IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI
(ORIGINAL JURISDICTION)

ORIGINAL SPECIAL PETITION NO.2 OF 2015

Dated: 28th April, 2015.

Present: Hon'ble Smt. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. Nayan Mani Borah, Technical Member (P&NG).

IN THE MATTER OF:

Reliance Gas Transportation Infrastructure Limited, a Company incorporated under the Companies Act, 1956, having its Registered Office at 101, Shivam Apartments, 9, Patel Colony, Bedi Bunder Road, Jamnagar – 361 008, Gujarat. ... Petitioner

Versus

Petroleum And Natural Gas Regulatory Board, First Floor, World Trade Centre, Babar Road, New Delhi – 110 001. ... Respondent

Counsel for the Petitioner(s) ... Mr. Paras Kuhad, Sr. Adv.
Mr. K.R. Sasiprabhu
Mr. Vishnu Sharma
Mr. Gaurav Mitra
Ms. Deepali Dwivedi
Mr. Jitin Chatturvedi
Mr. Abhik Chimni
Ms. Swati Vijayverjiya

Counsel for the Respondent(s) … Mr. Anand K. Ganesan
Ms. Sonali Malhotra

JUDGMENT

PER HON'BLE (SMT.) JUSTICE RANJANA P. DESAI - CHAIRPERSON

1. The Petitioner is a Company incorporated under the Companies Act, 1956 and engaged in the business of construction and operation of pipelines for the transportation of natural gas. The Petitioner owns and operates a 1460 (one thousand four hundred and sixty) kilometer long "common carrier" pipeline by the name of the "East-West Pipeline" ("**EWPL**") which runs from Gadimoga in Andhra Pradesh to Bharuch in Gujarat. The said pipeline transports natural gas for the customers under the Gas Transportation Agreements entered into with the Petitioner.

2. The Respondent is a statutory body constituted under the provisions of the Petroleum and Natural Gas Regulatory Board Act, 2006 ("**PNGRB Act**") to regulate "the refining, processing,

storage, transportation, distribution, marketing and sale of petroleum, petroleum products and natural gas excluding production of crude oil and natural gas so as to protect the interests of consumers and entities engaged in specified activities relating to petroleum, petroleum products and natural gas and to ensure uninterrupted and adequate supply of petroleum, petroleum products and natural gas in all parts of the country and to promote competitive markets and for matters connected therewith or incidental thereto".

3. Section 11(e)(ii) of the PNGRB Act empowers and mandates the Respondent to regulate, by regulations, inter alia, transportation rates for common carriers or contract carriers. Section 22 of the PNGRB Act, *inter alia*, empowers and mandates the Respondent to lay down by regulations, the transportation tariffs for common carriers or contract carriers, and the manner of determining such tariffs. The principle underlying determination of tariff is to ensure that the consumer interest is protected while the carrier/transporter gets back its cost as well as reasonable rate of return on such cost.

4. As per the scheme of the PNGRB Act, the Respondent is mandated to, *inter alia*, determine the natural gas pipeline tariffs for common carriers and contract carriers. For this purpose, the Respondent framed the Petroleum and Natural Gas Regulatory Board (Determination of Natural Gas Pipeline Tariff) Regulations, 2008 ("**Tariff Regulations**"). The Tariff Regulations were notified by the Central Government on 20/11/2008. As per Regulation 3(1) of the Tariff Regulations, the same are applicable to the pipeline operated by the Petitioner. The tariff fixation is accordingly to be undertaken by the Respondent in accordance with Regulation 4 read with Schedule "A" of the Tariff Regulations.

5. Schedule "A" of the Tariff Regulations provides for determination of the natural gas pipeline tariff based on data submitted by the entity which owns / operates the pipeline. The factors to be considered in tariff fixation include (A) actual or normative level of capital employed ("**capex**"), whichever is lower, (B) actual or normative level of operating expenses ("**opex**"),

whichever is lower and (C) volumes computed in the manner laid down.

6. In terms of the Tariff Regulations, the pipeline tariff is determined for the period commencing from the date of commissioning of the pipeline and ending at the time of tariff review. The determination is for want of final figures done on the basis of available figures for capex/opex/volumes as compared to normative capex/opex whichever is lower ("provisional initial unit tariff"). The determination is thereafter subject to 'adjustments' with reference to the final figures to arrive at the final initial unit natural gas tariff (hereinafter referred to as "the final initial unit tariff"), (Clause 9(3) of Schedule "A"). Any difference between the provisional and final tariff is to be retrospectively adjusted with the customers. There is only one determination of tariff. The Respondent is not empowered to re-evaluate principles/norms and carry out a re-determination of tariff in the guise of finalization, which is a limited exercise of adjustment. The final initial unit tariff as determined applies for a period of five consecutive years after the initial unit tariff period (i.e. the period

commencing from the date of commissioning of the pipeline and ending on the last day of that financial year). Tariff review is thereafter undertaken after the end of five consecutive years after the end of the initial unit tariff period (i.e. after 1+5 = six years). The tariff fixed after review would be applicable for the five consecutive years thereafter when it will be subject to further reviews at 5 year intervals.

7. The initial unit tariff period in the present case is from 1/4/2009 to 31/3/2010. The final initial unit tariff arrived at would be applicable till 31/3/2015. The first tariff review would thereafter be undertaken for the five consecutive years after such period i.e., from 1/4/2015 to 31/3/2020 (Regulation 2(1)(h)). Subsequent tariff reviews will be done at 5 year intervals thereafter.

8. In the present case, vide Order dated 19/4/2010, the Respondent, under the provisions of Regulation 4 read with Clause 9(2) of the Schedule "A" of the Tariff Regulations, determined the provisional levelised initial unit tariff for the

EWPL at Rs.52.23 per mmBtu (Rupees fifty two and paise twenty three only per million British thermal units.)

9. Subsequent to the determination of the provisional initial unit tariff, the Respondent passed order dated 9/6/2010 approving the apportionment of levelised tariff over all the tariff zones.

10. On 22/7/2010, the Petitioner, submitted its proposal for the final initial unit tariff for the EWPL, in accordance with Clause 9(6) of Schedule "A" of the Tariff Regulations, enclosing all the requisite information including final computations of capex and opex, and proposing a final tariff of Rs.72.93 per mmBtu (Rupees seventy two and paise ninety three only per million British thermal unit).

11. It is the case of the Petitioner that the Respondent failed to finalize the initial unit tariff within the stipulated timelines under the PNGRB Act and Regulations thereunder. The Petitioner was thus constrained to approach the High Court of Delhi vide Writ Petition (C) No.3204 of 2014, pursuant to which it sought a writ

in the nature of mandamus directing the Respondent to determine the final initial unit tariff within a reasonable time-frame.

12. On 11/12/2014, when the aforesaid writ petition was taken up before the High Court of Delhi, the Respondent handed over in the Court a document titled Public Consultation Document (**PCD**) (Ref. No.PNGRB/M(C)/04 dated 4/12/2014), in relation to finalization of initial unit tariff of the Petitioner. As per the aforesaid PCD, comments from various stakeholders would have been received by the Respondent by 26/12/2014 and the same would thereafter have been forwarded to the Petitioner. Thereafter, the Petitioner would have been granted 15 days' time to furnish its comments thereon, i.e. by 15/1/2015.

