IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL No. 98 OF 2021 & IA No. 2004 OF 2024
AND
APPEAL No. 465 OF 2023

Dated: 28th November, 2025

Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon'ble Smt. Seema Gupta, Technical Member (Electricity)

APPEAL No. 98 OF 2021 & IA No. 2004 OF 2024

In the matter of:

NOIDA POWER COMPANY LIMITED
Through its Authorized Representative,
Plot No. E.S.S., Knowledge Park -IV,
Greater Noida, Uttar Pradesh- 201310 … Appellant(s)

VERSUS

1. UTTAR PRADESH ELECTRICITY REGULATORY COMMISSION
Through its Secretary,
Vidyut Niyamak Bhawan,
Vibhuti khand, Gomti Nagar,
Lucknow - 226010 ... Respondent No.1

2. RAMA SHANKER AWASTHI
301, Surbhi Delux Apartment,
6/7 Dalibagh, Lucknow – 226001 … Respondent No.2

Counsel on record for the Appellant(s) : Vishal Gupta
Sumeet Sharma
Divyanshu Gupta
Paras Choudhary
Tenzen Tashi Negi
Anil Dutt for App. 1

Counsel on record for the Respondent(s) : C.K. Rai for Res. 1

Anand K. Ganesan
Swapna Seshadri

Divyanshu Bhatt
Amal Nair
Shashwat Singh
Savyasachi Saumitra
for Res. 2

APPEAL No. 465 OF 2023

In the matter of:

RAMA SHANKER AWASTHI
301, Surbhi Delux Apartment,
6/7 Dalibagh, Lucknow – 226001 … Appellant(s)

VERSUS

1. **UTTAR PRADESH STATE ELECTRICITY REGULATORY COMMISSION**
Through its Secretary,
Vibhuti khand, Kisan Mandi Bhawan,
Gomti Nagar, Lucknow - 226010 ... Respondent No.1

2. **NOIDA POWER COMPANY LIMITED**
Through its Managing Director,
Registered Office, Electric Sub-station,
Knowledge Park -IV, Greater Noida,
Gautam Buddha Nagar,
Uttar Pradesh- 201310 … Respondent No.2

Counsel on record for the Appellant(s)	:	Anand K. Ganesan Swapna Seshadri Divyanshu Bhatt Amal Nair Shashwat Singh for App. 1
Counsel on record for the Respondent(s)	:	C.K. Rai Sumit Panwar Anuradha Roy for Res. 1 Vishal Gupta Anil Dutt Sumeet Sharma

Paras Choudhary
Tenzen Tashi Negi
Debolina Roy for Res. 2

JUDGMENT

(PER HON'BLE MRS. SEEMA GUPTA, TECHNICAL MEMBER, ELECTRICITY)

The Appeal 98 of 2021 is preferred by the Appellant-Noida power Company Limited challenging a limited portion of the tariff order dated 04.12.2020 passed by the Uttar Pradesh Electricity Regulatory Commission ("UPERC") in Petition No. 1541 of 2019, with regard to various claims of Appellant which has been disallowed, changed/altered.

The Appeal 465 of 2023 is preferred by the Appellant-Rama Shankar Awasthi challenging the tariff order dated 04.12.2020 passed by the Uttar Pradesh Electricity Regulatory Commission ("UPERC") in Petition No. 1541 of 2019, whereby the UPERC while disallowing some expenditure in True up of FY 2018-19, has not disturbed the claims already made in previous years.

These two appeals are against the same order and are integrally connected and are therefore being disposed of by this Common Judgement

Present case has a chequered history and brief details are as under:

The Appellant has filed this appeal being Appeal No. 98 of 2021 challenging the Tariff Order dated 04.12.2020 passed by UPERC in Petition no. 1541 of 2019 for approval of Annual Revenue Requirement (ARR) for FY 2020-21, Annual Performance Review (APR) for FY 2019-20 and True up for FY 2018-19. Further, an Appeal No. 343 of 2021 had been filed by the Appellant before this Tribunal challenging the Tariff

Order dated 26.08.2021 passed by UPERC in Petition No. 1684 of 2021. This Tribunal by its judgment dated 24.11.2022 had set aside the Tariff Order impugned in Appeal No. 343 of 2021 and remanded the matter to UPERC for fresh consideration.

The judgment dated 24.11.2022 passed by this Tribunal in Appeal No. 343 of 2021 was challenged by Mr. Rama Shanker Awasthi, Respondent No. 2 in Appeal No.98 of 2021, before the Supreme Court in Civil Appeal No. 9320 of 2022. The Supreme Court, by way of its order dated 13.02.2023 passed in Civil Appeal No. 9320 of 2022, has set aside the judgment dated 24.11.2022 passed by this Tribunal in Appeal No. 343 of 2021 and remanded the matter to this Tribunal in the following terms:

> *"After we have heard learned counsel for the parties, as there is a consensus arrived at between the parties, we are inclined to dispose of the present appeal.*
>
> *The order passed by the Appellate Tribunal for Electricity dated 24.11.2022 is hereby set aside and Appeal No. 343 of 2021 is restored on the file of the Appellate Tribunal and be tagged along with Appeal No. 98 of 2021, pending before the Tribunal.*
>
> *We request the Tribunal to decide both the appeals as expeditiously as possible on its own merits, but in no case, later than six months after the parties record their presence.*
>
> *Let both the parties record their presence before the Appellate Tribunal on 27.02.2023.*
>
> *In view of above, the appeal is disposed of."*

Subsequently, the Supreme Court vide its order dated 24.07.2023 modified the direction given earlier as regards disposal of the Appeal by this Tribunal in six months and directed the Tribunal to dispose the matter as expeditiously as possible. In view of the above orders of the Supreme Court, Appeal No. 343 of 2021 stood restored to its file before this

Tribunal and tagged along with the instant Appeal being Appeal No. 98 of 2021. Appeal No. 98 of 2021 & Appeal 465 of 2023, pertains to year filed prior to Appeal No 343 of 2021, is being taken up first.

Brief facts of the case:

The Appellant-Noida power Company Limited **(in short "NPCL")** was granted license for distribution and retail supply of electricity in the Greater Noida area of the State of Uttar Pradesh on 30.08.1993 (the "**1993 License**") and 18.07.1996 (the "**1996 Amended License**") under the Indian Electricity Act, 1910. After coming into force of the Electricity Act, 2003, the Appellant is a deemed distribution licensee in terms of first proviso to Section 14 of the Act. The licensed area of the Appellant is as per the 1993 license and thereafter as amended by 1996 Amended License.

The Respondent No. 1 is the Uttar Pradesh Electricity Regulatory Commission **(in short "UPERC/State Commission").** Respondent No. 2 is Mr Rama Shanker Awasthi,

On 12.05.2014, the State Commission notified the UPERC (Multi Year Distribution Tariff) Regulations, 2014 (the **"MYT Regulation 2014**"). These regulations govern the approval of Revenue Requirements and the determination of tariffs, applicable from 01.04.2015 to 31.03.2020.

On 30.11.2017, the State Commission approved the Business Plan, the Multi-Year Aggregate Revenue Requirement (ARR), and the Tariff for the First Control Period (FY 2017-18 to FY 2019-20), as well as the True-Up of ARR and Revenue for FY 2015-16 of the Appellant.

On 20.07.2018, Appellant filed Petition No.1349 of 2018 before the State Commission seeking approval of the Annual Performance Review (APR) for FY 2017-18, revised ARR estimates along with Multi-Year Tariff

proposal for FY 2018-19 to FY 2019-20, and True-Up for FY 2016-17; State Commission vide its order dated 22.01.2019 in Petition No. 1349 of 2018 approved the ARR for FY 2018-19 under the "MYT Regulation 2014".

On 29.10.2018 the Appellant filed Petition No. 1382 of 2018 for approval of the APR for FY 2018-19, revised ARR and tariff for FY 2019-20, and true-up for FY 2017-18.

The State Commission issued Public Notice on 10.04.2019, releasing the Draft Uttar Pradesh Electricity Regulatory Commission (Multi Year Tariff for Distribution, Transmission & SLDC) Regulations, 2020. ("Draft MYT Regulation 2020")

The State Commission, vide the Tariff Order dated 03.09.2019, in Petition No. 1382 of 2018, approved the APR for FY 2018-19 under the MYT Regulations 2014. The Appellant had already challenged a limited part of the Tariff Order dated 03.09.2019 read with the Order dated 04.06.2020 passed in Review Petition No.1512 of 2019 in Petition No.1382 of 2018 before this Tribunal under Appeal *(DFR No.246 2020)* and the same is pending adjudication.

On 24.09.2019, the State Commission directed the Appellant to make necessary preparation for filing the Business plan for the Control Period, April 1, 2020 to March 31, 2025 latest by 15.10.2019, in view of pending finalization/ publication of Draft MYT Regulation, 2020.

On 22.11.2019, the State Commission uploaded the notified Uttar Pradesh Electricity Regulatory Commission (Multi Year Tariff for Distribution and Transmission) Regulations, 2019 (**"MYT Regulations 2019**") dated 23.09.2019. These Regulations are applicable for determination of tariff from 01.04.2020 onwards till 31.03.2025 *(unless*

extended by the State Commission). The Appellant has challenged the MYT Regulations 2019 by way of a Writ Petition being W.P. (MISB) No.24992 of 2020 before the Hon'ble High Court of Judicature at Allahabad, Lucknow, which is pending adjudication.

As per Regulation 4.1 of the MYT Regulations 2019, the Appellant is to file its tariff petition for True-Up of FY 2018-19, APR of FY 2019-20 and ARR of FY 2020-21 on or before 30.11.2019, however, the Appellant filed its tariff petition being Petition No.1541 of 2019 on 27.12.2019 (the "**Tariff Petition**"). The State Commission, on 05.06.2020 admitted the Petition after obtaining clarifications, additional documents, issuance of Public Notice by Appellant consisting of the summary and highlights of the proposed ARR and Tariff for FY 2020-21, APR for 2019-20 and True-Up for FY 2018-19. The State Commission after conducting public hearing on 08.07.2020, sought further clarification from the Appellant and passed Impugned Order on 04.12.2020 for True-Up of FY 2018-19, APR of FY 2019-20 and ARR of FY 2020-21.

In the meanwhile, on 26.11.2020, State Commission approved the Business Plan of the Appellant for the Control Period i.e. FY 2020-21 to FY 2024-25. The Appellant has preferred another Appeal against the Business Plan order on limited aspects before this Tribunal on 18.01.2021 under DFR No. 17 of 2021, which is pending adjudication.

In the Impugned Order, various claims of Appellant – NPCL, the Distribution licensee have been disallowed and aggrieved by the said order of the State Commission, the Appellant has approached this Tribunal vide **Appeal No 98 of 2021** raising the following issues for our consideration, which has been categorized in various sections:

Appeal No 98 of 2021 : Issues raised by Appellant – NPCL

Section 1 (License Issue)

Term of License of Appellant : Term of the License of Appellant is common for all these years (True up for FY 2018-19, APR for FY 2019-20 and ARR for FY 2020-21).

Issues concerning True up for FY 2018-19

Section 2 (Miscellaneous Issue)

1. Expenses Incurred Due to Change in Law-GST
2. Miscellaneous Expenses
3. Non-tariff Income - Cost of Borrowing for Delayed Payment Surcharge (DPS)
4. Efficiency Gain on Loan Swapping
5. Disallowance of Un-Metered Sales -
6. Sharing of gains or losses on account of controllable factors -
7. Inclusion of Treasury Income in the Non-tariff income for reducing the ARR
8. Disallowance of Working Capital on Electricity Duty

Section 3 (Power Purchase Issue)

1. Long Term Power Purchase from M/s DIL
2. Medium Term Power Purchase -
3. Short Term Power
4. Banking of Power
5. Sale of Surplus Power
6. Erroneous Computation of RPO (Non-Consideration of Net-Metering Power and) and disallowance of Transmission Charges of RE Power

Section 4 (Capital Expenditure)

1. CAPEX on Projects above Rs. 10 Crores
2. Vehicles
3. CAPEX on 132 kV and above assets
4. Capital Works in Progress
5. Justification for optimum utilization of un-utilized lands
6. Consequent per Annum Disallowances on the account of above

Issues Concerning APR for FY 2019-20

(Section -4 (Capital Expenditure)

1. Capital Works in Progress

Issues Concerning ARR for FY 2020-21

Section 2 (Miscellaneous Issue)

1. Loss on Retirement/Impairment of Assets
2. Disallowance of Operation & Maintenance Expenses:
   (a) Disallowance of Financing Cost of DPS
   (b) Due to error in computation of normative O&M expenses based on trued-up O& M expenses of FY 2015-16 to FY 2019-20
   (c) No additional allowance to meet expenses on Standards of Performance compliance
3. Deviation from MYT Regulation with respect to computation of Debt-Equity Ratio
4. Energy Balance/Distribution Losses
5. Provision for Write off of Bad and Doubtful Debts
6. Disallowance in Contingency Reserve
7. Tariff Philosophy

8. Wheeling Charges; Non-recovery of Wheeling Charges from Open Access Customer availing supply directly through the State transmission network
9. Additional Surcharge
10. Revenue Gap / Surplus

Section 3 (Power Purchase Issue)

1. Medium Term Power Purchase
2. RE Power to meet RPO (Transmission Charges disallowed) -
3. Long Term Power Purchase from M/s DIL
4. Intra-State Transmission Charges and Losses

Section 4 (Capital Expenditure)

1. Capital Expenditure Disallowance on Vehicles

Appeal No 465 of 2023 ; Issues raised by Appellant – Consumer

a) For the 220 KV substations on which tariff has been denied in True up of FY 2018-19; these assets ought to be decapitalized in the books and all depreciation, interest etc. already claimed in the previous years should be adjusted in the true up for FY 2018-19

b) Investment already made in land and boundary wall for construction of sub-station and thermal power plant at BZP, KP-5 and Jaun Samana, which have not fructified, but already capitalized should be disallowed.

c) Discrepancies in the assets created from consumer contributions, based on comparison between the Fixed Asset Register for FY 2018-19 and Cost Book Data, 2016 need to be addressed.

d) Unmetered sales to agricultural consumers ; Impact ought to be given for the past period

e) Recovery of EHV losses for the past period

f) Recovery of excess amount of short-term power allowed to NPCL for period prior to FY 2018-19

g) GST disallowances for the period FY 2017-18;

h) Revenue from sale of power for past period as per balance sheet of NPCL.

i) Adjustment of Electricity Duty allowed for previous years :

ANALYSIS & DISCUSSION

We have heard Mr. B.P.Patil, learned senior Counsel & Mr Buddy Ranganathan learned senior Counsel appearing on behalf of the Appellant - NPCL (Appeal No 98 of 2021) and Mr. Sitesh Mukherjee, learned senior Counsel appearing on behalf of the State Commission, and Mr. Anand K. Ganeshan, learned Counsel on behalf of Appellant – Consumer (Appeal 465 of 2023) at length. Learned counsel on behalf of Consumer (Respondent No 2 in Appeal 98 of 2021) submitted that they adopts the submission made by State Commission in the Appeal No 98 of 2021.

Besides specific issues raised in the Appeals, it is important for us to address general contention/ concern of Sri B.P. Patil, learned senior Counsel appearing on behalf of Appellant (Appeal 98 of 2021) and Respondent no 2 (Appeal 465 of 2023) that learned senior Counsel on behalf of State Commission, without substantiating the reasons given in Impugned Order, during the hearing has tried to justify various disallowance on the reasons which are extraneous to the Impugned Order itself as well as the reply filed by the State Commission; thus State Commission has effectively, not only sought to supplant its findings in the Impugned Order, but has virtually created a new Impugned Order, both of which are impermissible in law. In this context, Sri B.P. Patil, Learned

Senior Counsel put forth his submissions on the following aspects: (a) the character of "tariff determination" function of the Appropriate Commission is quasi-judicial in character; (b) rules of natural justice obligate the Appropriate Commission to record reasons for disallowing a claim in the tariff order; (c) the Appropriate Commission is not entitled to supplement the reasons, assigned in the Impugned Order, with fresh reasons at the appellate stage; (d) the Appropriate Commission is disentitled from defending the tariff order passed by it in appeal, as if it is an adversarial party; and (e) this Tribunal should not remand the matter to the Commission. Further, the learned senior counsel has strongly objected to the issues raised by Appellant in Appeal No 465 of 2023, as these pertains to revision of Tariff Order for previous years, which have attained finality and were not even part of the tariff determination of the years in Impugned Order. On the other hand, the Appellant-Consumer (Appellant in Appeal No.465 of 2023) would put forth submissions on (i) role of consumers in tariff determination; and (ii) jurisdiction of the Commission to rectify past errors.

Thus before examining the specific issues raised in both the appeals, it is but appropriate that the afore-said general submissions are considered and dealt with under different heads.

I. IS THE "TARIFF DETERMINATION" FUNCTION OF THE COMMISSION QUASI-JUDICIAL IN CHARACTER?

A. SUBMISSIONS URGED ON BEHALF OF NPCL

On the character of the "tariff determination" function of the Appropriate Commission, – Learned Senior Counsel would refer to the Statutory Scheme under the Electricity Act to submit that, under Section 61 of the Act, the Commission frames *regulations* laying down the

general principles, terms, and conditions for tariff; under Section 62 read with Section 64 of the Act, the Commission then applies those principles (as also the principles of Section 61 of the Act) to determine tariff for a particular licensee/generating company after a public process (publication, objections, hearing, reasons); and, one among the functions of the State Commission under Section 86 of the Act, is tariff determination. Learned Senior Counsel would rely, in this regard, on (i) **W.B. Electricity Regulatory Commission v. CESC Ltd 2002 SCC OnLine SC 949;** (ii) **PTC India Ltd. v. CERC, 2010 SCC OnLine SC 364;** (iii) **GRIDCO Ltd. v. Western Electricity Supply Co. of Orissa Ltd., (2024) 2 SCC 500;** and (iv) **Airports Economic Regulatory Authority of India v.Delhi International Airport Ltd. and Others 2024 SCC OnLine SC 2923.**

Learned Senior Counsel, would further submit that framing of terms and conditions of tariff under Section 61 of the Act is in the nature of subordinate legislation (regulations of general application), and is legislative in character; actual tariff determination, under Section 62/64 of the Electricity Act, involves the following, which bears the essential attributes of a quasi-judicial power: (i) filing of an application, (ii) publication for objections/suggestions, (iii) opportunity of hearing (while the mandate is only to consider all the subjections/objections and not for a public hearing *per se*, however the State Commission, in the present case, generally conducts public hearing), (iv) duty to record reasons, and (v) specific application to the applicant and stakeholders; and the nature of the power of the Appropriate Commission, in determining tariff under Sections 62 and 64 of the Electricity Act, is quasi-judicial.

B. JUDGEMENTS RELIED ON BEHALF OF THE APPELLANT NPCL UNDER THIS HEAD :

1. W.B. Electricity Regulatory Commission v. CESC Ltd 2002 SCC OnLine SC 949 (under the 1998 Act), the Supreme Court observed that, though normally price fixation is in the nature of a legislative function and principles of natural justice are not normally applicable, in cases where such right is conferred under a statute, it becomes a vested right, compliance of which becomes mandatory; and, while the requirement of principles of natural justice can be taken away by a statute, such a right, when given under the statute, cannot be taken away by courts on the ground of practical inconvenience, even if such inconvenience does in fact exist.

2. In **PTC India Ltd. v. CERC, 2010 SCC OnLine SC 364,** the Supreme Court (in Para 49 & 50) observed that decision-making and regulation-making functions are both assigned to CERC; price fixation exercise is really legislative in character, unless by the terms of a particular statute it is made quasi- judicial as in the case of tariff fixation under Section 62 made appealable under Section 111 of the 2003 Act, though Section 61 is an enabling provision for the framing of regulations by the CERC; under Part VII of the 2003 Act actual determination/fixation of tariff is done by the appropriate Commission under Section 62 whereas Section 61 is the enabling provision for framing of regulations containing generic propositions in accordance with which the appropriate Commission has to fix the tariff.

3. In **GRIDCO Ltd. v. Western Electricity Supply Co. of Orissa Ltd., (2024) 2 SCC 500,** the Supreme Court (in Para 26 & 27), following **PTC (India) Ltd. v. CERC, (2010) 4 SCC 603**, observed that the nature of power exercised by the Commission, while fixing the tariff under

Section 62 of the Electricity Act, is quasi-judicial.

4. In **Airports Economic Regulatory Authority of India v. Delhi International Airport Ltd. and Others 2024 SCC OnLine SC 2923,** the Supreme Court (in Para 51& 52) observed that, in **PTC (India) Ltd. v. CERC, (2010) 4 SCC 603,** it was held that tariff fixation, like price fixation is generally of a legislative character; the judgment in **PTC (India) Ltd** is an authority only for the proposition that the question whether determination of tariff is a legislative or an adjudicatory function must be determined upon an analysis of the provisions of the statute conferring the power; that was the test that was propounded in **SITARAM SUGAR** as well; in **GRIDCO LTD**, the Supreme Court was hearing appeals arising out of the decisions of the Appellate Tribunal for Electricity constituted under Section 110 of the Electricity Act, 2003 which arose from orders issued by the Orissa Electricity Regulatory Commission determining tariff; relying on the judgment in **PTC (India) Ltd**, a two-Judge Bench of the Supreme Court, in **GRIDCO LTD**, had held that tariff determination being a quasi- judicial function, the Commission could not have preferred an appeal against the order of the Appellate Tribunal; the judgment of the two-Judge Bench in **GRIDCO LTD** also dealt with the nature of function of the Appropriate Commission under Section 62 of the Electricity Act which was already settled by the judgment of the Constitution Bench in **PTC (India) Ltd** that it was adjudicatory.

C. CONSIDERATION AND OUR VIEW :

The requirement of recording reasons, in a quasi-judicial order, is one of the principles of natural justice. **(S.N. Mukherjee v. Union of India, (1990) 4 SCC 594: 1990 SCC OnLine SC 406).** Where an

authority makes an order, in exercise of a quasi-judicial function, it must record its reasons in support of the order it makes. Every quasi-judicial order must be supported by reasons. **(Siemens Engg. & Mfg. Co. of India Ltd. v. Union of India, (1976) 2 SCC 981: 1976 SCC OnLine SC 189).** An important consideration of the requirement of an authority, exercising quasi-judicial functions, to record reasons for its decision, is that such a decision is subject to appeal. Reasons, if recorded, would enable the appellate Tribunal to effectively exercise its appellate power. **(S.N. Mukherjee v. Union of India, (1990) 4 SCC 594: 1990 SCC OnLine SC 406).** It is only if the Regulatory Commission is held to exclusively exercise quasi-judicial functions, while undertaking tariff determination under Sections 62 & 64 of the Electricity Act, would this facet of the rules of natural justice apply.

In **PTC India Ltd. v. Central Electricity Regulatory Commission, (2010) 4 SCC 603**, a Constitution Bench of the Supreme Court, on an analysis of various sections of the Electricity Act, 2003, held that decision-making and regulation-making functions were both assigned to the CERC; a statutory instrument, such as a rule or regulation, emanates from the exercise of delegated legislative power which is a part of administrative process resembling enactment of law by the legislature whereas a quasi-judicial order comes from adjudication which is also a part of the administrative process resembling a judicial decision by a court of law (**Shri Sitaram Sugar Co. Ltd. v. Union of India: (1990) 3 SCC 223**); price fixation exercise is legislative in character, unless by the terms of a particular statute it is made quasi-judicial as in the case of tariff fixation under Section 62 made appealable under Section 111 of the 2003 Act, though Section 61 is an enabling provision for the framing of regulations by the CERC; and under Part VII of the 2003 Act actual

determination/fixation of tariff is done by the appropriate Commission under Section 62 whereas Section 61 is the enabling provision for framing of regulations containing generic propositions in accordance with which the appropriate Commission has to fix the tariff.

Following the Constitution Bench Judgement in **PTC India Ltd. v. CERC, (2010) 4 SCC 603)**, a two-judge bench of the Supreme Court, in **BSES Rajdhani Power Ltd. v. DERC:** (**2023**) **4 SCC 788**, held that the Commission performs a quasi-judicial function while determining tariff; and a tariff order is quasi-judicial in nature which becomes final and binding on the parties unless it is amended or revoked under Section 64(6) or set aside by the Appellate Authority.

While examining whether appeals can be preferred, by the Commission, to the Supreme Court, against the orders passed by the Appellate Tribunal in appeals under Section 111 of the Electricity Act, a two judge bench of the Supreme Court, in **GRIDCO Ltd. v. Western Electricity Supply Co. of Orissa Ltd., (2024) 2 SCC 500**, following the Constitution Bench Judgement, in **PTC (India) Ltd. v. CERC, (2010) 4 SCC 603,** held that the function of the Commission of tariff fixation under Section 62 is quasi-judicial; in the appeals preferred against the tariff orders passed by the Commission, the Appellate Tribunal has dealt with the legality and validity of the decisions of the Commission rendered in the exercise of quasi-judicial power; in short, the Appellate Tribunal has tested the correctness of the order of the Commission; the Commission is bound by the order of the Appellate Tribunal; there was serious doubts about the propriety and legality of the act of the Commission of preferring appeals against the orders of the Appellate Tribunal in appeal by which its own orders had been corrected; the Commission could not be the aggrieved party except possibly in one appeal where the issue was about

non-compliance by the Commission of the orders of the Appellate Tribunal; and, if the Commission was exercising legislative functions, the position would have been different.

