal basis and was not a part of the Transfer Scheme.

He has further argued that the Transfer Scheme which was amended by Notification of 29.3.2005 transfers only assets, liabilities and proceedings specified in Schedule G thereof, it does not transfer the function (namely, bulk purchase and supply of electricity specified in Schedule G). He has also contended that the residual function of the Board are not transferred to the State Government and hence, there can be no question of the State Government re-transferring the functions of the Board to GUVNL. All that could be transferred and was actually transferred by the State Government was assets, liabilities and proceedings relating to Schedule G alone. Based on these contentions he has argued that the Petitioner

company is not a deemed Licensee within the meaning of Section 2(38) read with Section 14 of the Electricity Act, 2003. He has also argued that the business of bulk purchase and sale of electricity- which the GUVNL website mentions as one of its activities- is not an activity contemplated under the Electricity Act, 2003.

6.2 The learned Advocate for the petitioner has extensively cited various provisions of the Gujarat Act, the Electricity Act, 2003 and the Transfer Scheme to refute the arguments put forward by the Respondent and to establish that the Petitioner is a deemed Licensee under the provisions of the Electricity Act, 2003. According to him, the contention of the Respondent that the Transfer Scheme issued on 24.10.2003 was valid only for 12 months and therefore, there cannot be any transfer and vesting of functions of the Gujarat Electricity Board in GUVNL after 12 months is erroneous. Section 28 of the Gujarat Act- and even Section 131 of the Electricity Act, 2003- enables the State Government to issue, by notification, Transfer Schemes from time to time. We agree with the learned Advocate for the Petitioner that because of this provision, the State Government can notify such schemes from time to time and effect transfer of functions, duties, powers and obligations etc. It cannot be said that the Transfer Scheme of 2003 is the only Transfer Scheme and that any other transfer is ruled out after 2004. The issue of provisionality for a period of 12 months of the Transfer Scheme is with reference to classification of undertakings and transfer of assets, liabilities and proceedings including personnel. In other words, such transfer remains provisional for 12 months and becomes final thereafter. The State Government can introduce Transfer Schemes from time to time”.

6.3 As regards the issues relating to transfer of functions to GUVNL and whether the Electricity Act, 2003 envisages bulk purchase and sale of electricity, we accept the arguments put forward on behalf of the Petitioner.

6.4

6.5 The respondent has also raised the issue that the term “licensee” used in Section 86(1)(f) refers only to a person who is issued a licence by the appropriate Commission under the Electricity Act, 2003 and not to a “deemed licensee”. In this context, we agree with the argument of the learned Advocate for the Petitioner that Section 14 which deals with grant of licence recognizes deemed licensees, who are deemed to have been granted licence under the said section. Further, apart from Section 14, the term “deemed licensee” is not used elsewhere in the Electricity Act, 2003. The term used is only “licensee”. If the interpretation of the respondent is accepted, it would result in an absurd situation where all the references to licensees in the Electricity Act would not include deemed licensee and hence the other provisions of the Electricity Act would not apply to the deemed licensees. The deemed licensee will not be governed by any regulation, including tariff. This sounds absurd. In view of this, we accept that the plain meaning of the deemed licensee is that it is deemed to be a licensee for all purposes of the Electricity Act. The deeming provision in a statute is provided for the purpose of creating a legal fiction.

6.6 In view of the above analysis, we hold that the Petitioner, GUVNL, is a deemed licensee and hence a licensee under the provisions of the Electricity Act, 2003”.

13. In the light of the above findings, we have to analyse the various points pointed out by the Appellant relating to the 1st question as to whether Gujarat Urja can be construed to be the licensee or deemed licensee. Let us now go into this question.
14. Admittedly, the Gujarat Urja (R-2) has not obtained the licence from the State Commission. But, the reading of the relevant provisions under Section 14 and 86 (1) (f) of the Act, 2003 would disclose that the term 'Licensee' refers not only to the person who is issued a fresh licence but also to a deemed licensee. Section 14 which deals with the grant of licence itself recognised the deemed licensee. Therefore, the deemed licensees are deemed to have been granted the licence under Section 14 of the Electricity Act.
15. The plain meaning of the term "deemed licensee" is that it is deemed to be a licensee for all purposes of the Electricity Act. A deeming provision in a statute is provided for the purpose of creating a legal fiction. We cannot curtail the application of the deeming provision. The effect of a statute which has been provided with legal fiction is that whenever a legislature by a statute creates a legal fiction indicating that something shall be deemed to have been done which in fact has not been done, the Tribunal has to give full effect to such legal fiction after examining the question as to for what

purpose such a statutory fiction had been created. This principle is well settled. The Hon'ble Supreme Court in 1995 Supp (2) SCC 498, Voltas Limited, Bombay V. Union of India and Others has dealt with a deeming provision and laid down the principles which are quoted below:

“8. The effect of a statute containing a legal fiction is by now well settled. The legislature by a statute may create a legal fiction saying that something shall be deemed to have been done which in fact and truth has not been done, but even then Court has to give full effect to such statutory fiction after examining and ascertaining as to for what purpose and between what parties such statutory fiction has been resorted to. In the well known case of East End Dwellings Co. Ltd. V. Finsbury Borough Council¹, Lord Asquith has said:

“ If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it... The statute says that you must imagine a certain state of affairs. It does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that State of affairs”.

This Court in the case of State of Bombay v. Pandurang Vinak², Chief Inspector of Mines V. Karam Chand Thaper³, J.K. Cotton Spg and Wvg. Mills Ltd., V. Union of India ⁴, M. Venugopal v. Divisional Manager, LIC⁵ and recently in the case of Harish Tandon V. Addl District Magistrate⁶, has

dealt with in detail the effect of a statutory fiction and the limitation of the court to ignore the mandate of the legislature, unless it is violative of any of the provisions of the Constitution.....”

In the light of the above ratio, the statutory fiction has to be given full effect and due recognition and the same, cannot be ignored. Therefore, it is not correct to contend that merely because a licence has not been obtained by a person from the State Commission, he cannot be considered to be a deemed licensee.

16. Let us now examine whether Gujarat Urja is a deemed licensee as a successor entity of the Electricity Board. We shall first examine the provisions of the 2003 Act.

17. According to 5th proviso to Section 14, the Government company or the company referred to in sub-section (2) of Section 131 of this Act and the company or companies created in pursuance of the Acts specified in the schedule, shall be deemed to be a licensee under the 2003 Act.

18. Section 131 (1) of the Act provides for vesting of property, rights and liabilities of the Electricity Board in State Government. Section 131 (2) stipulates the transfer of property, rights and liabilities vested in State Government to

companies in accordance with the transfer schemes. The relevant sub-sections of Section 131 are reproduced below.

“131. Vesting of property of Board in State Government.

- (1) *With effect from the date on which a transfer scheme, prepared by the State Government to give effect to the objects and purposes of this Act, is published or such further date as may be stipulated by the State Government (hereafter in this Part referred to as the effective date), any property, interest in property, rights and liabilities which immediately before the effective date belonged to the State Electricity Board (hereafter referred to as the Board) shall vest in the State Government on such terms as may be agreed between the State Government and the Board.*
- (2) *Any property, interest in property, rights and liabilities vested in the State Government under sub-section (1) shall be re-vested by the State Government in a Government company or in a company or companies, in accordance with the transfer scheme so published along with such other property, interest in property, rights and liabilities of the State Government as may be stipulated in such scheme, on such terms and conditions as may be agreed between the State Government and such company or companies being State Transmission Utility or generating company or transmission licensee or distribution licensee, as the case may be :*
- (4) *The State Government may, after consulting the Government company or company or companies being State Transmission Utility or generating company or*

transmission licensee or distribution licensee, referred to in sub-section(2)(hereinafter referred to as the transferor), require such transferor to draw up a transfer scheme to vest in a transferee being any other generating company or transmission licensee or distribution licensee, the property, interest in property, rights and liabilities which have been vested in the transferor under this section, and publish such scheme as statutory transfer scheme under this Act.

(5) A transfer scheme under this section may-

(a) provide for the formation of subsidiaries, joint venture companies or other schemes of division, amalgamation, merger, reconstruction or arrangements which shall promote the profitability and viability of the resulting entity, ensure economic efficiency, encourage competition and protect consumer interests;

(e) mention the functions and duties of the transferee;

(7) The Board shall cease to be charged with and shall not perform the functions and duties with regard to transfers made on and after the effective date.

Explanation.- For the purpose of this Part, -

(a) "Government company" means a Government Company formed and registered under the Companies Act, 1956.

(b) "company" means a company to be formed and registered under the Companies Act, 1956 to

undertake generation or transmission or distribution in accordance with the scheme under this Part.”

19. Section 131 (2) stipulates transfer of property, rights and liabilities etc., vested in State Government under Section 131 (1) to be re-vested in a Government company or in a company or companies such companies being State Transmission Utility or generating company or transmission licensee or distribution licensee, as the case may be. It does not have a provision for creation of a State Trading Company responsible for bulk procurement and bulk supply of power to the distribution licensees. Section 131 (4) also stipulate STU or generating company or transmission licensee or distribution licensees as transferors or transferee.

20. In “Explanation” to the Part dealing with reorganization of the Electricity Board given under Section 131 clearly defines ‘company’ registered under the Companies Act, to undertake generation or transmission or distribution in

accordance with the scheme under this part. It does not include a trading company.