13. In light of the aforesaid, the High Court of Delhi vide its Order dated 11/12/2014 in the abovementioned Writ Petition (C) No.3204 of 2014 directed the Respondent to finalise the initial unit tariff latest by 28/2/2015. Admittedly, the aforesaid order has been subsequently varied at the instance of both parties and

the aforesaid period has been extended vide order dated 9/2/2015.

14. Pursuant to the aforesaid order of the High Court of Delhi, and in line with the timelines laid down under the PCD, the Petitioner has submitted its objections in relation to the findings contained in the PCD on 25/12/2014.

15. The Respondent has also forwarded to the Petitioner comments received from other stakeholders namely GAIL and GSPL on 26/12/2014 and the Petitioner, in turn, has furnished its comments thereon on 8/1/2015.

16. It is the case of the Petitioner that on a bare perusal of the aforesaid PCD, it is evident that the Respondent in the guise of finalization of tariff is seeking to re-evaluate norms/principles and consequentially re-determine tariff. According to the Petitioner, a *de novo* enquiry cannot be initiated into the principles/norms to be applied at the stage of finalization of tariff, since such exercise has already been conclusively concluded at the stage of initial determination of tariff. This is

the sole determination that the Respondent is empowered under the PNGRB Act and the Tariff Regulations thereunder to undertake. It is the case of the Petitioner that the Respondent is acting beyond its jurisdictional mandate. The Respondent, as per the PNGRB Act and the Tariff Regulations, has to simply carry out the exercise of adjustment provided therein. Any attempt at this stage on the part of the Respondent to re-open the exercise of determination of tariff by taking a fresh look at principles / parameters / norms to be applied has to be prevented by this Tribunal. It is further the case of the Petitioner that the responsibility of ensuring that the Respondent carries out its functions, in accordance with the PNGRB Act and Regulations thereunder, has been vested with this Tribunal under Section 121 of the Electricity Act, 2003 ("**the Electricity Act**"). It is the case of the Petitioner that unless this Tribunal issues appropriate instructions or directions or orders to the Respondent, the tariff finalization exercise will not only be contrary to the mandate of the PNGRB Act but will be a futile exercise resulting in an erroneous tariff, which will not be in the

interest of the stakeholders as a whole and will have grave financial consequences for the Petitioner. The Petitioner apprehends that the Respondent will not effectively consider the objections of the Petitioner in relation to the PCD. The Petitioner has, therefore, sought the following reliefs.

> *"(a) Issue an appropriate order / instruction / direction directing the Respondent in the course of finalization of initial unit tariff:*
>
> *(i) to consider the normative capex assessed at the time of provisional tariff determination and not to seek to reassess the normative capex data;*
>
> *(ii) to adopt the report prepared by Gulf Interstate Engineering (GIE) and not to seek to reduce the capex by relying on the report of M/s. Bechtel, USA;*
>
> *(iii) to consider the relevant capacity data for the financial year 2009-10 and not to seek to rely on capacity data beyond financial year 2009-10;*
>
> *(iv) to calculate the volume divisor on the basis of the sum total of the capacity requirement of the entity and the firmed up contracted capacity with other entities for the year 2009-10;*
>
> *(v) to consider the correct inflation rate at 5.86% instead of 4.5%;*

(vi) to factor in the future/maintenance capex i.e. the cost of any replacement or improvement or modification;

(vii) to factor in losses on account of unaccounted and maintenance gas;

(viii) to consider exchange rate variation based on historical trend;

(ix) to consider normative tax rate applicable for corporate assesses for the construction period.

(b) Issue an appropriate order / instruction / direction directing the Respondent to properly apply all relevant principles / parameters as outlined by the Petitioner in the present petition as well as in its comments to the public consultation document in finalizing the initial unit tariff.

(c) Pass any other and further order(s) as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case."

17. On 20/3/2015, when this petition was heard for admission, Mr. Ganesan, learned counsel for the Respondent appeared and raised objection to the maintainability of the petition. We, therefore, issued notice limited to the question of maintainability. Mr. Ganesan accepted service of notice on behalf of the Respondent. Written submissions were filed by both the sides.

We have, therefore, heard Mr. Kuhad, learned senior counsel appearing for the Petitioner and Mr. Ganesan, learned counsel appearing for the Respondent on the question of maintainability of the petition. We have carefully perused the written submissions filed by the parties.

18. At the outset, we must note that Mr. Kuhad later orally submitted that he is not pressing prayer (a)(ii) of the petition as it is individual in nature and it specifically relates to the case of the Petitioner. He submitted that the other prayers are general in nature and deserve to be granted. Against this background, we shall now give gist of the submissions of the Petitioner.

19. Gist of the written submissions advanced on behalf of the Petitioner is as under:

(a) The principles underlying the tariff determination made on provisional basis are under challenge in Appeal No.161 of 2013 and Appeal No.298 of 2014. In Appeal No.25 of 2013, this Tribunal has set aside the Respondent's determination on issues relating to manner of calculation of volume

divisor, etc. and directed it to reconsider the issues and to pass a final order on tariff only thereafter. The Respondent has, so far, not reconsidered the issues. Instead, the Respondent has in its PCD related to the instant case of the petitioners, reiterated the principles that were declared invalid in Appeal No.25 of 2013. The issues involved in these appeals are also involved in the present case.

(b) A perusal of the PCD clearly shows that the Respondent has already made a determination on various issues as well as a determination not to change its stand.

(c) The Respondent can exercise Judicial, Regulatory and Legislative powers. Regulatory power involves prescription of regulatory norms to be applicable to the regulated activity i.e. tariff determination.

(d) Ambit of power of this Tribunal while exercising superintendence over the regulatory powers of the Respondent is much wider than the power available to it while exercising its superintendence over the Respondent's

judicial discretion. The exercise of regulatory power quite often entails formulation of principles/policies. It carries the right to evolve presumptive principles. Such a body is therefore subject to control in matters of policy. Interpretative forays by regulatory bodies have to be subject to safeguards such as exercise of superintendence by superior regulatory body like this Tribunal. This Tribunal is also an expert body.

(e) In ***Cellular Operators Association of India v. Union of India & Ors.***[1] and ***BSNL v. TRAI & Ors.***[2], the Supreme Court has held that the limitation applicable to the power of judicial review exercised by Courts in relation to judicial functions have no application to the exercise of the powers by a regulatory body such as Telephone Disputes Settlement and Appellate Tribunal ("**TDSAT**"). Section 34 of the PNGRB Act read with Section 121 of the Electricity Act is based on this principle. In relation to regulatory matters, it confers supervisory power upon a higher level superior

[1] (2003) 3 SCC 186
[2] (2014) 3 SCC 222

regulatory body i.e. this Tribunal. This Tribunal is statutorily vested with the power to supervise the exercise of regulatory powers by the Respondent.