On the other hand, a two judge bench of the Supreme Court, in **Energy Watchdog v. CERC, (2017) 14 SCC 80**, observed that determination of tariff can take place in one of two ways — either under Section 62, where the Commission itself determines the tariff in accordance with the provisions of the Act (after laying down the terms and conditions for determination of tariff mentioned in Section 61) or under Section 63 where the Commission adopts tariff that is already determined by a transparent process of bidding; in either case, the general regulatory power of the Commission under Section 79(1)(*b*) (similar to 86(1)(b)) is the source of the power to regulate, which includes the power to determine or adopt tariff; in fact, Sections 62 and 63 deal with "determination" of tariff, which is part of "regulating" tariff; whereas "determining" tariff for inter-State transmission of electricity is dealt with by Section 79(1)(*d*), Section 79(1)(*b*) is a wider source of power to "regulate" tariff; and Section 62 deals with "determination" of tariff, which is part of "regulating" tariff.

The afore-said observations of the two-judge bench of the Supreme Court, in **Energy Watchdog v. CERC, (2017) 14 SCC 80**, was referred with approval by a subsequent three-judge bench of the Supreme Court in **Tata Power Co. Ltd. Transmission v. Maharashtra Erc: (2023) 11 SCC 1** which had also taken note of the observations of the Constitution Bench, in **PTC (India) Ltd. v. CERC, (2010) 4 SCC 603,** on the general regulatory power of the Regulatory Commission.

Likewise, a three-judge bench of the Supreme Court, in **GUVNL v. Renew Wind Energy (Rajkot) Pvt. Ltd: 2023 SCC OnLine SC 411,** after referring to the Constitution Bench Judgement of the Supreme Court in **PTC (India) Ltd. v. CERC, (2010) 4 SCC 603**, held that, while Section 61 of the Electricity Act enacts the basis for tariff determination, Section 62 is concerned with fixation of various other charges and tariffs; Section 64 lists the manner and procedure for tariff determination by the Commission; Section 86 lists the functions of the Commission and reiterates the determination of tariffs to be a prominent task of the commission; tariff determination comprehends the exercise of regulatory function, including purchase, sourcing, procurement of electricity from generators, by distribution and other licensees, and their sales; and Tariff fixation is a statutory function.

In **POWER GRID CORPORATION OF INDIA LIMITED VS MADHYA PRADESH POWER TRANSMISSION COMPANY LIMITED & ORS (Judgement in Civil Appeal No. 6847 of 2025 dated 15.05.2025),** a two judge bench of the Supreme Court held that the regulatory powers provided to the CERC under Section 79 are of ad hoc nature and are required to be exercised by the CERC in the context of the specific circumstances of the parties before it; the CERC is enabled to exercise its regulatory powers by way of orders under Section 79 and the purview of Section 79 is not limited to only adjudicatory orders but includes within its scope administrative functions as well; the CERC is a quasi-judicial body enjoined to regulate and administer the subject of electricity generation, transmission and distribution; and, since the regulatory powers under Section 79(1) are of an ad hoc nature and are not of general application, the orders thereunder are made appealable under Section 111.

While both the two-judge bench judgements of the Supreme Court, in **BSES Rajdhani Power Ltd. v. DERC:** (**2023**) **4 SCC 788** and in **GRIDCO Ltd. v. Western Electricity Supply Co. of Orissa Ltd., (2024) 2 SCC 500**, have emphasised on tariff determination being a quasi-judicial exercise, the Constitution Bench judgement of the Supreme Court, in **PTC India Ltd. v. Central Electricity Regulatory Commission, (2010) 4 SCC 603**, has, following the earlier Constitution Bench Judgement in **Shri Sitaram Sugar Co. Ltd. v. Union of India: 1990) 3 SCC 223**, held that determination of tariff, like the price fixation exercise, is legislative in character, unless by the terms of a Section 62 made appealable under Section 111 of the Electricity Act, 2003.

On the other hand, in the two judge bench judgement of the Supreme Court in **Energy Watchdog v. CERC, (2017) 14 SCC 80**), and the three-judge bench judgement of the Supreme Court in **Tata Power Co. Ltd. Transmission v. Maharashtra Erc: (2023) 11 SCC 1,** it has been held that the source of power for determination of tariff under Section 62 of the Electricity Act is the general regulatory power of the Commission under Section 79(1)(*b*) (similar to 86(1)(b)); and "determination" of tariff is part of "regulating" tariff. Likewise, a three-judge bench of the Supreme Court, in **GUVNL v. Renew Wind Energy (Rajkot) Pvt. Ltd: 2023 SCC OnLine SC 411,** after referring to the Constitution Bench Judgement of the Supreme Court in **PTC (India) Ltd. v. CERC, (2010) 4 SCC 603**, has held that tariff determination comprehends the exercise of regulatory function; and Tariff fixation is a statutory function.

It is well settled that legislative action, plenary or subordinate, is not subject to natural justice. Subordinate legislation cannot be questioned on the ground of violation of principles of natural justice on which

administrative action may be questioned. **(Madras City Wine Merchants' Assn. v. State of T.N., (1994) 5 SCC 509; Indian Express Newspapers (Bombay) Pvt. Ltd. v. Union of India: (1985) 1 SCC 641, 691; Tulsipur Sugar Co. Ltd. v. Notified Area Committee, Tulsipur: (1980) 2 SCC 295; Rameshchandra Kachardas Porwal v. State of Maharashtra [(1981) 2 SCC 722;** and **Bates v. Lord Hailsham of St Marylebone [(1972) 1 WLR 1373 : (1972) 3 All ER 1019**).

If, as has been held in **PTC (India) Ltd. v. CERC, (2010) 4 SCC 603**, tariff determination is a legislative function, then principles of natural justice (among which includes the requirement of recording reasons) would not apply to such an exercise, for the requirement of complying with the rules of natural justice, by passing a reasoned order, is applicable mainly to quasi-judicial proceedings. This requirement of assigning reasons, in compliance with the rules of natural justice, may also not strictly apply to a regulatory exercise.

What must, however, be borne in mind is that the Supreme Court, in **PTC (India) Ltd. v. CERC, (2010) 4 SCC 603**, has held that tariff determination, like a price fixation exercise, is legislative in character, unless by the terms of a particular statute it is made quasi-judicial as in the case of tariff fixation under Section 62 made appealable under Section 111 of the 2003 Act. Would the fact that a tariff order, which partakes the characteristics of a regulatory or a legislative exercise, can be the subject matter of an appeal under Section 111 of the Electricity Act, result in its shedding its legislative or regulatory character, and become exclusively a quasi-judicial order necessitating compliance with the rule of natural justice of recording reasons for such an order being passed.

In **West Bengal State Electricity Regulatory Commission Vs Impex Ferro Ltd. & Ors 2015 SCC Online Cal 774,** the Division Bench of the Calcutta High Court held that the tariff Order passed under Section 64 is subject to an appeal before the Appellate Tribunal under Section 111 at the behest of an aggrieved party where the parties shall be given an opportunity of hearing by the Tribunal while disposing of such appeal; in **PTC India Ltd,** the Apex Court has held that exercise of tariff fixation under Section 62 is a quasi-judicial act, and as such fixation of tariff is made appealable under Section 111 of the said Act; no doubt, principles of natural justice are attracted whenever a decision is taken by a quasi-judicial authority affecting the rights of a person; however, what procedure is to be adopted by the authority so that the same is just, fair and reasonable and satisfies the principles of natural justice would depend on the facts of each case including the scheme of the legislation under which such decision is taken, the nature of enquiry, the subject matter which is dealt with, the nature of the decision taken and prejudice, if any, caused to the affected person by such procedure adopted under the statute.

After referring to **Gorkha Security Services v. Government (NCT of Delhi), (2014) 9 SCC 105**, **Chief General Manager, Calcutta Telephones District, Bharat Sanchar Nigam Limited v. Surendra Nath Pandy, (2011) 15 SCC 81, Oriental Bank of Commerce v. R.K. Uppal, (2011) 8 SCC 695,** and **Carborundum Universal Ltd,** the Division Bench of the Calcutta High Court observed that, although determination of tariff under Section 64 has been held to be a quasi-judicial act, it cannot be said to be an adversorial exercise; the decision making process partakes the nature of a statutory inquiry where the authority is called upon to arrive at an informed decision as to tariff

fixation after considering the objections or suggestions of all stakeholders, including the consumers who may be affected by the decision so taken; the nature of such enquiry is, therefore, not adversorial in nature as in the course of a disciplinary proceeding against a particular delinquent; and the Commission is required to arrive at an informed decision, relating to tariff fixation, within a time frame under a statutory scheme which requires considering written objections/representations only of the objectors including consumers.

On the test to determine quasi-judicial functions, the Supreme Court, in **Airports Economic Regulatory Authority of India v. Delhi International Airport Ltd. and Others 2024 SCC OnLine SC 2923**, observed that the exercise of power by Authorities and Tribunals was described as "quasi-judicial' to ensure that the principles of natural justice were complied with; however, with the evolution of the doctrine of fairness and reasonableness, all administrative actions (even if there was nothing 'judicial (or adjudicatory)' about them) are required to comply with the principles of natural justice; the evolution of the fairness doctrine has transcended many boundaries; thus, the reason for which the expression 'quasi-judicial' came into vogue was no longer relevant; neither were the tests to identify them because the functions of an authority no more need to have any semblance to 'judicial functions' for it to act judicially (that is, comply with the principles of natural justice); the substitution of the standard of whether the Authority undertakes a quasi-judicial function with the test of adjudication is not an aberration; and it was a standard which was true to the purpose of the principle and which accounted for the subsequent constitutional developments.

On the test for determining an 'adjudicatory function', the Supreme Court, in **Airports Economic Regulatory Authority of India v.Delhi**

International Airport Ltd. and Others: 2024 SCC OnLine SC 2923, observed that two principles were deducible from the judgment of the Supreme Court in **Sitaram Sugar Co. Ltd vs Union of India: (1990) 3 SCC 223**; the first was that one of the factors to determine if an order was issued in exercise of an adjudicatory function, was whether it was specific to an individual or of general application; the second was that it was not necessary that a legislative action must always be 'subjective' and an adjudicatory function 'objective'; and the Constitution Bench, in **Sitaram Sugar Co. Ltd vs Union of India: (1990) 3 SCC 223**, had repudiated this distinction by observing that a legislative action can also be based on an objective set of factors.

On the question whether tariff determination was an adjudicatory function in the context of the judgements in **PTC India Ltd. v. Central Electricity Regulatory Commission, (2010) 4 SCC 603,** and **GRIDCO Ltd. v. Western Electricity Supply Co. of Orissa Ltd., (2024) 2 SCC 500,** the Supreme Court, in **Airports Economic Regulatory Authority of India v. Delhi International Airport Ltd. and Others 2024 SCC OnLine SC 2923**, observed that, in **PTC India Ltd vs CERC: (2010) 4 SCC 603**, a Constitution Bench of the Supreme Court made certain observations on the fixation of tariff by the Electricity Commission under the provisions of the Electricity Act, 2003; Section 61 of the Electricity Act provided that the Appropriate Commission (which is defined under the Act to mean Central Regulatory Commission, State Regulatory Commission or Joint Commission) must, subject to the provisions of the Electricity Act, specify the terms and conditions for the determination of tariff; the provision also stipulated factors that the Appropriate Commission must be guided by; Section 62 dealt with "determination of tariff"; the provision conferred the Appropriate Commission with the

power to determine tariff for supply, transmission, wheeling and retail sale of electricity; Section 63 dealt with “determination of tariff by bidding process”; the provision provided that notwithstanding Section 62, the Appropriate Commission must adopt the tariff determined through a transparent bidding process; and Section 64 of the Electricity Act prescribed the procedure to determine tariff under Section 62 which included filing an application and provision for suggestions and objections.

After extracting Para 26 of the judgement in **PTC India Ltd vs CERC: (2010) 4 SCC 603** (wherein, among others it was held that, under the Electricity Act, 2003, if one reads Section 62 with Section 64, it becomes clear that, although tariff fixation like price fixation is legislative in character, the same is made appealable under the Electricity Act vide Section 111), Paras 49 & 50 (wherein, among others it was held that price fixation exercise was really legislative in character, unless by the terms of a particular statute it was made quasi-judicial as in the case of tariff fixation under Section 62 made appealable under Section 111 of the 2003 Act, though Section 61 is an enabling provision for the framing of regulations by CERC), the Supreme Court, in **Airports Economic Regulatory Authority of India v. Delhi International Airport Ltd. and Others: 2024 SCC OnLine SC 2923**, analysed the observations of the Constitution Bench in **PTC India Ltd vs CERC: (2010) 4 SCC 603** thus: (a) Tariff-fixation, like price fixation is generally of a legislative character; (b) Tariff-fixation is of an adjudicatory or quasi-judicial character if it is made so by the statute which confers the Authority with the power to determine tariff; (c) The Electricity Act confers the Appropriate Commission with both regulatory and adjudicatory/decision-making powers, even with respect to tariff. Section 61 which confers the

Appropriate Commission with the power to specify terms and conditions for the determination of tariff, is of legislative character while the power to determine tariff in terms of Sections 62 and 64 is an adjudicatory function; (d) though the decision does not expressly make a distinction between powers that are general in nature and powers that are specific/individual in nature, such an inference can be drawn from paragraph 50 which specifically applies the tests formulated in **Sitaram Sugar Co. Ltd vs Union of India: (1990) 3 SCC 223**; and (e) the fact that the order of the Appropriate Commission determining tariff was subject to appeal was also one of the factors that weighed with the Court.

The Supreme Court, in **Airports Economic Regulatory Authority of India v. Delhi International Airport Ltd. and Others 2024 SCC OnLine SC 2923,** thereafter observed that the respondents had relied on **PTC India Ltd vs CERC: (2010) 4 SCC 603** to contend that tariff determination by an Authority constituted under any statute was an adjudicatory function; such an interpretation of the judgment in **PTC India Ltd vs CERC: (2010) 4 SCC 603**, was erroneous; the Supreme Court, in **PTC India Ltd vs CERC: (2010) 4 SCC 603,** expressly noted that tariff fixation, like price fixation is generally of a legislative character; the judgment, in **PTC India Ltd vs CERC: (2010) 4 SCC 603**, was an authority only for the proposition that the question of whether determination of tariff was a legislative or an adjudicatory function must be determined upon an analysis of the provisions of the statute conferring the power; and that was the test that was propounded in **Sitaram Sugar Co. Ltd vs Union of India: (1990) 3 SCC 223** as well.

The Supreme Court, in **Airports Economic Regulatory Authority of India v.Delhi International Airport Ltd. and Others: 2024 SCC OnLine SC 2923**, thereafter observed that, in **GRIDCO vs Western**

Electricity Supply Company of Orissa Ltd: 2023 SCC OnLine SC 1249, the Supreme Court was hearing appeals arising out of the decisions of the Appellate Tribunal for Electricity constituted under Section 110 of the Electricity Act, 2003 which arose from orders issued by the Orissa Electricity Regulatory Commission determining tariff; relying on the judgment in **PTC India Ltd vs CERC: (2010) 4 SCC 603**, a two-Judge Bench of the Supreme Court held that tariff determination being a quasi-judicial function, the Commission could not have preferred an appeal against the order of the Appellate Tribunal; the judgment of the two-Judge Bench, in **GRIDCO Ltd. v. Western Electricity Supply Co. of Orissa Ltd., (2024) 2 SCC 500,** also dealt with the nature of function of the Appropriate Commission under Section 62 of the Electricity Act which was already settled by the judgment of the Constitution Bench in **PTC India Ltd vs CERC: (2010) 4 SCC 603** that it was adjudicatory; in **PTC India Ltd vs CERC: (2010) 4 SCC 603**, the Supreme Court drew a distinction between Section 61 of the Electricity Act which grants the Appropriate Commission the power to issue specific terms and conditions for determination of tariff and Section 62 which grants the power to determine tariff; the crucial test that has been consistently applied by the Supreme Court in drawing the distinction is to determine if the function is discharged in the capacity of a regulator or an adjudicator; it may be possible that certain statutes create a clear distinction between the regulatory and adjudicatory roles with respect to the same function; when such a distinction is created, the Authority does not put on the hat of a regulator while undertaking the adjudicatory function; on the other hand, certain other statutes may require the Authority to 'determine' something in its capacity as a regulator; and, in such cases, a clear distinction between the adjudication and regulatory functions cannot be drawn.

The enumerated functions of the State Commission, as stipulated under Section 86 of the Electricity Act. are determination of tariff, regulation of electricity purchase and procurement process of distribution licensees, facilitating intra-State transmission, issuing licences to persons, promoting cogeneration and generation of electricity from renewable sources, levy fee, specify or enforce standards, fix trading margins. All these functions are regulatory in character rather than adjudicatory. The real adjudicatory function is only provided in sub-clause (*f*) whereupon the Commission has the option of adjudicating the disputes between the licensees and generating companies, or to refer such disputes to arbitration. (**State of Gujarat & Ors. Vs. Utility Users Welfare Association & Ors. (2018) 6 SCC 21**; **PTC India Ltd. (2010) 4 SCC 603;** and **Kerala State Electricity Board Vs Principle, Sir Syed Institute for Technical Studies & Ors (2021) 14 SCC 118).** Even while exercising its powers of adjudication, the Commission is not disabled from exercising its regulatory powers. As the CERC is a quasi-judicial body enjoined to regulate and administer the subject of electricity generation, transmission and distribution, its orders are made appealable under Section 111. (**POWER GRID CORPORATION OF INDIA LIMITED VS MADHYA PRADESH POWER TRANSMISSION COMPANY LIMITED & ORS (Judgement in Civil Appeal No. 6847 of 2025 dated 15.05.2025).**

In the light of the law declared by the three judge bench of the Supreme Court, in **Airports Economic Regulatory Authority of India v. Delhi International Airport Ltd. and Others: 2024 SCC OnLine SC 2923**, explaining the principles laid down in **PTC India Ltd. (2010) 4 SCC 603,** it is clear that (i) Tariff-fixation, like price fixation is generally of a legislative character; and (ii) the Electricity Act confers the Appropriate

Commission with both regulatory and adjudicatory/decision-making powers, even with respect to tariff. As the Constitution Bench Judgement, in **PTC India Ltd. (2010) 4 SCC 603,** has been interpreted by a three judge bench of the Supreme Court in **Airports Economic Regulatory Authority of India v. Delhi International Airport Ltd. and Others: 2024 SCC OnLine SC 2923** , lower courts/Tribunals in the hierarchy, including this Tribunal, must follow the latter decision in **Airports Economic Regulatory Authority of India**. **(Refer: Sakinala Harinath vs State of A.P: 1993(6) SLR Page 1 (APHC FB)).** The observations, in the two judge-bench of the Supreme Court, in **GRIDCO Ltd. v. Western Electricity Supply Co. of Orissa Ltd., (2024) 2 SCC 500,** notwithstanding, this Tribunal must follow the larger three judge bench judgement of the Supreme Court in **Airports Economic Regulatory Authority of India v. Delhi International Airport Ltd. and Others: 2024 SCC OnLine SC 2923,** for judicial discipline requires that the opinion expressed by larger benches of the Supreme Court should be followed in preference to those expressed by smaller benches of the Supreme Court. **(Union of India vs K.S. Subramanyam: AIR 1976 SC 2433; Commissioner of Sales Tax vs Pria Chemicals Ltd: (1995) 1 SCC 58; and Lily Thomas vs UOI: (2000) 6 SCC 224).**

As held by the Supreme Court in **Airports Economic Regulatory Authority of India v.Delhi International Airport Ltd. and Others 2024 SCC OnLine SC 2923**, and the Division Bench of the Calcutta High Court in **West Bengal State Electricity Regulatory Commission Vs Impex Ferro Ltd. & Ors 2015 SCC Online Cal 774,** it does appear that the observations of the Constitution Bench of the Supreme Court in **PTC India Ltd. v. CERC, (2010) 4 SCC 603**, that tariff determination is a quasi-judicial exercise, were made only in the context of such an order

being made appealable to this Tribunal under Section 111 of the Electricity Act. The judgement, in **PTC India Ltd. v. CERC, (2010) 4 SCC 603**, cannot be read out of context to denude the exercise of tariff determination either of its legislative or its regulatory character.

Suffice it to conclude our analysis under this head holding that, while the exercise of tariff determination is akin to price fixation and is legislative and regulatory in character, it has been held also to be an exercise of a quasi judicial power, since an appeal lies against the tariff order passed by the Commission, to the Appellate Tribunal under Section 111(1) of the Electricity Act.

II. DO THE RULES OF NATURAL JUSTICE OBLIGATE THE COMMISSION TO RECORD ELABORATE REASONS IN THE TARIFF ORDER?

A. SUBMISSIONS URGED ON BEHALF OF NPCL

On applicability of Principles of Natural Justice/ Duty to Record Reasons, Learned Senior Counsel would submit that tariff determination under Sections 62 and 64 of the Electricity Act, being a quasi- judicial function and under the overarching umbrella of transparency under Section 86(3) of the Electricity Act, principles of natural justice apply, subject to the statutory scheme; Section 64(3) expressly provides that the Commission, before passing a tariff order, must: (i) issue Notice (publication of tariff petition in the abridged form), (ii) consider suggestions and objections received from the public, and (iii) give the applicant a reasonable opportunity of being heard before rejecting the application; this requirement is consistent with the rule *audi alteram partem* (the right to be heard); further, because tariff orders affect a wide body of stakeholders, i.e., distribution companies, consumers (individual and collective) and even the State Government (which provides

subsidies), the duty to adopt a transparent, fair, and participatory procedure is inherent in the Act; the Commission has an obligation to record reasons for its tariff orders; Section 64(3)(a) & (b) of the Electricity Act require the Commission to either accept (with modifications/conditions) or reject the tariff application with reasons recorded in writing; even otherwise, recording of reasons is a facet of natural justice, and is indispensable to transparency and fairness; additionally, passing of a reasoned order becomes quintessential when an authority departs from a past practice; and, as has been demonstrated during the proceedings in the present Appeal, the Respondent Commission has departed from its past practice followed during the tariff determination/ARR stage, while truing-up by way of the Impugned Order, without assigning cogent reasons for such departure**.** Reliance is placed in this regard on (i) **Himadri Mukherjee vs. Bimal Chandra Ghosh, 2010 SCC OnLine Cal 2358, Para 9;** and (ii) **Kranti Associates (P) Ltd. v. Masood Ahmed Khan 2010 SCC OnLine SC 987.**

B. JUDGEMENTS RELIED ON BEHALF OF THE NPCL UNDER THIS HEAD:

1. In **Himadri Mukherjee v. Bimal Chandra Ghosh, 2010 SCC OnLine Cal 2358: AIR 2011 Cal 60,** the Calcutta High Court held that no reason has been assigned for deviating from the offer given by the Regional Transport Authority in the past to the writ-petitioner; only because some other schools were willing to take the self-same duty, such fact cannot be a ground for giving a go-by to the promise given to the writ-petitioner that he would be the sole training school for conducting such training provided he continued with the arrangement for the next three years; although, in the affidavit used before the High Court by the

State, it is alleged that it received various complaints against the writ petitioner about its conduct in the running of the training school causing harassment to the applicants for heavy driving licence, it appears that no such allegation was conveyed to the writ petitioner in writing nor was any explanation called for in that behalf.

2. In **Kranti Associates (P) Ltd. v. Masood Ahmed Khan 2010 SCC OnLine SC 987,** the Supreme Court (in Paras 12, 15 and 47 on which reliance is placed on behalf of the appellant) observed that it had initially recognized a sort of demarcation between administrative orders and quasi-judicial orders but, with passage of time, the distinction between the two got blurred and thinned out and virtually reached a vanishing point in **A. K. Kraipak v. Union of India: (1969) 2 SCC 262 : AIR 1970 SC 150;** the Supreme Court has always opined that the face of an order, passed by a quasi-judicial authority or even an administrative authority affecting the rights of parties, must speak; and it must not be like the “inscrutable face of a sphinx”.

Summarizing its analysis, the Supreme Court held: (a) in India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially; (b) a quasi-judicial authority must record reasons in support of its conclusions; (b) insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well; (c) recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power; (d) reasons reassure that discretion has been exercised by the decision- maker on relevant grounds and by disregarding extraneous considerations; (e) reasons have virtually become as indispensable a component of a decision-making process as

observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies; (f) reasons facilitate the process of judicial review by superior courts; (g) the ongoing judicial trend in all countries, committed to the rule of law and constitutional governance, is in favour of reasoned decisions based on relevant facts; this is virtually the lifeblood of judicial decision- making justifying the principle that reason is the soul of justice; (h) judicial or even quasi-judicial opinions can be as different as the judges and authorities who deliver them; all these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered; and this is important for sustaining the litigants' faith in the justice delivery system; (i) insistence on reasons is a requirement for both judicial accountability and transparency; (j) if a judge or a quasi-judicial authority is not candid enough about his/her decision-making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to the principles of incrementalism; (k) reasons in support of decisions must be cogent, clear and succinct; a pretence of reasons or "rubber-stamp reasons" is not to be equated with a valid decision-making process; (l) transparency is the sine qua non of restraint on abuse of judicial powers; transparency in decision-making not only makes the judges and decision-makers less prone to errors but also makes them subject to broader scrutiny (**David Shapiro in Defence of Judicial Candor [(1987) 100 Harvard Law Review 731- 37]);** (m) since the requirement to record reasons emanates from the broad doctrine of fairness in decision-making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. (**Ruiz Torija v. Spain [(1994) 19 EHRR 553] EHRR, at 562 para 29 and Anya v. University of Oxford [2001 EWCA Civ 405 (CA)]** , wherein the Court referred to Article 6 of the European

Convention of Human Rights which requires, adequate and intelligent reasons must be given for judicial decisions"); and (n) in all common law jurisdictions, judgments play a vital role in setting up precedents for the future; and therefore, for the development of law, the requirement of giving reasons for the decision is of the essence and is virtually a part of 'due process".