21. Section 43 imposes a duty on the distribution licensee to supply electricity on request. Thus, the distribution licensee has to be responsible to procure power to meet its universal supply obligation in its licensed area.
22. The last proviso to Section 14 stipulates that the distribution licensee shall not require a licence to undertake trading in electricity. There is a purpose for this provision. The distribution licensee has to advance planning to procure projected energy and power requirements of its consumers. However, the planned and actual energy and power required and availability will not always match. It is possible that a distribution licensee has made excessive power procurement based on its demand projections that could not materialize due to reasons beyond its control. In such a case, the distribution licensee could sell its surplus to third parties. Similarly in case of its requirement exceeding the availability, the distribution licensee may have to buy

additional power in the short term. Thus, the distribution licence can do power trading without taking any trading licence.

23. Section 62(1) stipulates that the Appropriate Commission has to determine tariff for supply of electricity by generating company to distribution licensee, transmission of electricity, wheeling of electricity and retail sale of electricity. The State Commission is not empowered to determine the tariff for supply by a generating company to a trading licensee.

24. Section 86(1) (b) stipulates that the State Commission shall regulate electricity purchase and procurement process of distribution licensee. However, the Act does not provide for regulation of the electricity purchase and procurement process of a trading licensee. Section 86(1) (j) only provides for fixing of trading margin for intra-state trading of electricity, if considered necessary by the State Commission. Thus, if a State Trading licensee is made responsible to procure power for all the distribution licensees in the State, the State Commission will not be able to regulate electricity purchase and procurement process of the Trading licensee. Therefore, the State Commission will not be able to effectively exercise its power to regulate electricity purchase and procurement process of the distribution licensees under section 86(1)(b) of the Act. It has to be kept in mind that the Power Purchase Cost is a major expenditure of the distribution licensee.

25. The object and reasons of the Act also clearly state that the trading as a distinct activity is being recognized with the safeguard of Regulatory Commissions being authorized to fix ceiling on trading margins, if necessary.
26. The conjoint reading of the various provisions of the Act indicates that the distribution licensee itself has to be responsible for procurement of power to meet the requirements of its consumers. The 2003 Act has no provision for creation of a State Trading licensee for bulk procurement of power and bulk supply to the distribution licensee of the State and to trade the surplus power. On the other hand, the Act casts universal supply obligation upon the distribution licensee and allows trading of power by the distribution licensee without a separate trading licence.
27. The Electricity (Supply)Act 1948 stipulated that the State Electricity Board has to arrange for the supply of electricity that may be required within the State and for the transmission and distribution of the same in the most efficient and economical manner. The Board also had a duty

to supply electricity to a licensee or other persons requiring such supply. The Board could also enter into an agreement with any person providing electricity within the State for purchase. The Board could also enter into purchase and sale of electricity to be generated or used outside the State. Such functions have not been assigned to any entity under the 2003 Act. However, the distribution licensee under the 2003 Act has to arrange for the supply of electricity that may be required in its licensed area and for its distribution to meet its universal supply obligation under section 43 and has also been allowed to undertake trading in electricity without grant of a licence.

28. Section 5.3.4 of the National Electricity Policy stipulates that the Power Purchase Agreements with the generating companies would need to be suitably assigned to the distribution companies. There is no provision for a Trading Company to be assigned with the PPAs and to be responsible for procuring power for the distribution licensees.

29. The Tariff Policy also has similar provision. The relevant sub clause under clause 8.4 is reproduced below:

“2. The National Electricity Policy states that existing PPAs with the generating companies would need to be suitably assigned to the successor distribution companies. The State Governments may make such assignments taking care of different load profiles of the distribution companies so that retail tariffs are uniform in the State for different categories of consumers. Thereafter the retail tariffs would reflect the relative efficiency of distribution companies in procuring power at competitive costs, controlling theft and reducing other distribution losses.”

30. Thus the Tariff Policy envisages assignment of PPAs with generating companies to the successor distribution companies of the State. Initially, while assigning the PPAs the load profiles of the distribution licensees have to be considered i.e. licensee having lower mix of subsidising to subsidised consumer consumption could be assigned more power from the cheaper power stations. Thereafter, the retail tariffs will reflect the relative efficiency of distribution companies in procuring power at competitive costs and controlling theft and reducing distribution losses.

31. Thus, the tariff policy also envisages procurement of power directly by the distribution licensees and the reduction in tariff on account of the efficiency of the distribution licensee in procurement of power and other operations to be passed on the consumers of that distribution licensee.
32. In some States, including Gujarat, State Trading companies have been constituted following the reorganization of the State Electricity Board, which are responsible for bulk purchase and supply to the distribution licensees in the State. All the PPAs with generating companies have also been assigned to the State Trading Company. However, the cost of power supply to various distribution licensees is not the average cost of procurement of power by the State Trading Company. The cost of supply to a distribution licensee is decided by the Commission with a view to keep the retail supply uniform for all the distribution licensees irrespective of their relative efficiencies. This is against the provisions and spirit of the Electricity Act, National Electricity Policy and Tariff Policy to promote competition.
33. The State Government by its wisdom notified the transfer scheme, 2003 transferring the generation function to Gujarat State Electricity Corporation Ltd.(GSECL) transmission

function to Gujarat Energy Transmission Corporation Ltd.(GETCO) and distribution functions to the four distribution companies. However, the bulk purchase and bulk supply function i.e. purchase of electricity in bulk from generating companies within and outside the State of Gujarat and supply in bulk to distribution companies and other distribution licensees was retained with the Board, till further orders of the State Government. Subsequently, on 29.3.2005, the State Government by an administrative order transferred the bulk purchase and supply function to the Gujarat Urja.

34. Let us now examine the relevant provisions of the State Reorganisation Act, 2003 which was notified on 12.5.2003 before the enactment of the 2003 Act and the provisions of which not inconsistent with the 2003 Act have been saved under section 185(3) of the 2003 Act. It is noticed that the Reorganisation Act,2003, is based on the Indian Electricity Act 1910 and the Electricity(Supply) Act,1948 prevailing at the time of its notification.

35. Section 20(1) of the Reorganisation Act, 2003 stipulates grant of licence to any person *inter alia* to supply electricity in bulk to any other licensee. This provision is in line with the provision of the Electricity (Supply) Act 1948 but is inconsistent with the provisions of the 2003 Act.
36. Section 28(1) of the Reorganisation Act, 2003 provides for notification by the State Government from time to time to reorganize the Government Electricity Industry and transfer of its functions, duties, powers, obligations, etc. as per the transfer scheme.
37. Section 28(6) provides for the State Government to notify the functions, duties, powers, obligations, etc. exercisable by the Board under the 1910 Act and 1948 Act be exercisable by the first transferee or the second transferee or by other companies, etc., as specified by the State Government.
38. Section 30 stipulates that the transfers in terms of Section 28 shall be provisional for a period of 12 months from the effective date of transfer and the State Government reserves

the right to alter, vary, modify or add or change the terms as the Government may consider appropriate.

39. Accordingly, the Transfer Scheme 2003 was notified on 24.10.2003.

40. As per the Transfer Scheme, the generation assets and the functions of the Electricity Board related to generation were transferred to Gujarat State Electricity Corporation Ltd.(GSECL), transmission assets and functions to Gujarat Energy Transmission Corporation Ltd.(GETCO) and the distribution assets and functions to four distribution companies. All the assets, liabilities, proceedings and functions specified in schedule G were continued to be retained by the Electricity Board till the further orders of the State Government. The bulk purchase and bulk supply functions, namely, purchase of electricity in bulk from the generating companies within and outside the State including GSECL, and supply of electricity in bulk to distribution companies and other distribution licensees in the State of Gujarat or outside were included in Schedule G and were

retained by the Electricity Board. Such functions were being carried out by the Board under the 1948 Act but the same are inconsistent with the 2003 Act. Section 131 of the 2003 Act also does not envisage continuation of bulk purchase and supply function with the Board subsequent to reorganisation. Thus, the provision relating to retaining of function of bulk procurement and supply to distribution licensees with the Board in the Transfer Scheme was inconsistent with the 2003 Act.

41. According to clause 9 of the Transfer Scheme, the scheme was provisional for a period of 12 months from the date of transfer. However, during the period of 12 months the State Government could amend, vary or modify or change the terms and conditions of transfer. According to clause 9 (3), on expiry of the period of 12 months the date of transfer and subject to any directions given by the State Government, the transfer of assets, liabilities, proceedings and personnel made in accordance with the Transfer Scheme shall become final.

42. Subsequently, on 1.4.2005, the State Government by an administrative order formed Gujarat Urja as the holding company with the functional responsibility of bulk purchase and sale of electricity and supervision co-ordination and facilitation of the activities of the other six companies. 100% shares of the generation, transmission and distribution companies are also held by Gujarat Urja with effect from 1.4.2005 thus becoming subsidiaries of Gujarat Urja.

43. The Ld. Sr. Counsel for the Appellant has contended that the Transfer Scheme issued on 24.10.2003 was valid only for 12 months and therefore, there can not be any transfer and vesting of functions of the Electricity Board in Gujarat Urja after 12 months. We notice that the Section 28 of the Reorganisation Act enables the State Government to issue by notification, Transfer Scheme from time to time. Section 28(4) also empowers the Government to transfer the functions, duties, powers and obligation from the first transferee to the second transferee. Thus transferring of residual functions from the Electricity Board to Gujarat Urja

could not be challenged on the ground of time limit of 12 months. However, what needs to be examined is as to whether the retention of functions of bulk purchase and sale transferred with the Board and then transfer to Gujarat Urja are in consonance with the Electricity Act, 2003.