(f) Discharge of regulatory functions is under almost all statutes, always subject to policy control by superior bodies. The validity of policy control over Regulatory Boards such as the Respondent through policy directives was upheld by the Supreme Court in ***Real Food Products***[3]. The power to control the functions of the Respondent by way of issuance of binding policy directives is a settled principle.

(g) In ***PTC India Ltd. v. CERC***[4], ("***PTC India Ltd.***") the Supreme Court has held that Section 121 of the Electricity Act confers supervisory powers of statutory functions on the Tribunal. Its jurisdiction encompasses all aspects relating to statutory functions under the Electricity Act.

[3] (1995) 3 SCC 295
[4] (2009) 5 SCC 466

(h) In ***PTC India Ltd. v. CERC***[5], ("***PTC India Ltd. (CB)***") the Constitution Bench observed that Section 121 did not confer power of judicial review on the Tribunal, but it was not possible to lay down any exhaustive list of cases in which there was failure in performance of statutory functions by the Appropriate Commission. The Supreme Court gave an example in that it was open to the Tribunal to direct the Commission to perform its statutory function of specifying the Grid Code having regard to Grid Standards.

(i) In ***O.P. No.1 of 2012 (BSES Rajdhani Power Ltd. v. DERC & Ors.)***, this Tribunal vide its judgment dated 14/11/2013 held that Section 121 vests a supervisory power with the Tribunal to issue appropriate orders, instructions or directions to the Commission to ensure performance and remedy any failure of statutory functions. It was made clear that the performance of statutory functions would include performance of statutory functions

[5] (2010) 4 SCC 603 (CB)

negligently, poorly or improperly and all such cases would invite order or directions of the Tribunal. There were no limitations on the ambit of Section 121 and that the power has to be read in its complete amplitude to attain the statutory objects of the Act.

(j) The need for an independent second tier regulatory body is made clear by the Supreme Court in ***BSNL v. TRAI & Ors.***.

(k) The Respondent has admitted in the counter affidavit filed by it in the Delhi High Court in Writ Petition (C) No.3204 of 2014 that this Tribunal has original jurisdiction.

(l) The authorities cited by the Respondent are cases dealing with exercise of judicial functions in which directions cannot be issued for controlling such exercise. As such, no reliance can be placed on the authorities cited by the Respondent.

(m) Assuming but not admitting that Section 121 does not include the power of regulatory supervision but was limited to judicial superintendence even then the present petition would lie. The power of judicial superintendence would arise not only when there is wrongful exercise of jurisdiction but also wrongful assumption of jurisdiction. (***State of Gujarat v. Vakhatsinghji Vajesinghji, Vaghela (dead) by his legal representatives and Ors. etc.,***[6] ***Shantilal Ambala Mehta v. M.A. Rangaswamy***[7] and ***The King v. Electricity Commissioners***[8]).

(n) Reopening the normative assessment and seeking to redetermine the same and thus converting the exercise of finalization (i.e. merely involving adjustment) into an exercise of redetermination would fall squarely within the four corners of wrongful assumption of jurisdiction and thus require interference under Section 121. It is well established that even under the narrow power of judicial

[6] (1968) 3 SCR 692 (para 14)
[7] (1977) 79 Bom LR 633 (para 27)
[8] (1924) 1 K.B. 171

superintendence, the Courts can not only examine the validity of actions assailed but directions can also be issued as to the manner in which the power is to be exercised. (***Surya Dev Rai v. Ram Chander Rai & Ors.***[9] and ***Vakhatsinghji Vajesinghji, Vaghela***).

(o) Same standards must apply for different pipelines since all the pipelines operate in the same market place. Since this Tribunal is already seized of the same material issues in other cases all the appeals and this petition may be heard together so that uniform, composite directions can be issued which will apply across the board to all pipelines.

20. Gist of the submissions filed on behalf of the Respondent is as under:

(a) The tariff determination of the Petitioner is pending and there is an interim order in Appeal No.253 of 2014 directing that the tariff be not determined pending the appeal filed by the Petitioner on the issue of capacity.

[9] (2003) 6 SCC 675 (para 38(9))

(b) Section 121 of the Electricity Act provides for the power of this Tribunal to issue orders, instructions or directions for the performance of statutory functions of the Appropriate Commission/PNGRB.

(c) The power under Section 121 of the Electricity Act has been held to be only administrative and not judicial in nature (***PTC India Ltd. (CB)***)

(d) In ***PTC India Ltd. (CB)***, while interpreting Section 121, the Constitution Bench of the Supreme Court has relied upon its decision in ***Raman & Raman Ltd. v. State of Madras***[10]. In paragraph 82, the Supreme Court has applied tests laid down in ***Raman & Raman***.

(e) In ***Raman & Raman***, it is held that Section 43-A of the Motor Vehicles Act, 1939 (in *pari materia* with Section 121 of the Electricity Act) only provides for issuing orders or directions of administrative character and not of judicial character. Section 64-A of the Motor Vehicles Act is in *pari*

[10] AIR 1959 SC 694

materia with Section 111(6) of the Electricity Act and Section 33(6) of the PNGRB Act.

(f) Article 227 of the Constitution provides for the power of superintendence of the High Court. The said power has been held to be both administrative as well as judicial in nature. However, even under Article 227, the power does not include the power to direct a subordinate court to pass an order in a particular manner. Nor does the Court act as an Appellate Court (***Jasbir Singh v. State of Punjab***[11]). The power under Article 227 is only to see that the procedure is followed and not the correctness of the decision itself (***Mohd. Yonus v. Mohd. Mustaqim***[12]). In ***TGN Kumar v. State of Kerala***[13], the Supreme Court following its judgment in ***Jasbir Singh***, held that the exercise of power under Article 227 cannot put fetters on the discretionary jurisdiction of the authority.

[11] (2006) 8 SCC 294
[12] (1983) 4 SCC 566
[13] (2011) 2 SCC 272

(g) Affidavit filed in the Delhi High Court was for direction on tariff determination, not manner of determination. Under Section 121, direction can be given for tariff determination, not the manner of tariff determination. The affidavit filed by the Respondent was only to this extent. That was also rejected by the High Court which proceeded to decide the writ petition.

(h) Superintendence under Section 121 is only for directions of administrative character and not judicial.

(i) Even where the power covers both administrative and judicial superintendence (Article 227), the power is only on the process of the decision and not on the correctness of the decision.

(j) Even in judicial superintendence, the discretion granted to the subordinate authorities cannot be curtailed nor can the manner in which the decision is to be taken be specified.

(k) The Petitioner wants principles underlying tariff determination to be settled by this Tribunal and the Respondent to only make necessary calculations. The Petitioner has prayed for interpretation of Regulations in a particular manner under Section 121 or to disregard the Regulations. Both are impermissible.

(l) This Tribunal has only Appellate and Supervisory jurisdiction [unlike Section 14 of the Telecom Regulatory Authority of India Act, 1997 (as amended) ("**TRAI Act**").

(m) Original Jurisdiction is distinct from supervisory jurisdiction (***Surya Dev Rai***).

