

Appellate Tribunal for Electricity
(Original Jurisdiction)

OP NO.1 OF 2012

AND

OP NO.2 OF 2012

Dated: 14th Nov, 2013

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

OP NO.1 OF 2012

IN THE MATTER OF

BSES Rajdhani Power Limited
BSES Bhawan, Nehru Place,
New Delhi – 110 019

... Petitioner

Versus

- 1. Delhi Electricity Regulatory Commission,**
Viniyamak Bhawan,
'C' Block, Shivalik,
Malviya Nagar,
New Delhi-110 017
- 2. The Chief Secretary,**
Government of National Capital Territory of Delhi
Delhi Secretariat, Players Building,
IP Estate, New Delhi-110 002

3. **National Thermal Power Corporation Limited.,
NTPC Bhhawan, Scope Complex,
7, Institutional Area,
Lodhi Road,
New Delhi-110 003**
4. **NHPT Limited.,
NHPC Office Complex, Sector-33,
Faridabad, Haryana-121 003**
5. **Power Grid Corporation of India Limited.,
B-9, Qutab Institutional Area,
Katwaria Sarai,
New Delhi-110 016**
6. **Indraprastha Power Generation Company Limited.
Himadri Rajghat House Complex,
New Delhi-110002**
7. **Pragati Power Corporation Limited.,
Himadri Rajghat House Complex,
New Delhi-110 002**
8. **Satluj Jal Viduyt Nigam Limited
Sharma Niwas, Below BCS,,
New Shimla-171 009**
9. **Tehri Hydro Development Corporation Limited.
Alaknanda Bhawan, Pragatipuram,
Bypass Road, Rishikesh-249 201**
10. **Nuclear Power Corporation of India Limited.,
Rawatbhata Rajasthan Site, Plant Site,
Anushakti-323 303,
Kota, Rajasthan**

11. **Aravali Power Company Private Limited.,
1st Floor, Pawan Hans Towers
C-14, Sector-1,
NOIDA-201 301 (UP)**

12. **Damodar Valley Corporation Limited.,
Commercial Department,
DVC Towers: VIP Road,
Kolkata-700 054**

13. **Delhi Transco Limited.,
Shakti Sadan, Kotla Marg,
New Delhi-110 002**

....Respondent(s)

Counsel for Appellant(s): Mr. Amit Kapur
Mr. Anupam Varma
Mr. Vishal Anand
Ms. Deepieka Kalia
Mr. Nikhil Sharma
Mr. Aakash Sherwal

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Mr. Ravi S.S. Chauhan
Mr. Ranjan Mukheejee
Mr. K.M. Varma
Mr. Rinku Gautam
Mr. Prateek
Mr. M.S. Gupta for R-1

Mr. Pawan Upadhyay
Ms. Anisha Upadhyay for R-2

Mr. Jayant Nath Sr. Adv.
Mr. Vivek Narayan Sharma for R-3

Mr. S.K. Meena for R-4

Mr. M.G. Ramachandran

Mr. Anand K. Ganesan

Ms. Swapna Seshadri for NTPC Powergrid

Ms. Swagatika Sahoo R-3,5,9

Mr. Swetaketu Mishra

Mr. Ritin Rai for R-12

Mr. Kumar Gaurav for R-13

OP NO.2 OF 2012

IN THE MATTER OF

**BSES Yamuna Power Limited
Shakti Kiral Building,
Karkardooma,
Delhi -110 092**

... Petitioner

Versus

- 1. Delhi Electricity Regulatory Commission,
Viniyamak Bhawan,
'C' Block, Shivalik,
Malviya Nagar,
New Delhi-110 017**
- 2. The Chief Secretary,
Government of National Capital Territory of Delhi
Delhi Secretariat, Players Building,
IP Estate, New Delhi-110 002**

3. **National Thermal Power Corporation Limited.,
NTPC Bhhawan, Scope Complex,
7, Institutional Area,
Lodhi Road,
New Delhi-110 003**
4. **NHPT Limited.,
NHPC Office Complex, Sector-33,
Faridabad, Haryana-121 003**
5. **Power Grid Corporation of India Limited.,
B-9, Qutab Institutional Area,
Katwaria Sarai,
New Delhi-110 016**
6. **Indraprastha Power Generation Company Limited.
Himadri Rajghat House Complex,
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7. **Pragati Power Corporation Limited.,
Himadri Rajghat House Complex,
New Delhi-110 002**
8. **Satluj Jal Viduyt Nigam Limited
Sharma Niwas, Below BCS,,
New Shimla-171 009**
9. **Tehri Hydro Development Corporation Limited.
Alaknanda Bhawan, Pragatipuram,
Bypass Road, Rishikesh-249 201**
10. **Nuclear Power Corporation of India Limited.,
Rawatbhata Rajasthan Site, Plant Site,
Anushakti-323 303,
Kota, Rajasthan**