C. CONSIDERATION AND OUR VIEW:

Even if the rule of natural justice that reasons should be recorded, as in a quasi-judicial order, is presumed to apply, the question which would necessitate examination is whether, even in cases relating to tariff determination and passing of tariff orders, this rule would invariably apply notwithstanding the statutory frame-work under which the tariff order is passed under Section 62 read with Section 64 of the Electricity Act, 2003.

Rules of natural justice are not statutory rules, and are applicable either where the statutory provisions explicitly stipulate or are silent. Rules of natural justice can operate in areas not covered by any law validly made. If a statutory provision can be read consistent with the principles of natural justice, the courts should do so as it must be presumed that the Legislature intended that the statutory authorities act in accordance with principles of natural justice (**C. B. Gautam vs Union of India: (1993) 199 ITR 530 (SC); A. K. Kraipak v. Union of India, AIR 1970 SC 150).**

Rules of natural justice can operate only in areas not covered by any law validly made. They can supplement the law but cannot supplant it (**A. K. Kraipak v. Union of India, AIR 1970 SC 150; Swadeshi Cotton Mills v. Union of India, (1981) 1 SCC 664: 1981 SCC OnLine SC 35**). Rules of natural justice are not rigid rules, they are flexible and their

application depends upon the setting and the background of the statutory provision, nature of the right which may be affected and the consequences which may entail. (**R. S. Dass v. Union of India [1986] Supp SCC 617)**. The application of natural justice depends upon the nature of the jurisdiction conferred on the authority, upon the character of the rights of the persons affected, the scheme and policy of the statute and other relevant circumstances disclosed in a particular case. (**K. L. Tripathi v. State Bank of India : 1984) 1 SCC 43; Union of India v. P. K. Roy: AIR 1968 SC 850; Channabasappa Basappa Happali v. State of Mysore: AIR 1972 SC 32).**

Rules of natural justice are not embodied rules. The extent of their application depends upon the particular statutory framework. **(S.N. Mukherjee v. Union of India, (1990) 4 SCC 594: 1990 SCC OnLine SC 406).** Rules of natural justice are neither cast in a rigid mould nor can they be put in a legal strait-jacket. They are not immutable but are flexible. These rules can be adapted and modified by statutes and statutory rules and regulations. (**Union of India v. Tulsiram Patel: (1985) 3 SCC 398**). The rules of natural justice are not constant: they are not absolute and rigid rules having universal application. The requirement of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the authority is acting, the subject matter that is being dealt with, and so forth. *(***State of Kerala v. K.T. Shaduli Yousuff: (1977) 39 STC 478 (SC); Suresh Koshy George v. The University of Kerala: [1969] 1 S.C.R. 317; Russel v. Duke of Norfolk: [1949] 1 All. England Reports 108**). As the rules of natural justice are not embodied rules, its application must depend to a great extent on the framework of the law. (**Maneka Gandhi v. Union of India: AIR 1978 SC 597; Suresh Koshy George;**

AIR 1978 SC 597 D.F.O., South Kheri v. Ram Sanehi Singh (1971) 3 SCC 864 = AIR 1973 SC 205). The Court/Tribunal should not proceed as if there are inflexible rules of natural justice of universal application, for rules of natural justice vary with the laws prescribed by the legislature. (**Chingleput Bottlers v. Majestic Bottling Co.: AIR 1984 S.C. 1030).** Its application may be excluded either expressly or by necessary implication. **(Umrao Singh Choudhary (Dr) v. State of M.P., (1994) 4 SCC 328).** If a statutory provision *either specifically or by inevitable implication* excludes the application of the rules of natural justice, then the court cannot ignore the mandate of the legislature. Whether or not the application of the principles of natural justice in a given case has been excluded, wholly or in part, in the exercise of statutory power, depends upon the language and basic scheme of the provision conferring the power, the nature of the power, the purpose for which it is conferred and the effect of the exercise of that power. (**Union of India v. Col. J.N. Sinha; Swadeshi Cotton Mills v. Union of India, (1981) 1 SCC 664: 1981 SCC OnLine SC 35**)

Not only can principles of natural justice be modified but, in exceptional cases, they can even be excluded where the nature of the action to be taken, its object and purpose and the scheme of the relevant statutory provisions warrant its exclusion. (**Tulsiram Patel: (1985) 3 SCC 398; State of U.P. v. Sheo Shanker Lal Srivastava: (2006) 3 SCC 276).** If a statutory provision either specifically, or by necessary implication, excludes the application of any or all the principles of natural justice, then the court cannot ignore the mandate of the Legislature or the statutory authority and read, into the concerned provision, principles of natural justice. (**Union of India v. Col. J.N. Sinha: (1970) 2 SCC 458; Tulsiram Patel; (1985) 3 SCC 398**). The implication of natural

justice being presumptive, it may be excluded by express words of the statute or by necessary intendment. (**Swadeshi Cotton Mills v. Union of India: (1981) 1 SCC 664; Tulsiram Patel: (1985) 3 SCC 398).**

With regards exercise of power by an authority, including exercise of judicial or quasi-judicial functions by them, the legislature, while conferring the said power, may dispense with the requirement of recording reasons. It may do so by making an express provision to that effect. Such an exclusion can also arise by necessary implication from the nature of the subject matter, the scheme and the provisions of the enactment. **(S.N. Mukherjee v. Union of India, (1990) 4 SCC 594: 1990 SCC OnLine SC 406).** In the absence of any statutory requirement to record reasons, the order is not rendered illegal for absence of reasons. If any challenge is made to the validity of any such order, it is always open to the authority concerned to place the reasons before the court which may have persuaded it to pass the order. Such reasons must already exist on record as it is not permissible to the authority to support the order by reasons not contained in the record. (**Union of India v. E.G. Nambudiri, (1991) 3 SCC 38: 1991 SCC OnLine SC 161).**

In this context, it relevant to note that the exercise of tariff determination is undertaken by the Appropriate Commission under Section 62 read with Section 64 of the Electricity Act. Under Section 62(1) the Appropriate Commission shall determine the tariff in accordance with the provisions of the Electricity Act for (a) supply of electricity by a generating company to a distribution licensee; (b) transmission of electricity; (c) wheeling of electricity; and (d) retail sale of electricity. Section 64 prescribes the procedure for tariff orders. Section 64(1) provides that an application, for determination of tariff under Section 62, shall be made by a generating company or a licensee in such manner,

and accompanied by such fee, as may be determined by Regulations. Section 64(2) requires every applicant to publish the application, in such abridged form and manner, as may be specified by the Appropriate Commission. Section 64(3)(a) stipulates that the Appropriate Commission shall, within one hundred and twenty days from receipt of an application under sub-section (1) and after considering all suggestions and objections received from the public, issue a tariff order accepting the application with such modifications or such conditions as may be specified in that order.

On the application being published in an abridged form by the Applicant, the obligation cast on the Appropriate Commission under Section 64(3) of the Electricity Act is to issue a tariff order after considering all suggestions and objections received from the public. Would an order passed in such a tariff determination exercise require reasons to be recorded and, if so, whether such reasons should be detailed and elaborate? Would failure to do so vitiate the tariff determination exercise, and consequently the tariff order itself?

The procedure, for determination of tariff under Section 62, commences with an application being filed under Section 64(1) by the generator or the licensee seeking determination of tariff. The said application is required to be made in the manner, and accompanied by such fees, as may be stipulated under the Regulations made by the Appropriate Commission. Section 64(2) requires every application to be published in such abridged form and manner, as may be specified by the Appropriate Commission i.e. by way of Regulations. Section 64(3) contemplates receipt of suggestions and objections to the application from the public which the Appropriate Commission is required to consider before passing the tariff order. A timeframe of 120 days, from the date

of receipt of the application under Section 64(1), is stipulated for the Commission to issue the tariff order. Section 64(3)(a) enables the Commission to issue a tariff order accepting the application with such modifications or such conditions as may be specified in that order. Section 64(3)(b) confers power on the Appropriate Commission to reject the application for reasons to be recorded in writing, if such application is not in accordance with the provisions of the Electricity Act and the rules and regulations made there-under or the provisions of any other law for the time being in force. Under the proviso to Section 64(3)(b), an applicant shall be given a reasonable opportunity of being heard before rejecting his application. Section 64(4) requires the Appropriate Commission, within seven days of making the order, to send a copy of the order to the Appropriate Government, the Central Electricity Authority, the concerned licensees and to the persons concerned.

From the afore-said provisions, it is clear that the tariff determination exercise is, ordinarily, required to be undertaken and completed within a specified timeframe, and for a tariff order to be passed within 120 days from the date of receipt of an application from the licensee under Section 64(1), or for the said application to be rejected.

The proviso to Section 64(3)(b) makes it clear that it is only in cases where it intends to reject the application, is the Commission required to comply with the following requirements before passing an order of rejection:- (i) it should record reasons in writing specifying (a) that the application made under Section 64(1) is not in accordance with the provisions of the Electricity Act and the Rules and Regulations made there-under, or (b) the application made under Section 64(1) is not in accordance with the provisions of any other law for the time being in force. In addition, the Appropriate Commission is also required to give

the applicant a reasonable opportunity of being heard before rejecting his application. Since the requirement of recording reasons is to be fulfilled, in terms of the proviso to Section 64(3)(b), only where the application filed by the applicant (in this case the distribution licensee) is sought to be rejected, it is implicit that no such obligation is statutorily mandated to be satisfied where the Commission passes a tariff order under Section 64(3)(a) either accepting the application made by the licensee under Section 64(1) in toto, or with such modifications or on imposition of such conditions as the Commission deems appropriate.

Further, as noted hereinabove, Section 64(3) of the Electricity Act requires the Commission to pass a tariff order within 120 days from the date of receipt of an application after considering the suggestions and objections received from the public. In case the test of elaborate reasons required to be assigned, akin to the requirement in an adjudicatory process culminating in a judicial/quasi-judicial order, is extended even to tariff orders, then compliance with the statutory requirement of passing a tariff order within the specified timeframe of 120 days, and communicating the order within seven days of its passing, may, well-nigh, be impossible of compliance.

We are of the view, therefore, that this rule of natural justice may not apply in situations where the Commission undertakes a tariff determination exercise under Section 62 read with Section 64 of the Electricity Act, unless the applicable Regulations expressly stipulate an elaborate reasoned order to be passed by the Commission on the tariff application, either accepting or modifying the tariff order or imposing conditions while passing the tariff order. Admittedly, no such regulations have been made by the UPERC.

Even otherwise, the observations, in the afore-said judgments of the Supreme Court, in **BSES Rajdhani Power Ltd. v. DERC:** (**2023**) **4 SCC 788 and GRIDCO Ltd. v. Western Electricity Supply Co. of Orissa Ltd., (2024) 2 SCC 500,** cannot be read out of context to contend that, despite the specific stipulation in various sub-sections of Section 64 of the Electricity Act, a tariff order passed, in culmination of the tariff determination exercise, with or without modifications or on imposition of such conditions as the Commission deems appropriate, must satisfy the test of elaborate reasons being recorded therein.

Realism must inform "reasonable opportunity". If the decision-making body, after fair and independent consideration, reaches a just conclusion, there is no error in law. (**Chairman, Board of Mining Examination vs Ramjee**: **(1977) 2 SCC 256).** Principles of natural justice cannot be stretched too far. **(Bar Council of India v. High Court of Kerala (2004) 26 SCC 311).** They are not codified canons, but are principles ingrained in the conscience of man. Natural justice is the administration of justice with a common-sense It is the substance of justice which should determine its form. (**Canara *Bank* v. *V.K. Awasthy,* (2005) 6 SCC 321)**. What particular rule of natural justice should be applied, and what its content should be in a given case, must depend to a great extent on the facts and circumstances of the case, and the framework of the statute under which the enquiry is held. **(*V.K. Awasthy,* (2005) 6 SCC 321)**.

As noted hereinabove, compliance with the rules of natural justice (including recording of reasons) vary depending on the statutory framework under which the order is required to be passed. In the context of the provisions of the Electricity Act, more particularly Section 64(3)(b) thereof, it is only when the Commission rejects the application made

under Section 64(1) is it required to record reasons in writing, that too only if such an application is (*i*) not in accordance with the provisions of the Electricity Act and the Rules and Regulations made there-under or (*ii*) it is not in accordance with any other law for the time being in force. Save, in such situations, the provisions of the Electricity Act and the Regulations made by the UPERC do not either expressly or by necessary implication obligate the Commission to record reasons.

What we must, however, bear in mind is that the tariff order passed by the Commission, under Section 64(3)(a) or (b), can be subjected to challenge by way of an appeal to this Tribunal under Section 111(1) of the Electricity Act. In the absence of any reasons being assigned by the Commission for its passing an order, either under clause (a) or (b) of Section 64(3), this Tribunal would not be able to effectively adjudicate upon the validity or otherwise of the said order passed by the Commission. It is in this context that the requirement, of reasons being recorded in the tariff order, must be examined.

It is not required that reasons, even in a quasi-judicial order passed by a tribunal, should be as elaborate as in the decision of a court of law. The extent and nature of the reasons would depend on the particular facts and circumstances, and the statutory framework. **(S.N. Mukherjee v. Union of India, (1990) 4 SCC 594: 1990 SCC OnLine SC 406).** All that is required is that the order should be explicit and articulate so as to lend assurance that the case has been properly considered **(Siemens Engg. & Mfg. Co. of India Ltd. v. Union of India, (1976) 2 SCC 981: 1976 SCC OnLine SC 189),** and that the authority has given due consideration to the points in controversy. **(S.N. Mukherjee v. Union of India, (1990) 4 SCC 594: 1990 SCC OnLine SC 406).**

While elaborate reasons, as is required to be assigned in a judicial order passed by a court, need not be recorded in the tariff order passed by the Commission on the culmination of the tariff determination exercise, the tariff order must indicate, albeit in brief but with sufficient clarity, the reasons which weighed with the Commission, either in accepting the tariff application in toto or with modifications/ conditions or for rejecting the application filed under Section 64(1).

As shall be elaborated later in this judgement, in terms of the provisions of the Electricity Act and the Regulations made by the UPERC, while a consumer (in the area of supply of a distribution licensee with respect to whose application the tariff order has been passed by the Commission) is entitled, as of right, to put-forth his objections/ suggestions during the public hearing, such an objector is not entitled, as of right, to participate in the proceedings before the Commission, and the Commission may, in its discretion, not permit the objector to participate in the hearing of tariff/ application. Such an objector, though not a party to the proceedings before the Commission, may well be aggrieved by the order of the Commission allowing a particular claim of the applicant, in the tariff application filed by them under Section 64(1), in its entirety and would, as a person aggrieved, be entitled to prefer an appeal under Section 111(1) to this Tribunal.

Unless reasons, even if it be in brief, are indicated by the Commission for allowing a particular claim in the tariff application in its entirety, this Tribunal may find it difficult, in appellate proceedings under Section 111(1) of the Electricity Act, to adjudicate on the validity or otherwise of such a claim allowed by the Commission in the impugned order. We shall examine later in this order the role and extent of

participation by the Commission, (which passed the tariff order), in appellate proceedings instituted in challenge to the said tariff order.

Suffice it to conclude our analysis under this head holding that, while the Commission need not assign elaborate reasons for either allowing or rejecting or modifying the claims made in the tariff application, the tariff order should indicate, albeit in brief, the reasons which weighed with the Commission in this regard. We are of the view that even in cases where a particular claim, in the application filed under Section 64(1), is accepted by it in toto, the Commission must briefly indicate its reasons for doing so for, even if the applicant would not be aggrieved thereby, an aggrieved consumer may prefer an appeal challenging the tariff order passed by the Commission.

III. CAN THE COMMISSION SUPPLEMENT THE REASONS, GIVEN IN THE IMPUGNED TARIFF ORDER, AT THE APPELLATE STAGE?

A. SUBMISSIONS URGED ON BEHALF OF NPCL

Learned Senior Counsel would submit that an authority exercising quasi-judicial power must stand or fall on the reasons contained in its order; supplementing or supplanting those reasons or creating new reasons later (in an affidavit, counter, or argument before an appellate body) is not permissible; when a statutory authority makes an order based on certain reasons, its validity must be judged by those reasons alone; it cannot supplement or substitute new reasons or grounds to supplant the Order in appeal or later proceedings; a tariff order under Sections 62 and 64 of the Act is a quasi-judicial determination, subject to Appeal under Section 111 of the Act before this Tribunal; if the reasons disclosed in the Tariff Order are untenable, irrelevant, or demonstrate misapplication of principles, the order may be set aside or remanded; the Commission

cannot defend its Tariff Order by adding fresh reasons in appeal (through affidavits or submissions) as this results in avoidance of (1) transparency in decision-making; (2) accountability of the Commission; and (3) proper exercise of appellate jurisdiction by this Tribunal, which reviews the reasoning, not the post-hoc justification; it is one thing to permit the Commission to not only explain the Impugned Order but also champion the reasons given therein by reference to documents and facts already on the record of the case or by means of Judgments or Regulations that support (not supplement or supplant) the reasons which exist in the Impugned Order; on the other hand what the Commission cannot be allowed to do, no matter how attractive an argument it may be, would be to either (a) add reasons to the Order which are not there, (b) assign new reasons to justify what is there, (c) seek to fill up the lacunae therein or much less (d) create an entirely new reasoning or Order different from the one passed by it.

B. CONSIDERATION AND OUR VIEW

We must express our inability to agree with the submission, urged on behalf of the Appellant-Distribution Licensee, that quasi-judicial orders must invariably, and in all cases, stand or fall on the basis of the reasons contained in the order, and cannot be supplemented at the appellate stage. While we have no quarrel with the submission that a completely new case cannot be made out by the Commission, when an appeal against the order passed by it is being heard by this Tribunal, we are of the view that it can supplement or seek to elaborate the brief reasons, indicated by it in the impugned order, by a reference to the material on record including the applicable law ie the Electricity Act, the rules made by the Appropriate Government and the Statutory Regulations made by the Appropriate Commission. The material on record, based on which

the brief reasons indicated in the impugned order, can be supplemented/elaborated, would include the application filed under Section 64(1) and the documents filed therewith; the clarifications sought by the Commission and the documents furnished by the applicant in response thereto, as also the suggestions/ objections (along with the documents, if any) received by the Commission during the public hearing. We must, however, express our inability to agree with the submission urged on behalf of the Commission that the record of the Commission, on which reliance can be placed by them during the hearing of the said appeal, can be the entire record of the Commission from the date on which it was established under the Electricity Act, 2003.

We must not lose sight of the fact that a tariff application is filed, seeking determination of tariff, for a certain period and, in the absence of the impugned order specifically reflecting the Commission having referred therein to the tariff orders passed by it earlier or the records relating to the previous years, it would be inappropriate to permit them to refer to any record they may choose to rely upon for the first time at the appellate stage, more so the records relating to a period anterior to the period for which the application has been filed under Section 64(1). Permitting the Commission to do so would, in effect, amount to permitting them to make out a completely new case at the appellate stage, which case is neither reflected in the impugned order nor is it discernable from the material on record relating to the tariff application.

While holding that the Commission cannot be permitted to make out a completely new case at the appellate stage, we must also make it clear that the tariff applicant must also be required to confine its contentions in the appeal to what it has specifically pleaded, or contended before the Commission during the original tariff proceedings,

and not beyond. If the Appellant were to raise a completely new or fresh ground at the appellate stage, (i.e. a new ground or new reasons for its claim), which was not stated by them before the Commission, and this Tribunal were to permit the applicant to raise a plea for the first time at the appellate stage, the Commission would undoubtedly be entitled to rebut the same. In such an event, the Commission cannot be expected to confine itself to the material on record with respect to the application filed under Section 64(1).

While no judgement has been specifically referred to on behalf of the Appellant-Distribution Licensee in support of their submission that, when a statutory authority makes an order based on certain reasons, its validity must be judged by those reasons alone, the two well-known and off-quoted judgments of the Supreme Court in this regard are (*i*) **Commissioner of Police, Bombay v. Gordhandas Bhanji: AIR 1952 SC 16**; and (ii) **Mohinder Singh Gill & Anr. vs the Chief Election Commissioner, New Delhi & Ors: AIR 1978 SC 851**. Let us, therefore, take note of the factual context in which the law was declared in the said judgements.

a. In **Commr. of Police v. Gordhandas Bhanji, AIR 1952 SC 16,** the respondent had sought permission, under the rules then in force, from the District Magistrate in the form of a no-objection certificate. Permission was initially refused on the ground that the public of the locality had objected, there was already one cinema theatre in the area, and it was not necessary to have another “for the present”. On the said area becoming part of Greater Bombay, the jurisdiction to grant or refuse a licence was transferred to the Commissioner of Police, Bombay. The respondent put in a second application, this time to the Commissioner of Police which was also turned down “owing to public opposition”. The

respondent again applied, and sought “reopening of his case” contending, among other grounds, that a modern cinema, of the type he proposed to build, was indispensable. The Commissioner of Police consulted the Government of Bombay, and wrote to the respondent that the question of considering and approving sites for cinemas was under the consideration of the Government of Bombay, and when a decision was arrived at, his application would be examined. Around this time a Cinema Advisory Committee was constituted by the Government which, after inspection of the site and prolonged discussions, held that, in view of the location of four schools nearby, this site was unsuitable for the purpose required and therefore it should be rejected. A note was drawn up to that effect, and the matter was ordered to be placed on the agenda of the next meeting of the Committee “for final decision”.

In his affidavit filed before the Court, the Commissioner of Police stated that, within a month thereafter, the Committee advised that the application should be granted and, accordingly, the Commissioner accorded necessary permission by his letter addressed to the respondent. There was nothing on the face of the said letter to indicate that the decision was not that of the Commissioner himself given in bona fide exercise of the discretion vested in him, though the Commissioner had stated in his affidavit that he was fully satisfied that the petitioner's application should be refused, but that it was only at the instance of the Cinema Advisory Committee that he had granted permission.

It is in this context that the Supreme Court noted that there was no suggestion that the Commissioner’s will was overborne or that there was dishonesty or fraud in what he did; in the absence of that, he was entitled to take into consideration the advice tendered to him by a public body set up for this express purpose, and he was entitled in the bona fide exercise

of his discretion to accept that advice and act upon it; the sanction accorded by him, in the letter addressed to the respondent, was a valid sanction; this sanction occasioned representations to the Government presumably by the "public" who were opposing the scheme; thereafter, the Commissioner wrote to the respondent directing him "not to proceed with the construction of the cinema pending government orders". This was followed by another communication by the Commissioner to the respondent as follows: *"I am directed by the Government to inform you that the permission to erect a cinema at the above site granted to you under this office letter … dated 16-7-1947, is hereby cancelled."*

In determining whether this was a cancellation by the Commissioner on his own authority acting in the exercise of the power which was either vested in him or of which he bona fide believed himself to be possessed, or whether he merely acted as a post office in forwarding orders issued by some other authority, the Supreme Court observed that this was not an order of cancellation by the Commissioner but was merely an intimation by him of an order passed and made by another authority, namely, the Government of Bombay; reference to the Commissioner's affidavit to contend that this was really an order of cancellation made by him, and that the order was his order and not that of the Government, was not tenable as public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do; public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself; the language used in the order could

not be construed to be an order which in effect says: *"I, so and so, by virtue of the authority vested in me, do hereby order and direct this and that."*; if the Commissioner of Police had the power to cancel the licence already granted and was the proper authority to make the order, it was incumbent on him to say so in express and direct terms; public authorities could not play fast and loose with the powers vested in them, and persons to whose detriment orders are made are entitled to know with exactness and precision what they are expected to do or forbear from doing and exactly what authority is making the order.

The Supreme Court further observed that it was clear from the Rules that the only person vested with the authority to grant or refuse a licence was the Commissioner of Police; the Rules vested him with absolute discretion *at any time* to cancel or suspend any licence which had been granted under the Rules; but the power to do so was vested in him and not in the State Government, and could only be exercised by him at *his* discretion; no other person or authority could do it; in the exercise of his discretion, the Commissioner had granted a licence and that licence still held good as there was no valid order of cancellation since the Commissioner did not exercise his discretion to cancel the licence he had granted earlier; he had merely forwarded to the respondent an order of cancellation which another authority had purported to pass; the Commissioner had before him objections which called for the exercise of the discretion regarding cancellation specifically vested in him by the Rules; he was therefore bound to exercise it and bring to bear on the matter his own independent and unfettered judgment and decide for himself whether to cancel the licence or reject the objections; and that duty he could now be ordered to perform.