(n) In ***O.P. No.1 of 2012***, this Tribunal has not held that Section 121 is judicial in nature. The direction for performance could be because of non-performance, under performance etc. The directions given in paragraph 40 are only for implementation of previous decisions, not the manner of implementation.

(o) Reliance placed on the Constitution Bench judgment in ***PTC India Ltd. (CB)*** is misplaced. Section 79(1)(h) states that the Central Commission shall specify Grid Code having regard to Grid Standards. Thus, it is one of the statutory functions of the Central Commission. However, the discretionary powers cannot be overridden by supervisory jurisdiction. The submission that the question of law or substantial question of law has to be decided only by this Tribunal is incorrect. The Respondent has one member having judicial expertise.

(p) The submission that policy directives can be issued by this Tribunal under Section 121, corresponding to Section 78-A of the Electricity (Supply) Act, 1948 is incorrect. The Policy Directives are issued under Section 42(2) of the PNGRB Act, Sections 107 and 108 of the Electricity Act, by the Government. The field of policy directives is an occupied field.

(q) PCDs are issued to invite comments and objections. No decision is taken by the said document itself. The process has been adopted in compliance with the directions of this Tribunal in ***Appeal No.222 of 2012 decided on 6/1/2014 (Reliance Industries Ltd. v. Petroleum & Natural Gas Regulation Board & Ors.***) that the consumers and the public should be given an opportunity of participating in the Provisional Initial Tariff determination proceedings by circulating the issues and seeking comments.

21. Before we deal with the rival submissions, it is necessary to have a look at the relevant legal provisions. Section 30 of the PNGRB Act provides for Appellate Tribunal. It says that the Appellate Tribunal established under Section 110 of the Electricity Act shall be the Appellate Tribunal for the purposes of the PNGRB Act. The said Section to the extent it is relevant reads thus:

> *"**30. Appellate Tribunal. –** (1) Subject to the provisions of this Act, the Appellate Tribunal established under Section 110 of the Electricity Act,*

2003 (36 of 2003) shall be the Appellate Tribunal for the purposes of this Act and the said Appellate Tribunal shall exercise the jurisdiction, powers and authority conferred on it by or under this Act."

22. Section 34 of the PNGRB Act provides for procedure and powers of the Appellate Tribunal. It states that the provisions of Sections 120 to 124 (both inclusive) of the Electricity Act shall *mutatis mutandis* apply to the Appellate Tribunal in the discharge of its functions under the PNGRB Act. The said Section reads thus:

*"**34. Procedure and powers of the Appellate Tribunal. –** The provisions of sections 120 to 124 (both inclusive) of the Electricity Act, 2003 (36 of 2003) shall mutatis mutandis apply to the Appellate Tribunal in the discharge of its functions under this Act as they apply to it in the discharge of its functions under the Electricity Act, 2003."*

23. The controversy in this petition revolves around Section 121 of the Electricity Act. It is necessary to reproduce the said section.

"121. Power of Appellate Tribunal.

The Appellate Tribunal may, after hearing the Appropriate Commission or other interested party, if

any, from time to time, issue such orders, instructions or directions as it may deem fit, to any Appropriate Commission for the performance of its statutory functions under this Act."

24. Section 111 of the Electricity Act provides for appeal to the Appellate Tribunal. So far as it is relevant, it reads as under:

"111. Appeal to Appellate Tribunal.

(1) Any person aggrieved by an order made by an adjudicating officer under this Act (except under section 127) or an order made by the Appropriate Commission under this Act may prefer an appeal to the Appellate Tribunal for Electricity:

xxx xxx xxx

(6) The Appellate Tribunal may, for the purpose of examining the legality, propriety or correctness of any order made by the adjudicating officer or the Appropriate Commission under this Act, as the case may be, in relation to any proceeding, on its own motion or otherwise, call for the records of such proceedings and make such order in the case as it thinks fit."

25. We are concerned here with the scope of powers of this Tribunal under Section 121 of the Electricity Act. A plain reading of Section 121 makes it clear that any order, instruction or direction issued by this Tribunal under this section must be for

securing performance of the Appropriate Commission's statutory functions under the Electricity Act. Several judgments have been cited before us. But we feel that it is not necessary to refer to all of them because, fortunately for us, we have the judgment of the Constitution Bench of the Supreme Court in ***PTC India Ltd. (CB)***, which throws light on the ambit of this Tribunal's powers under Section 121.

26. In that case, the Constitution Bench was, *inter alia*, dealing with the question whether Parliament has conferred power of judicial review on this Tribunal under Section 121 of the Electricity Act. The Constitution Bench observed that under Section 121 of the Electricity Act, there must be a failure by a Commission to perform its statutory functions in which event the Tribunal is given authority to issue orders, instructions or directions to the Commissions to perform their statutory functions. The Constitution Bench referred to the Supreme Court's judgment in ***Raman and Raman*** where Section 43-A of the Motor Vehicles Act, 1939 (the 1939 Act), as amended by Madras Act, 20 of 1948 came for consideration before the

Supreme Court. Section 43-A conferred power on the State Government to issue "orders" and "directions" as it may consider necessary in respect of any matter relating to road transport to the State Transport Authority or a Regional Transport Authority. The meaning of the words "orders" and "directions" came up for interpretation before the Supreme Court in the said case. It was held, on examination of the 1939 Act, that Section 43-A was placed by the legislature before the sections conferring quasi-judicial powers on tribunals, which clearly indicated that the authority conferred under Section 43-A was confined to administrative functions of the Government and the tribunals rather than to their judicial functions. It was further held in that case that the legislature had used two words in that section (i) orders and (ii) directions. The Supreme Court noticed that the 1939 Act contained a separate chapter which dealt with making of "rules" which indicated that the words "orders" and "directions" in Section 43-A were meant to clothe the Government with the authority to issue directions of administrative character. The Supreme Court observed that

whether an order is in the nature of law or an administrative direction depends upon the character or nature of the orders or directions authorized to be issued in exercise of the power conferred. The words "orders" and "directions" were not laws. They were binding only on the authorities under the Act. Such orders and directions would cover only an administrative field of the officers and, hence, they do not regulate the rights of the parties. Applying the tests laid down in ***Raman and Raman***, the Constitution Bench held that the words "orders", "instructions" or "directions" in Section 121 do not confer power of judicial review on the Tribunal. The Constitution Bench further observed that it was not possible to lay down any exhaustive list of cases in which there is failure in performance of statutory functions by the Appropriate Commission. However, by way of illustration, the Constitution Bench referred to Section 79(1)(h) of the Electricity Act under which CERC is required to specify the Grid Code having regard to the Grid Standards. Section 79 deals with functions of CERC. The Constitution Bench referred to the definitions of the words "Grid", "Grid Code"

and "Grid Standards" and observed that the Grid Code is a set of rules which governs the maintenance of the network, which is vital. In the absence of the making of the Grid Code in accordance with the Grid Standards, it is open to the Tribunal to direct CERC to perform its statutory functions of specifying the Grid Code having regard to the Grid Standards prescribed by the authority under Section 73. The Constitution Bench concluded that the words "orders", "instructions" or "directions" in Section 121 of the Electricity Act cannot confer power of judicial review on this Tribunal.