11. **Aravali Power Company Private Limited.,**
1st Floor, Pawan Hans Towers
C-14, Sector-1,
NOIDA-201 301 (UP)

12. **Damodar Valley Corporation Limited.,**
Commercial Department,
DVC Towers: VIP Road,
Kolkata-700 054

13. **Delhi Transco Limited.,**
Shakti Sadan, Kotla Marg,
New Delhi-110 002

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Mr. Pawan Upadhyay
Ms. Anisha Upadhyay for R-2

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Mr. Anand K. Ganesan
Ms. Swapna Seshadri for NTPC Powergrid

Ms. Swagatika Sahoo R-3,5,9

Mr. Swetaketu Mishra
Mr. Ritin Rai for R-12

Mr. Kumar Gaurav for R-13

JUDGMENT

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

1. BSES Rajdhani Power Limited and BSES Yamuna Power Limited are the Petitioners herein.
2. They have filed these Petitions under Section 121 of the Electricity Act, 2003 raising some fundamental issues relating to functioning of the Delhi State Commission.
3. The Petitioners claiming to have suffered an undeserved cash flow and financial crisis due to the acts and omissions by the Delhi Commission by failing, refusing and neglecting to perform the statutory functions, have filed these Petitions praying for the issuance of appropriate orders and directions to the Delhi Commission to perform its statutory functions, which it failed to do.

4. The following instances have been shown by the Petitioners in their Petitions to demonstrate that the Delhi State Commission failed and neglected to perform its statutory functions:

- (a) In spite of lapse of nearly 9 years since the enactment of the Act, 2003, there has been no effective implementation of an efficacious Fuel Price Adjustment. The first effective order allowing Fuel Price Adjustment was passed on 1.2.2012 giving an ad-hoc allowance of 5% and an unjustified disallowance of 5.75% from the claim of 10.75% increase as per the prescribed formula. The second order was passed on 1.5.2012 by the State Commission, which again gave only an ad-hoc allowance of 6% as against the claim of 7.27% increase without dealing with the backlog of the previous quarter.
- (b) Till date, no Power Purchase Cost Adjustment Mechanism has been put in place. These actions are in violation of Section 62(4) of the Act read with Para 8.2.2 of the Tariff Policy. It is also against the directions given by the Full Bench of this Tribunal reported in 2011 ELR (APTEL) 1742.

- (c) Continuous failure to determine the cost of the reflective tariff in a timely manner in terms of Part VII of the Act, 2003 resulted in an ever increasing accumulation of a Regulatory gap. In spite of filing of the ARR's by the Petitioners based on actual expenses incurred during the Financial Year 2010-11, the Delhi Commission failed to consider the filings and accounts for expenditures and revenues for the Financial Year 2010-11 in the Tariff Order dated 26.8.2011.
- (d) The Delhi Commission 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.
- (e) The Delhi Commission refused to follow the directions and findings of this Tribunal in three direct judgments related to Delhi Commission since 2009 on the basis that the Delhi Commission has already proposed to file Appeals in these cases before Hon'ble Supreme Court. Those judgments of this Tribunal which have not been

followed and implemented by the Delhi Commission are as follows:

(i) Judgment dated 6.10.2009 reported in 2009 ELR (APTEL) 880 for the control period of the Financial Year 2007-08 to FY 2010-11. Against this judgment, the Civil Appeal proposed to be filed by the Delhi Commission, has neither been admitted nor was the notice issued by the Hon'ble Supreme Court.

(ii) Judgment dated 30.7.2010 reported in 2010 ELR (APTEL) 891 for the truing-up for the tariff period 2007-08. Though there is a proposal in the impugned order for Filing the Appeal before the Hon'ble Supreme Court, no such Appeal has been filed till date.

(iii) Judgment dated 12.7.2011 reported in 2011 ELR (APTEL) 1196 for truing-up for the tariff period 2007-08 which was rendered in favour of the Petitioners. In this matter, though Appeal has been admitted by the Hon'ble Supreme Court, no stay has been granted so far.