After noting that the High Court had directed the Commissioner of Police to "withdraw the order of cancellation passed by him", the Supreme Court modified the High Court's order, and directed the Commissioner of Police to consider the request made to him for cancellation of the licence sanctioned by him earlier and, after weighing all different aspects of the matter, and after bringing to bear his own unfettered judgment on the subject, himself to issue a definite and unambiguous order either cancelling or refusing to cancel the said licence in the exercise of the absolute discretion vested in him by the Rules.

b. In **Mohinder Singh Gill v. Chief Election Commr., (1978) 1 SCC 405,** the appellant and the third respondent were candidates for election in a Parliamentary Constituency; the appellant alleged that, when at the last hour of counting it appeared that he had all but won the election, at the instance of the respondent, violence broke out and the Returning Officer was forced to postpone declaration of the result; the Returning Officer reported the happening to the Chief Election Commissioner; an officer of the Election Commission, who was an observer at the counting, reported about the incidents to the Commissioner; the appellant met the Chief Election Commissioner and requested him to declare the result; eventually, the Chief Election Commissioner issued a notification which stated that, taking all circumstances into consideration, the Commission was satisfied that the poll had been vitiated; and therefore, in exercise of the powers under Article 324 of the Constitution, the poll already held was cancelled and a repoll was being ordered in the constituency; the appellant contended that, before making the impugned order, the Election Commission had not given him a full and fair hearing and all that he had was a vacuous meeting where nothing was disclosed; and the

Election Commission had contended that a prior hearing had, in fact, been given to the appellant.

On the candidate's complaint of violation of principles of natural justice, it was urged by the respondents that the tardy process of notice and hearing would thwart the conducting of elections with speed; unless civil consequences ensued, hearing was not necessary; and a right accrues to a candidate only when he is declared elected.

Justifying his order cancelling the poll, the Chief Election Commissioner filed an affidavit wherein he admitted that the appellant met him in his office on the morning of March 22, 1977 with the request that the Returning Officer be directed to declare the result; he had agreed to consider and told him off, and eventually passed an order; the observer Shri Menon had apprised him of "the various incidents and developments regarding the counting of votes in the constituency" and also had submitted a written report; and, while admitting receipt of the wireless message of the returning officer, he concludes his affidavit stating that:

> *"……after taking all these circumstances and information including the oral representation of the first petitioner into account on March 22, 1977 itself I passed the order cancelling the poll in the said parliamentary constituency. In my view this was the only proper course to adopt in the circumstances of the case and with a view to ensuring fair and free elections, particularly when even a recount had been rendered impossible by reason of the destruction of ballot papers".*

It is in this context that the Supreme Court, relying on the observations of Bose, J. in **Commr. of Police, Bombay v. Gordhandas Bhanji, 1951 SCC 1088 : AIR 1952 SC 16,** held that, when a statutory

functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out; and Orders are not like old wine becoming better as they grow older.

The Supreme Court thereafter observed that, even if the cancellation of the poll were an administrative act, that per se did not repel the application of the natural justice principle; the Addl. Solicitor-General had only contended that such grievances should be left to be fully sorted out and solved later before the Election Tribunal set out by the Act; and a fair hearing was a postulate of decision-making cancelling a poll, although fair abridgement of that process was permissible.

The Supreme Court, after noting that the appellant had challenged, in his election petition, the declaration of the third respondent as the returned candidate, and had also prayed for his being declared the duly elected candidate, observed that the cornerstone of the second constituency-wide poll was the cancellation of the first; if that was set aside as invalid by the High Court for any good reason then the second poll falls and the third respondent too with it; having regard to the statutory setting and its comprehensive jurisdiction, it was within the powers of the Election Court to direct a re-poll of particular polling stations to be conducted by the specialised agency under the Election Commission and report the results and ballots to the court; even a re-poll of postal ballots could be ordered taking care to preserve the secrecy of the vote; the Election Court could if necessary, after setting aside the election of Respondent 3 (if there were good grounds therefor), keep the case pending, issue directions for getting available votes, order recount

and/or partial re-poll, keep the election petition pending and pass final orders holding the appellant elected if — only if — valid grounds were established; and such being the wide ranging scope of implied powers, all the reliefs the appellant claimed were within the Election Court's power to grant.

The Supreme Court concluded holding that (a) Article 329(*b*) of the Constitution is a blanket ban on litigative challenges to electoral steps taken by the Election Commission and its officers for carrying forward the process of election to its culmination in the formal declaration of the result; (b) the Constitution contemplates a free and fair election and vests comprehensive responsibilities of superintendence, direction and control of the conduct of elections in the Election Commission. This responsibility may cover powers, duties and functions of many sorts, administrative or other, depending on the circumstances; and (c) two limitations are laid on its plenary character, firstly, when Parliament or any State Legislature has made valid law relating to or in connection with elections, the Commission, shall act in conformity with, not in violation of, such provisions but where such law is silent Article 324 is a reservoir of power to act for the avowed purpose of, not divorced from, pushing forward a free and fair election with expedition; secondly, the Commission shall be responsible to the rule of law, act bona fide and be amenable to the norms of natural justice insofar as conformance to such canons can reasonably and realistically be required of it as fair play-in-action in a most important area of the constitutional order viz. elections; there is a remedy for every wrong done during the election in progress although it is postponed to the post-election stage and procedure as predicated in Article 329(*b*) and the 1951 Act; the Election Tribunal has, under the various provisions of the Act, large enough powers to give relief

to an injured candidate if he makes out a case and such processual amplitude of power extends to directions to the Election Commission or other appropriate agency to hold a poll, to bring up the ballots or do other thing necessary for fulfilment of the jurisdiction to undo illegality and injustice and do complete justice within the parameters set by the existing law; the bar of Article 329(*b*) is as wide as the door of Section 100 read with Section 98; the writ petition was dismissible but every relief (given factual proof) now prayed for in the pending election petition was within reach. In the light of and conditioned by the law laid down, the appeal was dismissed.

While it is true that, in both the afore-said judgments, it has been held that a public order, publicly made in the exercise of statutory power, must stand or fall on its own legs, the Supreme Court in **Gordhandas Bhanji**, while interdicting the order passed by the Commissioner of Police, directed him to pass an order afresh exercising his discretion alone, and not act on the directions of any other authority. In **Mohinder Singh Gill**, the Supreme Court left it to the Election Tribunal (ie the High Court hearing the Election Petition filed by the Respondent) to examine the election petition on its merits. In terms of the law declared in these two judgements, this Tribunal would then be required, after setting aside the impugned tariff order, to remand the matter to the Commission to pass an order afresh assigning reasons. Such a course of action the Appellant claims ought not to be followed, as the appellate jurisdiction exercised by this Tribunal is akin to a first appeal under Section 96 of the Civil Procedure Code.

It is true that a first appeal, under Section 111(1) of the Electricity Act, is, in view of Section 111(3) thereof, a continuation of the original proceedings instituted before the Regulatory Commission, and is

available both on questions of fact and law. The expression “appeal” has not been defined in the CPC. Black's Law Dictionary (7th Edn.) defines an appeal as “a proceeding undertaken to have a decision reconsidered by bringing it to a higher authority”. It is a judicial examination of the decision by a higher court of the decision of a subordinate court to rectify any possible error in the order under appeal. **(Malluru Mallappa v. Kuruvathappa, (2020) 4 SCC 313).** A first appeal is a full rehearing of the original proceedings, and the appellate forum possesses all powers, jurisdiction and authority as the forum of first instance, the jurisdiction and range of subjects being co-extensive. **(Southern Power Distribution Company of AP Limited v. Andhra Pradesh Electricity Regulatory Commission, 2022 SCC OnLine APTEL 110; H-Energy (P) Ltd. v. Petroleum & Natural Gas Regulatory Board, 2023 SCC OnLine APTEL 17).** Such an appeal is a continuation of the proceedings of the original court.

Ordinarily, the appellate jurisdiction involves a re-hearing on law as well as on facts and is invoked by an aggrieved person (**Santosh Hazari v. Purushottam Tiwari, (2001) 3 SCC 179; Madhukar v. Sangram, (2001) 4 SCC 756; B.M. Narayana Gowda v. Shanthamma, (2011) 15 SCC 476; H.K.N. Swami v. Irshad Basith, (2005) 10 SCC 243; Sri Raja Lakshmi Dyeing Works v. Rangaswamy Chettiar, (1980) 4 SCC 259; Shankar Ramchandra Abhyankar v. Krishnaji Dattatreya Bapat, (1969) 2 SCC 74; H-Energy (P) Ltd. v. Petroleum & Natural Gas Regulatory Board, 2023 SCC OnLine APTEL 17),** unless the statute conferring a right of appeal limits the rehearing in some way. **(Hari Shankar v. Rao Girdhari Lal Chowdhury : AIR 1963 SC 698).** It is a valuable right of the parties and, unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law.

(Girijanandini Devi v. Bijendra Narain Choudhary : AIR 1967 SC 1124; Santosh Hazari v. Purushottam Tiwari; (2001) 3 SCC 179; H-Energy (P) Ltd. v. Petroleum & Natural Gas Regulatory Board, 2023 SCC OnLine APTEL 17).

The parties have a right to be heard both on questions of law and on facts, **(Santosh Hazari v. Purushottam Tiwari, (2001) 3 SCC 179; Madhukar v. Sangram, (2001) 4 SCC 756; B.M. Narayana Gowda v. Shanthamma, (2011) 15 SCC 476; Sri Raja Lakshmi Dyeing Works v. Rangaswamy Chettiar, (1980) 4 SCC 259)**, and the appellate court has the jurisdiction to reverse or affirm the findings of the trial court. **(H.V. Sreenivasa Murthy v. B.V. Nagesha, 2008 SCC OnLine Kar 837; Vinod Kumar v. Gangadhar, (2015) 1 SCC 391; B.V. Nagesh v. H.V. Sreenivasa Murthy, (2010) 13 SCC 530; H-Energy (P) Ltd. v. Petroleum & Natural Gas Regulatory Board, 2023 SCC OnLine APTEL 17).**

While the appellate jurisdiction of this Tribunal involves a re-hearing on law as well as on facts, and all questions of fact and law are open for consideration by re-appreciating the material and evidence, it also goes without saying that the jurisdiction exercised by this Tribunal is not in substitution of the original proceedings before the Commission, and this Tribunal need not, in each and every case, take upon itself the task of adjudicating issues which were not even considered by the concerned Regulatory Commission. This would be more so in an appeal filed against a tariff order passed by the Commission in the exercise of, among others, its regulatory and quasi-legislative power.

Even if we were to proceed and adjudicate the appeal on its merits, we must necessarily examine the material on record, relating to the tariff

application filed under Section 64(1), in cases where the impugned order does not, per se, assign any reasons. What the Appellant-Distribution Licensee appears to seek, though it has not been explicitly so stated, is for their claim, in their Section 64(1) tariff application, to be allowed solely on the ground that the Commission has not assigned reasons for rejecting their claim. Such a course of action, as suggested on behalf of the Appellant-Distribution Licensee, is impermissible and does not find support either from the law declared by the Supreme Court in **Gordhandas Bhanji** and **Mohinder Singh Gill**, or from the provisions of the Electricity Act and the Regulations made by the UPERC thereunder.

IV. CAN THE APPROPRIATE COMMISSION DEFEND THE IMPUGNED TARIFF ORDER, IN AN APPEAL BEFORE THIS TRIBUNAL, AS IF IT IS AN ADVERSORIAL PARTY?

A. SUBMISSIONS URGED ON BEHALF OF THE NPCL:

Learned Senior Counsel would submit that tariff determination being quasi-judicial, the Commission cannot act as an adversarial party to defend its tariff order in appeal; its permissible role is limited to being a formal or *pro forma* respondent; the Commissions may be impleaded as a Respondent in an appeal under Section 111 of the Act, either because the Act or the Rules require it; but their role is limited and neutral; they may assist this Tribunal by placing the record, explaining the process and reasons already given in the Order, or clarifying the regulatory framework; they are not expected to actively defend their order like a litigant or attempt to add fresh reasons; the Commission is required to draw a balance between the interests of the utilities on the one hand and the consumers on the other; and that, however, does not mean that they become a successor or a representative of such interests. Reliance is placed in this regard on **GRIDCO Ltd. v. Western Electricity Supply**

Co. of Orissa Ltd., (2024) 2 SCC 500: 2023 SCC OnLine SC 1249.

Learned Senior Counsel, would further submit that the Counsel for the State Commission had relied upon **Airports Economic Regulatory Authority of India v. Delhi International Airport Ltd. and Others 2024 SCC OnLine SC 2923** during the course of proceedings in the present Appeal; however, the **Airports Economic Regulatory Authority of India** Judgement (i) deals with a different statute/enactment i.e., Airport Economic Regulatory Authority of India act, 2008; and (ii) it has been passed in different facts and circumstances i.e., in context of an appeal against the appellate body i.e., the Telecom Disputes Settlement and Appellate Tribunal before the Supreme Court; the Judgement, in **Airports Economic Regulatory Authority of India v.Delhi International Airport Ltd. and Others 2024 SCC OnLine SC 2923**, is inapplicable to the present case; and, in the context of the Electricity Act, 2003, the **GRIDCO Ltd. v. Western Electricity Supply Co. of Orissa Ltd., (2024) 2 SCC 500** Judgement holds the ground.

B. JUDGEMENTS RELIED ON BEHALF OF NPCL UNDER THIS HEAD:

In **GRIDCO Ltd. v. Western Electricity Supply Co. of Orissa Ltd., (2024) 2 SCC 500 : 2023 SCC OnLine SC 1249,** the Supreme Court (in Paras 31) observed that, as held by the Constitution Bench in **PTC (India) Ltd. v. CERC, (2010) 4 SCC 603**, the Commission exercises quasi-judicial powers under Section 62; they had serious doubts about the propriety and legality of the act of the Commission in preferring appeals, against the orders of the Appellate Tribunal in appeal, by which its own orders had been corrected; the Commission cannot be the

aggrieved party except possibly in one appeal where the issue is about non-compliance by the Commission of the orders of the Appellate Tribunal; and, if the Commission was exercising legislative functions, the position would have been different.

C. CONSIDERATION AND OUR VIEW

On the question of impleadment of the court or tribunal as a party in appellate proceedings, the Supreme Court, in **Jogendrasinhji Vijaysinghji v. State of Gujarat, (2015) 9 SCC 1 : 2015 SCC OnLine SC 606,** observed that civil courts, which decide matters, are courts in the strictest sense of the term; neither the court nor the Presiding Officer defend such orders before the superior court; if the High Court needs the original records, the same can always be called for without the Court or the Presiding Officer being impleaded as a party; authorities or the tribunals, who in law are entitled to defend the orders passed by them, are necessary parties and, if they are not arrayed as parties, the writ petition (or Appeal) can be treated to be not maintainable or the court may grant liberty to implead them as parties; there are tribunals which are not required to defend their own orders, and in that case such tribunals need not be arrayed as parties; in such a situation, even if the superior court is required to call for the records, the concerned Judge need not be a party; in essence, when a tribunal or authority is required to defend its own order, it is to be made a party failing which the proceeding before the higher (appellate) forum would be regarded as not maintainable; and such a petition (appeal) can be held to be not maintainable if a tribunal or authority that is required to defend the impugned order has not been arrayed as a party, as it is a necessary party.

The judgement, in **Jogendrasinhji Vijaysinghji v. State of Gujarat, (2015) 9 SCC 1,** was followed in **B.M.S. Kazi v. Muslim Education Society, (2016) 9 SCC 263: 2016 SCC OnLine SC 841**, wherein the Supreme Court considered the scope and ambit of certain provisions of the Gujarat Secondary Education Act, 1972. Under Section 39(4) of the said Act, the Tribunal was empowered to decide, among others, a dispute of the nature referred to in sub-section (1) of Section 38 or an appeal under sub-section (5) of Section 36. Under sub-section (5) of Section 36, a person aggrieved by an order of dismissal, removal or reduction in rank had a remedy of an appeal before the Tribunal. Section 39(9) provided for orders which could be passed by the Tribunal upon finding that the dismissal, removal or reduction in rank of a headmaster, teacher or member of the non-teaching staff was unlawful or unjustified. The Tribunal was constituted both as an original and an appellate adjudicating forum, an original forum to decide disputes under Section 38(1) and an appellate forum under Section 39(5).

It is in this context that the Supreme Court held that the Tribunal is not required to defend its orders when they are challenged before the High Court in a special civil application under Articles 226 and 227; the lis is between the management and a member of its teaching or non-teaching staff, as the case may be; it is for the person aggrieved to pursue his or her remedies before the Tribunal; an order of the Tribunal is capable of being tested in exercise of the power of judicial review under Articles 226 and 227; when the remedy is invoked, the Tribunal is not required to step into the arena of conflict for defending its order; hence, the Tribunal is not a necessary party to the proceedings in a special civil application; the appellant had instituted a proceeding before the Tribunal to challenge an order of dismissal passed against him in disciplinary

proceedings; before the Tribunal, the legality of the order of dismissal was in question; the lawfulness of the punishment imposed upon the appellant was a matter for the employer to defend against a challenge of illegality in the special civil application; the Tribunal was not required to defend its order in the writ proceedings before the learned Single Judge; even if the High Court was to require the production of the record before the Tribunal, there was no necessity of impleading the Tribunal as a party to the proceedings, the Tribunal not being required in law to defend its own order; and the proceedings under Articles 226 and 227 of the Constitution were maintainable without the Tribunal being impleaded.

As held by the Supreme Court, in **Joginder Singhji Vijay Singhji** and **BMS Kazi,** Tribunals, which in law are entitled to defend the orders passed by them, are necessary parties to the appellate proceedings. The question which would, therefore, necessitate examination is whether the Appropriate Commission, which passed the impugned tariff order, is entitled in law to defend its order. In this context, it is relevant to note that a dispute under Section 86(1)(f) is between two adversorial parties such as a licensee and a generating company. In such a dispute, if, say, a licensee prefers an appeal against the order passed by the Commission, it may not be necessary for the Commission to defend its order at the appellate stage, since the adversorial party i.e. the generating company, would do so.

A tariff order, however, stands on a different footing. Judicial notice can be taken of the fact that, ordinarily, a tariff order passed, in an application made under Section 64(1), is in a proceeding before the Commission where the only party is the applicant, be it a generator or a licensee. If we were to hold that the Appropriate Commission should neither be arrayed as a Respondent nor be permitted to participate in the

appellate proceedings, there may not be any other party which would contest the claim of the Appellant in an appeal preferred by the generating company/ licensee, against such an order. Not only would the Appellate Tribunal not have the benefit of the valuable assistance required to adjudicate whether or not the claim made by the Appellant is valid, it would also be deprived of the expert assistance required in an appeal preferred against tariff orders which may involve highly complex and technical issues.

In this context, it is useful to refer to Section 124 of the Electricity Act, which relates to the right of the appellant to take assistance of legal practitioner and of the Appropriate Commission to appoint presenting officers. Section 124 (1) stipulates that a person, preferring an appeal to the Appellate Tribunal under this Act, may either appear in person or take the assistance of a legal practitioner of his choice to present his case before the Appellate Tribunal, as the case may be. Section 124(2) enables the Appropriate Commission to authorize one or more legal practitioners or any of its officers to act as presenting officers, and enables every person so authorized to present the case with respect to any appeal before the Appellate Tribunal, as the case may be. The words *"any appeal before the Appellate Tribunal"* in Section 124(2) are extremely wide, and would bring within its ambit an appeal preferred against the tariff order also. Section 124(2) confers on the Appropriate Commission a right to authorize one or more legal practitioners or any of its officers to act as presenting officers in such appeals.

It is true that a discretion is conferred on the Commission whether or not to appoint presenting officers where an appeal is preferred, against its order, before this Tribunal, and they may choose not to so appoint. It cannot, however, be said that, even if they so wish to appoint a legal

practitioner or its officers to present their case before this Tribunal in appellate proceedings, they should be disabled from doing so. The very fact that Parliament has recognized the need to permit the Appropriate Commissions to appoint legal practitioners to defend its orders at the appellate stage would also support the view that the Commission is entitled to defend its tariff orders at the Appellant stage of the proceedings.

We must, therefore, express our inability to agree with the submission urged on behalf of the Appellant that the permissible role of the Commission is limited to being a formal or a proforma Respondent for, if that were to be so, Parliament would not have conferred a right on the Commission coupled with a discretion to appoint presenting officers in an appeal preferred against its orders.

The Commission would be entitled in law to defend its orders for yet another reason. Among its responsibilities, include its' obligation to protect consumer interest. Any increase in tariff, on the tariff order being modified in appeal, would be passed on to the consumers and would, undoubtedly, fasten an additional financial burden on them.

While it is true that the Commission is required to ensure recovery of costs of electricity by the distribution licensees in a reasonable manner while safeguarding consumer interest, such an exercise must, until the tariff order is modified or set aside in an appeal, be presumed to have been undertaken by the Commission in passing the tariff order. That does not mean that the Commission must refrain from even participating or from defending its orders at the appellate stage. We have no reason to doubt that, in the discharge of its statutory obligations to protect consumer interest, the Commission would be entitled in law to defend its

orders in an appeal before this Tribunal.

Reliance placed by the Appellant, on **GRIDCO Limited vs. Western Electricity Supply Co. of Orissa: 2024 2 SCC 500,** is misplaced. The question which arose for consideration in **GRIDCO Limited** was whether the Commission could prefer an appeal to the Supreme Court, under Section 125 of the Electricity Act, against an appellate order passed by this Tribunal in an appeal preferred against the order passed by the Commission itself. We are not called upon to examine any such question in the present appeal. What we are concerned, on the other hand, is with the question whether the Commission can defend its order in an appeal preferred to this Tribunal against such an order.

As noted hereinabove, the Supreme Court, in **Airports Economic Regulatory Authority of India v. Delhi International Airport Ltd. and Others 2024 SCC OnLine SC 2923**, took note of both the earlier judgements of the Constitution Bench in ***PTC India Limited*** and of the two judge bench in ***Gridco Limited***. While it is true that the **Airports Economic Regulatory Authority of India** judgement was concerned with the provisions of the Airport Economic Regulatory Authority of India Act, 2008, a reading of the said judgment would show that not only did the Supreme Court consider certain provisions of the Electricity Act but it had also examined the law laid down by the Constitution Bench in ***PTC India Limited*** and the two judge bench judgement in ***Gridco*** rendered in the context of the Electricity Act. We are, therefore, of the view that reliance placed by the Appellant-Distribution Licensee on ***Gridco*** is wholly misplaced.

V. IS THIS TRIBUNAL DISABLED FROM REMANDING CERTAIN ASPECTS OF THE TARIFF ORDER FOR RE-CONSIDERATION

BY THE COMMISSION?

A. SUBMISSIONS URGED ON BEHALF OF NPCL:

Learned Senior Counsel would submit that, where the reasons given in an impugned order are found to be unsustainable, and there is deviation from past practice, the correct course is for this Tribunal to set aside the order and direct continuation of the past practice, without warranting a remand; keeping in view the timelines prescribed under Section 64(3) of the Act, for determination of tariff, the consequence of remand after a long lapse of time ought to be considered; the principles under the Code of Civil Procedure, 1908, as to when a matter can be remanded, are also relevant; even otherwise, in view of Sections 111(3) and 111(6) of the Electricity Act, and in the interest of justice, this Tribunal is required to decide the issue finally, unless remand is inevitable; an order cannot be remanded only because the issuing authority is unable to justify the reasons which are there in the Order; the Supreme Court has, time and again, held that an appellate court should not, ordinarily, remand a case to the lower court, and where it finds that material is available on its record, it should itself decide the appeal one way or the other by confirming, reversing or modifying such impugned order; and, thus, a remand cannot be ordered at the behest of the very authority whose order is impugned i.e., in this case, the State Commission.

Learned Senior Counsel, would further submit that, additionally, the timeline of 120 days (as provided under Section 64(3)) has been found to be adequate by the legislature while making the law for determination of tariff and passing of the final Tariff Order; the State Commission, in the present case, follows the timeline of 120 days from the date of admission of the tariff petition; thus, the State Commission has sufficient time to pass a reasoned order and cannot rely upon the same as an excuse to

pass non-reasoned orders and then seek a remand to supplement reasons; the Appellant is not canvassing that the Appellate Court becomes the Original Court; what it is canvassing is that the Appellate Court decides the issue on merits, and then remit the matter to the Original Court whether for computation or calculation or even a prudence check of the numbers in accordance with the principle that may be laid/upheld by the Appellate Court; and, for this Tribunal to remand the matter to the Commission without deciding the principle of the claim, would amount to allowing the Commission an opportunity to involve the Appellant in a merry-go-round of litigation.