27. We feel that in view of the above clear pronouncement of law by the Constitution Bench, no further discussion is necessary on this issue. It is clear that under Section 121 of the Electricity Act, this Tribunal cannot undertake judicial review. It can only secure performance of statutory functions by the Appropriate Commission by issuing such orders, instructions or directions as may be necessary. This conclusion admits of no debate.

28. Counsel for the Petitioner relied on the judgment of the Supreme Court in ***PTC India Ltd.*** whereby reference was made to the Constitution Bench. Since the Constitution Bench answered the issues referred to it and set all the controversies at rest and since we have referred to the said judgment in some detail in the preceding paragraphs, it is not necessary to refer to the order which made reference to the Constitution Bench.

29. We must also refer to the judgment of this Tribunal on which heavy reliance is placed by the Petitioner. In ***O.P. No.1 of 2012 and O.P. No.2 of 2012***, this Tribunal was dealing with Petitions filed under Section 121 of the Electricity Act by BSES Rajdhani Power Limited and BSES Yamuna Power Limited. The case of the Petitioners therein was that on account of acts and omissions by the Delhi Electricity Regulatory Commission ("**Delhi Commission**") by failing, refusing and neglecting to perform its statutory functions, the Petitioners had suffered an undeserved cash flow and financial crisis. It was the Petitioners' case that in spite of lapse of nearly nine years since the enactment of the Electricity Act, there had been no effective implementation of an

efficacious Fuel Price Adjustment; that till date, no Power Purchase Cost Adjustment Mechanism had been put in place, which was in violation of Section 62(4) of the Electricity Act read with paragraph 8.2.2 of the Tariff Policy; that there has been continuous failure to determine the cost of the reflective tariff in a timely manner in terms of Part VII of the Electricity Act resulting in an ever increasing accumulation of a Regulatory gap; that the Delhi Commission had refused to provide any recovery mechanism and amortization schedule along with carrying cost for the admitted revenue gap of nearly Rs.3658 crores accumulated over the years and that the Delhi Commission has refused to follow the directions and findings of this Tribunal in three judgments relating to the Delhi Commission.

30. The Delhi Commission contended that the petitions were not maintainable, *inter alia*, on the ground that Section 121 of the Electricity Act relates to and was limited to issuing of directions with respect to statutory functions; direction under Section 121 can be issued only in a case where it is found that the Delhi Commission is guilty of non-performance of statutory

functions. A distinction has to be drawn between non-performance and poor performance or improper performance. Both, the poor and improper performance of statutory function are amenable to challenge and correction only in the Appeals under Section 111(1) or Revisions under Section 111(6) of the Electricity Act. Under Section 121 of the Act, no direction can be issued to the Appropriate Commission to perform its statutory functions in a particular manner. The powers under Section 121 are not the same as powers under Article 227 of the Constitution. While dealing with the maintainability of the petitions, this Tribunal referred to the Constitution Bench Judgment in ***PTC India Ltd. (CB)*** and observed as under:

> *"15. Let us now take up the **1st issue** regarding maintainability of the Petitions filed under Section 121 of Act, 2003. The maintainability of the petitioners and efficacy of the prayers shall be governed by the scope of Section 121 of the Act enacted by the Parliament. This Section has been interpreted in detail by the Constitutional Bench of the Hon'ble Supreme Court in the case of PTC Vs. Central Commission reported in (2010) 4 SCC 603. The following aspects are relevant in view of the above judgment.*

a) *The powers under Section 121 are in addition to and not residuary powers excluding appellate power under Section 111(1) and revisional power under Section 111(6).*

b) *Section 121 vests a supervisory statutory powers with this Tribunal to issue appropriate orders, instructions or directions as it may deem fit to an appropriate Commission after hearing such Commission to ensure due performance of statutory functions by the said appropriate Commission.*

c) *The power may be exercised to remedy any failure by the Commission to perform its statutory functions as deemed fit by the Appellate Tribunal. Once, this Tribunal finds that there is a cause for it to issue appropriate directions to the Commission, the nature of directions or orders are qualified only by the objective of securing performance of statutory functions by the Commission.*

d) *The term "performance" has been defined in Legal dictionary to cover diverse facets of performance including:-*

   i) *Complete or partial performance as also non performance.*

   ii) *Proper or defective performance/mis-performance.*

e) *Section 121, in context of the natural meaning of "performance" subsumes within itself all aspects of performance including partial, complete and non- performance. Had the Parliament intended to limit the ambit of Section 121 of the Act and the powers of this Tribunal, it would not have used the*

term "performance" not limited it by a specific suffix or prefix. In the absence of such a limitation, the power has to be read in its complete amplitude to attain the statutory objects of the Act.

f) As per the Doctrine of Merger when the tariff order passed by the Commission is interfered with or approved by this Tribunal, what survives in the eyes of law is the tariff order merged into order of this Tribunal. Any failure, refusal and neglect to implement the same goes to the heart of failure to perform the statutory functions of the Commission. This would render an Appellate remedy under Section 111 of the Act nugatory and flouting of the judgments of this Tribunal. This principle has been laid down in 2010 (8) SCC 313 in Pernod Richard India(P) Ltd. Vs. Commissioner of Customs, ICD Tughlakabad and Kunhayammed and Ors Vs. State of Kerala in 2000(6) SCC 359.

g) It is an established position of law that fixation of tariff is a statutory function. In performance of its statutory functions, the Delhi Commission has to follow the provisions of the Act and Regulations framed there under. Part-VII of the Act read with the tariff regulations governs the timely determination of tariff and due implementation in letter and spirit of the statutory framework by Appropriate Commissions. The performance of statutory functions negligently, poorly or improperly would invite the orders or directions by this Tribunal to the appropriate Commission for the performance of its statutory duties. The above principle has been laid down in the following decisions:-

(i) ***Transmission Corporation of Andhra Pradesh Ltd. and Anr. etc. etc. vs. Sai***

Renewable Power Pvt. Ltd. and Ors. etc. *;(2011) 11 SCC 34.*

(ii) ***U.P. Power Corporation Ltd. vs. NTPC Ltd & Ors.****; (2009) 6 SCC 235, Paras 21, 38, 46.*

(iii) ***Essar Power Limited, Mumbai v. UPERC, Lucknow and NPCL, Greater Noida*** *;2011 ELR (APTEL) 182.*

(iv) ***Rajkot Municipal Corporation vs. Manjulben Jayantilal Nakum and Ors.;*** *(1997) 9 SCC 552*

(v) ***Lucknow Development Authority vs. M.K. Gupta*** *; (1994) 1 SCC 243*

(vi) ***Jay Laxmi Salt Works (P) Ltd. vs. State of Gujarat*** *; (1994) 4 SCC 1."*

31. This Tribunal noted several attendant circumstances and came to a conclusion that the Delhi Commission failed to perform its statutory functions since 2007 which warrants interference by this Tribunal under Section 121 of the Electricity Act by giving suitable directions to restore the efficacy of the functions of the Delhi Commission. The petitions were held maintainable.