5. With reference to the principle that mere filing of the Appeal in the Hon'ble Supreme Court would not amount to automatic stay of the judgment of this Tribunal but it would amount to refusal to comply with the directions given in the judgment of the Superior Authority i.e. this Tribunal, by the Subordinate Authority, i.e. Delhi Commission, the learned Counsel for the Petitioners have cited the following judgments:

(a) Bhopal Sugar Industries Ltd v Income Tax Officer, Bhopal, AIR 1961 SC 182 (Constitution Bench) Income Tax Appellate Tribunal;

(b) RBF Rig Corporation Mumbai v Commissioner of Customs (Imports) Mumbai (2011) 3 SCC 573- Custom, Excise and Gold (Control) Appellate Tribunal;

(c) Smt Kausalya Devi Bogra & Ors v Land Acquisition Officer (1984) 2 SCC 324 –Land Acquisition Authority;

(d) Atma Ram Properties (P) Ltd vs Federal Motors Pvt Ltd (2005) 1 SCC 705;

(e) Madan Kumar Singh vs District Magistrate Sultanpur (2009) 9 SCC 79

(f) HG Rangangoud vs State Trading Corporation of India Limited and Ors (2012) 1 SCC 297;

6. According to the learned Counsel for the Petitioners, due to the failure of the Delhi Commission to perform the statutory functions under the Act and refusal to implement the findings and directions given by this Tribunal, the Petitioners suffered a heavy loss and that, therefore, this Tribunal may issue suitable directions to Delhi Commission to set right the anomalous situation.
7. The Delhi Commission through its learned Counsel has questioned the maintainability of these Petitions by making detailed submissions.
8. The crux of the submissions are given as below:
 - (a) Section 121 relates to and is limited to issuing of directions with respect to statutory functions. It does not subsume within itself either regulations of the Delhi Commission or the previous judgment of this Tribunal or Supreme Court or the Delhi High Court.
 - (b) 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 function. 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 111(6) of the Act.

(c) The prayers of the Petitioners cannot be granted since Section 121 does not contemplate issuing directions to an appropriate Commission to :-

(i) perform its statutory functions in a particular manner.

(ii) implement past directions given in the judgments of Supreme Court, Delhi High Court or Tribunal.

(iii) the powers u/s 121 are not of the same nature and as Article 227 of the Constitution of India.

9. In this matter, the Division Bench of this Tribunal initially heard the learned Counsel for the parties. Ultimately, these Petitions were transferred to Full Bench for deciding the issues raised in view of the importance with reference to the power of this Tribunal to monitor over the functions of the Delhi Commission and to issue suitable and appropriate

directions to Delhi Commission with regard to its proper functioning.

10. Thereupon, the Full Bench heard the learned Counsel for the parties in detail. After hearing the parties, this Tribunal felt that there was a failure on the part of the Delhi Commission to perform its statutory functions. Noticing the same, this Tribunal felt that it would be proper to direct the Chairman of the Delhi Commission to file an Affidavit giving explanation for the non-performance of the statutory functions as pointed out by the Petitioners. Accordingly ordered on 30.5.2012.
11. Let us now quote the said order passed by this Tribunal directing the Chairman of the Delhi Commission to file such an Affidavit. The said order dated 30.5.2012 is as follows:

“The main grievance of the petitioners in these petitions in OP No.1 of 2012 and OP No.2 of 2012 filed under Section 121 of the Electricity Act, 2003 is that the State Commission refused to obey and implement the directions given by this Tribunal in Appeal Nos.36 of 2008, 52 of 2008, 153 of 2009, 142 of 2009 and 147 of 2009 on the ground that the State Commission had intended to file the Appeal as against those directions given by this Tribunal in the Hon’ble Supreme Court of India.

On this aspect, we heard the senior learned counsel for the State Commission.

In the reply filed by the Commission before this Tribunal dated 15.03.2012, the State Commission has taken a stand that in some instances the Commission did not implement the orders of this Tribunal as the Commission has taken a conscious decision to prefer Appeal against the orders of this Tribunal before the Supreme Court of India and when the matters are pending before the Supreme Court of India the Commission is not inclined to implement the orders of this Tribunal as in the event the Appeal before Supreme Court is allowed it would be practically difficult for the Commission to locate the consumers who have paid the higher bills and retribute/refund in the running bills. The relevant portion of the reply is as follows:-

“It is correct that in one or two instances, the Commission did not implement the order of the Hon’ble Tribunal on account that an appeal has been filed by the Commission and is pending before the Hon’ble Supreme Court or the Commission has taken a conscious decision to prefer an appeal against that order of this Hon’ble Tribunal before the Hon’ble Supreme Court of India. The reason thereof is no other than the fact that if, pending appeal, the order impugned is implemented, then about few Lac consumers of electricity of Delhi will be impacted; in event the appeal is allowed, it will be practically difficult to retribute all such consumers in a fair, equitable and transparent manner.”