44. As discussed in the preceding paragraphs, there is no provision in the Electricity Act, 2003 including Section 131, regarding a licensee responsible for bulk procurement and supply of power to the various distribution licensees of the State. Section 20(1) of the State Reorganisation Act stipulates grant of licence to any person to supply electricity in bulk to any other licensee but it is inconsistent with the provision of the 2003 Act and therefore will not be applicable as per section 185(3) of the 2003 Act. The question arises as to whether such an entity created in the State under Transfer Scheme being inconsistent with the provisions of the Act could be treated as a deemed licensee? According to the Appellant, the answer must be a emphatic 'No'. This requires serious consideration.

45. Section 14 of the Act provides for grant of licence for transmission, distribution and trading. There is no provision for a licence for bulk procurement and bulk supply of electricity to the distribution licensees of the State or an electricity trader who will be responsible for bulk procurement and supply to the distribution licensees. On the other hand as per the last proviso to Section 14, the distribution licensee does not require a license to undertake trading in electricity. The National Electricity Policy and Tariff Policy also provide for assigning of the PPA to the distribution licensees and make them responsible for procurement of power to encourage competition. Thus, Gujarat Urja may not be a deemed licensee under the provisions of the Act.

46. While holding that Gujarat Urja may not be a deemed licensee under section 14 of the 2003 Act, we want to make it very clear that the State Govt. could form a trading company which would take licence from the State Commission to carry out trading of power under the provisions of the Act. There is also no illegality if the distribution licensees of the State jointly procure power through their authorised representative. However, the distribution licensees will themselves be accountable for

load forecasting, procedure for procurement, reasonableness of price, payment, etc.

47. Though we decide that Gujarat Urja may not be deemed licensee, we cannot brush aside the fact that Gujarat Urja admittedly is the holding company and the distribution licensees are its subsidiaries. Gujarat Urja has 100% equity holding of the distribution licensee. Gujarat Urja is also procuring power on behalf of its subsidiary distribution licensees and also trading power surplus to the needs of the distribution licensees.

48. Thus there is a nexus between the PPA entered into between Gujarat Urja and PTC and the distribution licensees. Even assuming that Gujarat Urja is not a deemed licensee, there is no illegality if Gujarat Urja as the holding company enters into PPA on behalf of and as a representative of the distribution licensees to procure power and to sell power surplus to the needs of the distribution licensees. Gujarat Urja has signed PPA with PTC after stepping into the shoes of the distribution licensees and on their behalf. Thus, the PPA signed by Gujarat Urja with PTC on behalf of the distribution licensees will be construed as a PPA between the distribution licensees and the PTC.

49. The Tribunal in various cases has decided that if there is a nexus between the PPA entered into between a generating company and the trading licensee and the distribution licensee of State, then the concerned State Commission will have jurisdiction to arbitrate upon a dispute between the generating company and the trading licensee. The same principle will apply to this case also since Gujarat Urja is the holding company of the distribution licensees and is procuring power and trading surplus power to the needs of the distribution licensees on their behalf. There is clearly a nexus between the PPA entered into between Gujarat Urja and PTC and the distribution licensees. PTC was also aware of the status and functions of Gujarat Urja at the time of signing of the PPA. PTC raised the dispute of status of Gujarat Urja and jurisdiction of the State commission only when Gujarat Urja sought penalty/compensation from PTC under the PPA. Thus the Gujarat State Commission is the appropriate Commission to adjudicate upon the dispute between the Appellant(PTC) and the Gujarat Urja(R2).

50. Thus, on the first issue, even assuming that Gujarat Urja is not a deemed licensee, we hold that there is a nexus between the PPA entered into between PTC and Gujarat Urja and the distribution licensees of Gujarat. Therefore, the dispute in question between PTC and Gujarat Urja will be construed to be a dispute between PTC and the distribution licensees i.e. between two licensees, for the purpose of deciding the jurisdiction of the Appropriate Commission. Accordingly, we answer this question against the Appellant.

51. Let us now go into **2nd question** namely whether the State Commission has got the jurisdiction to adjudicate upon the disputes between licensees inter-se.

52. It is contended by the Appellant that even assuming that the Gujarat Urja is a licensee, section 86(1)(f) deals with the dispute only between licensees and generating companies and not between the two licensees. The learned Senior Counsel appearing for the Appellant relied upon the judgement of Hon'ble Supreme Court in the case of Gujarat

Urja Vikas Nigam Limited Vs Essar Power Limited (2008/Vol-4/SCC 755) in which it is held that the dispute between the licensee and generating company can be adjudicated by State Commission whereas all other disputes would be decided upon according to section 11 of the Arbitration and Conciliation Act. He has also cited the judgment of Division Bench of High Court of Gujarat in PTC India Vs GUVNL reported as 2008(Vol.2) GLR 1185 wherein it is held that section 86 (1)(f) gives jurisdiction to the State Commission only in respect of disputes between licensees on one hand and generating companies on the other hand and not between licensees inter-se.

53. On the basis of these decisions, it is strenuously contended that the State Commission could not go into the dispute between two licensees since Section 86 (1) (f) provides that State Commission could go into the dispute only between the licensee and generating company. On the other hand it is submitted by the learned counsel for the Gujrat Urja(R-2)

that section 86(1)(f) of the Act would be applicable even for the dispute between two licensees.

54. It is further contended by the Respondent that, in view of the fact that plain reading of the said provision, the use of expressions “licensees” and “generating companies” (plural) would clearly show that the provisions would be applicable in the event of a dispute not only between the generating company and licensee but also between two generating companies or between two licensees.

55. In order to substantiate this plea, the learned counsel for the Respondent-2 cited the Bombay High Court judgment in the case of Dabhol Company, Maharashtra State Electricity Board in WP 1205 of 2001 in which it is held that the term “between” would indicate that the disputes mean not only the disputes between licensees and the utilities but also between two utilities. On the strength of this judgment the learned counsel for Respondent-2 contended that the provision 86(1)(f) is analogous to the provision of 22(2)(n) of the ERC Act and therefore the conclusion arrived at by the

State Commission on the strength of this decision of Bombay High Court judgment is perfectly justified. Per contra, the Appellant submits that the judgment of Gujarat High Court is binding on the Gujarat Commission and Bombay High Court judgment is not binding.

56. We have carefully considered the rival submissions made by both the parties on this question. Before dealing with this question it will be worthwhile to refer to the discussion and finding given by the State Commission on this question.

“APPLICABILITY OF SECTION 86(1)(f) TO ADJUDICATION OF DISPUTES BETWEEN TWO LICENSEES.

7. The second issue which was raised by the respondent in order to question the jurisdiction of the Commission and was argued extensively by both the parties is whether under Section 86(1)(f) the Commission can adjudicate on disputes between two licensees. It was argued by the respondent – and strongly contested by the petitioner – that Section 86(1)(f) covers adjudication of disputes only between a generating company on the one hand, and a licensee on the other, and not between two licensees. In this context, both the parties cited decisions of High Courts and the Hon’ble Supreme Court. In fact, several of the decisions and observations of High Courts and Hon’ble Supreme Court cited by both the parties related to the same cases. We analyse below the above issue in the light of the arguments put forward by both the parties.

8. *The respondent has relied on two important cases: The judgement of the Hon'ble Supreme Court in Gujarat Urja Vikas Nigam Ltd., V. Essar Power Ltd(2008)4 SCC755, and the decision of the Hon'ble Gujarat High Court in PTC India Ltd., V. GUVNL, 2008(2) GLF 1185. Shri Parag Tripathi, ASG, appearing on behalf of the respondent, also cited a number of cases to show that the decisions of the Hon'ble Supreme Court and the jurisdictional High Court, are binding on the Commission.*

8.1 *As it was argued by the learned Advocate for the petitioner in the above mentioned case between GUVNL and Essar Power, the Hon'ble Supreme Court was considering the scope of Section 86(1)(f) vis-a-is Section 11 of the Arbitration and Conciliation Act,1996. The only issue before the Hon'ble Supreme Court was with regard to the jurisdiction of the State Commission as against arbitration between the parties. Para 24 of the judgement of the Hon'ble Supreme Court reads as under:-*

“24. The main question before us is whether the application under Section 11 of the Act of 1996 is maintainable in view of the statutory specific provisions contained in the Electricity Act of 2003 providing for adjudication of disputes between the licensees and generating companies.”

8.2 *The respondent has made reference to paras 26 and 59 of the judgement of the Hon'ble Supreme Court to argue that the Hon'ble Supreme Court has decided the scope of 86(1)(f) to be limited only to disputes between a generating company on the one side and a licensee on the other. This does not seem to be valid. The decision of the Hon'ble Supreme Court is not to the effect that disputes which can be subject matter of any adjudication*

under Section 86(1)(f) of the Electricity Act, 2003 should be between a licensee and a generating company, and not between two licensees. There is no such observation either directly or something which leads to any such inference from a decision. In the paragraphs such as 26 and 59 cited by the respondent, the Hon^{ble} Supreme Court has used the same expression as in the relevant section of the Electricity Act, 2003. The Hon^{ble} Supreme Court in the above case was dealing with a dispute between a generating company (Essar Power Ltd.) and a licensee (GUVNL), and in this context the expressions a “licensee” and a “generating company” have been used. The Hon^{ble} Supreme Court has used the expression “licensees” in para 28, 34, 60 and 61 of the judgment dealing with the scope of Section 86(1)(f) of the Act. The Hon^{ble} Supreme Court has not gone into the issue whether this provision is applicable to disputes between only a licensee and a generating company, and not between two licensees.