32. We are bound by the above judgment of this Tribunal and we respectfully agree with it. The question is whether in this case, we must hold the present petition maintainable and follow the same course, which was followed by this Tribunal in that case. We will examine this aspect first.

33. For this purpose, we must see what the Petitioner is seeking in this petition. We have already referred to the relevant provisions of the PNGRB Act and the Tariff Regulations. In light of them, the Petitioner's case needs to be examined. For this, we need to revisit the facts.

(a) The initial unit tariff period in the present case is from 1/4/2009 to 31/3/2010. The final initial unit tariff arrived at would be applicable till 31/3/2015. The first tariff review would, thereafter be undertaken for the five consecutive years after such period i.e. from 1/4/2015 to 31/3/2020.

(b) The Respondent determined the provisional levalised initial unit tariff for EWPL at Rs.52.23 per mmBtu. Subsequent to the determination of the provisional unit tariff, the

Respondent passed order dated 9/6/2010, approving the apportionment of levelised tariff over all the tariff zones. On 22/7/2010, the Petitioner submitted its proposal for the final initial unit tariff for EPWL in accordance with clause 9(6) of Schedule "A" of the Tariff Regulations, enclosing all the requisite information and proposing a final tariff at Rs.73.93 per mmBtu.

(c) The Respondent failed to finalize the initial unit tariff within the time stipulated under the PNGRB Act, 2006 and the Tariff Regulations. The Petitioner had to approach the Delhi High Court. The Delhi High Court gave direction to the Respondent to determine the final initial unit tariff within a reasonable timeframe.

(d) On 11/12/2014, the Respondent produced PCD dated 4/2/2014 in the Delhi High Court in relation to finalization of initial unit tariff of the Petitioner.

(e) The Petitioner has submitted its objections in relation to the findings contained in the PCD on 25/12/2014. The

Respondent has also forwarded to the Petitioner the comments received from the stakeholders namely, GAIL and GSPL. The Petitioner, in turn, has forwarded its comments on 8/1/2015.

(f) The Petitioner's case is that from the PCD, it appears that the Respondent in the guise of finalization of tariff is seeking to revaluate norms/principles and consequently re-determine the tariff. A *de novo* enquiry cannot be conducted at this stage. Such exercise has been conducted by the Respondent at the stage of initial determination of tariff. This is the sole determination that the Respondent is empowered to make in law.

(g) On this apprehension, the Petitioner wants this Tribunal to pass order preventing the Respondent from acting beyond its jurisdictional mandate.

(h) The Petitioner apprehends an attempt on the part of the Respondent to reopen the exercise of determination of tariff

and, hence, it is stated in the petition that the Respondent must be prevented from doing so.

(i) The Petitioner's case is that unless this Tribunal passes such order at this stage, the tariff finalization exercise will be a futile exercise.

(j) The Petitioner further apprehends that the Respondent will not effectively consider the objections of the Petitioner in relation to PCD.

(k) According to the Petitioner, the Respondent is trying to revisit/reopen the normative assessment which would lead to misleading capex figures. That would ultimately result in erroneous tariff determination.

(l) According to the Petitioner, the Respondent is seeking to arbitrarily reduce the capex by raising the issue of appropriations of the pipeline design and the operating philosophy.

(m) According to the Petitioner, the Respondent is seeking to rely upon the capacity data beyond financial year 2009-10. This is outside the ambit of the Respondent's jurisdiction.

(n) According to the Petitioner, the Respondent is wrongly calculating the volume divisor. The Respondent is wrongly considering inflation rate at 4.5%. The Respondent has wrongly considered the key parameters like, future/maintenance capex, unaccounted and maintenance gas, exchange rate variation and income tax rate for return on capital employed.

(o) On these apprehensions, it is stated in the petition that the Respondent is acting in a pre-determined and pre-disposed manner. Finalization of initial tariff when it takes place, will result in an erroneous tariff fixation which will prejudicially affect the Petitioner. The Petitioner, therefore, wants this Tribunal to direct the Respondent to consider the factors stated in the prayers which we have already quoted during the finalization of initial unit tariff.

Thus, one thing is clear that the Petitioner has approached this Tribunal during the pendency of the proceedings of finalization of initial tariff.

34. In ***O.P. Nos.1 and 2 of 2012***, the Petitioners therein had stated that they had suffered heavy losses on account of the Delhi Commission's acts and omissions. The allegations were very gross and disclosed that the Delhi Commission had shown utter disregard to the judgments of this Tribunal and had also exhibited inertia, indolence and indifference. It had consistently not performed its statutory functions. It was stated that in spite of lapse of nearly nine years since the enactment of the Electricity Act, there had been no effective implementation of an efficacious Fuel Price Adjustment. It was stated that till date, no Power Purchase Cost Adjustment Mechanism had been put in place. It was alleged that continuous failure to determine the cost of the reflective tariff in a timely manner in terms of Part VII of the Electricity Act had resulted in an ever increasing accumulation of regulatory gap. It was contended that the Delhi Commission had refused to provide any recovery mechanism and

amortization schedule along with carrying cost for the admitted revenue gap of nearly Rs.3658 crores accumulated over the years. The Delhi Commission had not followed the judgments of this Tribunal. It appears from the judgment that questions were even raised in Parliament about the Delhi Commission's conduct. It is in this background that this Tribunal held that the petitions filed by the Petitioners therein were maintainable under Section 121 of the Electricity Act and that the refusal by the Delhi Commission to implement the judgments of this Tribunal would amount to judicial indiscipline. Instead of taking any penal action against the Delhi Commission, this Tribunal directed the Delhi Commission to correct its mistakes committed earlier and follow the directions issued by the Tribunal, in future. This Tribunal directed the Delhi Commission to take immediate action in pursuance to the directions given in O.P. No.1 of 2011 dated 11/11/2011 wherein certain general directions have been given in *suo motu* petition to the Appropriate Commissions, *inter alia*, to file annual tariff revision petitions, in time. It is pertinent to note that in that case, the Petitioners therein were not seeking

any direction at the interim stage in pending proceedings. Assuming that directions under Section 121 of the Electricity Act can be even issued in case of individual grievance, they ought not to be generally issued in cases where final tariff determination is pending such as the present case in such a manner that it will have impact on the final determination. That will amount to prejudging the issues involved in the pending proceedings and may bring pressure on the Appropriate Commission. The Appropriate Commission must be allowed to do its work independently. If the proceedings are concluded and it is found that the Appropriate Commission has not performed its statutory functions, this Tribunal can in an appeal carried from the order under Section 111 of Electricity Act always set aside the said order and issue appropriate directions. In our opinion, directions contemplated under Section 121 are of general nature and must be issued sparingly with care and circumspection in cases where Appropriate Commission's failure to perform statutory functions is well established and which has a general wide-ranging adverse impact.