On behalf of the Commission, the note of arguments was filed before this Tribunal on 02.05.2012. In this note, the State Commission has referred to the aspects which are given below:-

“(b) the Commission had good and proper reasons to not straightaway comply with the orders of this

Hon'ble Tribunal in that either appeals had been filed or were to be filed in connection with the said orders, before the Hon'ble Supreme Court:"

"The case laws cited by the petitioner, regarding hierarchy of courts and judicial discipline etc. are not applicable in the same manner and rigour to regulatory bodies as to lower courts."

"it is submitted that the words used by the Commission in its tariff order dated 26-08-2011 were inappropriate and regrettable and, unwittingly, conveyed an attitude of defiance, which was completely not intended."

Thus, the reply as well as the notes submitted on behalf of the Commission would indicate that Commission has taken a stand not to follow the directions issued by this Tribunal on the ground that in some matters the Appeal had already been filed and in some matters the Appeal is to be filed in the Supreme Court of India and, therefore, it may not be advisable to follow the orders of this Tribunal.

As indicated above, the State Commission in the notes, however, stated that the words used by the Commission in the Tariff Order dated 26.08.2011 as inappropriate, regrettable and unwittingly conveyed the attitude of defiance.

When the State Commission has taken conscious decision not to follow the directions issued by this Tribunal, no reasons has been mentioned in the Tariff Order dated 26.08.2011 for such a decision.

We are not able to understand as to under what circumstances the conscious decision had been taken by the Commission for not obeying the directions of this Tribunal and why those circumstances were not

mentioned in the Tariff Order. In the same way we are not able to understand under what circumstance the State Commission admitted in its note submitted on 02.05.2012 that the words used by the Commission in the Tariff Order were inappropriate and regrettable.

The reply has been filed on behalf of the Commission only by the Secretary of the Commission. The note on behalf of the Commission has been filed by the counsel appearing on behalf of Commission.

Thus, there is no clarity from the State Commission with reference to the stand taken by the Commission.

Under these circumstances we deem it appropriate to direct the Chairman of the State Commission to file an Affidavit sworn to by him on his behalf and on behalf of the other Members of the Commission explaining the above circumstances in order to enable this Tribunal to take further course of action in this matter.

This Affidavit on his behalf and on behalf of the Members of the Commission has to be filed before this Tribunal on or before 20.06.2012.

*Post the matter for further hearing on **04.07.2012 at 2.30**"*

12. Accordingly, as directed by this Tribunal the Chairman of the Delhi Commission filed an affidavit submitting that the observations made by the Delhi Commission in its various orders relating to the non implementation of the Tribunal's directions, of course, were not happily worded but they are unintentional and regrettable.

13. The main grievance of the Petitioners, as indicated above is that the Delhi Commission has refused to obey and implement the directions issued by this Tribunal in its previous judgments.
14. In the light of the submissions made on behalf of the Petitioners and the Delhi Commission, two issues are raised for consideration:-
- (a) Maintainability of the Petitions under Section 121 of the Act.
 - (b) Non-compliance of the directions issued by this Tribunal.
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

16. In the light of above principles we shall see the prayer made by the petitioners in the petitions under Section-121 of the Act. The cause of action with reference to the prayers primarily relate to:-

i) Non-performance/ineffective and failure to duly perform statutory function of determining timely cost reflective tariff as determined by Section 61 and 62 of the Act read with relevant regulations.

ii) Ineffective, poor and inexplicably dilatory implementation of fuel price adjustment formula thereby failing to duly perform the statutory function under Section 62(4) of the Act.

iii) Failure to perform statutory functions of fuel and power purchase cost adjustment mechanism and its implementation in terms of Section 62(4) of the Act.