8.3 The respondent has also relied on the decision of the Hon^{ble} High Court of Gujarat in PTC India Ltd. v. GUVNL referring to para 30 of the judgement which reads as under:

“30. As regards the objection based on Para 3.7.1 of R.F.P. that a dispute arising out of or in connection with the process shall be submitted to adjudication by the Appropriate commission, it is pertinent to note that the question of invoking this clause would arise when an agreement is already entered into between the parties, and thereafter, one of the parties raises a dispute about the tariff stream or the tariff structure. It is at that stage that the dispute will have to be adjudicated by the Appropriate commission. In the facts of the instant case, there is no dispute about the

determination of tariff which is already indicated as Rs. 2.89 per unit.

8.3.1 Based on the above paragraphs of the judgement, the respondent contends that the Hon^{ble} High Court of Gujarat has authoritatively held that the scope of Section 86(1)(f) is limited to the dispute between a licensee and a generating company and cannot extend to a dispute between to licensees. It has also been argued by the respondent that the above decision being that of the Hon^{ble} High Court of Gujarat is binding on this Commission as an authoritative precedence and in any case as an obiter dicta.

8.3.2 We do not accept the above inference of the respondent. The above quoted para 30 of the Judgement of the Hon^{ble} High Court needs to be read in the context of the issue before the High Court. The Hon^{ble} High Court was considering the maintainability of the writ petition under Art. 226 of the Constitution of India in the circumstances where an alternative remedy was provided for in Section 86(1)(f) of the Electricity Act, 2003. The Hon^{ble} High Court came to the finding that there was no dispute between a generating company and a licensee, namely, the Project developer and PTC India Ltd., and there was no agreement between PTC India Ltd. and GUVNL. The issue in the case was a direction to be given to GUVNL to enter into an agreement with PTC India Ltd. Such a direction is outside the scope of Section 86(1)(f) which envisages disputes to be settled after coming into existence of a relationship between two licensees and not before. In terms of Section 86(1)(f) the Commission cannot adjudicate to decide that a licensee will enter into an agreement with another licensee.

8.3.3 *In the above case the Hon^{ble} High Court decided to exercise the writ jurisdiction. The observations contained in para 30 to this effect that “There is no dispute between the petitioner (which is a licensee to undertake trading in the electricity as an electricity trader) and the generating company with which it has entered into an agreement being Corporate Power Ltd. Under the circumstances, there is no question of applicability of Section 86(1)(f) of the Act” to be considered in the above context. This sentence in the judgement cannot be read totally out of context to contend that the Hon^{ble} High Court has held that a dispute between two licensees is outside the scope of Section 86(1)(f) of the Act. There is no such observation. There is no such discussion on the merits. Any observation made in this context cannot be taken as a decision stating that the Commission has no jurisdiction on a dispute between two licensees or that the scope of section 86(1)(f) is limited to dealing with a dispute between a licensee and a generating company. The observation made by the Hon^{ble} High Court is not a ratio decidendi for the proposition that no dispute between two licensees can be adjudicated under Section 86(1)(f).*

8.4 *As mentioned earlier, the respondent cited several judgements to contend that the decisions of the Hon^{ble} Supreme Court and the Hon^{ble} High Court are binding on the Commission. In view of the foregoing analysis, the above argument becomes redundant. The respondent has also argued on the principle of obiter dicta. It may be mentioned here that an obiter dicta is not a binding decision. A decision binds on the issue that is decided and not what can be inferred or deduced or assumed from the decision. In this context, the following decisions cited by the learned Advocate for the petitioner are relevant.*

8.4.4 In view of the above, we are of the view that the two judgements cited by the respondent cannot be taken as obiter dicta. Furthermore, the observations from the judgements referred to by the respondent do not lead to the inference that Section 86(1)(f) of the Electricity Act, 2003 does not cover adjudication of a dispute between two licensees.

9. The above conclusion becomes much stronger if we consider the following judgements cited by the learned Advocate for the petitioner.

9.1 Before discussing the judgements, it is worthwhile to quote the section 86(1)(f) of the Electricity Act, 2003 as follows:

“(f) adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration;”

9.1.1 It may be observed that the term used is “licensees” in contrast to “a licensee”. In this connection, it is worthwhile to read Section 22(2)(n) of the Electricity Regulatory Commissions Act, 1998:

“(n) to adjudicate upon the disputes and differences between the licensees and utilities and to refer the matter for arbitration”.

9.2 The above provision was interpreted by the Hon“ble Bombay High Court while analyzing the same contention that the dispute between two licensees cannot be adjudicated by the State Commission in the case of Dabol Power Co. v. Maharashtra State Electricity Board, decided on 5.3.2002 in WP No. 1205 of 2001.

9.3 *The Karnataka Electricity Regulatory Commission by order dated 21.10.2009 in Petition No. 20 of 2009 adjudicated upon the dispute between M/s. Mangalore Electricity Supply Company Ltd., a distribution licensee, and M/s Pune Power Development Pvt Ltd., an inter-state trading licensee. In the appeal filed against this decision, the Appellate Tribunal in appeal No. 200 of 2009 upheld the jurisdiction of the State Commission to adjudicate upon disputes between two licensees.*

9.4 *The disputes between Tata Power and Reliance Industries, both being two licensees, were decided by the Hon^{ble} Supreme Court in Tata Power Company v. Reliance Energy Ltd (2008) 10 SCC 321. This arose out of the order passed by the Maharashtra Electricity Regulatory Commission holding that Tata Power has a restricted licence; the order was taken up in appeal to the Appellate Tribunal and then to the Hon^{ble} Supreme Court under a petition under Section 22(2)(e) and (n) of the Electricity Regulatory Commissions Act. The above dispute between two licensees was adjudicated by the Commission without there being an issue of lack of jurisdiction of the Commission.*

9.5 *The above decision clearly brings out that adjudication of disputes between two licensees comes within the purview of Section 86(1)(f) of the Electricity Act, 2003. We do not find any merit in the argument of the respondent that the decision of the Hon^{ble} Bombay High Court in the case of Dabhol Power Company is not applicable in the present case, because the judgement of the Hon^{ble} Gujarat High Court in the case relating to PTC India Ltd. v. GUVNL is binding. The latter judgement, even if it is binding on the Commission, has no relevance to the issue in question.*

9.6 *In a very recent judgement dated 4.11.2011 in appeal No. 15 of 2011, the Appellate Tribunal for Electricity has clearly observed in the context of Section 86(1)(f) as under:*

“15. This provision deals with adjudication of the dispute between (a) Generating Company and Licensee or (b) between Licensees”.

9.7 *Hence, we hold that the Commission has the jurisdiction to adjudicate upon disputes between two licensees under Section 86(1)(f) of the Electricity Act, 2003.*

57. In the light of the discussions and findings rendered by the State Commission as referred to above, on this question, we have to analyse the submissions made by both parties.

58. Before considering the authorities cited by both the parties, let us go into the first principle by adopting an interpretation of the relevant section of the Act.

59. Let us quote 86(1)(f) of the Electricity Act as below:-

“adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration.”

60. The plain reading of section 86(1)(f) of the Act would indicate that the section refers to the disputes between the licensees and generating companies. The term used is “licensees” as opposed to a “licensee”(singular). The section 86(1)(f) confers power on the State Commission to

adjudicate upon the disputes between the generating companies and the licensees since the disputes can directly or indirectly have ramifications on the matters statutorily entrusted to its exclusive jurisdiction. The term “adjudicate” denotes wide amplitude. The word “between” can not mean i.e. only between the generating companies on one hand and licensees on the other hand. On a proper interpretation the word “between” can be understood to mean “among”.

61. The scheme of Electricity Act,2003 would clearly show that the provisions of 86(1)(f) would be applicable even to the disputes between two licensees. In other words, on a plain reading of the provision, it is noticed that the expressions “licensees”(plural) generating companies(plural) have been used and this would show that the provisions would be applicable in the event of disputes not only between (a) generating company and licensee but also (b) between two generating companies and (c) between two licensees. There is no rationale whatsoever to limit or restrict the application of section 86(1)(f) of the Act, only to those mentioned in clause (a) as referred to above as contended by the Appellant. Similarly, there is no rationale whatsoever to exclude the dispute between two licensees from the adjudication under section 86(1)(f) of Electricity Act,2003.

62. In the context of the above interpretation, let us now deal with the decisions cited by both the parties. The Appellant has relied upon the decision of the High Court of Gujarat in PTC India Limited Vs Gujarat Urja Vikas Nigam Limited reported in 2008(Vol.II) GLR 1185. The Appellant has referred to para 30 of the above judgement. The same is as follows:-

“30. As regards the objection based on Para 3.7.1 of R.F.P that a dispute arising out of or in connection with the process shall be submitted to adjudication by the Appropriate Commission, it is pertinent to note that the question of invoking this clause would arise when an agreement is already entered into between the parties, and thereafter, one of the parties raises a dispute about the tariff stream or the tariff structure. It is at that stage that the dispute will have to be adjudicated by the Appropriate Commission. In the facts of the instant case, there is no dispute about the determination of tariff which is already indicated as Rs.2.89 per unit.

So also, the contention based on Sec.86(1)(f) does not come in the way of maintainability of the petition because it only provides the licensees and the generating companies and to refer any dispute for arbitration. Neither the petitioner nor the respondent is a generating company.