Learned Senior Counsel, would also submit that that the inevitable consequence of an order remanding the instant appeal will be that the same would prolong, cause delay and not put an end to the *lis;* it is a *sine qua non* for the tariff proceedings to take place on a regular basis and in a timely manner as the delay therein ultimately leads to burden being carried forward to the consumers; and, if this Tribunal were to remand the matter at the behest of the State Commission, it would indirectly be permitting the State Commission to do what it cannot do directly i.e., to supplement the reasons in the Impugned Order, which is impermissible in law. Reliance is placed by the Learned Senior Counsel on (i) **Ashwinkumar K. Patel v. Upendra J. Patel, (1999) 3 SCC 161, Para 8**; (ii) **Arvind Kumar Jaiswal (D) Thr. LR v. Devendra Prasad Jaiswal Varun, 2023 SCC OnLine SC 146, Para 3;** (iii) **BSES Rajdhani Power Ltd. v. Union of India: 2025 SCC OnLine SC 1637, Para 69.8(iii);** and (iv) **Tariff Revision, In re: 2011 SCC OnLine APTEL 173, Para 59-60.**

B. JUDGEMENTS RELIED ON BEHALF OF THE NPCL:

1. In **Ashwinkumar K. Patel v. Upendra J. Patel, (1999) 3 SCC 161,** the Supreme Court observed that the High Court should not, ordinarily, remand a case under Order 41 Rule 23 CPC to the lower court merely because it considered that the reasoning of the lower court in some respects was wrong; such remand orders lead to unnecessary delays and cause prejudice to the parties to the case; when material was available before the High Court, it should have itself decided the appeal one way or the other; it could have considered various aspects of the case mentioned in the order of the trial court and considered whether the order of the trial court ought to be confirmed or reversed or modified; it could have easily considered the documents and affidavits and decided about the prima facie case on the material available; in matters involving agreements of 1980 (and 1996) on the one hand and an agreement of 1991 on the other, as in this case, such remand orders would lead to further delay and uncertainty; and the remand by the High Court was not necessary.

2. In **Arvind Kumar Jaiswal (D) Thr. LR v. Devendra Prasad Jaiswal Varun, 2023 SCC OnLine SC 146,** the Supreme Court observed that an order of remand prolongs and delays the litigation and, hence, should not be passed unless the appellate court finds that a re-trial is required, or the evidence on record is not sufficient to dispose of the matter for reasons like lack of adequate opportunity of leading evidence to a party, where there had been no real trial of the dispute or there is no complete or effectual adjudication of the proceedings, and the party complaining has suffered material prejudice on that account; where evidence has already been adduced and a decision can be rendered on appreciation

of such evidence, an order of remand should not be passed remitting the matter to the lower court, even if the lower court has omitted to frame issue(s) and/or has failed to determine any question of fact, which, in the opinion of the appellate court, is essential; and the first appellate court, if required, can also direct the trial court to record evidence and finding on a particular aspect/issue in terms of Rule 25 to Order XLI, which then can be taken on record for deciding the case by the appellate court.

3. In **BSES Rajdhani Power Ltd. v. Union of India: 2025 SCC OnLine SC 1637,** the Supreme Court observed that it was necessary to restate the directions issued by the Appellate Tribunal in its orders dated 11.11.2011 and 14.11.2013, as it was relevant for the present purpose among which was that Regulatory Commissions must undertake truing up on a regular basis, immediately at the end of the financial year so that any discrepancies between the ARR and the revenue realized through tariffs is brought to notice and can be rectified in a timely manner; this was necessary so that the burden or benefit of present years is not carried forward to future consumers; and delay in truing up could lead to imposition of carrying costs and cash-flow problems for the utility.

4. In **Tariff Revision, In re: 2011 SCC OnLine APTEL 173,** a Full Bench of this Tribunal observed that tariff determination ought to be treated as a time bound exercise; if there is any lack of diligence on the part of the Utilities which has led to the delay, the State Commission must play a pro-active role in ensuring compliance with the provisions of the Act, Regulations and the Statutory Policies under the Electricity Act, 2003; and, in the absence of performance of functions and duties enjoined under the Act and Regulations by the State Commission, it is the duty of the Tribunal to intervene and wake them up from their deep slumber and to make them act to ensure that the Regulations are being

followed scrupulously by the Commissions as well as the Utilities.

C. CONSIDERATION AND OUR VIEW :

It is settled law that the Superior/Appellate Court can set aside the entire judgment of the Court below and remand the matter to the subordinate court to consider all issues afresh. Such a remand is called 'open Remand'. The subordinate court can, in such cases, decide the entire matter afresh, on the available material, on its own accord. The Superior/Appellate Court may also remand the matter on specific issues with a specific direction through a "Remand Order. This is called a 'Limited Remand Order'. In case of Limited Remand, the jurisdiction of the Court below is confined only to the matter remanded. When a matter is remanded by the appellate forum to the lower court or the lower authority, with specific directions, the lower court or the lower authority should restrict its enquiry to matters prescribed in the order of "Limited Remand". In other words, the Court below, to which the matter is remanded by the Superior Court, is bound to act within the scope of the remand order. It is not open to the Court below to do anything but to carry out the terms of the remand in letter and spirit**. (Karnataka Power Transmission Corporation Limited and Anr. versus M/s Global Energy Private Limited and Anr. (Judgement in Appeal No. 272 of 2014 dated 6th February, 2025); Meghalaya State Electricity Board versus Meghalaya State Electricity Regulatory Commission (Judgement of this Tribunal in Appeal 37 of 2010 dated 10.08.2010); Mohan Lal vs. Anandibat (1971) 1 SCC 813; Paper Products Ltd. vs. CCE (2007) 7 SCC 352; Smt. Bidya Devi vs. Commissioner of Income Tax, Allahabad AIR 2004 Calcutta 63; K.P. Dwivedi vs. Tate of U.P. (2003) 12 SCC 572; Mr. Muneswar and Ors. vs. Smt. Jagat Mohini Des AIR (1952) Calcutta 368; Amrik Singh vs. Union of India (2001)**

10 SCC 424; Union of India & Anr. Vs. Major Bhadur Singh (2006) 1 SCC 367; Prakash Singh Badal & Anr. Vs. State of Punjab and Ors. (2007) SCC 1).

The main principles of limited remand are as follows: (i) when a matter if remanded by the superior court to the subordinate court for re-hearing in the light of observations contained in the judgment, then the same matter is to be heard again on the material already available on record. Its scope cannot be enlarged by introduction of further evidence, regarding subsequent events simply because the matter has been remanded for a re-hearing or de-novo hearing; (ii) the court below to which the matter is remanded by the superior court is bound to act within the scope of remand. It is not open to the court below to do anything but to carry out the terms of the remand in letter and spirit; (iii) when the matter comes back to the superior court again in appeal, after the final order upon remand is passed by the Court below, the matter/issues finally disposed of by the order of remand, cannot be re-opened; (iv) the remand order is confined only to the extent it was remanded. Ordinarily, the Superior Court can set aside the entire judgment of the court below or it can remand the matter on specific issues through a "Limited Remand Order". In the case of a Limited Remand Order, the jurisdiction of the court below is limited to the issue remanded. It cannot sit in appeal over the Remand Order; (v) if no appeal is preferred against the order of Remand, the issues finally decided in the order of remand by the Superior Court attains finality and the same can neither be subsequently re-agitated before the court below to which it was remanded nor before the superior court where the order passed upon remand is later challenged in Appeal. **(Damodar Valley Corporation v. CERC (Judgement in Appeal No. 146 of 2009 dated 10.05.2010; Damodar Valley**

Corporation vs Jharkhand SERC: Judgement in Appeal No. 332 of 2024 dated 15.10.2024); Meghalaya State Electricity Board v. Meghalaya State Electricity Regulatory Commission (Order in Appeal No. 37 of 2010 Dated 10th August, 2010); Mohan Lal vs. Anandibat (1971) 1 SCC 813; Paper Products Ltd. vs.CCE (2007) 7 SCC 352; Smt. Bidya Devi vs. Commissioner of Income Tax, Allahabad: AIR 2004 Calcutta 63; K.P. Dwivedi vs. Tate of U.P. (2003) 12 SCC 572; Mr. Muneswar and Ors. vs. Smt. Jagat Mohini Des AIR (1952) Calcutta 368; Amrik Singh vs. Union of India (2001) 10 SCC 424; and Union of India & Anr. Vs. Major Bhadur Singh (2006) 1 SCC 3670)

As noted under the earlier head, while absence of reasons in a tariff order may, in certain circumstances, necessitate the said order being set aside on that score, we find it difficult to agree with the submission, urged on behalf of the Appellant-NPCL, that this Tribunal should, after setting aside the impugned order for non-compliance with this rule of natural justice, merely direct that the past practice be continued. Absence of reasons, even if this rule of natural justice is held applicable to a tariff order, would result in non-compliance of the said rule which would only necessitate the impugned order being set aside on this score, and the Commission being directed to now comply with this particular rule of natural justice by assigning reasons for passing the tariff order. Alternatively, this Tribunal, in the exercise of its appellate jurisdiction, could examine the Appellant's claim on the basis of the material available on record, as an appeal is a continuation of the original proceedings.

While it may be open to this Tribunal, in certain circumstances, to examine the issue at the appellate stage on the basis of the material on record, it must also be borne in mind that, while an appeal is a

continuation of the original proceedings, it is not in substitution thereof. Though this Tribunal can examine the validity of the impugned order passed by the UPERC, both on facts and law, that does not mean that the appellate proceedings before this Tribunal can be converted or be treated as the original proceedings which would lie only before the Commission. Entertaining and adjudicating every issue at the appellate stage, instead of passing an order of remand, would only result in this Tribunal exercising the jurisdiction conferred by the Electricity Act on Regulatory Commissions, defeating the very object of the Parliamentary Legislation, in constituting a Commission and conferring it with regulatory/ legislative/ quasi-judicial powers to pass tariff orders.

We may not be understood to have held that, in every case where reasons have not been assigned, the matter should be remanded to the Commission directing it to pass a reasoned order afresh. All that we have held is that it is not necessary that, in each and every case where the impugned tariff order is bereft of reasons, this Tribunal should take upon itself the task of adjudicating the issue, instead of remanding the matter to the Commission.

The effect of the timeline of 120 days to pass a tariff order has been dealt with earlier in this judgment, and does not bear repetition under this head. While we have no quarrel with the submission that an order of remand would prolong the lis, every such appeal being entertained and examined by this Tribunal on merits, would only result in prolonging hearing and disposal of the large number of appeals pending adjudication before this Tribunal, some of them for more than a decade. In any event, the Appellant themselves have, in the present appeal, sought remand of certain issues for fresh consideration by the

Respondent-Commission. As they have chosen to make such a request on their own accord, we see no justification in the Appellant selectively contending that certain other issues should not be remanded, and must instead be adjudicated by this Tribunal.

VI. ROLE OF CONSUMERS IN TARIFF DETERMINATION:

A. SUBMISSIONS URGED ON BEHALF OF CONSUMER:

Sri Anand. K. Ganeshan, Learned Counsel would submit that consumers are a very important, if not the most important, stakeholder in the tariff determination process, and the Electricity Act mandates an opportunity for their participation; the extent of consumer participation ought to extend to all aspects that affect the tariff, and should not be limited to the averments or contentions raised by the licensee in its petition; the State Commission, under Section 62 of the Electricity Act, has wide powers in relation to tariff determination, and such proceedings are regulatory and inquisitorial in nature rather than adjudicatory or adversarial; the Commission also has suo-motu powers to determine tariff or to examine issues not specifically raised by the licensee in the tariff petition; as the State Commission is vested with such wide powers, the role of the consumer cannot be confined merely to filing representations or objections limited to the scope of the licensee's application; considering that the entire cost incurred by the licensee is ultimately borne by the consumers, the role of the consumers, in the tariff determination process, cannot be curtailed or restricted in any manner. Reliance is placed on (1) **WBERC v. CESC Limited, (2002) 8 SCC 715, para 40** to submit that, even though under the 1998 Act there was no specific provision for consumers to file its objections and representations to the tariff proceeding under Section 29, relying on the fact that the State

Commission is required to bear consumer interest in mind, and on Section 26 (corresponding to Section 94(3) of the 2003 Act), the Supreme Court held that consumer participation is necessary; (2) **State of Himachal Pradesh v. JSW Hydro Energy Limited: 2025 SCC OnLine SC 1460 (para 9.4)** wherein it was held that these measures are ultimately intended to protect and subserve consumer interests by making electricity supply accessible at cheaper rates for those who cannot afford it, as well as making supply accessible in all areas and regions; and, in this vein, the Act provides for the need for transparent subsidy policies; (3) **Torrent Power Limited v. UPERC & Others, 2025 SCC OnLine SC 1410, (para 38, 41, 48, 55 and 56)** wherein it was held that Electricity being a natural resource that vests in the State, the provisions of the Act, 2003 keep consumers' interest at the core of all processes that are sought to be governed under the Act, 2003 namely, generation, transmission and distribution of electricity; (4) in **All India Power Engineer Federation v. Sasan Power Ltd., (2017) 1 SCC 487,** the Supreme Court, while rendering the judgment in the context of a statutory tariff appeal, has underscored that consumer interest in tariff is inter-twined with public interest; the function of tariff adoption or determination is also mandated to be carried by ERCs in accordance with public interest and to safeguard consumer needs; in view of the Conduct of Business Regulations of the State Commission enabling any proceedings to be initiated suo moto, an investigation under Section 128 can also be initiated suo motu; and therefore the petition of the consumer, seeking investigation, is not beyond the jurisdiction of the State Commission; and (5) in **Rama Shankar Awasthi v. Lanco Anpara Power Limited, 2016 SCC OnLine APTEL 126, (para 21 to 27)** it was held that, considering various provisions of the Electricity Act, its preamble and particularly Section 94(3), the consumer has locus to

participate even in disputes under Section 86(1)(f) having an impact on tariff.

Learned Counsel, would further submit that in the light of the foregoing judicial pronouncements, where consumer interest is ultimately to be subserved, there would be no rationale in excluding participation of the consumer in the representations/objections before the State Commission or to limit it only to the averments in the tariff petition, and not raise any issue that may have an impact on the tariff of the licensee; the expression *"suggestions and objections",* as employed in Section 64(3) of the Electricity Act, 2003, cannot be construed in a restrictive manner to mean only objections to the claims or submissions made by the licensee in its tariff petition; the said expression, necessarily, encompasses, within its ambit, all such suggestions and objections that may be relevant for a just and lawful determination of tariff by the State Commission; by way of illustration, the consumers can represent on new tariff categories to be provided, consumers can suggest that there are past dues which should be passed on even though the petition does not refer to the same; the consumers can suggest that there have been undue amounts recovered which should be passed on to the consumers in the tariff; and the consumers can also seek reduction in tariff, even though the claim is for increase in tariff.

B. SUBMISSIONS URGED ON BEHALF OF NPCL:

Sri B.P. Patil, Learned Senior Counsel would submit that the rights of consumers to participate in tariff proceedings are expressly recognized under the Electricity Act, 2003; Section 64(2) of the Act confers upon a consumer the right to access or obtain a copy of the licensee's tariff petition/application, which is required to be published by the licensee in

the prescribed form and manner; Section 64(3) further provides that the Commission shall consider all suggestions and objections before either issuing the tariff order or rejecting the application; the proviso to sub-section (3) of Section 64 affords a reasonable opportunity of hearing only to the applicant (licensee), with no hearing contemplated for a consumer, suggester, or objector, a position affirmed by this Tribunal in "**Hooghly Chamber of Commerce & Industry v. WBERC & Anr.", 2015 SCC OnLine APTEL 95** (APL 77 of 2014); when a consumer files an appeal before this Tribunal, the right to an oral hearing arises only with respect to the specific issues previously raised before the Commission; and, where new grounds or fresh pleas are urged directly before this Tribunal, any attempt to claim the right to oral hearing at the appellate stage for consideration of suggestions or objections, which was not available before the Commission, cannot be sustained.

Learned Senior Counsel, would further submit that the objections and suggestions must relate specifically to the tariff proposal made by the Utility, which can be considered under Section 64 of the Act; an objector cannot be permitted to raise issues that are alien to the tariff proposal, as doing so would impermissibly widen the scope of proceedings initiated by the Licensee; accordingly, a consumer or objector may raise only those issues that have a material bearing on the tariff and proposals of the licensee; an objection or suggestion under Section 64 cannot be treated as an independent proceeding against the licensee, particularly when the Act provides several other provisions under which a consumer may seek relief against a licensee; however none of these have been invoked in the present case; equally, a consumer or an Objector cannot, in a tariff proceeding for a particular year, raise issues which admittedly pertain to previous years, the tariff of

which already stands finalized, trued up, done and dusted; if a Consumer did not file a Review or an Appeal against any of the earlier Orders of the Commission, he/she cannot be permitted to bypass such statutorily available remedies by recourse to a fresh initiation against a licensee and that too in the licensee's petition; and a Petitioner cannot be put in a worse position by filing a petition than he would have been if he had not filed such a petition at all.

C. JUDGEMENTS RELIED ON BEHALF OF THE APPELLANT CONSUMER:

1. In **West Bengal Electricity Regulatory Commission v. CESC Ltd., (2002) 8 SCC 715**, the question which arose for consideration was the locus standi of the consumers before the Commission in its proceedings, as also before the High Court in an appeal under Section 27 of the Electricity Regulatory Commissions Act, 1998 ("the1998 Act" for short). The Commission, in the proceedings before it, issued a newspaper publication calling upon the persons to appear and file objections in case they were interested in the proceedings before it. Pursuant to the said publication, a number of organisations including some of the appellants, representing sections of the consumers, appeared and filed their objections and submitted their arguments which were taken note of by the Commission in the proceedings before it. This was not objected to by the respondent Company which, being aggrieved by the final order of fixation of tariff by the Commission, preferred the statutory appeal before the High Court. To the said appeal, the respondent Company impleaded only the Commission as a party respondent, but the High Court, in the initial stage, thought it appropriate to issue a public notification of the filing of the appeal, and called upon the interested parties to represent themselves before it. Pursuant to the

said publication, some of the organisations representing consumers sought impleadment before the High Court. However, when the matter came up for final hearing the applications of these consumer organisations were rejected by the High Court holding that the Commission does not have the power to issue indiscriminate notice to the consumers or for hearing them. It also held that the advertisements published in this regard, as per the Commission's Regulations as also the advertisements issued by the High Court in the appeal, were all on an erroneous view that the 1998 Act envisages such procedures.

On the question whether the consumers had a legal right or not to be heard in the proceedings before the Commission under Section 29(2) of the 1998 Act, as also in an appeal under Section 27 of the said Act, the Supreme Court held that though, generally, it is true that price fixation is in the nature of a legislative action and no rule of natural justice is applicable, the said principle cannot be applied where the statute itself has provided a right of representation to the party concerned; the 1998 Act not only took away the right of the licensee or a utility to determine the tariff, but also conferred the said power on the Commission; this was done because one of the primary objects of the 1998 Act was to create an independent regulatory authority with the power of determining the tariff, bearing in mind the interests of the consumers whose rights were till then totally neglected; the fact that the Commission was obligated to bear in mind the interests of the consumers is also indicative of the fact that the Commission had to hear the consumers in regard to fixation of tariff; this right of the consumers is further supported by the language of Section 26 of the Act, which specifically mandates the Commission to authorise any person as it deems fit to represent the interest of the consumers in all proceedings before it; if the above provision of the Act

is read in conjunction with Sections 22 and 29 read with Section 58(2)(d) of the 1998 Act, it is clear that the Commission, while framing Regulations, must keep in mind the interests of the consumers for the purpose of determining the tariff; the mandate of Parliament, in Section 37 of the 1998 Act, is that the Commission should ensure transparency while exercising its powers and discharging its functions which also indicates that the proceedings of the Commission should be public which, in itself, shows participation by interested persons; that apart, the State of West Bengal in the exercise of its power under Section 57 of the Act has enacted the West Bengal Electricity Regulatory Commission (Appointment of Chairperson and Members Functions, Budget and Annual Report) Rules, 1999; under Rule 4(1)(c) the State Government has provided that the Commission before taking any decision on the rates of tariff must notify its intention in this behalf, in leading newspapers of West Bengal and hold public hearing for the said purpose; even the Commission, under the power conferred on it in Section 58 of the Act, has framed the West Bengal Electricity Regulatory Commission (Conduct of Business) Regulations, 2000 as amended by the Regulations dated 3-2- 2000, wherein, under Regulation 18, the Commission can permit an association or other body corporate or any group of consumers to participate in any proceedings before the Commission, on such terms and conditions, including, in regard to the nature and extent of participation as the Commission may consider appropriate; the Commission under Regulation 19 is also empowered to notify a procedure to associations, groups, forums or body corporates or registered consumer associations, for the purpose of representation before the Commission; a combined reading of these provisions of the Act, Rules and Regulations, clearly shows that the statute has unequivocally provided a right of hearing/representation to the

consumers, though the manner of exercise of such right is to be regulated by the Commission; when a statute confers a right which is in conformity with principles of natural justice, the same cannot be negatived by a court on an imaginary ground that there is a likelihood of an unmanageable hearing before the forum concerned; in cases where such right is conferred under a statute, it becomes a vested right, compliance of which becomes mandatory; such a right when given under the statute cannot be taken away by courts on the ground of practical inconvenience, even if such inconvenience does in fact exist; the statute, having conferred a right on the consumer to be heard in the matter pertaining to determination of the tariff, the High Court was in error in denying that right to the consumers; consequently, the right of the consumers to prefer an appeal under Section 27 of the 1998 Act to the High Court is similar, if they are in any manner aggrieved by any order made by the Commission; and, if the Company is an aggrieved party and if it prefers an appeal, then it has to make such of those consumers who have been heard by the Commission, as party-respondent, and such consumers will have the right of audience before the appellate court.

2. In **State of Himachal Pradesh v. JSW Hydro Energy Limited: 2025 SCC OnLine SC 1460 (para 9.4),** the Supreme Court observed that the measures, referred to in the judgement, were ultimately intended to protect and subserve consumer interest by making electricity supply accessible at cheaper rates for those who cannot afford it, as well as making supply accessible in all areas and regions; and, in this vein, the Act provides for the need for transparent subsidy policies.

3. In **Torrent Power Limited v. UPERC & Others, 2025 SCC OnLine SC 1410, (para 38, 41, 48, 55 and 56),** the Supreme Court observed that Electricity being a natural resource that vests in the State,

the provisions of the Electricity Act, 2003 keep consumers' interest at the core of all processes that are sought to be governed under the said Act, namely, generation, transmission and distribution of electricity. After referring to its earlier judgement, in **All India Power Engineer Federation v. Sasan Power Ltd., (2017) 1 SCC 487,** the Supreme Court observed that, under the scheme of the Electricity Act, 2003, the Central and State ERCs are vested with regulatory functions, tariff determination functions, and adjudicatory functions, in particular under Sections 79 and 86 respectively; whilst in the exercise of regulatory functions, the ERCs are also required to comply with the various Regulations made by the respective Central and State Commissions under Sections 178 and 181 respectively, a close reading of most of the Regulations framed by the ERCs i.e., Regulations pertaining to Open Access, Connectivity Regulations, Regulations on Renewable Power Purchase Obligations etc., indicated that regulatory powers and functions of the ERCs must be exercised in public or consumer interest alongside commercial principles; the function of tariff adoption or determination was also mandated to be carried by ERCs in accordance with public interest and to safeguard consumer needs; Section 61 of the Electricity Act, 2003 also required ERCs to consider commercial principles in matters of tariff, and therefore ERCs were expected to undertake a balancing act between commercial prudence and consumer interest.

On whether the ERCs had *suo motu* power to initiate a proceeding under Section 128, the Supreme Court, in **Torrent Power Limited v. UPERC & Others, 2025 SCC OnLine SC 1410**, referred to the Uttar Pradesh Electricity Regulatory Commission (Conduct of Business) Rules, 2004 (the "**Conduct of Business Rules, 2004**"), more particularly, Regulation 14(a) thereof, which dealt with initiation of

proceedings and enabled the commission to initiate any proceedings sou moto or on a petition filed by any affected person, and then observed that a perusal of the Regulation led them to conclude that the UPERC had jurisdiction to entertain a petition praying for investigation under Section 128. The Supreme Court, also clarified that, as a principle of law, the ERCs are not competent to entertain a matter on the singular ground of public interest.

4. In **All India Power Engineer Federation v. Sasan Power Ltd., (2017) 1 SCC 487,** the Supreme Court made it clear that, even if waiver is claimed of some of the provisions of the PPA, such waiver, if it affects tariffs that are ultimately payable by the consumer, would necessarily affect public interest and would have to pass muster of the Commission under Sections 61 to 63 of the Electricity Act; this was for the reason that what is adopted by the Commission under Section 63 is only a tariff obtained by competitive bidding in conformity with the Guidelines issued; if at any subsequent point of time such tariff is increased, which increase is outside the four corners of the PPA, even in cases covered by Section 63, the legislative intent and the language of Sections 61 and 62 make it clear that the Commission alone can accept such amended tariff as it would impact consumer interest and therefore public interest.

5. In **Rama Shankar Awasthi v. Lanco Anpara Power Limited, 2016 SCC OnLine APTEL 126,** this Tribunal held that the Preamble of the Electricity Act states that the said Act is enacted inter alia to protect interest of consumers; that the consumer is a major stakeholder in the power sector can hardly be disputed; Section 94(3) of the said Act will apply to Section 86(1)(f) of the said Act as well; when Section 94(3) or any other provision of the said Act does not exclude proceedings under

Section 86(1)(f) from the purview of Section 94(3), such exclusion cannot be inferred; it is not unlikely that a dispute which may ostensibly be described as a contractual dispute may have wide ramifications and decision of the State Commission may have an adverse impact on the consumer interest; and it is precisely for this reason that the legislature has made a provision for consumer participation in Section 94(3).