17. According to the learned Counsel for the Petitioners, the admitted series of glaring and deliberate failures of Delhi Commission to perform statutory functions are reflected in the following documents which are admittedly public documents. The detailed documents relating to failure to perform statutory functions by the Delhi Commission are as follows:-

a) A Parliament question was raised. With reference to that, a response was sought from the Delhi Commission. In response to the Parliament question, the Delhi Commission sent a reply to the Delhi Government on 25.8.2010.

b) In the Writ Petition filed before the Delhi High Court, Delhi Commission filed an affidavit dated 22.9.2010 admitting various aspects.

c) Delhi Commission gave statutory advice to Delhi Government through letter dated 15.12.2010. This statutory advice was filed by Delhi Commission itself before the Delhi High Court on 21.12.2010.

d) Press Note dated 26.8.2011 issued by the Delhi Commission admitting that there has been a total 7% increase in tariff over 7 years between 2004-2005 and 2010-11. The same thing has been referred to, in the tariff order dated 26.8.2011.

18. These documents referred to above have not been disputed by the Delhi Commission. It becomes evident from the perusal of the documents that Delhi Commission has failed to perform its statutory functions since 2007 which warrants interference by this Tribunal under Section 121 of the Act, 2003 by giving suitable directions to restore the efficacy of the function of the Delhi Commission.
19. Under these circumstances, we have to hold that these Petitions filed by the Petitioners under Section 121 of the Act are maintainable.
20. Let us now come to the **2nd issue** relating to the non compliance of the directions issued by the Tribunal as well as the provisions of the Act, 2003.
21. According to the learned Counsel for the Petitioners, the Delhi Commission has failed to perform its statutory functions in the following aspects:

- (a) The State Commission has failed to perform the time bound cost reflective tariff determination and truing-up under Part VII of the Electricity Act read with Para 5.3 (h) of the Tariff Policy, since 2007 without factoring carrying cost to fund the gap and time bound recovery of regulatory assets.
- (b) The Delhi Commission has admittedly and deliberately not performed its statutory functions under Section 62 (4) of the Act read with Para 8.2.2 of the Tariff Policy since 2003 with reference to the putting in place scheduling a mechanism for fuel price adjustment and Power Purchase Cost Adjustments with appropriate periodicity and creation of regulatory assets without any recovery mechanism and amortization schedule.
- (c) The Delhi Commission refused to follow the directions and findings of this Tribunal in 3 direct judgments which have been indicated above. The same are reiterated below:
- (i) Judgment dated 6.10.2009 reported in 2009 ELR (APTEL) 880 for the control period of the Financial Year 2007-08 to FY 2010-11.

(ii) Judgment dated 30.7.2010 reported in 2010 ELR (APTEL) 891 for the truing-up for the tariff period 2007-08.

(iii) Judgment dated 12.7.2011 reported in 2011 ELR (APTEL) 1196 for truing-up for the tariff period 2007-08 which was rendered in favour of the Petitioners.

Admittedly, no Appeal has been filed nor admitted by the Hon'ble Supreme Court in the first two cases. In respect of the 3rd case, though the Appeal has been admitted, no stay has been granted so far.

22. The above facts have not been disputed by the Delhi Commission. As mentioned earlier, the Delhi Commission refused to implement the clear and specific findings and directions issued by this Tribunal in all those judgments merely on the ground that the Delhi Commission has filed Appeals in some cases and proposed to file Appeals in some other cases.
23. As mentioned above, mere filing of the Appeal without getting stay of the operation of the judgment of this Tribunal and mere proposal to file the Appeal before the Hon'ble Supreme

Court could not be the ground for refusal to implement the judgment of this Tribunal.

24. The refusal by the Delhi Commission to implement the judgment of this Tribunal would amount to judicial indiscipline and is contrary to the settled position of law.
25. As laid down by the Hon'ble Supreme Court that mere filing of the Appeal or proposal to file the Appeal would not amount to the effect of automatic stay.
26. This principle has been laid down in the following judgments as quoted earlier:

(a) *Atma Ram Properties vs. Federal Motors Pvt. Ltd.* (2005) 1 SCC 705

(b) *Madan Kumar Singh vs. Distt Magistrate:* (2009) 9 SCC 79

(c) *Thirunavukkarasu Mudaliar (Dead) by LRs. vs. Gopal Naidu (Dead) by LRs.* (2006) 12 SCC 390

27. When a similar issue was raised before this Tribunal in the case of DTL Vs DERC & Others, this Tribunal gave a judgment on 29.9.2010 holding that the Delhi Commission cannot claim that mere pendency of the Appeal before the Hon'ble Supreme Court would make the State Commission

entitled to contend that they need not follow the judgment of this Tribunal.