35. In this case, the Petitioner has approached this Tribunal under Section 34 of the PNGRB Act read with Section 121 of the Electricity Act at an interim stage. It is strenuously contended by counsel for the Petitioner that a perusal of the PCD clearly shows that the Respondent had already made a determination on various issues as well as determination not to change its stand. The Petitioner, therefore, feels that the tariff finalization will be a futile exercise. This submission does not appeal to us. The procedure of PCD was adopted by the Respondent vide Notification dated 27/2/2014 after this Tribunal gave a direction in ***Appeal No.222 of 2012 decided on 6/1/2014 (Reliance Industries v. Petroleum & Natural Gas Regulatory Board & Ors.)***. In that case, the order of the Respondent fixing Provisional Natural Gas Pipeline Tariff was challenged. One of the grievances of the Appellant therein was that the Appellant being a consumer/beneficiary of the pipeline, it was a necessary party and had a right of hearing. It was urged that the Respondent ought to have issued public notice. This Tribunal found

substance in this submission. This Tribunal held that there is no procedural requirement under the existing tariff regulations to give such a hearing. However, since the consumers would ultimately become real aggrieved parties, they must be heard before deciding the Provisional Initial Tariff. In that case, the Tribunal gave direction to the Respondent to frame necessary regulations providing for a fair opportunity to the consumers and the public to participate in the Provisional Initial Tariff Determination Proceedings. Pursuant to this direction, the PCD procedure has been adopted. The PCD documents cannot be equated with the final determination of tariff by the Respondent. The Petitioner's fear that its objections will not be taken into account appear to us to be baseless. The Respondent's Notification dated 27/2/2014 introducing amendment of Regulation 4 of the Tariff Regulations, 2008, inter alia, states:

> *"(2) Prior to determination of the natural gas pipeline tariff, the Board shall issue a public notice on its website containing a public consultation document providing an opportunity to stakeholders (including the entity concerned) to participate in the determination of the natural gas pipeline tariff.*

(3) Stakeholders (including the entity concerned) may submit therein comments in writing within fifteen days from the date of webhosting of the public notice."

A copy of the PCD is furnished to us by the Petitioner's counsel. Last paragraph thereof reads as under:

"7.3 On the expiry of the period provided for stakeholder comments, the Board will forward the comments received to the entity concerned for it to submit comments within 15 days. The Board may, if required, also invite all stakeholders who have offered their comments and the entity concerned for discussions. The Board will after considering the tariff filings by the entity, the comments of stakeholders, the response of the entity concerned and discussions, if any, issue the tariff order."

This paragraph makes it amply clear that PCD is not the final determination of tariff. Tariff order is to follow after consideration of comments of the stakeholders. We are in the circumstances not inclined to entertain this petition. Another reason which persuades us to do this is that directing the Respondent to take into consideration each and every factor mentioned in the prayer clause would mean directing the

Respondent to perform its function of finalization of initial tariff in a particular manner which we cannot do. In this connection, it is necessary to refer to the judgments of the Supreme Court which relate to the High Court's powers under Article 227 of the Constitution of India on which reliance is placed by the Respondent.

36. In ***Jasbir Singh***, the Supreme Court held that in exercise of its powers under Article 227 of the Constitution, the High Court can pass orders to keep the subordinate courts within the bounds of their authority but the power of superintendence vested in the High Court under Article 227 cannot be used to influence the subordinate court to pass any order or judgment in a particular manner. The relevant paragraph of the Supreme Court judgment could be quoted.

> *"The power of superintendence over all the subordinate courts and tribunals is given to the High Court under Article 227 of the Constitution. The said power is both of administrative and judicial nature and it could be exercised suo motu also. However, such power of superintendence does not imply that the High Courts can influence the subordinate judiciary to pass any order or judgment in a particular manner. While*

invoking the provisions of Article 227, the High Court would exercise such powers most sparingly and only in appropriate cases in order to keep the subordinate courts within the bounds of their authority."

37. The same principles were reiterated by the Supreme Court in ***TGN Kumar***. The Supreme Court observed that while it is true that the power of superintendence conferred on the High Court under Article 227 of the Constitution is both administrative and judicial, but such power is to be exercised sparingly and only in appropriate cases in order to keep the subordinate courts within the bounds of their authority. In any event, the power of superintendence cannot be exercised to influence the subordinate judiciary to pass any order or judgment in a particular manner.

38. In ***Mohd. Yunus***, the Supreme Court was again considering the nature and scope of the High Court's power under Article 227 of the Constitution. The relevant observations of the Supreme Court could be quoted.

> *"The supervisory jurisdiction conferred on the High Courts under Article 277 is limited to seeing that an inferior court or tribunal functions within the limits of its authority, and not to correct an error apparent on the face of the record, much less an error of law. A mere wrong decision without anything more is not enough to attract jurisdiction under this article.*
>
> *In exercising the supervisory power under Article 227, the High Court does not act as an Appellate Court or Tribunal. It will not review or re-weigh the evidence upon which the determination of the inferior court or tribunal purports to be based or to correct errors of law in the decision."*

39. In ***Surya Dev Rai***, the Supreme Court was, *inter alia,* considering the question as to the impact of the amendment made to Section 115 of the Civil Procedure Code by Act 46 of 1999. In that connection, the Supreme Court also considered the scope of Articles 226 and 227 of the Constitution. While defining the contours of the power of the High Court under Article 227 of the Constitution, the Supreme Court observed as under:

> *"It is well settled that the power of superintendence conferred on the High Court under Article 227 is administrative as well as judicial, and is capable of being invoked at the instance of any person aggrieved*

or may even e exercised suo motu. The paramount consideration behind vesting such wide power of superintendence in the High Court is paving the path of justice and removing any obstacles therein. The power under Article 227 is wider than the one conferred on the High Court by Article 226 in the sense that the power of superintendence is not subject to those technicalities of procedure or traditional fetters which are to be found in certain jurisdiction."

40. The following conclusion of the Supreme Court is material. It reads thus:

"(4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When a subordinate court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction."

41. These judgments of the Supreme Court indicate that though the High Court's power of superintendence over subordinate courts under Article 227 of the Constitution is very wide, even the High Court cannot direct the subordinate courts to pass

orders in a particular way. It can only direct the subordinate courts to function within the limits of their authority and jurisdiction in the manner prescribed by law. We can take guidance from the above judgments. This Tribunal is undoubtedly, as contended by the Petitioner, a superior regulatory body having supervisory power but it cannot direct the Appropriate Commission to pass orders in a particular way. It can only ask the Appropriate Commission to act within the bounds of its jurisdiction and if it fails to exercise its jurisdiction which vests in it, this Tribunal can direct the Appropriate Commission to exercise it in the manner provided by law. But this power also cannot ordinarily be exercised in the midst of the proceedings pending before the Appropriate Commission.

42. It must be remembered that under Section 111(1) of the Electricity Act, an appeal is provided to this Tribunal against any orders made by the adjudicating officer under the Electricity Act. Merits of individual case can be examined by this Tribunal. Under Section 111(6) of the Electricity Act, for the purpose of examining the legality, propriety or correctness of any order

made by the adjudicating officer or the Appropriate Commission under the Electricity Act, this Tribunal may in relation to any proceedings on its own motion or otherwise, call for the records of such proceedings and make such order in the case as it thinks fit. Section 121, on the other hand, as we have already noted, is a supervisory power.