This Tribunal further observed that Regulations 17 and 18 of the "Uttar Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations 2004 are in tune with the purport, intent and provisions of the said Act, and Section 86(1)(f) cannot be excluded from the purview of these regulations; even a decision in a contractual matter can have repercussions on the tariff; it can have adverse impact on consumer interest; it is precisely for this reason that the said Act makes unequivocal provision for consumer participation in proceedings before the Appropriate Commission; if the legislature wanted to deny the consumer the right to participate in proceedings under Section 86(1)(f) of the said Act, it would have said so; and this Tribunal cannot add anything to the provisions of the said Act so as to deny the consumer his right to participate in the proceedings before the State Commission; the Appellant is a consumer in the State of Uttar Pradesh; he is a member of the State Advisory Committee constituted by the State Commission; he had participated in the proceedings before the State Commission; he had filed objections to the claim of Lanco; his presence is noted in the impugned order; it is his case that the relief of compensatory tariff granted to Lanco will ultimately put additional burden on the consumers; he is, therefore, a 'person aggrieved' within the meaning of Section 111 of the said Act; it is not possible to hold that the Appellant has no locus; and the alleged privity of contract between Lanco and Respondent No.2 cannot

disentitle the Appellant-consumer from filing the appeal.

D. JUDGEMENTS RELIED ON BEHALF OF NPCL:

In **Hooghly Chamber of Commerce & Industry v. WBERC & Anr.", 2015 SCC OnLine APTEL 95** (APL 77 of 2014)**,** this Tribunal observed that Tariff Determination under the MYT framework is a two part process, first part comprises of determination of ARR and second part is tariff designing and, therefore, tariff determination cannot be considered separate from determination of ARR; further, determination of ARR is part of the tariff determination process prescribed under Section 64 of the Electricity Act, 2003 and, accordingly, the State Commission, in this case, had invited objections/suggestions from the stakeholders at the time of determination of ARR for the 3rd control period comprising three years i.e. 2011-12, 2012-13 and 2013-14; thus, the Impugned Order is a mere tariff designing exercise undertaken by the State Commission as part of the same proceedings, wherein ARR for the MYT period was determined after inviting objections/suggestions from the stakeholders; though the stakeholders, including the Appellant/petitioner, had filed their objection/suggestions at the time of determination of ARRs before passing of the MYT order dated 1.12.2012, and after publication of the tariff petition/application, making the same available on the website of the State Commission and inviting objections/suggestions from the stakeholders, including the Appellant, and having heard the stakeholders after giving opportunity of hearing to them, and adopting the methodology provided under Section 64 of the Electricity Act, 2003, the State Commission passed the MYT order dated 1.12.2012, whereby the State Commission had determined the ARR for each tariff year of the three year control period namely: 2011-12, 2012-13 and 2013-14 and determined the tariff for the first two years of the

MYT period; in the present case, no determination or prejudice had been showed to have been caused to the Appellant so far as the impugned order is concerned; the ARR determined by the State Commission in the impugned order is the same as was determined under the MYT order dated 1.12.2012, and the tariff is also the same as was provided for FY 2012-13; the Appellant/petitioner tried to raise certain grievances against the MYT order dated 1.12.2012, under the garb of challenging the impugned order in this Appeal, which merely provided the tariff design for the next FY 2013-14, which the Appellant cannot legally do because the tariff order dated 1.12.2012 had already become final as not challenged by any of the stakeholders including the Appellant/petitioner before this Appellate Tribunal or any other higher Forum; there was no violation of the principles of natural justice in passing the impugned order; no fresh public notice or fresh opportunity of hearing was required to be given by the State Commission; a composite application/petition was filed by the distribution licensee for the MYT period of three years namely; 2011-12, 2012-13 and 2013-14 and the State Commission, vide the MYT order dated 1.12.2012, had determined the ARR for each year of the MYT period and determined the tariff for the first two years; by the impugned order, the State Commission, having adopted the same facts and figures as determined in the ARR for 2013-14, had provided tariff design and determined the tariff for the next tariff year namely: FY 2013-14 of the MYT period; in such a situation, the State Commission was not mandated to re-undergo or readopt the methodology provided under Section 64 of the Electricity Act, 2003 while adopting the same norms and figures particularly when the tariff remained the same.

E. CONSIDERATION AND OUR VIEW:

The obligation cast on the Appropriate Commission, under Section 64(3) of the Electricity Act, is to issue a tariff order or to reject the application within 120 days from the date of its receipt under Section 64(1), after considering all suggestions and objections received from the public. Section 64(4) requires the Appropriate Commission, within seven days of making the order, to send a copy thereof, among others, to the person concerned, which would undoubtedly include a consumer who has submitted his objections/suggestions.

In the exercise of the powers conferred by various clauses of sub-section (2) of Section 181 read with various other provisions of the Electricity Act, 2003, the Uttar Pradesh Electricity Regulatory Commission made the "*Uttar Pradesh Electricity Regulatory Commission (Multi Year Tariff for Distribution and Transmission) Regulations, 2019*" ("the 2019 Regulations" for short). The said Regulations were notified on 23.09.2019, and published in the UP Gazette. Regulation 5.8 of the 2019 Multi-year tariff Regulations required the Petitioner, within three working days of issuance of the Admittance Order, to publish a Public Notice, in at least two English and two Hindi daily newspapers having wide circulation in its licensed area, outlining the ARR, proposed Tariff, True-Up and such other matters as may be directed by the Commission, and inviting suggestions and objections from the stakeholders and the public at large. Under the 1st proviso thereto, the Petitioner was also required to upload, on its website, the Petition filed before the Commission along with all regulatory filings, information, particulars and documents in the manner stipulated by the Commission.

Regulation 5.9 of the 2019 Multi-Year Tariff Regulations required the Commission, within one hundred and twenty days from admittance, after considering all suggestions and objections received from the stakeholders and public at large, to (a) Issue a Tariff Order accepting the Petition with such modifications or such conditions as may be specified in that Order, or (b) reject the Petition for reasons to be recorded in writing if such Petition was not in accordance with the provisions of the Electricity Act and the Rules and Regulations made thereunder or any other provisions of law, after giving the petitioner a reasonable opportunity of being heard. Regulation 5.10 required the Petitioner to publish the tariff, approved by the Commission, in at least two English and two Hindi daily newspapers having wide circulation in its licenced area of supply, and to upload the approved Tariff/Rate Schedule on its internet website and make available, for sale, a booklet both in English and Hindi containing such approved Tariff/Rate Schedule.

The UP Electricity Regulatory Commission also made the Uttar Pradesh Electricity Regulatory Commission (Conduct of Business), Regulations, 2019. Under Regulation 20(d)(i) thereof, every person, who intended to file objections or comments in regard to a matter pending before the Commission pursuant to the advertisement and publication issued for the purpose, was required to deliver to an Officer, designated by the Commission for the purpose, the statement of the objection or comments with copies of the documents and evidence in support thereof within the time fixed for the purpose or, in case no time has been specified, within a period not exceeding four (4) weeks from the date of the advertisement/publication issued for the purpose or such period as was specified by the Commission.

Regulation 20(d)(ii) enabled the Commission to permit such person or persons, who had filed objections or comments as provided in clause (i) or any other person as the Commission considered appropriate, to participate in the Proceedings before the Commission, in case the Commission considered that the participation of such person or persons would facilitate the Proceedings and the decision in the matter. Regulation 20(d)(iii) stipulated that, unless permitted by the Commission, the person, filing objections or comments, shall not be entitled to participate in the Proceedings; however, the Commission shall be entitled to take into account the objections and comments filed by the person(s) after giving such opportunity to the parties in the Proceedings as the Commission considered appropriate to deal with the objections and comments.

The requirement of publication of the application as stipulated under Section 64(2), and receipt of objections from the public as stipulated under Section 64(3), when read in conjunction with the above-referred Regulations, make it amply clear that any member of the public, whose interest may be adversely affected by the determination of tariff under Section 62, can put-forth his objections to the application submitted by a generating company or a licensee under Section 64(1) for determination of tariff under Section 62. The afore-said Regulations, however, disables participation of the objector in the tariff proceedings, unless specifically permitted by the Commission. The Regulations require the applicant, who filed the tariff petition, to be given an opportunity to deal with the objections and comments received during the public hearing, if the Commission intends taking into account such objections and comments.

In **West Bengal Electricity Regulatory Commission vs. CESC Limited: (2002) 8 SCC 715,** on which reliance is placed on behalf of the appellant consumer, the Supreme Court examined the scope of Sections 27 and 29 of the Electricity Regulatory Commissions Act 1998, which are similar to Sections 62 and 64 of the Electricity Act, 2003 in terms of which any member of the public, likely to be adversely affected by the determination of tariff under Section 62, may submit objections/suggestions with respect to the Application made under Section 64(1).

Further, in **WBERC vs. CESC Limited: (2002) 8 SCC 715),** the Supreme Court has held, while considering the scope of Regulation 18 of the WBERC (Conduct of Business) Regulation 2000, that the manner in which a right of hearing/representation, provided thereby to the consumers, should be exercised should be regulated by the Commission. While a member of the public, who is likely to be adversely affected by the tariff determination exercise, is entitled, as of right, to file objections to the tariff application, the Commission can, in addition and in terms of Regulation 20(d)(ii) of the 2019 (Conduct of Business) Regulations, permit such person or persons, who had filed objections or any other person as the Commission considers appropriate, to participate in the proceedings before the Commission, in case the Commission considers that the participation of such person or persons would facilitate the Proceedings and the decision in the matter. Regulation 20(d)(iii) thereof makes it clear that, unless permitted by the Commission, the person, filing objections or comments, shall not be entitled to participate in the proceedings.

In addition, and in the exercise of its powers under Section 94(3), the Commission may authorise any association/body corporate/group of

consumers or even individuals to represent the interests of consumers in the Section 62 proceedings. Neither the provisions of the Electricity Act nor the aforesaid Regulations, or the judgement of the Supreme Court, in **WBERC vs. CESC Limited ((2002) 8 SCC 715)**, support the submission, made before us on behalf of the Appellant-Consumer, that the role of consumers, in the tariff determination process, is unfettered and cannot be curtailed or restricted in any manner.

In Rama Shankar Awasthi vs. Lanco Anpara Power Limited (Appeal No. 173 of 2016 and IA Nos. 373 and 569 of 2016 dated 30.11.2016), the contention urged before this Tribunal, on behalf of the Respondent Company, was that, since the State Commission adjudicates contractual disputes between a distribution licensee and a generating company under Section 86(1)(f) of the said Act, a consumer cannot be allowed to participate. The Appellant, as a consumer in the State of Uttar Pradesh, had participated in the public hearing held by the State Commission, and had put-forth his submissions as an objector. It is in this context that this Tribunal observed that Section 94(3) would apply to proceedings under Section 86(1)(f) also; a contractual dispute may also have wide ramifications and have an adverse impact on consumer interest; it is for this reason that a provision for consumer participation has been made under Section 94(3); Regulations 17 and 18 of the 2004 UPERC Regulations are informed with the purport, intent and provisions of the Electricity Act; and Section 86(1)(f) could not be excluded from the purview of these Regulations.

While it is no doubt true that Section 94(3) of the Electricity Act was noted in the afore-said judgment, this Tribunal was not called upon to examine its scope and ambit and analyse these provisions or take note of the restrictions imposed therein for consumer participation. Section

94(3) of the Electricity Act, 2003 enables the appropriate Commission to authorise any person, as it deems fit, to represent the interests of the consumers in the proceedings before it. Unlike Section 64(3) which confers a right, to raise objections, on any member of the public likely to be adversely affected by the tariff determined under Section 62 read with Section 64, Section 94(3) merely enables and does not obligate the Appropriate Commission to authorise any person to represent the interests of consumers in the proceedings before it. A discretion is conferred on the Commission, if it so considers it appropriate, to permit a person to participate in the tariff proceedings to represent consumers interests. Even if the Appropriate Commission is of the view that it should authorise a person to represent the interests of consumers, as to who should be the person, to be so authorised, is again a matter for the Commission, in its discretion, to decide "as it deems fit".

As noted hereinabove, participation of consumers in tariff proceedings, is neither unfettered nor unrestricted. Section 64(3) only requires the Appropriate Commission, within 120 days from the date of receipt of a tariff application under Section 64(1) and after considering all suggestions and objections received from the public, to issue a tariff order. All that is required, under Section 64(3), is for the Commission to consider the suggestions and objections received from the public which would include consumers who may be adversely affected on the claims put forth by the distribution licensee, in their tariff application, being accepted by the Commission with or without modifications.

The UPERC Regulations, as detailed hereinabove, confer a discretion on the Commission to permit participation of such objectors in the hearing of the tariff petition. Neither the provisions of the Electricity Act nor the Regulations confer any right on a consumer to participate in

the proceedings before the Commission. Their right is confined only to putting forth suggestions and objections to the tariff application filed under Section 64(1) and nothing more.

It is true that a consumer has the right to prefer an appeal against the tariff order passed by the Commission under Section 111(1) of the Electricity Act in case he is aggrieved thereby. The meaning of the words "person aggrieved" must be ascertained with reference to the purpose and the provisions of the statute, as its meaning may vary according to the context of the statute. **(Bar Council of Maharashtra v. M.V. Dabholkar, (1975) 2 SCC 702 : 1975 SCC OnLine SC 264).** The words "persons aggrieved" are, ordinarily, of wide import. They include "a person who has a genuine grievance because an order has been made which prejudicially affects his interests". **(Bar Council of Maharashtra v. M.V. Dabholkar, (1975) 2 SCC 702 : 1975 SCC OnLine SC 264).**

In relation to availing judicial remedies, the words "person aggrieved" corresponds to the requirement of locus standi. Where a right of appeal is provided against an administrative or a quasi-judicial decision by a statute, such a right is invariably conferred on a person aggrieved or a person who claims to be aggrieved. A person will be held to be aggrieved by a decision if that decision is materially adverse to him. Normally, one is required to establish that one has been denied or deprived of something to which one is legally entitled in order to make one "a person aggrieved". Again, a person is aggrieved if a legal burden is imposed on him. The meaning of the words "a person aggrieved" is sometimes given a restricted meaning in certain statutes which provide remedies for the protection of private legal rights. The restricted meaning requires denial or deprivation of legal rights. **(Bar Council of Maharashtra v. M.V. Dabholkar, (1975) 2 SCC 702 : 1975 SCC OnLine**

SC 264). Generally speaking, a person can be said to be aggrieved by an order which is to his detriment, pecuniary or otherwise, or causes him some prejudice in some form or other. A person aggrieved, even if he is not a party to a litigation, may prefer an appeal with the leave of the appellate court, and such leave would not be refused if the judgment appealed against is binding on him. **(Adi Pherozshah Gandhi v. H.M. Seervai, Advocate General of Maharashtra, (1970) 2 SCC 484).**

The important words in the definition of 'person aggrieved' are "a benefit which he might have received" "and" "a legal grievance" against the decision which "wrongfully deprives him of something" or affects 'his title to something". It is apparent that any person who feels disappointed with the result of the case is not a "person aggrieved". He must be deprived thereby of a benefit which he would have received if the order had gone the other way. The order must cause him a legal grievance by wrongfully depriving him of something. It is no doubt a legal grievance and not a grievance about material matters but his legal grievance must have a tendency to injure him. That the order is wrong does not, by itself, give rise to a legal grievance. (**In Re Sidebotham Ex p. Sidebotham: (1880) 14 Ch D 458 [CA]; Adi Pherozshah Gandhi v. H.M. Seervai, Advocate General of Maharashtra, (1970) 2 SCC 484).** As the words "person aggrieved" are of wide import, they should not be subjected to a restricted interpretation. They include not a busy body but certainly one who had a genuine grievance because an order had been made which prejudicially affected his interests. **(Adi Pherozshah Gandhi v. H.M. Seervai, Advocate General of Maharashtra, (1970) 2 SCC 484).**

Relying on **Bar Council of Maharashtra v. M.V. Dabholkar: (1975) 2 SCC 702; Jasbhai Motibhai Desai v. Roshan Kumar: (1976) 1 SCC 671; In re Sidebothem, (1880) 14 Ch D. 458; Gopabandhu**

Biswal v. Krishna Chandra Mohanty: (1998) 4 SCC 447; Shobha Suresh jumani v. Appellate Tribunal, Forfeited Property: (2001) 5 SCC 755; Thammanna v. K. Veera Reddy, (1980) 4 SCC 62; Northern Plastics Ltd. v. Hindustan Photo Films Mfg. Co. Ltd., (1997) 4 SCC 452; and Bansari v. Ram Phal: (2003) 9 SCC 606, the Gujarat High Court, **in Lalbhai Trading Co. v. Union of India, 2005 SCC OnLine Guj 500,** observed that the phrase "person aggrieved" is wider than the phrase "party aggrieved"; generally speaking, a person can be said to be aggrieved by an order which is to his detriment, pecuniary of otherwise or causes him some prejudice in some form or other; and a person who is not a party to a litigation has no right to appeal merely because the judgment or order contains some adverse remarks against him.

As the expression "person aggrieved" has not been defined in the Electricity Act, and these words are of the widest amplitude, the said expression in Section 111(1) should be given its natural meaning, and would include a consumer who would suffer a legal (financial) injury as a result of the tariff order. **(Emmar MGF Construction Pvt. Ltd. v. Delhi Electricity Regulatory Commission : (Order of APTEL in APL No. 123 of 2008 dated 08.09.2009); Tata Power Delhi Distribution Ltd. v. Delhi ERC, 2023 SCC OnLine APTEL 14; Bar Council of Maharashtra v. Dabholkar (1975) 2 SCC 702, Municipal Corpn., Greater Bombay v. Lala Pancham, 1964 SCC OnLine SC 91 and J.M. Desai v. Roshan Kumar (1976) 1 SCC 671; Reliance Industries Ltd. v. PNGRB, 2014 SCC OnLine APTEL 5; and Rain CII Carbon (Vizag) Ltd. v. A.P. ERC, 2023 SCC OnLine APTEL 40).** As the liability, fastened by the impugned tariff order, is to borne by consumers, including the Appellant in Appeal No. 465 of 2023, it is evident that the Appellant-Consumer is a person aggrieved by the impugned order passed by the UPERC.

Apart from the right of appeal conferred on an aggrieved consumer under Section 111(1), and the right to file objections/ suggestions under Section 64(3), there is no other provision either in the Electricity Act or in the Regulations made by the UPERC which confer a right on a consumer to participate in tariff proceedings. Section 94(3) is an enabling provision and does not obligate the Commission to authorise any person to participate in the tariff proceedings. Further, it is for the Commission, as it deems fit, to authorise any person to represent the interests of consumers in tariff proceedings. No particular consumer can therefore claim, as of right, to be entitled to participate in the tariff proceedings before the Commission.

The right of a consumer or a member of the general public, to file objections/ suggestions under Section 64(3) read with the applicable Regulations, is confined to the application made under Section 64(1). As noted hereinabove, while an application for determination of tariff under Section 62 is required to be made either by a generating company or a licensee under Section 64(1), an additional obligation is cast on such an applicant, by Section 64(2), to publish the application in an abridged form and manner as is specified by the Commission.

Regulation 5.8 of the 2019 Multi-Year Tariff Regulations required the Petitioner, within three working days of issuance of the Admittance Order, to publish a Public Notice, in at least two English and two Hindi daily newspapers, outlining the ARR, proposed Tariff and True-Up, and inviting suggestions and objections from the stakeholders and the public at large. Regulation 20(d)(i) of the 2019 (Conduct of Business), Regulations required every person, who intends to file objections or comments in regard to a matter pending before the Commission pursuant to the advertisement and publication issued for the purpose, to deliver to

an Officer, designated by the Commission for the purpose, the statement of the objection or comments with copies of the documents and evidence in support thereof within the time fixed for the purpose or, in case no time has been specified, within a period not exceeding four (4) weeks from the date of the advertisement/publication issued for the purpose.

We see no reason to disagree with the submission urged on behalf of the Appellant-Distribution Licensee that, in view of the proviso to Section 64(3), an opportunity of hearing is required to be provided only to the applicant under Section 64(1), that too only in cases where the Commission intends to reject their application. The said provision does not contemplate, much less stipulate, an opportunity of hearing being provided to the consumer to participate in the tariff proceedings before the Commission.

It is only with respect to the tariff order, and if he has suffered any legal injury as a result thereof, can a person claimed to be aggrieved thereby and consequently claim to be entitled to prefer an appeal there-against. Since a tariff order, passed under Section 64(3), is confined only to the application made under Section 64(1), it goes without saying that any challenge to the tariff order, by way of an appeal under Section 111(1), would invariably be confined only to the contents of the tariff application under Section 64(1) and not beyond.

A conjoint reading of sub-sections (1) to (3) of Section 64 of the Electricity Act, read with the Regulations afore-mentioned, make it clear that the suggestions/ objections which the public can make under Section 64(3) is only with respect to the application filed by a generating company or a licensee under Section 64(1), seeking determination of tariff. No independent right either to participate in the tariff proceedings before the

Commission or to raise objections/ make suggestions on matters un-related to the Section 64(1) application is stipulated in any of the provisions of the Electricity Act or in the afore-mentioned Regulations.

The tariff determination exercise, undertaken by the Commission under Sections 62 and 64 of the Electricity Act, cannot be equated to an investigation under Section 128 thereof. The power of investigation under Section 128 can be exercised by the Appropriate Commission only on its being satisfied that a licensee has failed to comply with any of the conditions of license or has failed to comply with any of the provisions of the Electricity Act or the rules or regulations made thereunder. Certain other conditions, as stipulated under Section 128, necessitate compliance before an investigation is ordered. A detailed procedure is provided in Section 128, after receipt of a report from the investigating authority, including giving the licensee an opportunity of being heard and to make a representation in connection with the investigation report. The provisions of Section 128 of the Electricity Act cannot be extrapolated into Section 64. Reliance placed by the Appellant-Consumer on **Torrent Power Limited v. UPERC & Others, 2025 SCC OnLine SC 1410**, wherein the scope of Section 128 was considered, is therefore misplaced.

VII. JURISDICTION OF THE COMMISSION TO RECTIFY PAST ERRORS?

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT CONSUMER:

Learned Counsel, would submit that, with regard to the jurisdiction of the State Commission to rectify any error that may have occurred in the past, the process of tariff determination is a continuous and ongoing

exercise; the jurisdiction of the Commission is wide and is not circumscribed by the principles of *res judicata*, the provisions of Order 2 Rule 2 of the CPC, review principles contained in Order 47 Rule 1 or such other issues; the Commission can exercise suo moto powers and can also correct its own mistakes, as noted in **"*Uttar Pradesh Power Corporation Limited v. NTPC Limited*" (2009) 6 SCC 235**, paras 34–40 and 46; and when the State Commission is empowered to *suo motu* raise issues and rectify errors committed in the past, there exists no legal or rational basis to contend that such power may be exercised only *suo motu* and not when the same is brought to the Commission's notice by a consumer, when the tariff is paid only by the consumers.

Learned Counsel, would further submit that, in the present case, the State Commission has, with respect to two specific issues, acknowledged the existence of errors committed in the past; however, despite such acknowledgment, the Commission has failed to rectify the said errors; and, by virtue of the same, NPCL has gained amounts which are not legitimately payable by the consumers.

B. SUBMISSIONS URGED ON BEHALF OF NPCL:

Learned Senior Counsel, would submit that, in the present case, the consumer has advanced an erroneous contention that, if the Commission possesses the power to suo motu re-open final tariff orders of the past, a consumer may likewise request the Commission to do so; this contention is misconceived on at least two counts: first, the Commission does not, even suo motu, have the power to re-open tariff orders that have attained finality; and second, even assuming without admitting that such power exists, a consumer cannot, as a matter of right, compel the Commission to exercise such purported power to suo motu re-open past

tariff orders; certain issues were admittedly not raised in the original objections, but were, for the first time, introduced in the Review Petition filed by the consumer; such issues cannot be agitated at all in the present appeal, inter alia, for the following reasons: (i) Review on any such "first time" issues was not maintainable; even otherwise, the rejection of a Review Petition is not appealable; therefore, any claims made for the first time in the Review and rejected are not appealable at all; moreover, even in an Appeal from the Original Order, such claims could not be adjudicated since such "first time" issues were not raised in the original proceedings at all; where a consumer has failed to raise an issue during the tariff proceedings before the Commission under Section 64 of the Act, such issue cannot thereafter be litigated or re-litigated in an appeal, as permitting fresh consumer pleas at the appellate stage would defeat the statutory framework of participatory tariff determination; it is not the case of the Appellant that he was unaware of, or was in any manner prevented from raising, these issues during the relevant tariff proceedings; on the contrary, the Appellant has been actively participating in the tariff proceedings relating to the licensee since FY 2012-13.

Learned Senior Counsel would further submit that the Appellant-Consumer has, contrary to settled legal principles, (i) sought to challenge issues pertaining to earlier tariff orders from FY 2007-08 onwards during the truing-up of FY 2018-19 in the impugned tariff proceedings; and (ii) he has contended that the State Commission has wide/inherent powers to correct any mistake that has occurred in the past, by reopening the earlier tariff orders, which have been trued-up and have attained finality; and the Appellant-Consumer, having failed to challenge the tariff orders for the earlier years either by way of a review petition or an appeal within the period of limitation prescribed under the Electricity Act, 2003 read

with the applicable UPERC (Conduct of Business) Regulations, cannot now be permitted to assail issues arising from those tariff orders after the expiry of the limitation period, as doing so would amount to either a disguised review by the State Commission of past tariff orders or a disguised appeal by the Appellant in respect thereof.