28. The relevant observation is as follows:

*“28....(iii) On the issue of DVB arrears, this Tribunal has already passed order in favour of the Appellant in its decision dated 13.01.2009 in Appeal No. 133/07. Despite this, the State Commission following its earlier practice, has considered the past arrears relating to the DVB recovered by the distribution company and remitted to the holding company as a revenue of the Appellant. This is contrary to the provisions of the statutory Transfer Scheme as well as the dictum laid down by this Tribunal in the decision quoted above. **According to the Learned Counsel for the State Commission, the judgment dated 13.01.2009 passed by the Tribunal has been appealed before the Supreme Court and as such it has not attained finality and, therefore, the same need not be followed. This contention of the Learned Counsel for the State Commission is untenable since it is settled law that mere pendency of the Appeal before the Supreme Court would not entitle the State Commission to observe that they need not follow the order of the Tribunal. Therefore, the State Commission is directed to allow the claim of the Appellant relating to this issue.**”*

29. Any action or omission by a subordinate authority which violates or refuses to give effect to a direction given by a superior authority, has been repeatedly held to be a denial of justice which is destructive of basic principles in the

administration of justice. It is well settled law that the findings and directions of Appellate Authority are binding on subordinate authorities, which should be implemented effectively and scrupulously unless the same has been stayed or struck down by the Appellate Forum.

30. This aspect has been dealt by the Hon'ble Supreme Court in various decisions in detail. Those decisions are as under:

(a) **Bhopal Sugar Industries Ltd. v. Income Tax Officer, Bhopal:** AIR 1961 SC 182;

(b) ***Shri Baradakant Mishra Vs. Bhimsen Dixit:*** (1973) 1 SCC 446 ;

(c) **Smt. Kausalya Devi Bogra & Ors. Vs Land Acquisition Officer:** (1984) 2 SCC 324;

(d) **RBF Rig Corporation, Mumbai Vs. Commissioner of Customs (Imports), Mumbai:** (2011) 3 SCC 573;

(e) ***Maninderjit Singh Bitta Vs UOI:*** (2011) 11 SCC 315

31. The observations made by the Hon'ble Supreme Court in these judgments are as follows:

(a) **Bhopal Sugar Industries Ltd. v. Income Tax Officer, Bhopal:** AIR 1961 SC 182;

“

8. *We think that the learned Judicial Commissioner was clearly in error in holding that no manifest injustice resulted from the order of the respondent conveyed in his letter dated March 24, 1955. **By that order the respondent virtually refused to carry out the directions which a superior tribunal had given to him in exercise of its appellate powers in respect of an order of assessments made by him. Such refusal is in effect a denial of justice, and is furthermore destructive of one of the basic principles in the administration of justice based as it is in this country on a hierarchy of courts. If a subordinate tribunal refuses to carry out directions given to it by a superior tribunal in the exercise of its appellate powers, the result will be chaos in the administration of justice and we have indeed found it very difficult to appreciate the process of reasoning by which the learned Judicial Commissioner while roundly condemning the respondent for refusing to carry out the directions of the superior tribunal, yet held that no manifest injustice resulted from such refusal***".

(b) *Shri Baradakant Mishra Vs. Bhimsen Dixit:*
(1973) 1 SCC 446 ;

“

15. *The conduct of the appellant in not following the previous decision of the High Court is calculated to create confusion in the administration of law. It will undermine respect for law laid down by the High Court and impair the Constitutional authority of the High Court. His conduct is therefore comprehended by the principles underlying the law of Contempt. The analogy of the inferior court's disobedience to*

the specific order of a superior court also suggests that his conduct falls within the purview of the law of Contempt. Just as the disobedience to a specific order of the Court undermines the authority and dignity of the court in a particular case, similarly the deliberate and malafide conduct of not following the law laid down in the previous decision undermines the Constitutional authority and respect of the High Court. Indeed, while the former conduct has repercussions on an individual case and on a limited number of persons, the latter conduct has a much wider and more disastrous impact. It is calculated not only to undermine the Constitutional authority and respect of the High Court, generally, but is also likely to subvert the Rule of Law and engender harassing uncertainty and confusion in the administration of law.

(c) Smt. Kausalya Devi Bogra & Ors. Vs Land Acquisition Officer: (1984) 2 SCC 324;

“

9. *The direction of the appellate court is certainly binding on the courts subordinate thereto. That apart, in view of the provisions of Article 141 of the Constitution, all courts in India are bound to follow the decisions of this Court. Judicial discipline requires and decorum known to law warrants that appellate directions should be taken as binding and followed. It is appropriate to usefully recall certain observations of the House of Lords in Broom v. Cassell & Co. [1972] 1 All E.R. 801 Therein Lord Hailsham, L.C. observed :*

The fact is, and I hope it will never be necessary to say so again, that in the hierarchical system of courts which exist in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tier”.