63. Based on the above observation made by the Gujarat High Court, the Appellant contends that High Court has clearly held that 86(1)(f) is restricted to a dispute between the licensee and generating company and it can not extend to a dispute between two licensees and therefore the decision is binding on the State Commission. The State Commission while considering the decision of the High Court held that the said order passed by the High Court was in the context of the issue before the High Court, which is different from

the issue raised before the State Commission and as such, the observation made while discussing with some other issue cannot be taken as a ratio on this issue and as such this is not binding on the State Commission.

64. On the contrary, the Appellant strenuously contended that there is a specific finding with regard to the disputes between two licensees raised by the parties, who were parties before the present proceedings and so this finding would be binding on both the parties as well as State Commission.

65. We are unable to accept the contention of the Appellant. In fact, we do not find any infirmity in the reasonings given by the State Commission to reject the arguments of the Appellant. As correctly pointed out by the State Commission, these observations were made by Gujarat High Court while considering the maintainability of the writ petition under article 226 of Constitution of India, in the light of the circumstances where alternative remedy was provided for under various provisions of the Act. In that context, the High Court of Gujarat came to a finding that there is no dispute between the generating company and licensee since there was no agreement between the parties. The issue in the above writ petition relating the direction to be issued to the Gujarat Urja Vikas Nigam Limited to enter in

agreement with PTC India Limited. Such a direction is wholly, outside the scope of section 181 of the Act which envisages the disputes to be settled after giving to the existence of relationship between two licensees. In other words, in terms of section 86(1)(f) the State Commission can not adjudicate to provide that a licensee will enter into an agreement with another licensee.

66. In the above context, the High Court of Gujarat decided to exercise the writ jurisdiction. Therefore, the observations made by the High Court to the fact that there is no dispute between the Writ Petitioner which is a licensee to undertake the trading in electricity and the generating company with which it has entered into an agreement and under those circumstances there is no question of applicability of section 86(1)(f). This has got to be viewed in the above context. In other words, the observations contained in the judgement of Gujarat High Court cannot be understood and read, totally out of context to contend that the High Court of Gujarat has held that a dispute between two licensees is outside the scope of section 86(1)(f) of the Act. In other words, there is no ratio decided on the basis of discussion and merits.

67. In the said matter High Court of Gujarat considered the question whether to exercise the Writ jurisdiction or not when there is an alternative remedy available. It is settled

law even when there is an alternative remedy available, it would not oust jurisdiction of the High Court under article 226 of the Constitution of India. The High Court, by practice generally refused to exercise its jurisdiction and relegates the parties to approach through alternative remedy. But, in this case, the High Court while exercising its discretion wanted to exercise its jurisdiction and passed necessary orders. Any observation made in the above context can not be taken as a ratio to the effect that State Commission has no jurisdiction to decide on the disputes between two licensees as the State Commission will have jurisdiction to deal with the disputes only between licensee and generating company. If the contention of the Appellant, on the strength of the above judgment is accepted, it would defeat the object and purpose of the provision of the Act. Therefore, the reliance placed by the Appellant on the judgement of Gujarat High Court is misplaced since the mere observations, on the principle of obiter dicta can not be considered to be a binding precedents. The decision binds on the issue that is decided and not what can be inferred or deduced or assumed from the said decision. On this point the learned Counsel for Gujarat Urja (R-2) has cited the following authorities which are as follows:-

A. Krishena Kumar V Union of India, (1990) 4 SCC 207

“18. The basic question of law that has to be decided, therefore, is what was the ratio decidendi in Nakara case and how far that would be applicable to the case of the PF retirees.

19. The doctrine of precedent, that is being bound by a previous decision, is limited to the decision itself and as to what is necessarily involved in it. It does not mean that this Court is bound by the various reasons given in support of it, especially when they contain “propositions wider than the case itself required”. This was what Lord Selborne said in Caledonian Railway Co. v. Walker’s Trustees and Lord Halsbury in Quinn v. Leatham. Sir Frederic Pollock has also said : “Judicial authority belongs not to the exact words used in this or that judgment, nor even to all the reason given, but only to the principles accepted and applied as necessary grounds of the decision”.

20. In other words, the enunciation of the reason or principle upon which a question before a court has been decided is alone binding as precedent. The ratio decidendi is the underlying principle, namely, the general reasons or the general grounds upon which the decision is based on the test or abstract from the specific peculiarities of the particular case which gives rise to the decision. The ratio decidendi has to be ascertained by an analysis of the facts of the case and the process of reasoning involving the major premise consisting of a pre-existing rule of law, either statutory or judge-made, and a minor premise consisting of the material facts of the case under immediate consideration. If it is not clear, it is not the duty of the

court to spell it out with difficulty in order to be bound by it. In the words of Halsbury:

“The concrete decision alone is binding between the parties to it but it is the abstract ratio decidendi, as ascertained on a consideration of the judgment in relation to the subject matter of the decision, which alone has the force of law and which when it is clear is not part of a tribunal’s duty to spell out with difficulty a ratio decidendi in order to bound by it, and it is always dangerous to take one or two observations out of a long judgment and treat them as if they gave the ratio decidendi of the case. If more reasons than one are given by a tribunal for its judgment, all are taken as forming the ratio decidendi.”

B. Bhavnagar University V Palitana Sugar Mills (P) Ltd., (2003 2 SCC 111

“59. A decision, as is well known, is an authority for which it is decided and not what can logically be deduced therefrom. It is also well settled that a little difference in facts or additional facts may make a lot of difference in the precential value of a decision. [See Ram Rakhi v. Union of India, Delhi Admn (NCT of Delhi) V Manohar Lal, Haryana Financial Corpn. V. Jagdamba Oil Mills and Nalini Mahajan (Dr) V Director of Income Tax (Investitation)]

C. Amrendra Pratap Singh v. Tej Bahadur Prjapati (2004) 10 SCC 65

“28.... A judicial decision is an authority for what it actually decided and not for what can be read into it by implication or by assigning an assumed

intention to the judges, and inferring from it a proposition of law which the judges have not specifically laid down in the pronouncement....”

**D. Municipal Corpn of Delhi V. Grunam Kaur (1989)
1 SCC 101**

“12. In Gerard v. Worth of Pairs Ltd.² (k) , the only point argued was on the question of priority of the claimant’s debt, and, on this argument being heard, the court granted the order. No consideration was given to the question whether a garnishee order could properly be made on an account standing in the name of the liquidator. When therefore, this very point was argued in a subsequent case before the Court of Appeal in Lancaster Motor Co. (London) Ltd. V Bremith Ltd.³, the Court held itself not bound by its previous decision. Sir, Wilfrid Greene, M.R., said that he could not help thinking that the point now raised had been deliberately passed Sub Silentio by counsel in order that the point of substance might be decided. He went on to say that the point had to be decided by the earlier court before it could make the order which it did; nevertheless, since it was decided “without argument, without reference to the crucial words of the rule, and without any citation of authority”, it was not binding and would not be followed. Precedents sub silentio and without argument are of no moment. This rule has ever since been followed. One of the chief reasons for the doctrine of precedent is that a matter that has once been fully argued and decided should not be allowed to be reopened. The weight accorded to dicta varies with the type of dictum. Mere casual expressions carry no weight at all.

Not every passing expression of a judge, however eminent, can be treated as an ex cathedra statement, having the weight of authority.”

E. Union of India V Chajju Ram (2003) 5 SCC 568

“23. It is now well settled that a decision is an authority for what it decides and not what can logically be deduced there from. It is equally well settled that a little difference in facts or additional facts may lead to a different conclusion”.

68. In view of the above principles laid down by the Hon'ble Supreme Court, we are unable to accept the contention of the Appellant on this issue.
69. In this context, we are to deal with one of the decisions cited by the learned Counsel for respondent given by Bombay High Court in the case of Dabhol Power Company Vs Maharashtra State Electricity Board in WP No.1205 of 2011 wherein the provisions of section 22(2)(n) of the Electricity Regulatory Commission Act 1998 which is parimateria to section 86(1)(f) of the Electricity Act of 2003 has been interpreted. The Bombay High Court in that judgement has given interpretation with regard to the term “between” the licensees” and “Utilities”.

70. Let us quote the relevant portion of the said judgment. Section 22(2)(n) of Electricity Regulatory Commission Act 1998 reads as under:-

“(n) to adjudicate upon the disputes and differences between the licensees and utilities and to refer the matter for arbitration”.

“37. Section 22(2)(n) confers power on the State Commission to adjudicate upon disputes and differences between the licensees and utilities as such disputes and differences can directly or indirectly have ramifications or implications on the matters statutorily entrusted to its exclusive jurisdiction. Such disputes can no longer be left to be resolved through private dispute resolution mechanisms and have to be adjudicated upon by the Commission in accordance with the provisions of the ERC Act. The word ‘adjudicate’ clearly denotes wide amplitude of power. The Legal Thesaurus(2n Edition) defines adjudicate as “to deliver judgment, determine finally, exercise judicial authority”. The Blacks Law Dictionary(6th Edition) defines it as “to determine finally. Synonymous with adjudge in its strictest sense”. Mr. Chidambaram, however, urged that section 22(2)(n) would cover disputes only between the licensees and utilities and not between two utilities. In other words, there must be dispute between licensee on the one hand and the utility on the other hand. The interpretation is based on complete misconceived reading of section 22(2)(n). The submission ignores the well settled meaning of the word “between” which means “among”. The Blacks Law Dictionary (6th Edition) states that sometimes it is used synonymous with among. In re:Cossentine(1933) CH 119 Maugham J examined the article in the Oxford

Dictionary on the word and pointed out that, today, with reference to a division and particularly to an equal division, the words 'between' was not only the natural word to use, but was just and proper as the word 'among'. (see also re: Alcock(1945) 1 Ch.264.) (emphasis supplied).