With respect to the contention that a consumer is entitled to bring to the notice of the Commission any disallowances pertaining to past true-up tariff orders, and upon receipt of such information, the Commission is under an obligation to re-open and reconsider the said past true-up orders, Sri B.P. Patil, Learned Senior Counsel appearing on behalf of the Appellant-NPCL, would submit that the role and participation of consumers in the process of tariff determination is statutorily defined and limited, so as to streamline the tariff determination process to enable the Commission to decide the tariff petition(s) within the stipulated time frame; permitting a consumer/ suggester/ objector to agitate fresh pleas at the appellate stage which were not urged during the proceedings under Section 64, especially by seeking to invoke the Commission's duty to protect consumers, would not only be contrary to the statutory scheme but also undermine the finality and efficacy of the tariff determination process; while exercising jurisdiction under Section 111 of the Electricity Act, 2003, this Tribunal is empowered to examine the correctness, legality, and propriety of the order passed by the Commission; the appellate jurisdiction under this provision does not extend to entertaining new pleas or issues that were never raised before the Commission, except in limited circumstances analogous to those contemplated under Order XLI Rule 27 of the Code of Civil Procedure, which, in the present case, has admittedly not been invoked; and, therefore, a suggester or objector, a consumer in this case, cannot be

permitted to make new submissions and argue fresh points for the first time before this Tribunal as the same is beyond the permissible scope of Section 111 of the Act.

Learned Senior Counsel, would also submit that this Tribunal has, in a plethora of judgements, held that once a tariff order has been trued-up by the State Commission, and such order has attained finality, there is no scope of reopening of such orders; distribution business is a capital-intensive activity which requires financial stability to ensure uninterrupted supply of electricity to consumers; if tariff orders pertaining to a financial year, which have already been trued-up and attained finality, are allowed to be re-opened in subsequent years to alter parameters or methodologies already determined, the distribution licensee would be exposed to perpetual regulatory uncertainty; such uncertainty would undermine the financial viability of the licensee and consequently jeopardize the very objective of ensuring reliable and continuous supply of power to consumers; and it is impermissible for the State Commission to reopen the earlier tariff orders, which have been trued- up and have attained finality, unless the Appellant demonstrates that the State Commission has been misled by exercise of fraud.

Reliance is placed by the Learned Senior Counsel on (i) **BSES Rajdhani Power Ltd. vs. Delhi Electricity Regulatory Commission, (2023) 4 SCC 788;** (ii) **Tata Power Delhi Distribution Limited vs. Delhi Electricity Regulatory Commission: (Judgment of Aptel in Appeal No. 246 of 2014 dated 30.09.2019);** (iii). **Tata Power Delhi Distribution Limited vs. Delhi Electricity Regulatory Commission: (Judgment of Aptel in Appeal No. 301 of 2015 dated 28.01.2025);** and (iv) **BSES Rajdhani Power Limited vs. Delhi Electricity Regulatory Commission: (Judgment of Aptel in** Appeal **No. 69 of 2018 dated**

21.07.2025).

C. JUDGEMENTS RELIED ON BEHALF OF THE APPELLANT-CONSUMER

In **Uttar Pradesh Power Corporation Limited v. NTPC Limited" (2009) 6 SCC 235 (paras 34–40 and 46),** the Supreme Court observed that, while exercising its power of review so far as alterations or amendment of a tariff is concerned, the Central Commission stricto sensu does not exercise a power akin to Section 114 of the Code of Civil Procedure or Order 47 Rule 1 thereof; its jurisdiction, in that sense and for the aforementioned purposes, would not be barred in terms of Order 2 Rule 2 of the Code of Civil Procedure or the principles analogous thereto; revision of a tariff must be distinguished from review of a tariff order; whereas Regulation 92 of the 1999 Regulations provides for revision of tariff, Regulations 110 to 117 also provide for extensive power to be exercised by the Central Commission in regard to the proceedings before it; having regard to the nature of jurisdiction of the Central Commission in a case of this nature, even principles of res judicata will have no application; while a tribunal or a court exercises adjudicatory power, although provisions of Section 11 of the Code of Civil Procedure are not applicable but the general principles of res judicata may be applicable as has been held in **Sri Bhavanarayanaswamivari Temple v. Vadapalli Venkata Bhavanarayana Charyulu: (1970) 1 SCC 673;** in a labour matter in **Bharat Barrel and Drum Mfg. Co. (P) Ltd. v. Employees Union [(1987) 2 SCC 591;** in a rent control matter in **Vijayabai v. Shriram Tukaram: (1999) 1 SCC 693, in a writ petition in Forward Construction Co. v. Prabhat Mandal: (1986) 1 SCC 100,** and in an arbitration proceeding in **K.V. George v. Water and Power Deptt: (1989) 4 SCC 595,** but such a question does not arise herein; the

Central Commission has a plenary power; its inherent jurisdiction is saved; having regard to the diverse nature of jurisdiction, it may for one purpose entertain an application so as to correct its own mistake but in relation to another function its jurisdiction may be limited; the provisions of the 1998 Act do not put any restriction on the Central Commission in the matter of exercise of such a jurisdiction; it is empowered to lay down its own procedure; Regulations 92, 94, 103 and 110 of the 1999 Regulations confer a wide power upon the Central Commission; they are to be exercised in different circumstances; whereas Regulations 92 and 94 are to be exercised in regard to Chapter V, Regulations 103 and 110 apply in regard to cases where Regulations 92 and 94 would not have any application; Regulations 92 and 94 do not restrict the power of the Central Commission to make additions or alterations in the tariff; making of a tariff is a continuous process; it can be amended or altered by the Central Commission, if any occasion arises therefor; the said power can be exercised not only on an application filed by the generating companies but by the Commission also on its own motion; the concept of regulatory jurisdiction provides for revisit of the tariff; and it is a well-settled principle of law that a subordinate legislation validly made becomes a part of the Act and should be read as such.

D. JUDGEMENTS RELIED ON BEHALF OF NPCL

1. In **BSES Rajdhani Power Ltd. vs. Delhi Electricity Regulatory Commission, (2023) 4 SCC 788 (Para 58),** the Supreme Court held that revision or re-determination of the tariff already determined by the State Commission, on the pretext of prudence check and truing up, would amount to amendment of the tariff order, which can be done only as per the provisions of sub-section (6) of Section 64 of the 2003 Act within the period for which the Tariff Order was applicable; the State Commission

could not have amended the tariff order for the earlier period, in the guise of 'true- up' after the relevant financial year is over and the same is replaced by a subsequent tariff Order; this would amount to a retrospective revision of tariff when the relevant period for such tariff order is already over; it is not permissible to amend the tariff order made under Section 64 of the 2003 Act during the 'truing up' exercise"; and reopening of the original order at the true-up stage is impermissible, even if the original tariff determination was violative of the applicable Tariff Regulations.

2. In **Tata Power Delhi Distribution Limited vs. Delhi Electricity Regulatory Commission: (Judgment of Aptel in Appeal No. 246 of 2014 dated 30.09.2019),** this Tribunal noted the submission, urged on behalf of the Appellant, that the Respondent Commission had illegally re-opened the tariff for prior period i.e. FY 2004-05 to 2009-10 for which true up has been completed, to review the methodology adopted by the Appellant during such period for recording misused units while computing total energy sales of the Appellant for FY 2010-11. This Tribunal, thereafter, observed that they were inclined to accept the submissions of the learned counsel for the Appellant that true up of all the matters pertaining to past periods had been considered by the Respondent Commission for reopening and re-truing up relating to the quantum of misused units which is in contravention of settled principles of law; once the Commission has trued up the facts and figures projected by the Appellant for year to year basis, and has passed final orders, there is no scope for reopening of the trued up matters for reconsideration of any aspect by devising any new methodology or any new principle whatsoever; when final true up for previous years have been completed, and final orders have been passed by the Commission which have

attained finality, they cannot be reopened for re-examination; and trued up matters/ orders cannot be re-opened or re-examined /reconsidered.

3. In **Tata Power Delhi Distribution Limited vs. Delhi Electricity Regulatory Commission: (Judgment of Aptel in Appeal No. 301 of 2015 dated 28.01.2025),** this Tribunal noted that, by way of the impugned order, the Commission had included the amount of Rs.3.36 crores and Rs.4.12 crores recovered towards material cost under maintenance charges for the FYs 2010-11 and 2011-12 respectively in non-tariff income for these two FYs; while passing the impugned order, the Commission was dealing with a tariff petition filed by the appellant seeking truing up of ARR for the FY 2013-14 as well as for approval of revised ARR for FY 2014-15; true up for FYs 2010-11 and 2011-12 had already been completed and final orders in that regard had already been passed by the Commission, which had attained finality; in these facts and circumstances, the Commission could not have proceeded to include any amount recovered towards material cost under maintenance charges in the non-tariff income for FYs 2010-11 and 2011-12, the true up for which had already been completed, and had achieved finality; in terms of the judgment of this Tribunal, in **TPDDL v. DERC (2019) SCC OnLine (Aptel) 106,** when final true up for previous year has been completed and final orders have been passed by the Commission which have attained finality, the same cannot be re-opened for re-examination; and, therefore, the Commission could not have re-opened the tariff / trued up orders for FYs 2010-11 and 2011- 12 while determining the truing up of the ARR for FY 2013-14.

4. With regards re-opening of the net worth computation of the appellant for the previous years, this Tribunal, in **BSES Rajdhani Power Limited vs. Delhi Electricity Regulatory Commission: (Judgment of**

Aptel in Appeal **No. 69 of 2018 dated 21.07.2025)**, followed the judgement of the Supreme Court in **BRPL v. DERC (2023) 4 SCC 788** wherein it was held that revision or re-determination of the tariff already determined by the State Commission on the pretext of prudence check and truing up would amount to amendment of the tariff order, which can be done only as per the provisions of sub-Section (6) of Section 64 of the 2003 Act within the period for which the Tariff Order was applicable; the State Commission could not amend the tariff order for the period 01.04.2008 to 31.03.2010 in the guise of 'true up' after the relevant financial year was over and the same was replaced by a subsequent tariff Order; this would amount to a retrospective revision of tariff when the relevant period for such tariff order was already over; and it was not permissible to amend the tariff order made under Section 64 of the 2003 Act during the 'truing up' exercise."

E. CONSIDERATION AND OUR VIEW

Save in cases where such orders are vitiated by misrepresentation or fraud, past errors, i.e. errors, if any, in the tariff orders relating to earlier years, can be corrected only in accordance with the provisions of the Electricity Act and the Regulations. The only power conferred on the Commission to do so is either by amending the tariff order or revoking it under Section 62(4), or to review such order under Section 94(1)(f) of the Electricity Act.

Section 62(4) of the Electricity Act stipulates that no tariff or part of any tariff may, ordinarily, be amended, more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified. The embargo, under Section 62(4) of the Electricity Act, is for the tariff, or for

any part thereof, to be amended more frequently than once in any financial year. It does not disable the Commission from amending the tariff, or any of its part, once in any financial year. In other words, Section 62(4) does not disable the Commission from exercising its power to amend the tariff once every financial year. Further, the words "ordinarily" in Section 62(4) would require us to hold that, while the norm is to enable the Commission to amend the tariff, if need be, once in any financial year, the Commission is not disabled, in exceptional circumstances, from amending the tariff, or any of its part, even more than once in a financial year. Section 64(6) of the Electricity Act stipulates that a tariff order shall, unless amended or revoked, continue to be in force for such period as may be specified in the tariff order. While it may be permissible for the Commission to amend the tariff order, or revoke it, within the financial year under Section 62(4), it is impermissible for the Commission to amend the tariff order save in accordance with the provisions of the Electricity Act. In any event, the Electricity Act does not permit a Commission either to amend or revoke a tariff order, passed by it earlier, beyond the financial year or beyond the period specified in the tariff order.

The tariff order, made under Section 64 of the Electricity Act, is binding unless it is amended or modified in a process known to law. Revision or re-determination of the tariff, already determined by the Commission, amounts to amendment of the tariff order, which can be done only as per the provisions of Sections 62(4) and 64(6) of the Electricity Act within the period for which the tariff order is applicable. If any of the parties are aggrieved by any of the clauses in the tariff order, they are at liberty to seek its amendment or revocation under Sections 62(4) and 64(6) of the Electricity Act. **(BSES Rajdhani Power Ltd. v. Delhi Electricity Regulatory Commission, (2023) 4 SCC 788).**

While Section 64(6) recognizes the possibility of a tariff order being amended or revoked before completion of the period specified therein, and makes it clear that, save any such amendment or revocation, the tariff stipulated in the said order will remain in force for the specified period, the mode, manner and the circumstances in which such a tariff order may be amended or revoked is not stipulated either in Section 62(4) or Section 64(6) or in any other provision of the Electricity Act.

Since Sections 62(4) or 64(6) do not specify the mode, manner and the circumstances in which a tariff order may be amended or revoked, Section 21 of the General Clauses Act assumes relevance. The said provision specifically deals with the power to add to, amend, vary or rescind notifications/orders. **(Shree Sidhbali Steels Ltd. v. State of U.P., (2011) 3 SCC 193).** By virtue thereof, when a power is conferred on an authority to do a particular act, it includes in such power, the power to withdraw, modify, amend or cancel the notifications/orders earlier issued, which can be exercised in the like manner and subject to like conditions, if any, attached with the exercise of the power**. (Shree Sidhbali Steels Ltd. v. State of U.P., (2011) 3 SCC 193).** In view of Section 21 of the General Clauses Act, the amending or modifying order has to be made in the same manner as the original order and is subject to the same conditions that govern the making of the original order. **(Rajeev Suri v. DDA, (2022) 11 SCC 1; Kamla Prasad Khetan v. Union of India, 1957 SCC OnLine SC 27).**

While the power to amend or revoke a tariff order would be available to be exercised by the Commission under Sections 62(4) and 64(6) of the Electricity Act read with Section 21 of the General Clauses Act, the mode, manner and circumstances in which the power to amend a tariff order can be exercised, must, in view of the mandate of Section

21 of the General Clauses Act, be the same as that prescribed for passing the said tariff order in the first instance.

As the afore-said Regulations prescribe the mode and manner in which a tariff order should be passed, the requirement of Section 21 of the General Clauses Act, of the power to amend being exercised in the like manner and subject to like conditions as those which govern the original tariff order, would require the power to amend a tariff order to be exercised in the manner provided, and subject to the conditions stipulated, in the said Regulations for passing the tariff order.

While the Commission may have suo moto powers to determine tariff, more so when a recalcitrant generator/ licensee choses not even to make an application under Section 64(1), the powers vested in the Commission to amend or revoke the tariff order passed by it is not unfettered and is restricted by Section 62(4) and Section 64(6) of the Electricity Act read with Section 21 of the General Clauses Act and the afore-mentioned Regulations made by the UPERC.

In **Godde Venkateswara Rao v. Government of A.P: (1966) 2 SCR 172 : AIR 1966 SC 828,** an order had been passed by the government under Section 62 of the Andhra Pradesh Panchayat Samithies and Zila Parishads Act, 1959, and it was subsequently reviewed. The validity of this order of review was in question in that case. No power had been conferred for review of an order passed under Section 62. It was argued that the government was competent to review that order in exercise of power conferred by Section 13 of the Madras General Clauses Act, 1891 whereunder, if any power is conferred on the Government, that power may be exercised from time to time as the occasion requires. Repelling this argument, the Supreme Court held that

this Section cannot apply to an order made in the exercise of a quasi-judicial power.

It is well settled that a quasi-judicial order once passed and having become final cannot be reviewed by the authority passing that order unless power of review has been specifically conferred. **(H.C. Suman v. Rehabilitation Ministry Employees' Coop. House Building Society Ltd., (1991) 4 SCC 485: 1991 SCC OnLine SC 247).** Let us, therefore, consider the provisions of the Electricity Act relating to review.

The power of review, conferred on the Appropriate Commission under Section 94(1)(f), is in terms of the powers conferred on a Civil Court under the Code of Civil Procedure, 1908. It is clear, therefore, that it is only in terms of the provisions of Section 114 of the Civil Procedure Code, read with Order 47 thereof, that the Commission can exercise its powers of review. Further, on the tariff orders passed by the Commission for earlier years having attained finality, it is impermissible for the Commission to re-open those tariff orders or to interdict them, while examining the claims made by the applicant in a tariff application filed for a subsequent year/period.

Neither has the Commission sought to amend the impugned tariff order nor has it exercised its power of review. What the Appellant consumer contends is that, even without doing so, the Commission can, in a tariff order passed by it for a particular period, re-open tariff orders passed by it for the earlier financial years without either amending the earlier tariff order or reviewing them in accordance with the prescribed procedure. Such a contention is wholly untenable and does not merit acceptance.

As noted hereinabove, while the amendment to a tariff order must be carried out within the financial year, review of an earlier tariff order can only be undertaken in terms of Section 94(1)(f) of the Electricity Act read with Section 114 and Order 47 of the Civil Procedure Code. While determining tariff under Section 64(3) read with Section 62 of the Electricity Act, the Appropriate Commission cannot, without adhering to the procedure stipulated under Sections 62(4) and 64(6) or Section 94(1)(f), amend or revoke the tariff orders passed by it for the earlier years, more so after the financial year for which the earlier tariff orders were passed has elapsed or on the said tariff order having attained finality. The remedy for a consumer, if he was aggrieved by the tariff orders for a particular year, was to challenge its validity by way of an appeal under Section 111(1), that too within the period of limitation stipulated under Section 111(2) of the Electricity Act. Having failed to challenge the said order by way of an appeal, the Appellant cannot, through a side-wind, seek to have tariff orders for earlier years reversed by the Commission, that too while passing a tariff/true-up order in proceedings relating to a subsequent year/period.

DELIBERATION ON SPECIFIC ISSUES IN APPEAL 98 OF 2021

This Tribunal vide its order dated 08.11.2024 in IA No 1791 of 2024, permitted the Appellant to withdraw ten issues, as enumerated below, while reserving their right and granting liberty, if need be, to raise the said issues in subsequent legal proceedings, without expressing any opinion on its merits:

FOR TRUING-UP OF FY 2018-19	
1.	Efficiency Gain on loan swapping. ***[Issue No. 4 in Section 2 (Miscellaneous Issues)]***

2.	Erroneous computation of Renewable Purchase Obligation ("**RPO"**) and Non-consideration of Net-Metering power. ***[Issue No. 6 in Section 3 (Power Purchase Issues)]***
FOR ARR OF FY 2020-21	
3.	Provision for write-off of bad and doubtful debts. ***[Issue No. 5 in Section 2 (Miscellaneous Issues)]***
4.	Disallowance in Contingency Reserve. ***[Issue No. 6 in Section 2 (Miscellaneous Issues)]***
5.	Tariff Philosophy. ***[Issue No. 7 in Section 2 (Miscellaneous Issues)]***
6.	Non-recovery of Wheeling Charges from Open Access customer connected to the State Transmission Utility ("**STU"**). ***[Issue No. 8 in Section 2 (Miscellaneous Issues)]***
7.	Additional Surcharge. ***[Issue No. 9 in Section 2 (Miscellaneous Issues)]***
8.	Revenue-Gap/Surplus. ***[Issue No. 10 in Section 2 (Miscellaneous Issues)]***
9.	Disallowance of Renewable Power to meet RPO (Inter-State Transmission Charges for procurement of RE Power Disallowed). ***[Issue No. 2 in Section 3 (Power Purchase Issues)]***

10.	Intra-State Transmission Charges and Losses. ***[Issue No. 4 in Section 3 (Power Purchase Issues)]***

Further, this Tribunal vide its order dated 08.11.2024, remanded Issue No.6 (true up of FY 2018-19) of Section 2, which relates to sharing of gains and losses on account of controllable factors, extract of which is reproduced below:

> *"…….*
> *Mr. B.P. Patil, learned Senior Counsel appearing on behalf of the Appellant, would submit that, since the Appellant had sought payment on the basis of actuals, and the Commission had instead granted them the benefit on a normative basis, the Appellant had no occasion earlier to press for this claim though they are entitled to such a claim under Regulation 9.2 read with 11.1 and 11.2 of the UPERC (Multi-Year Distribution Tariff) Regulations, 2014) (for short "the Regulations").*
>
> *It is evident, therefore, that the applicability or otherwise of Regulation 9.2 read with Regulation 11.1 and 11.2 of the Regulations was not examined by the Respondent Commission, since no such occasion arose for them to do so earlier.*
>
> *Learned Counsel on both sides agree that, instead of this Tribunal taking upon itself the task of examining this issue, it would suffice if this issue is remanded to the Respondent Commission for its consideration afresh, in the light of Regulation 9.2 and 11.1 and 11.2 of the Regulations. This issue is, therefore, remanded to the Commission for its consideration, on the aforesaid issue, both on facts and law. It is made clear that we have not expressed any opinion on the applicability or otherwise of the said Regulations or, if the Regulations are applicable, whether or not the Appellant is entitled for grant of the reliefs in terms of the said Regulations, as all these are matters for the Commission to consider in accordance with law" .*

This Tribunal vide its order dated 02.01.2025, considered remand the Issue No.5 of Section 2 (True up of FY 2018-19), which relates to Disallowance of unmetered sales for FY 2018-19, extract of which is reproduced below:

"As Learned Senior Counsel on either side are in agreement, we set aside the impugned order with respect to this issue. When final orders are passed, with respect to all the issues in the main appeal, this issue shall be remanded to the Commission for its consideration afresh after complying with the rules of natural justice, making it clear that we have not expressed any opinion on merits. Needless to state that, while passing final orders in the main appeal, it shall also be made clear that all contentions on this issue are being left open to be agitated before the Commission."

Subsequently, this tribunal vide its order dated 12.09.2025 remanded the Issue No.5 of Section 2 (True up of FY 2018-19), Disallowance of unmetered sales for FY 2018-19,to State Commission.

This Tribunal vide its order dated 09.01.2025, considered remand of Issue No.2 of Section 3 (True up of FY 2018-19), Cost of Medium Term Power Purchase, extract of the order is as given below :

"It is unnecessary for us to delve on this issue any further, as Learned Senior Counsel on both side are in agreement that, instead of this Tribunal undertaking the exercise of determining the claim of the Appellant under this head, it would suffice instead to remand the matter to the Commission for its consideration afresh in accordance with law, after giving the Appellant an opportunity of being heard. The Commission shall, when it passes orders afresh, assign reasons for its conclusion even if it be in brief.

As several other issues necessitate adjudication in this appeal, it is made clear that, when final orders are passed with respect to all the issues in the main appeal, this issue shall be remanded to the Commission for its consideration afresh after complying with the rules of natural justice, making it clear that we have not expressed any opinion on merits. Needless to state that, while passing final orders in the appeal, it shall also be made clear that all contentions, to be urged on this issue, are being left open to be agitated before the Commission; and, consequent on remand, the Commission shall assign reasons, even if it be in brief, for its conclusions on this issue."

Subsequently, this tribunal vide its order dated 12.09.2025 remanded the Issue No.2 of Section 3 (True up of FY 2018-19), Medium Term Power Purchase ,to State Commission.

In addition, this Tribunal vide its order dated 12.09.2025 in IA No. 1245 of 2025, (Appeal No. 98 of 2021) permitted withdrawal of another four issues and one part issue as detailed below

FOR TRUING-UP OF FY 2018-19	
1.	Justification for optimum utilization of unutilized lands ***[Issue No. 5 in Section 4 (Capital Expenditure)]***
FOR ARR OF FY 2020-21	
2.	No additional allowance to meet expenses on Standards of Performance compliance. **[Issue No. 2(c) in Section 2 (Miscellaneous Issues)] –*Part issue***
3.	Energy Balance / Distribution Loss. ***[Issue No. 4 in Section 2 (Miscellaneous Issues)]***
4.	Medium Term Power Purchase ***[Issue No. 1 in Section 3 (Power Purchase Issues)]***
5.	Long Term Power Purchase from M/s Dhariwal Infrastructure Limited (“DIL”). **[Issue No. 3 in Section 3 (Power Purchase Issues)]**

Summarising, out of the 37 issues originally raised in the Appeal No.98 of 2021, 16 issues along with one part issue have been withdrawn by the Appellant and 4 issues have been remanded to the State Commission for reconsideration. The, issues remaining for adjudication before this Tribunal are 17, which are set out here in below as also recorded in the order of this Tribunal dated 12.09.2025 in IA No. 1245 of 2025 .