(d) RBF Rig Corporation, Mumbai Vs. Commissioner of Customs (Imports), Mumbai: (2011) 3 SCC 573;

“

19. We hasten to add, if for any reason, the subordinate authority is of the view that the directions issued by the Court is contrary to statutory provision or well established principles of law, it can approach the same Court with necessary application/petition for clarification or modification or approach the superior forum for appropriate reliefs. In the present case, as we have already noticed, the Respondents have not questioned the order passed by the High Court, which order has reached finality. In such circumstances, we cannot permit the adjudicating authority to circumvent the order passed by the High Court.”

(e) Maninderjit Singh Bitta Vs UOI: (2011) 11 SCC 315

“

16. Disobedience of Court orders, more so persistent disobedience, has been viewed very seriously by the concerned Courts. It is not only desirable but an essential requirement of law that the concerned authorities/executive should carry out their statutory functions and comply with the

orders of the Court within the stipulated time. Such course attains greater significance where the statutory law is coupled with the directions issued by a Court of law in relation to attainment of a public purpose and public interest”.

32. The reading of the above judgments would make it clear that the conduct of the Delhi Commission in refusing to implement this Tribunal’s directions, is highly reprehensible and the same is liable to be condemned.
33. Though the Act provides for suitable action against the Delhi Commission by imposing fine or cost for having violated our directions given in the Appeal under Section 111 of the Act, 2003, we refrain from doing so in view of the fact that the Delhi Commission in another Appeal filed before this Tribunal in Appeal No.14 of 2012 in which similar allegations have been leveled against the Delhi Commission, filed Affidavit tendering unqualified apology for non-compliance of the directions and expressed its willingness to implement our directions earnestly in letter and spirit in future.
34. The contents of the Affidavit filed by the Delhi Commission in Appeal No.14 of 2012 are reproduced below:

“That at the outset of the Written Submissions the Respondent most respectfully submits that the language used in the impugned order is not appropriate and the Respondent submits

unconditional apology for use of the said language in the impugned order. The Respondent duty is bound to implement all the directions issued by this Tribunal.

2. That DERC most respectfully submits that it has complied with several directions issued by this Hon'ble Court while doing true-up exercise for the year 2007-08 to 2011-12 vide tariff order dated 31.07.2013. Relevant extracts of the said tariff order are being enclosed herewith and marked as **ANNEXURE-1**.

3. That the reasons as to why the directions issued by this Tribunal are not complied with, are as follows:-

i). That the Commission has no intention not to comply with the directions issued by this Tribunal, it is respectfully submitted that implementation of the directions issued by this Tribunal were not complied with in the public interest at large. As a consequence of implementation of the said directions, huge amount to be awarded. The total amount comes along with carrying cost with the ARR of 2011-12, which will give a huge tariff shock to the consumers in the area of supply of Appellant.

ii). That against the judgment of this Tribunal dated 31.05.2011 in Appeal No. 52 of 2008, the Commission has filed Civil Appeal D No. 26630 of 2011, which came up for hearing on 09.01.2012 when Hon'ble Supreme Court condoned the delay and admitted the Appeal, which is pending.

iii). That the issue of apportioning carrying cost in debt/equity ratio of 70:30 and rebate on power purchase cost was decided by this Tribunal in its judgment dated 12.07.2011 in Appeal Nos. 142 of 2009 and 147 of 2009. Against the said judgment, the Commission has filed Civil Appeal Nos. 9003 and 9004 of 2012, which were admitted vide order dated 09.05.2012.

iv). That the Civil Appeal D No. 19428 of 2012 filed by the Commission against the judgment dated 30.07.2010 in Appeal No. 153 of 2009 was dismissed by Hon'ble Supreme Court on the ground of limitation in view of its earlier decision in Chattisgarh State Electricity Board Vs. CERC & Ors. reported in 2010 (5) SCC 23.

v). ...

vii). That again it is reiterated that only in the interest of public at large, the directions passed by this Tribunal were not implemented, though the Commission is bound to implement the same. This Tribunal can better protect the interest of the consumers and pass appropriate orders.

viii). That Respondent is confident that in respect of some of the issues this Tribunal will consider the arguments raised by the

Respondent and pass the orders in the interest of public at large as the wisdom of this Tribunal is wider than the wisdom of the Respondent Commission.