71. Thus, the above provision has been interpreted by the Bombay High Court while answering the similar point raised before the Bombay High Court that the dispute between two licensees can be adjudicated by State Commission. In the said decision the Bombay High Court has made a detailed discussion and analytical interpretation of the above provision which is parimateria to section 86(1)(f) of the Act, 2003. This interpretation in our view would squarely be applicable to the present case as well since in both the sections, the wordings are similar. As such the section 86(1)(f) should be interpreted to mean that the term 'dispute' means not the disputes only between the licensees and generating companies but also the disputes between the licensees inter-se and generating companies inter-se.
72. The Appellant cited the judgement of Hon'ble Supreme Court reported in 2008(Vol-4)SCC 755 in Gujarat Urja Vikas Nigam Limited Vs Essar Power Limited in which it is held that as far as the dispute between licensee and generating company is concerned the same would be adjudicated by the State Commission whereas all the other disputes

including between the licensees would be decided in accordance with section 11 of the arbitration and conciliation Act 1996.

73. On the strength of this judgement, the Appellant wants this Tribunal to infer that the Hon'ble Supreme Court has given a ratio in this judgment that 86(1)(f) is restricted only to adjudicate upon the disputes between the licensees on one hand and generating companies on the other hand and not between the licensees. According to the Appellant, the judgement of the Hon'ble Supreme Court is binding on both the State Commissions as well as this Tribunal.

74. This contention is mis-conceived for the following reasons:-

In the judgement of Hon'ble Supreme Court, 2008(Vol-4)SCC 755, the wide scope of section 86(1)(f) has been dealt with in detail. In the judgement, Hon'ble Supreme Court held that section 86(1)(f) confers a wide jurisdiction on the State Commission to adjudicate upon the disputes. As a matter of fact, the Hon'ble Supreme Court has held that the jurisdiction of the State Commission apart from the clauses under section (a) to (e) and (g) to(k) of 86(1) would extend further to other disputes within the jurisdiction of State Commission. The relevant observation is as follows:-

“The Hon’ble Supreme Court has held as under:

“After 10.6.2003 there can be no adjudication of dispute between licensees and generating companies by anyone other than the State Commission or the arbitrator(or arbitrators) nominated by it. We further clarify that all disputes, and not merely those pertaining to matters referred to in Clauses(a) to (e) and (g) to (k) in Section 86(1), between the licensees and generating companies can only be resolved by the Commission or an arbitrator appointed by it. This is because there is no restriction in Section 86(1)(f) about the nature of the dispute.”

75. Thus, the Hon’ble Supreme Court has held that section 86(1)(f) confers wide powers to the State Commission which not only includes the matters referred to under section 86(1)(a) to (e) and (g) to (k) but also other disputes. If the interpretation as suggested by the Appellant and if the disputes between two licensees are excluded, the very purpose of providing statutory adjudication of the disputes overriding the contractual arrangements between the parties would be frustrated. This is the ratio decided by the Hon’ble Supreme Court which is binding on the State Commission as well as this Tribunal.
76. Thus, reliance of the Appellant on the decision of the Hon’ble Supreme Court in the case of Gujarat urja Vikas Nigam Limited V Essar Power, (2008) 4 SCC 755 to contend that the Hon’ble Supreme Court has decided the scope of

Section 86(1) (f) to be only limited to a dispute between a generating company on one side and a licensee on the other is misplaced. The decision of the Hon'ble Supreme Court is not to the effect that the disputes which can be subject matter of any adjudication under section 86(1)(f) of the Electricity Act, 2003 should be between a licensee and a generating company and not between two licensees. In fact, there is no such observation either directly or indirectly or something which leads to any such inference from the decisions.

77. The attempt on the part of the Appellant to derive such an inference because of the use of the expressions 'a licensee' and 'a generating company' at paras 26 and 59 of the judgement is not factually correct. The Hon'ble Supreme Court in the above case was dealing with a dispute between a generating company(Essar Power Ltd) and a licensee (GUVNL) and in the above context the expression a licensee and a generating company had been used. The Hon'ble Supreme Court had not proceeded on the basis that only because the dispute was between a licensee and a generating company and not between two licensees, the provisions of Section 86(1)(f) of the Act will be applicable. The Hon'ble Supreme Court had referred to the expression 'licensees' i.e. in plural in Para 28, 34, 60, 61 of the

judgement dealing with the scope of Section 86(1)(f) of the Act.

78. In the above case, the Hon'ble Supreme Court was considering the scope of Section 86(1)(f) of the Act with reference to the Section 11 of the Arbitration and Conciliation Act, 1996. The issue before the Hon'ble Supreme Court was with regard to the jurisdiction of the State Commission as against arbitration between the parties. Para 24 of the decision of the Hon'ble Supreme Court reads as under:

“24. The main question before us is whether the application under section 11 of the Act of 1996 is maintainable in view of the statutory specific provisions contained in the Electricity Act of 2003 providing for adjudication of disputes between the licensees and the generating companies”.

79. In the above context, the Hon'ble Supreme Court had held on the wider scope and application of Section 86(1)(f) of the Act. The Scheme, objective and purpose of providing for compulsory adjudication of dispute between electricity utilities by the concerned Commission is clear. Such disputes have implications on consumer at large and public interest and should not be dealt only as an inter-state dispute between two parties without considering the impact of others. Accordingly, there is no rationale whatsoever to restrict the application of Section 86(1)(f) of the Act to a

dispute between a licensee and a generating company and exclude the dispute between the two licensees from its scope.

80. At this juncture it would be appropriate to refer to some of the decisions rendered by this Tribunal which dealt with the disputes between two licensees.
81. The first decision is in Appeal No.200 of 2009 decided in the case of Pune Power Development Private Limited vs Karnataka Electricity Regulatory Commission. In this decision we have upheld the jurisdiction of State Commission to adjudicate upon the disputes between two licensees. On the basis of the interpretation of section 86(1)(f) the following is relevant finding:-

“19. In the present case, the Appellant and the Respondent No.2 and 3 are licensees. It is an admitted fact that the Appellant is a trading licensee having obtained the trading licence from the Central Commission. The Respondent No.2 is a Distribution Licensee having obtained the licence from the State Commission. As such, both are licensees. The dispute in the present case arises under the Letter of Intent issued by the 2nd Respondent in favour of the Appellant.

20. In this regard, it is relevant to quote the definition of the term “Licensee” which is contained in Section 2(39) of the Act. The same reads as under:

“Section 2(39): “licensee” means a person who has been granted a licence under section 14.”.

21. Section 14 deals with licence issued by the Appropriate Commission for undertaking transmission, distribution and trading in Electricity. Having regard to the language of Section 86(1)(f) and Section 2(39) of the Act, there cannot be any distinction between the licences issued by the Commission whether Central or State. The State Commission will have jurisdiction to entertain the dispute and adjudicate the same so long as the part of the cause of action arose within its statutory jurisdiction. In the case on hand, the transaction has taken place within the jurisdiction of the Karnataka State Commission. The negotiations were held in Karnataka. The Letter of Intent also had been issued from Managalore. The power had been delivered by the KPTCL at the periphery of Karnataka. The power supplied has now been returned at KPTCL periphery. Thu, all actions under the contract have taken place within the territorial jurisdiction of the State Commission.”

82. In the above case the dispute had arisen between the distribution licensee of Karnataka and interstate trading licensee. In that case jurisdiction was questioned. The State Commission held that it has got jurisdiction. We upheld the jurisdiction on the reasonings referred to above.
83. Next decision is in the case of Lanco Power Limited Vs Haryana Electricity Regulatory Commission in Appeal No.15 and 52 of 2011 decided by this Tribunal on 04.11.2011. In that decision we have considered the scope and applicability of section 86(1)(f) of the Electricity Act to the dispute between two licensees. The following is finding.

“14. While dealing with this question, it would be proper to analyse the legal position with reference to the functions of the State Commission. Section 86(1)(f) of the Electricity Act, 2003(the Act) provides as under:-

(86) “Functions of State Commission

(1) The State Commission shall discharge the following functions, namely:-

.....
.....

(f) adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration;

15. This provision deals with the adjudication of the dispute between (a) Generating Company and Licensee or (b) between Licensees....”.

In this case also the PSA was entered into between Haryana Power and PTC and the Tribunal decided that there was a nexus between the PSA and the distribution licensees of Haryana.

84. The Hon’ble Supreme Court also dealt with similar disputes between two licensees. The said disputes between Tata Power Company Vs. Reliance Energy Limited, being two licensees were decided by Hon’ble Supreme Court in 2008(Vol-10)SCC 321. This arose out of the orders passed

by Maharashtra Electricity Regulatory Commission holding that Tata Power Limited is restricted licensee. This order was taken up with this Tribunal and then to Hon'ble Supreme Court. In that decision, the Maharashtra Commission decided the matter under section 22(2)(e) and (n) of the Electricity Regulatory Commission Act. The above dispute between two licensees was adjudicated by the Commission without there being any finding of lack of jurisdiction of the Commission. The Hon'ble Supreme Court also dealt with the said disputes between two licensees namely Tata Power Limited and Reliance Energy Limited and gave its finding.

85. In view of the above, we find that State Commission has got jurisdiction to adjudicate upon the disputes not only between the licensees and generating companies but also between two licensees. We have already held while answering the first question that there is a nexus between the PPA entered into between Gujarat Urja and PTC and the distribution licensees and therefore the dispute raised in the PPA will be construed as a dispute between the two licensees.