43. We shall now refer to some judgments to which our attention is drawn by counsel for the Petitioner, though in our opinion, they are not relevant for the purpose of the present case.

44. In ***Cellular Operators Association of India***, the Supreme Court was dealing with appeals filed by the Cellular Mobile Service Providers under Section 18 of the TRAI Act against the decision of the TDSAT. The Appellants approached TDSAT under Section 14 of the TRAI Act challenging the decision of the Government dated 25/1/2001 permitting the Fixed Service Providers to offer WLL with limited mobility. The Appellants had

also assailed the recommendations of the TRAI dated 8/1/2001. The TDSAT dismissed the Appellant's application holding that the jurisdiction of the TDSAT is not wider than that of the Supreme Court and that the TDSAT cannot interfere with the decision of the Government. In the Supreme Court, it was submitted that TDSAT exercises both the original jurisdiction and the appellate jurisdiction and the same is wide enough and not circumscribed by the jurisdiction of a court under Article 226 of the Constitution and, therefore, the TDSAT committed serious error by restricting its jurisdiction. On behalf of the Respondent, it was urged that the very composition of TRAI as well as the composition of expert body constituted by the Prime Minister indicates that it consisted of highly qualified technical experts and it is on their decision that the Government took the final decision. It would, therefore, be inappropriate for TDSAT or the Supreme Court to interfere with the said decision unless any statutory infirmity is found. While dealing with this issue, the Supreme Court considered the scope of Section 14 of the Act. The Supreme Court observed that Chapter IV containing Section

14 was inserted by an amendment of the year 2002 and the very statement of objects and reasons would indicate that to increase the investors' confidence and to create a level playing field between the public and private operators, suitable amendment was brought about in the Act and TDSAT was constituted for adjudicating the disputes between a licensor and a licensee, between two or more service providers, between a service provider and a group of consumers and also to hear and dispose of appeals against any direction, decision or order of the Authority. The Supreme Court further observed that having regard to the purpose and object for which the TDSAT was constituted and having examined the provisions of Chapter IV and, more particularly, the provision dealing with ousting the jurisdiction of the civil court, it was of the view that the power of the TDSAT is quite wide. Since the TDSAT is the original authority to adjudicate disputes and it has to also hear and dispose of appeals against the orders of TRAI, the decisions of the Supreme Court dealing with the power of exercising appellate or original power will have no application for limiting the

jurisdiction of TDSAT. The Supreme Court observed that the remedy under Section 14 is not a supervisory one. The Supreme Court observed that the TDSAT although is not a court has all the trappings of a court. Its functions are judicial. In our opinion, the Petitioner cannot draw any support from his judgment. Section 14 of the Act is not in *pari materia* with Section 121 of the Electricity Act. As we have already noted, the Constitution Bench in ***PTC India Ltd. (CB)*** has defined the scope of powers of this Tribunal. In ***O.P. Nos.1 and 2 of 2012***, this Tribunal has clarified having regard to the Constitution Bench judgment that Section 121 vests supervisory statutory powers with this Tribunal which are to be used to issue orders, instructions, directions to secure statutory performance of the Appropriate Commissions. Reliance placed on ***Cellular Operators Association of India*** is misplaced.

45. ***BSNL v. TRAI & Ors.*** is relied upon to emphasize the importance of a Tribunal as a second tier regulatory body. This judgment reiterates what the Supreme Court has said in ***Cellular Operators Association of India***. It is not necessary to

make a detailed reference to it as we do not for a moment doubt the importance of this Tribunal as a second tier regulatory body.

46. It is pointed out that under Section 42(1) of the PNGRB Act, the Central Government may, from time to time, by writing issue to the Board such directions as it may think necessary in the interest of sovereignty and integrity of India and the security of the State, friendly relations with the foreign State or public order. Mr. Kuhad compared this power of the Central Government with the powers of this Tribunal under Section 34 of the PNGRB Act read with Section 121 of the Electricity Act. According to him, in relation to regulatory matters, these provisions confer supervisory power upon a higher level superior regulatory body like this Tribunal. It is contended that if the Central Government can issue policy directives, this Tribunal can certainly issue policy directives. This is so stated in the written submissions also. In this connection, reliance is placed on ***Real Food Products***. We are unable to agree with Mr. Kuhad that Section 34 of the PNGRB Act read with Section 121 of the Electricity Act is comparable with Sections 42(1) and (2) of the PNGRB Act. The

policy directives are issued by the Government taking into consideration the sovereignty and integrity of India and the security of the State, friendly relations with the foreign State or public order. Framing of policy and issuing necessary directions in that behalf are functions of the Central Government. It is not possible for this Tribunal to trench on the Central Government's powers, notwithstanding howsoever superior status it has as a regulatory body. This Tribunal, however, can supervise the conduct of the Appropriate Commissions and issue such instructions, orders and directions which can ensure that the Appropriate Commissions perform their statutory functions properly. This Tribunal can ensure that if any policy directives are issued in accordance with the statutory provisions, they are followed by the Appropriate Commissions but, it will not be possible to agree with Mr. Kuhad that this Tribunal can under Section 34 of the PNGRB Act read with Section 121 of the Electricity Act issue policy directives. In ***Real Food Products***, the question which the Supreme Court was dealing with was whether a direction issued under Section 78-A of the Electricity

(Supply) Act, 1948 by the State Government is binding on the Electricity Board, or whether such directions are merely for guidance and the Board in formulating tariffs would yet be required to apply its mind independently to all the relevant criteria. While dealing with this question, the Supreme Court observed that Section 78-A uses the expression "the Board shall be guided by such directions on questions of policy as may be given to it by the State Government". The Supreme Court observed that the view expressed by the State Government on a question of policy is in the nature of a direction to be followed by the Board in the area of the policy to which it relates. In the context of the function of the Board of fixing the tariffs in accordance with Section 49 read with Section 59 and other provisions of the Act, the Board is to be guided by any such direction of the State Government. The Supreme Court observed that, however, if the action of the State Government is found to be in excess of the power of giving a direction on the question of policy, the Board may not be obliged to be bound by it. We do not think that this judgment helps the Petitioner.

47. So far as the grievance of the Petitioner that certain judgments of this Tribunal have not been followed by the Respondent is concerned, we are of the opinion that if that is true, the Respondent will suffer the consequence. It is not necessary for us, at this stage, to opine on this issue. The Respondent is expected to perform its statutory functions in accordance with law. If there are any pending appeals, which involve similar issues raised by the Petitioner, the Petitioner will undoubtedly get benefit if those issues are decided in its favour.

48. In the circumstances, the petition is dismissed as not maintainable.

49. Pronounced in the Open Court on this 28th day of April, 2015.

(Nayan Mani Borah)
Technical Member

(Justice Ranjana P. Desai)
Chairperson

√**REPORTABLE/~~NON-REPORTABALE~~**