35. The same stand has been taken by the Delhi Commission in these Petitions also at the end of the hearing.
36. Therefore, we do not propose to take any further action against the Delhi Commission except to advise the Delhi Commission to correct its mistakes committed earlier and follow the directions issued by this Tribunal. If there are any difficulties in implementation of the orders and directions issued by this Tribunal, it is open to the Delhi Commission either to file an Application seeking for clarification or praying for Review on those aspects. Instead of doing so, the State Commission ought not to have adopted the approach of confrontation with this Tribunal observing that they would not follow the Tribunal's directions.
37. As regards recovery of the Regulatory assets/amortization schedule and fuel and power purchase adjustment mechanism, this Tribunal in OP No.1 of 2011 dated 11.2011 has given the following directions to the State Commission.

“(iv) In determination of ARR/tariff, the revenue gaps ought not to be left and Regulatory Asset should not be created as a matter of course except where it is justifiable, in accordance with the Tariff Policy and the Regulations. The recovery of the Regulatory Asset should be time bound and within a period not exceeding three years at the most and preferably within Control Period. Carrying cost of the Regulatory Asset should be allowed to the utilities in the ARR of the year in which the Regulatory Assets are created to avoid problem of cash flow to the distribution licensee.

(vi) Fuel and Power Purchase cost is a major expense of the distribution Company which is uncontrollable. Every State Commission must have in place a mechanism for Fuel and Power Purchase cost in terms of Section 62 (4) of the Act. The Fuel and Power Purchase cost adjustment should preferably be on monthly basis on the lines of the Central Commission’s Regulations for the generating companies but in no case exceeding a quarter. Any State Commission which does not already have such formula/mechanism in place must within 6 months of the date of this order must put in place such formula/ mechanism.”

38. In view of the above, we direct the State Commission to take immediate steps for recovery of the admitted revenue gap and decide amortization schedule and also ensure that the Fuel and Power Purchase costs are passed on regularly and effectively as per the above directions of this Tribunal to avert the problems of cash flow experienced by the Petitioners which may come in the way of smooth operation

of the distribution system and meeting the requirements of electricity of the consumers in the national capital in a reliable manner if not remedied in time.

39. In view of the categorical stand taken by the Delhi Commission now, it is enough for us to direct the Delhi Commission to implement the directions of this Tribunal given in the decisions referred to above and pass an order in terms of those directions in future.

40. Summary of Our Findings

- i) The Petitions filed by the Petitioners under Section 121 of the Electricity Act, 2003 are maintainable.**
- ii) The refusal by the Delhi Commission to implement the judgments of this Tribunal would amount to judicial indiscipline and is against the settled position of law. Mere filing of the Appeal or proposal to file the Appeal would not amount to the effect of automatic stay of the Tribunal's judgment. However, in view of the affidavit filed by Delhi Commission in Appeal No.14 of 2012 and submissions made in these petitions, we do not propose to take any penal action against the Delhi Commission except to advise it to correct its**

mistakes committed earlier and follow the directions issued by this Tribunal in future.

iii) As regards recovery/amortization schedule of the admitted regulatory assets and effective implementation of Fuel & Power Purchase Adjustment mechanism, we direct the Delhi Commission to take immediate action in pursuance to the directions given in OP No.1 of 2011 dated 11.11.2011.

41. It is noted that the Delhi Commission has challenged judgments of this Tribunal dated 06.10.2009, 30.10.2009 and 12.07.2011 in Civil Appeal Nos. 884 of 2010, 980 of 2010 and 9003-04 of 2011. The Hon'ble Supreme Court on 25.07.2012 had directed that the proceedings before the Tribunal in the present Petitions may continue, but judgment should not be pronounced without the leave of the Supreme Court. This order was modified by the Hon'ble Supreme Court by its order dated 28.02.2013 to the effect that judgment may be pronounced in OP No. 1 and 2 of 2012 by this Tribunal, but the same may not be given effect to until further orders of the Hon'ble Supreme Court. The Applicants were also given the liberty to file fresh applications in the event the same become necessary. Accordingly, the implementation of this Judgment is subject to the further directions of the Hon'ble Supreme Court.

42. Thus, these Petitions are disposed of with the above directions to the Delhi Commission.

(V J Talwar) (Rakesh Nath) (Justice M. Karpaga Vinayagam)
Technical Member Technical Member Chairperson

Dated: 14th Nov, 2013

√REPORTABLE/~~NON-REPORTABLE~~