86. Accordingly, we reject the contention of the Appellant on this 2nd issue.

87. Let us now go into the **third question**. The said question is as follows:

“Whether the State Commission has the jurisdiction to adjudicate upon the dispute raised against the Appellant which is Inter State Trading Licensee to

whom, the licence was granted by the Central Commission?

88. On this question, we have heard both the parties who argued at length.
89. According to the Appellant, the State Commission does not have any jurisdiction over any dispute involving the Appellant viz Inter State Trading Licensee to whom the licence was granted by the Central Commission.
90. It is further contended by the Appellant that the PTC is a Trading Licensee within the meaning under Section 14 (c) of the Electricity Act, 2003 and it has a licence to do Inter State Trading including Intra State Trade and this issue of jurisdiction on this point, has been decided by this Tribunal in Appeal No.7 of 2009 i.e. the case of Lanco Amarkantakh Power Private Limited holding that the State Commission cannot have a jurisdiction to adjudicate the dispute relating to PTC and as such since the PTC is a Central Commission's Licensee, the Appellant cannot be under the jurisdiction of the State Commission u/s 86(1)(f). It is also contended by the Appellant that a licensee who has obtained licence from the Central Commission for inter State, the State does not automatically become the licensee of the State Commission.

91. According to the Gujarat Urja (R-2) , the mere fact that the PTC is an inter-State trading licensee to whom the licence was granted by the Central Commission would not oust the jurisdiction of the State Commission especially when the cause of action had taken place within jurisdiction of the Gujarat State Commission. In order to substantiate this plea, the Respondent relies upon the judgment of this Tribunal in Appeal No.200 of 2009 in the case of Pune Power Limited in which it has been held that the State Commission has got a jurisdiction to go into the dispute between a distribution licensee in Karnataka and an inter State Trading licensee to whom the Central Commission granted the licence since the main transaction had taken place in Karnataka.
92. In the light of the above contentions and the authorities cited by both the parties, let us now deal with this question.
93. Before doing the same, we would refer to the relevant portion of the discussion and finding given by the State Commission in the impugned order on this question:

10. The third issue raised on behalf of the petitioner is that the PTC has been granted an inter-state trading licence by the Central Commission and as such the State Commission has no jurisdiction under Section 86(1)(f) of the Electricity Act, 2003.

10.1 The learned Additional Solicitor General, appearing on behalf of the petitioner, relied on the

decision of the Appellate Tribunal for Electricity in the case of Lanco Amarkantak Power Pvt Ltd. v. Madhya Pradesh Electricity Regulatory Commission, Appeal No. 7 of 2009 decided on 6.9.2009, wherein the Tribunal was dealing with a dispute between a generating company in Chattisgarh and PTC. It was held that the Madhya Pradesh Commission did not have jurisdiction over the dispute because PTC was not a licensee of the Madhya Pradesh State Commission.

10.2 It is, however, important to note that the APTEL was dealing with a situation where the generating station was situated in Chattisgarh, the supply was to PTC as an inter-state trading licensee with onward supply to Madhya Pradesh, the delivery point of the generating station to PTC was in Chattisgarh, the Agreement was signed outside Madhya Pradesh and in such circumstances the Madhya Pradesh Commission could not have assumed jurisdiction. Even though, it is the same PTC which is the petitioner in the present case, the circumstances, situation and the facts of the case are totally different.

10.3 The scope and implications of the above decision has been considered by the Appellate Tribunal in a subsequent judgement in the case of Pune Power Development Pvt. Ltd. v. Karnataka Electricity Regulatory Commission & Others, Appeal No. 200 of 2009 decided on 23.2.2011. In this case, the Tribunal, dealing with a dispute between a distribution licensee in Karnataka and inter-state trading licensee, has upheld the jurisdiction of the Karnataka State Commission under Section 86(1)(f) of the Electricity Act, 2003. The Tribunal has, besides other grounds, also upheld the jurisdiction of the Karnataka State Commission having regard, inter alia, to the territorial jurisdiction.

10.4 *In view of the above decision of the Appellate Tribunal, the present case is undoubtedly within the jurisdiction of the Gujarat Electricity Regulatory Commission. The Agreement was to be performed within the State of Gujarat. The delivery point for the supply of electricity by GUVNL to PTC is at the periphery of Gujarat. The Letter of Intent dated 27.11.2009 leading to the Agreement between the parties was issued in the State of Gujarat. In view of the decision of the Hon^{ble} Supreme Court of India in the case of Grid Corporation of Orissa Limited v. Gajendra Haldea & Others, (2008) 13 SCC 414, the sale of electricity to PTC within the State would amount to intra-state sale and not inter-state sale (Para 9, 18 and 19).*

10.6 *We are unable to accept the argument of the learned Additional Solicitor General when he compares the language/construction of Section 86(1)(f) with that of Section 79(1)(f) of the Electricity Act, 2003 to contend that the scope of the former Section is much more limited compared to the latter. In this connection, it is worthwhile to again refer to the decision of the Appellate Tribunal for Electricity in the Pune Power case, wherein it held that all disputes not falling within the jurisdiction of the Central Commission would be within the jurisdiction of the State Commission under Section 86(1)(f). The jurisdiction of the Central Commission is limited to disputes involving generating companies and transmission licensees. In the present case, both GUVNL and PTC being trading licensees, the disputes would not be covered under Section 79(1)(f), but would come within the purview of Section 86(1)(f).*

10.7 The wide scope of Section 86(1)(f) has been dealt with by the Hon^{ble} Supreme Court of India in the case of Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd, (2008) 4 SCC 755, wherein it was held that Section 86(1)(f) confers a wide jurisdiction on the State Commission to adjudicate upon disputes. The Hon^{ble} Supreme Court has held that the jurisdiction of the State Commission, apart from the matters under clauses (a) to (e) and (g) to (k) of Section 86(1), extends to other disputes which making it very wide and without any restriction. Thus, Section 86(1)(f) has a very wide scope and includes the matters referred not only in Section 86(1)(a) to (e) and (g) to (k), but also other disputes.

10.8 As discussed above, we cannot accept the contention of the respondent that because of its having an inter-state trading licence issued by the Central Commission, the present dispute is not within the jurisdiction of this Commission under Section 86(1)(f). The matter does come within the jurisdiction of this Commission.

94. Bearing in mind the findings given by the State Commission as referred to above, as well as the rival contentions of the parties, we shall now discuss this issue.
95. According to the Appellant PTC, the Appellant being granted an inter State Trading licence by the Central Commission, cannot be subjected to the jurisdiction of the State Commission u/s 86 (1) (f) of the Electricity Act, 2003. In elaboration of this point, it is contended by the PTC that the provision of Section 86 (1) (f) of the Electricity Act, 2003

does not cover the dispute relating to the inter State licensee i.e. an electricity trader who has been granted a licence by the Central Commission and as such the State Commission can exercise jurisdiction only in respect of a licensee where the licence is being granted by the State Commission not in respect of an inter State licensee who has been granted a licence by the Central Commission.

96. In order to substantiate this contention, the Learned Senior Counsel has relied upon the decision of this Tribunal in the case of Lanco Amarkantak Power Private Limited Vs Madhya Pradesh Electricity Regulatory Commission in Appeal No.7 of 2009 dated 6.8.2009.
97. It is pointed out by the learned Senior Counsel for the Appellant that in the said judgment, this Tribunal has held that the Madhya Pradesh Commission did not have jurisdiction over the dispute because the PTC was not a licensee of the State Commission but it is an inter State licensee to whom the licence was granted by the Central Commission.
98. We have gone through the said decision.
99. In our view the said decision would not support the proposition being sought to be advanced in this case on behalf of the PTC. In that case, this Tribunal was dealing

with the situation where the generating station was situated in Chhatisgarh, the supply was to the PTC as an inter State Licensee from the delivery point of the generating station to PTC which was in Chhatisgarh and the agreement also was signed outside the Madhya Pradesh and under those circumstances it was held that the Madhya Pradesh Commission would not assume the jurisdiction. The relevant findings of this Tribunal on this issue is as follows:

“13. The main question that arises for consideration is as follows: Whether the Madhya Pradesh State Commission has got a jurisdiction to adjudicate upon the disputes between the Appellant, a generating company situated outside Madhya Pradesh and the R-2 (PTC) which has not been granted licence by the Madhya Pradesh State Commission?

14. On going through the entire records projecting the complete facts of the instant case and also relevant Clauses of the Regulations framed by the Madhya Pradesh State Commission as well as the Rules and Section of the Act, it is clear that this Madhya Pradesh State Commission has no jurisdiction to decide the dispute between the Appellant and R-2 which relates to the termination of their contract which was entered into between them in the form of PPA. The reasons are as follows:

.....
.....

15. The Madhya Pradesh State Commission itself has framed Regulations in 2004 which would give the details of the jurisdiction to adjudicate disputes between generating companies and trading licensees under Section 86(1)(f) read with Section 158 of the Act. It clarifies that the Madhya Pradesh State Commission can only deal with the dispute relating to the licensees that operate under a trading licence granted by the Madhya Pradesh State Commission.

16.
.....

17. Then, who is a trading licensee? This is defined under Clause 1.4(t) of the MPERC Regulations which is as follows:

“a person who has been granted a Trading Licence for intra-state trading in Madhya Pradesh and does not include a person granted license by CERRC (Central Commission) for inter-state trading or a person granted license for trading by other State Commission.”

18. So both Clauses 10.2 and 1.4(t) of the Regulations have clarified the situation.

i) Admittedly in this case the PPA has been executed in New Delhi, outside the State of Madhya Pradesh.

ii) The Appellant’s generating station admittedly situated outside the State of Chhattisgarh.

iii) The delivery point for power output from the Appellant’s power plant to the R-2 as defined in Article 1.1 of the PPA is located within the State of Chhattisgarh.

iv) Admittedly, the R-2 is not the trading licensee under the Madhya Pradesh State Commission and he is holder of the trading licence by the Central Commission for inter-state trading.

19. The above admitted facts clearly show that the PPA as also the rights and obligations arising thereunder bear no nexus with the State of Madhya Pradesh so as to confer any jurisdiction upon the Madhya Pradesh State Commission to adjudicate upon the disputes arising out of the said agreement”.

100. The finding on the basis of these facts would not apply to the present case as the facts are not similar.

101. As a matter of fact, as pointed out by the learned Counsel appearing for the Gujarat Urja (R-2), the scope of the above judgment has been considered by this Tribunal in a subsequent judgment in the case of Pune Power Development Private Limited Vs Karnataka Electricity Regulatory Commission and Ors in Appeal No.200/09 decided on 23.2.2011.
102. In this case, this Tribunal while dealing with the dispute between a distribution licensee in Karnataka and an inter State trading licensee to whom the Central Commission has granted licence has upheld the jurisdiction of the Karnataka State Commission u/s 86 (1) (f). The following is the finding given by this Tribunal with regard to the said issue.

“19. In the present case, the Appellant and the Respondent Nos.2 and 3 are licensees. It is an admitted fact that the Appellant is a trading licensee having obtained the trading licence from the Central Commission. The Respondent No.2 is a Distribution Licensee having obtained the licence from the State Commission. As such, both are licensees. The dispute in the present case arises under the Letter of Intent issued by the 2nd Respondent in favour of the Appellant.

20. In this regard, it is relevant to quote the definition of the term “Licensee” which is contained in Section 2(39) of the Act. The same reads as under:

“Section 2(39): “ licensee” means a person who has been granted a licence under section 14.”

21. Section 14 deals with licence issued by the Appropriate Commission for undertaking transmission, distribution and trading in Electricity. Having regard to the language of Section 86(1)(f) and Section 2(39) of the Act, there cannot be any distinction between the licences issued by the Commission whether Central or State. The State Commission will have jurisdiction to entertain the dispute and adjudicate the same so long as the part of the cause of action arose within its statutory jurisdiction. In the case on hand, the transaction has taken place within the jurisdiction of the Karnataka State Commission. The negotiations were held in Karnataka. The Letter of Intent also had been issued from Mangalore. The power had been delivered by the KPTCL at the periphery of Karnataka. The power supplied has now been returned at KPTCL periphery. Thus, all actions under the contract have taken place within the territorial jurisdiction of the State Commission.

22. This aspect is further clear from the relevant provisions of the Electricity Act, 2003. As held by the Constitution Bench of Hon'ble Supreme Court, the Act is conceived to be a complete code in itself and the Act overrides even an arbitration provision contained in the contracts. Therefore, all disputes which arose in relation to the transaction between the licensees are to be made subject to the jurisdiction of the State Commission or the Central Commission as contained in Sections 86 and 79 of the Act respectively. In this context, it would be relevant to refer to Section 79(1)(f) of the Act which confers the jurisdiction on the Central Commission with regard to the specific dispute. Section 79(1)(f) of the Act reads as under:

“Section 79(1)(f): to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration.”

23. The clauses (a) to (d) refer to the tariff of Central generating Companies and Tariff relating to composite scheme and inter-state transmission. A reading of this Section would make it clear that the jurisdiction conferred on the Central Commission is restricted to the aspects which are specified under clauses (a) to (d) aforesaid. However, if the jurisdiction of the State Commission which conferred under Section 86(1)(f) of the Act is looked into, it would be clear that no such restrictions are placed on its jurisdiction. In other words, all disputes between the licensees which do not fall under Section 79(1)(a) to (d) are within the jurisdiction of the State Commission.

24. A comparison of Section 79 and Section 86 of the Act would make it evident that the jurisdiction of the Central Commission is not only restricted to clauses (a) to (d) of Section 79(1) concerning generation tariff or transmission of inter-State electricity but also with regard to the disputes involving Generating Companies or transmission licensees. This means that any dispute between the Distribution Licensee and inter-State trading licensee is excluded from Section 79(1)(f). Thus, it is clear that only adjudicatory power of the Appropriate Commission for adjudication of disputes between Distribution Licensee and Trading Licensee has been vested with the State Commission under Section 86(1)(f) of the Act”.

103. The clear finding which has been rendered by this Tribunal in the above case was that the adjudicatory power of the appropriate Commission for adjudication of disputes between the distribution licensee of the State and an inter State Trading Licensee to whom the licence was granted by the Central Commission, has been vested with the State Commission u/s 86 (1) (f) of the Act. The facts as well as the finding in the above case would apply to the present case also since the facts in both these cases are similar.
104. In the present case, the agreement was to perform within the State of Gujarat. The delivery point for supply of electricity by the Gujarat Urja (R-2) to the PTC is at the periphery of the Gujarat. The Letter of Intent dated 27.11.2009 leading to the agreement between the parties was issued in the State of Gujarat.
105. In the light of the above facts, the sale by the Gujarat Urja to the PTC within the State amounting to intra State sale would fall within the jurisdiction of the State Commission as the cause of action has taken place within the State of Gujarat.
106. Therefore, the decision rendered in the Lanco Amarkantakh case in Appeal No.7 of 2009 would not apply to the present case whereas Pune Power Development Pvt Limited case in Appeal No.200 of 2009 would apply to the present case.

107. As a matter of fact, this Tribunal in Pune Power case i.e. Appeal No.200 of 2009, has distinguished the decision in Lanco Amarkantak case relied upon by the PTC. The same is as follows:

“25. The Appellant has relied upon the decision in the case of Lanco Amarkantak Power Private Limited vs Madhya Pradesh Electricity Regulatory Commission in Appeal No. 7 of 2009 dated 6.08.2009 to contend that only the Central Commission has jurisdiction to adjudicate upon the disputes under Section 86(1)(f) of the Act.

26. The reliance of the Appellant on the above decision is misconceived. It is settled law that the judgment is a precedent for what it decides and should be understood in the factual background of the case.

27. If we look at the facts of the said case, it is clear that the factual background of the said case is entirely different from the present case. This Tribunal in the said case was dealing with the jurisdiction of the Madhya Pradesh State Commission involving a dispute between the Generating Companies situated in Chhattisgarh and the PTC India Limited, an inter-State Trading Licensee. It was not dealing with any dispute relating to the sale of power to a Distribution Licensee in the State of Madhya Pradesh. Power Purchase Agreement was executed outside Madhya Pradesh. Admittedly, in that case, the Generating Station was situated in Chhattisgarh. The delivery point of power was also located in Chhattisgarh.

28. Based on these facts, this Tribunal came to the conclusion that none of the rights and obligations

arising under the PPA had any nexus to the State of Madhya Pradesh so as to confer jurisdiction upon the Madhya Pradesh State Commission. Based on the said finding, it was held in that case that Madhya Pradesh State Commission did not have the jurisdiction to deal with the said issue”.

108. In the light of the above decision, we cannot accept the contention of the Appellant that the Central Commission alone has got the jurisdiction. The Central Commission's jurisdiction is restricted to disputes involving generating companies and transmission licensees and of the disputes raised in this case.
109. In view of the above reasons, we are to conclude that merely because the PTC, the Appellant is an inter State Trading licensee and the licence was granted by the Central Commission it would not oust the jurisdiction of the State Commission especially when we find that cause of action had taken place within the jurisdiction of the Gujarat State Commission.
110. In the light of the above, we answer this question as against the Appellant.
111. Thus, we hold that the points raised by the Appellant questioning the maintainability of their petition and the jurisdiction of the State Commission have no merits.

112. Summary of our Findings

- i) Even assuming that Gujarat Urja is not a deemed licensee in terms of section 14 of the Electricity Act,2003, it has to be held that Gujarat Urja as holding Company of the distribution licensees has entered into a PPA on behalf of the distribution licensee for sale of power surplus to the needs of the distribution licensees and as such, Gujarat Urja while signing the PPA has stepped into the shoes of the distribution licensees. Thus there is nexus between the PPA entered into between Gujarat Urja and PTC and the distribution licensees of Gujarat. Therefore, the dispute between Gujarat Urja and PTC will be construed as a dispute between the two licensees.**

- ii) The State Commission has the jurisdiction under Section 86(1)(f) of the Act to adjudicate upon the dispute between two licensees. In this case as the PPA has a nexus with the distribution licensees of Gujarat, the State Commission has the Jurisdiction to adjudicate upon the dispute between the two licensees.**

- iii) The State Commission has the jurisdiction to adjudicate upon the dispute in this case even though PTC is an inter-state trading licensee, in terms of the findings of this Tribunal in Appeal No 200 of 2009 in the**

case of Pune Power Ltd as the transaction had taken place within the jurisdiction of the State Commission.

113. In view of our above findings, the Appeal is dismissed. The State Commission may proceed with the merits of the matter and pass an order after hearing both the parties in accordance with law.

114. There is no order as to costs.

115. Pronounced in the Open Court on 1st October, 2012.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 01st October, 2012

√REPORTABLE/~~NON-REPORTABLE~~