Issue No.	**Particulars**
Section – 1 (License Issue)	

1	Terms of License of Appellant
Issue regarding True-Up for FY 2018-19	
Section – 2 (Miscellaneous Issues)	
1	Expenses Incurred Due to Change in Law – GST
3	Non-tariff Income - Cost of Borrowing for Delayed Payment Surcharge (DPS)
7	Inclusion of Treasury income in the Non-tariff Income for reducing the ARR
Section – 3 (Power Purchase Issues)	
3	Short Term Power
4	Banking of Power
5	Sale of Surplus Power
Section – 4 (Capital Expenditure)	
1	CAPEX on projects above Rs. 10 cr.
2	Vehicles
3	CAPEX on 132 kV and above assets
4	Capital Work in Progress
6	Consequential per Annum Disallowances on the account of above
Issue regarding APR of FY 2019-20	
Section – 4 (Capital Expenditure)	
1	Capital work in progress
Issue regarding ARR for FY 2020-21	
Section – 2 (Miscellaneous Issue)	
1	Loss on Retirement/Impairment of Assets
2	Disallowance of O&M Expenses
	a. Disallowance of financing cost of DPS
	b. Due to error in computation of normative O&M expenses based on true-up O&M expenses of FY 2015-16 to FY 2019-20
	c. No additional allowance to meet expenses on Standards of performance compliance
3	Deviation from MYT Regulation with respect to computation of Debt-Equity Ratio
Section – 4 (Capital Expenditure)	
1	Capital Expenditure Disallowance on Vehicles

The above mentioned balance issues in Appeal No.98 of 2021 are deliberated in following paragraphs along with gist of submission made by Appellant and Respondent Commission.

SECTION 1: ISSUE NO 1 : TERM/TENURE OF NPCL'S LICENSE

The State commission in the Impugned Order had made observation that Appellant was granted a 30 year supply License on August 31, 1993 by the State government under section 3(1) of the Indian Electricity Act, 1910 (1910 Act) which authorized it to supply electricity in the licensed area. It was also mentioned that Appellant's License is valid up to August 30, 2023 and shall expire within the control period.

Learned Senior Counsel for the Appellant submitted that the State Commission in its earlier order, dated 26.11.2020, in Petition No. 1526/2019, which was filed by the Appellant for approval of its Business Plan for MYT Control Period FY 2020-21 to FY 2024-25, made similar observation and approved the business plan only up to August 2023 and restricted the Appellant-NPCL from entering into any long/medium term PPAs for purchase of power for the period beyond August, 2023.

The Appellant-NPCL by way of Appeal No. 72 of 2021 dated 18.01.2021 challenged the findings of the State Commission in the Business Plan Order dated 26.11.2020 on the term/tenure of the License granted to NPCL, before this Tribunal contending that since its License does not stipulate any term of its validity, such License continues to remain in force and doesn't have a limited/restricted term. This Tribunal in its judgement dated 23.08.2022 in Appeal No. 72/2021 had held as under:

- *As per Section 15(8) r/w 1st proviso to Section 14 of the Electricity Act, 2003 (**2003 Act**) the term of the License shall be 25 years after expiry of 1 year from the date of enactment of the 2003 Act. Thus, NPCL's License is valid till **09.06.2029***

- *With the repeal of the 1910 Act by the 2003 Act, the option to purchase the undertaking of NPCL by the State Board/Utility/State Government or by any designated agency, under Section 6 of the 1910 Act r/w*

Clause 10 of the Licence, being inconsistent with the 2003 Act, stands repealed and cannot be exercised at this stage. - and

- *NPCL was required to apply for a license u/S. 15 of the 2003 Act, 1 year post enforcement of the 2003 Act*

In compliance with this Tribunal's Judgement, dated 23.08.2022, whereby this Tribunal had *inter-alia* remitted the matter to the State Commission for a fresh decision considering the term of License up to 09.06.2029; the State commission issued a modified Order dated 22.11.2022 in Business Plan Petition No. 1526/2019 and allowed Appellant -NPCL to procure power for the period up to its License term i.e., 09.06.2029, relevant extract is reproduced below: .

> *"2.5.42 Currently, the Petitioner has only one long term PPA with M/s DIL which is related party and where the PPA term is going beyond the licence period as approved by the Commission. In view of Hon'ble APTEL Order regarding license tenure upto June 09, 2029 the Petitioner is now allowed to procure power for the period upto license tenure i.e., June 09, 2029 and obtain Commission's approval under Section 86 (1)(b) and in accordance with Section 63 of Electricity Act, 2003."*

In the meantime, aggrieved by this Tribunal's Judgement dated 23.08.2022, following Civil Appeals were filed before the Hon'ble Supreme Court:

- 21.10.2022: **Diary No. 34125/2022: Shri Rama Shankar Awasthi vs. NPCL & Anr.**
- 05.12.2022: **C.A. No. 410/2023: State of Uttar Pradesh vs. NPCL & Anr.**
- 20.12.2022: **Diary No. 42179 of 2022: NPCL vs. UPERC.**

Learned Senior Counsel for the Appellant submitted that while the aforesaid Appeals are pending before the Hon'ble Supreme Court, no

'Stay' has been granted on this Tribunal's judgement dated 23.08.2022. The State commission in subsequent tariff Orders, dated 24.05.2023, in Petition No. 1919/2022 filed for approval of ARR/Tariff for FY 2023-24 only observed that NPCL was granted a License on 31.08.1993. The State Commission vide its subsequent Order, dated 06.03.2024, in Petition No. 1526/2019 allowed NPCL to procure power on long-term basis beyond the term of its License i.e., 09.06.2029.

This Tribunal's Order, dated 23.08.2022, specifying the tenure of Appellant's License up to 09.06.2029 is pending adjudication before Supreme Court, it is needless to state that no further deliberations need to be made on this issue and the issue of License involved in the present appeal shall be in terms of the order of Supreme Court in above referred Civil Appeals.

SECTION 2: (MISCELLANEOUS ISSUE)

ISSUE NO 1 - EXPENSES INCURRED DUE TO CHANGE IN LAW-GST – TRUE UP FY 2018-19

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT-

Learned senior Counsel submitted that the disallowance of the additional impact of GST on O&M expenses amounting to Rs. 3.56 Crore in the Impugned Order is wholly illegal and arbitrary. The State Commission, in its Tariff Order dated 22.01.2019, while approving ARR for FY 2018-19 has principally agreed to provide differential GST to the Appellant at the time of truing-up and observed that the impact needs to be assessed based on audited results. In the Impugned Order, the State Commission has admitted that the GST impact was allowed in the True-up for FY 2017-18 vide Tariff Order dated 03.09.2019 (ARR for FY 2019-

20, APR for FY 2018-19 and True-up for FY 2017-18); the subsequent findings of the State Commission in the Impugned Order that the MYT Regulations, 2014 do not provide (a) any escalation with respect to indices (CPI/WPI); (b) any provision for adjustment of one-time expenses, are factually wrong since the MYT Regulations, 2014 do, in fact, unambiguously provide for (i) escalation with respect to indices; and also (ii) for the adjustment of one-time expenses and expenses beyond the control of the distribution licensee, over and above the normative O&M expenses after prudence check.

It is submitted that Regulation 25(c) and Regulation 25(e) of the MYT Regulations, 2014, specifically enable adjustment of one-time expenses and expenses beyond the control of the licensee, read with Regulations 9.1 and 10.1 which mandate the pass-through of 'uncontrollable factors' arising from 'Change in Law' events including taxes and duties.

It is further submitted that Regulation 11 of the MYT Regulations, 2014 lays down the mechanism for sharing of gains/losses arising from 'controllable factors' specified under Regulation 9.2, wherein Regulation 11.1 provides that approved aggregate gain to the licensee on account of 'controllable factors' to be shared equally between the licensee and the consumer; and (b) Regulation 11.2 provides for the approved aggregate loss to the licensee on account of 'controllable factors' to be shared equally between the licensee and the consumer. Therefore, while even losses on account of controllable factors are to be shared equally, it is wholly irrational and contrary to the scheme of the Regulations to contend that losses on account of 'uncontrollable factors'—such as the GST impact involved in the present case—are required to be borne entirely by the licensee. Therefore, by disallowing the impact of GST

(which indisputably is an ‘uncontrollable factor’), the State Commission has violated the express mandate of Regulation 10.1.

The State Commission has not only disregarded the applicable MYT Regulations, 2014, but has also acted in derogation of the settled legal position. It is a well-established principle that (i) uncontrollable factors, including ‘Change in Law’ events relating to statutory taxes and levies such as GST, are beyond the control of the utility and are required to be duly considered and allowed by the Appropriate Commission, as held in ***TPDDL vs. DERC*** (2019 SCC OnLine APTEL 106, and (ii) the approved gain or loss on account of uncontrollable factors must be passed through tariff, as categorically held in ***TPCL vs. MERC & Ors.*** (2009 SCC OnLine APTEL 97. It is equally settled that the Appropriate Commissions ought to pass Orders in accordance with the applicable Regulations, as laid down in ***PTC India Limited vs. CERC & Ors. (2010) 4 SCC 603***, and ***HPPC vs. HERC & Ors.*** (2012 SCC OnLine APTEL 44.

It is submitted that the Appellant is not praying for a revision of the norm/budget of the O&M expenses, as is being alleged, but is claiming the impact of the GST on normative basis over and above the allowable norm, as per the average incremental rate of GST computed/determined by the State Commission itself. The Appellant’s claim is strictly in accordance and within the four corners of Regulations 9.1, 10.1 and 25(e) of the MYT Regulations, 2014.

The findings of the State Commission that R&M is computed as a percentage of Gross Fixed Assets (GFA) and that, because GFA in the True-up was taken as actuals and thus already includes the impact of GST, there is no separate GST impact on R&M, are factually incorrect. The said findings are ex facie untenable, for the reason that the ARR

projections for FY 2018–19 in the Tariff Order dated 22.01.2019 were computed, in consonance with the MYT Regulations, 2014, on the basis of GFA taken on actuals for the five years immediately preceding the "Base Year" of the Control Period, i.e., FY 2016–17. Since GST was introduced only with effect from 01.07.2017, the GFA figures for the said five-year period anterior to FY 2016–17 could not, by any means, comprise or reflect the impact of GST. Additionally, the reliance placed by the State Commission on the MERC Order in the Impugned Order is wholly misplaced and legally unsustainable.

As regards the contention that O&M expenses are linked to the Escalation Index based on WPI and that the WPI inherently includes the impact of all taxes and duties (including GST), it is submitted that such a premise is factually incorrect. The State Commission has, in fact, itself considered WPI-based escalation while computing R&M and A&G expenses (which constitute components of O&M expenses) in its Business Plan Order dated 30.11.2017. Furthermore, the Ministry of Commerce & Industry, through its Press Release dated 12.05.2017, has categorically clarified that the Wholesale Price Index does not include the impact of GST.

It is well established that, at the stage of truing up, the Commission cannot alter the rules or methodology adopted during the initial tariff determination by modifying the fundamental principles, premises, or considerations underlying the original ARR projections, as held in ***BRPL vs. DERC & Ors. (2023) 4 SCC 788,*** and SLDC vs. GERC (2015) SCC OnLine APTEL 50. Furthermore, the Commission is bound by the doctrines of legitimate expectation and promissory estoppel, as reaffirmed in ***Ram Pravesh Singh vs. State of Bihar (2006) 8 SCC 381***,

Para 15, and ***UoI vs. Hindustan Development Corporation & Ors. (1993) 3 SCC 499,*** Para 23.

Learned senior Counsel submitted that State Commission, in its reply, has neither furnished any reasoning nor defended the findings recorded in the Impugned Order for disallowance of the GST impact, it has nevertheless sought to introduce new and additional grounds for the first time during the course of oral submissions in the present Appeal. The State Commission has now contended, that;

i) While Regulation 9.1 of the MYT Regulations, 2014 sets out the 'uncontrollable factors' which includes 'Change in Law' and taxes and duties. However, Regulation 9.2 sets out the illustrative/expected variations, which may be attributed by the State Commission to controllable factors, which includes variation in the O&M expenses, except those attributable to directions of the State Commission. Thus, the impact of uncontrollable factors, including on account of taxes and duties is negated by Regulation 9.2(f);

ii) Regulation 7 provides for specific trajectory for certain variables and Regulation 7.1(c), provides that the State Commission shall stipulate trajectory *inter-alia* relating to O&M expenses norm. Thus, Regulation 7.1 (c) corresponds to Regulation 9.2 (f) and therefore, any variation in O&M expenses will qualify as a 'controllable factor'; even though the O&M expenses have been recognized as variables under Regulation 7.1(c), however, by way of stipulating a trajectory for O&M expenses norm, State Commission has effectively treated the same as a 'controllable factor' to ensure efficiency in the performance of a distribution utility/licensee;

iii) Appellant has sought to reset/bump-up the norm/parameter/budget *qua* O&M expenses across the board by 5.88%, which is impermissible under the MYT Regulations, 2014. Even if the increase on account of GST is

to be allowed, the computation of 5.88% is on a notional basis and not on actuals and thus, ought not to be allowed;

iv) State Commission had erroneously allowed the impact on account of increase in GST in the Tariff Order dated 03.09.2019 (ARR for 2019-20, APR for 2018-19 and True-up for 2017-18). It is a settled legal position that a regulator can rectify its mistake/error by way of subsequent Orders and is not bound by its erroneous interpretation in the previous Orders as such.

With regard to above new contentions, it is submitted that in an appeal, the State Commission can only substantiate or defend the reasoning recorded in the Impugned Order, which it has failed to do in the present case. Without prejudice, even the new grounds urged by the State Commission are wholly unsustainable. Any attempt to interpret Regulation 9.1 with reference to Regulation 9.2 and/or Regulation 7.1(c), where there is no ambiguity in the language of Regulation 9.1, is contrary to established principles of statutory and regulatory interpretation and would be incongruous with the scheme of Regulation 9.1. Reliance on Regulation 9.2(f) read with Regulation 7.1(c) is also misplaced, as it would render Regulation 25(e) and Regulation 10.1 wholly otiose. As submitted before, Regulation 10.1 clearly provides that the approved gain or loss to the licensee on account of uncontrollable factors, which shall include taxes, duties, and Change in Law events, must be passed through as an adjustment in tariff, while Regulation 25(e) specifically mandates allowance of one-time expenses and expenses beyond the control of the licensee, over and above normative O&M expenses, subject to prudence check. The State Commission has itself vide its earlier Tariff Order dated 03.09.2019 computed/determined the average incremental rate of GST as 5.88% for FY 2018-19. Further, determination of the actual GST for FY 2018-19 will be near to impossible

as the Appellant will have to segregate and verify/provide details of all the GST items under the broad categories of services, material/services, lawyers fee and material (others). The Regulation 25(e) only provides for prudence check by the State Commission. The Appellant, contrary to the Commission's allegation, is not seeking any reset or revision of O&M norms across the board; its claim for the GST impact on R&M and A&G expenses over and above normative O&M is squarely covered by Regulations 9.1, 10.1, and 25(e). Furthermore, nowhere in the Impugned Order has the Commission stated that it had "erroneously" or "wrongfully" allowed the impact of GST in its earlier Tariff Order dated 03.09.2019, as is now being alleged. In view of above submissions, there is no merit in the contentions of State Commission.

B. SUBMISSIONS URGED ON BEHALF OF STATE COMMISSION

Learned Senior Counsel submitted that Part II of the MYT Regulations 2014, where Regulations 4 to 11.2, outlines the "*Tariff Framework and Guiding Principles for Multi Year Tariff (MYT)*"; Regulation 7.1, requires that *"the Commission shall stipulate a trajectory… for certain variables"* while approving the business plan. One such 'variable', for which, norm is mandated to be stipulated is the *"Operation and Maintenance expense norm"*. Although Regulation 7.1 acknowledges Operation and Maintenance expenses etc as part of "certain variables", yet mandates that a norm and trajectory shall be stipulated *"having regard to the re-organisation, restructuring and development of electricity industry in the state".* Likewise, for other variables noted in Regulation 7.1 which is an inclusive set. Similarly, under Regulation 9.2, the Commission is mandated to attribute the *"variations or expected variation in the performance of the applicant*[1]*"* to "controllable factors" in case of

"operation and maintenance expenses, except those attributable to the directions of the Commission".

Learned Senior Counsel contended that not all the listed uncontrollable factors in Regulation 9.1 are amenable in order to apply across the board to each and every one of the financial parameters (listed in Regulations 24). e.g. *"variation in sales"* has limited applicability to Regulation 16.1 dealing with "Metered sales forecast". Likewise the applicability of *"variation in cost of power generation and/or power…"* is confined to Regulations 19 and 20. Similarly, "Other expenses" as described in Clause (e) of Regulation 9.1 can only apply to Operation and Maintenance Expenses in Regulation 25, and not to other financial parameter which go into the tariff determination.

Learned Senior Counsel further contended that the Regulation 25 provides for the computation of O&M expenses, with Clauses (a) and (b) stipulating the manner in which the commission *"shall stipulate a separate trajectory of norms for each of the components of the O&M expenses"* namely, (i) Employee cost in; (ii) Repair and Maintenance expense; and (iii) Administrative and General expense. Further, Clauses (c) and (d) of main Regulation 25 outline specific expenses which do not form a part of the separate trajectory of norms. Under Clause (c) it is stated that, *"One-time expenses such as expense due to change in accounting policy, arrears paid due to pay commissions etc. shall be excluded from the norms in the trajectory"*. Secondly, under Clause (d) *"the expenses beyond the control of the Distribution Licensee such as dearness allowance, terminal benefits etc. in Employee cost etc, shall be excluded from the norms in the trajectory"*. It is further contented that Clause (e) refers back to these two categories of expenses, they are "*one-time expenses"* mentioned in Clause (c) Regulation 25 and

“expenses beyond the control of the Distribution Licensees such as dearness allowance, terminal benefits etc. in Employee cost etc”; and then goes on to say that they *“shall be allowed by the Commission over and above normative Operation & Maintenance Expenses after prudence check*”.

Referring to the contention of the Appellant that the words “the expenses beyond the control of Distribution Licensee” in Clause (e) of Regulation 25 should be interpreted to carry the meaning ascribed to “uncontrollable factors” in Regulation 9.1 or, at the very least, should include increases in indirect taxes due to the introduction of GST, learned senior Counsel submits that such an expansive interpretation, based on the plain meaning of the words “the expenses beyond the control of Distribution Licensee” appearing in Clause (e), would be incorrect. Learned Senior Counsel submitted that firstly, such an interpretation would negate the categorization of O&M expenses norm as a controllable factor under Regulation 9.2, read with Regulation 7.1. The terms “controllable” and “uncontrollable” are opposites, and if something is controllable, it cannot simultaneously be uncontrollable. The issue, particularly concerning GST (an uncontrollable factor) and O&M expense norms (a controllable factor), is to what extent a controllable factor can alter an uncontrollable one. It is further submitted that if a controllable factor were able to alter the norms prescribed for O&M expenses to any extent then the very classification of variations in O&M expense as a controllable factor in the hands of the distribution license would lose its significance and purpose. In these circumstances, this tribunal may adopt a harmonious construction to ensure that the provisions of both Regulation 9.1 and Regulation 9.2 remain applicable and relevant. In this regard, the observations in para 44 of the Hon’ble Supreme Court’s

decision in "***Chhattisgarh State Coop Bank Maryadit vs Zila Sahkari Kendriya Bank Maryadit"*** may be considered [(2020 6 SCC 411).

Learned Senior Counsel further contended that it is a well settled principle of law that if the plain meaning of words, when read in isolation, leads to a conflict with other provisions in the same statute or results in absurdity etc, then the meaning of those plain words should be construed harmoniously keeping in mind the purpose of the said provisions. Learned Senior Counsel submitted that the purpose and objective behind prescribing by way of MYT regulations, a trajectory of norms for variations in O&M expenses of a distribution licensee, as outlined in Regulation 7.1(c), Regulation 9.2(f), and the National Tariff Policy, would be undermined in the event that the fixed budget given to the distribution licensee towards annual O&M expenses is allowed to be exceeded by the distribution licensee by relying upon certain uncontrollable factors. The whole idea is to have the distribution licensee to manage its O&M expenses within the prescribed norms, consistent with the National Tariff Policy that greater predictability to consumer tariffs could be achieved by restricting tariff adjustments to known indicators of power purchase prices and inflation indices. Additionally, as per Regulation 11.1, any savings on controllable factors, such as O&M expenses below the prescribed norm, are shared in the ratio of 50:50 between the utility and the consumers, i.e 50% of the saving is retained by the Appellant distribution licensee. Conversely, expenses that exceed the prescribed O&M norm, the Appellant cannot pass on the same to the consumer in its entirety, but only 50% of such excess expense can be passed on to the consumer and 50% has to be absorbed by the Appellant distribution licensee. This aligns with the Tariff Policy, at para 8.1(2), "*The State Commission should introduce mechanisms for sharing of excess profits*

and losses with the consumers as part of the overall MYT framework....."

Learned Senior Counsel contended that O&M expenses, particularly its Repair and Maintenance component on which GST is claimed, are recurring and annually provided as a fixed budget. If the cost of equipment or service is higher then the actual impact thereon GST will also be higher. It is well within the prerogative of the Appellant to plan its procurement of goods and services for O&M in such a manner that the purported 5.88% cost increase due to the introduction of GST can be accommodated within the O&M norms prescribed under the MYT Regulations; the impact on account of GST can be offset by the Appellant as long as the overall O&M expense remains within the norms/ceiling/budget for O&M that is already prescribed, which for FY2018-19 is Rs. 89.98 Crore.

Learned senior Counsel submitted that under Regulation 25.1, (which deals with employee expenses component of O&M) specific provision is made for passing on of one-time expenses "*Provisions for expense beyond control of the Distribution Licensee and expected one-time expenses as specified above"*. Similarly, there is a specific provision made under Regulation 25.3 (dealing with A&G expenses part of O&M norms) for *"Cost for initiatives or other one-time expenses as proposed by the Distribution Licensee and validated by the Commission"*. There is no provision for passing on any other expenses in case of R&M expenses under Regulation 25.2. It is submitted that this leads to the inference that since provisions have been made for only passing on certain specific expenses over and above the prescribed "controllable" norm for O&M expenses, hence the words *"the expenses beyond the control of Distribution Licensee"* in Clause (e) of Regulation 25 have to be read in

its context - which is to say that they refer to expenses in Clause (c) and (d) of Regulation 25 which were kept outside the determination of trajectory of norms for O&M expenses and are added on during true-up based on the actual values of those items. It is submitted that **Clause (e) of Regulation 25** merely refers back to these two kinds of expenses i.e. *"one-time expenses"* in Clause (c) Regulation 25 and *"expenses beyond the control of the Distribution Licensees such as dearness allowance, terminal benefits etc. in Employee cost etc"* in Clause (d); and then goes on to say that they *"shall be allowed by the Commission over and above normative Operation & Maintenance Expenses after prudence check*" in Clause (e).

Learned senior counsel further pointed out that these items of expenses under clause (c) and (d) of Regulation 25 are also listed under uncontrollable factors in clause (f) of Regulation 9.1 as *Other expenses- "it will cover expenses like salary revision effected because of pay commission like salary revision effected because of Pay Commissions or any other expenses allowed by the Commission after prudence check"***.** Hence, the Regulation 25 intended to give full play to only the said component of "other expenses" in clause (f) of Regulation 9.1 and not all the other factors which have to be given limited play within the prescribed norms upon a harmonious construction.

It is submitted that it is a settled principle of law that identical words may have different meanings when used in different parts of the same statute. Accordingly, it is submitted that the words *"expenses beyond the control of the Distribution Licensee"* in Clause 25(e) must be interpreted as limited to those expenses excluded from the computation of the trajectory of norms, as referenced in Clauses (c) and (d) of Regulation 25. In support of its contention, the Respondent relies on the judgment of the Hon'ble Supreme Court in ***"Kolkata Metropolitan***

Development Authority vs Gobinda Chandra Makal & Anr".- [(2011) 9 SCC 207].

Learned Senior Counsel asserted that the MYT Regulations 2014 speaks for controllable and uncontrollable factors and does not recognize a hybrid factor (both controllable and uncontrollable). It is difficult to comprehend that R & M is controllable but tax over R & M services is uncontrollable. If GST is considered uncontrollable, it has to be only passed on an actual basis, not as an estimate or potential basis, but calculating actual GST is impractical. Since R&M norms include Service Tax, deducting it and then adding GST in the true-up would be impossible. Additionally, there is no provision for uncontrollable item in R&M, which is calculated as a percentage (2.67% in this case) of the average GFA, accounting for the previous five years of R&M costs, including Service Tax. Moreover, GST is not a one-time expense that can be adjusted under Regulation 25.3.

Learned Senior Counsel submitted that a Division Bench of the Delhi High Court, in its judgment dated 29-07-2016, dismissed a challenge made by Tata Power Distribution Company under Article 226 of the Constitution against the DERC's Terms and Conditions of Wheeling Tariff & Retail Supply Regulations 2011. The Appellant Distribution Licensee argued that O&M expenses included several uncontrollable factors such as (i) changes in taxes and statutory levies, (ii) minimum wages, (iii) inflation, (iv) service terms and conditions of employees transferred from the erstwhile DVB, (v) increase in consumer base, (vi) employee career growth and replacement costs, and (vii) inflation in Repair and Maintenance expenses. The writ petitioner therein contended that the failure to allow true-up of uncontrollable costs was contrary to paragraph 5.3(h)(4) of the NTP, 2006. In the said case, at Para 18, the High Court observed as under: **"***However, this does not*

necessarily mean that impugned regulations must provide for a specific determination of all uncontrolled elements of cost and provide for directly loading of those costs on the tariff for each year. NTP 2006 only states the principles which would guide the determination of tariffs. Indisputably there would be several ways to give effect to those principles. Providing an increase in cost on a normative basis taking into account inflation factor would- if such normative basis has been arrived at after exercising due skill and after taking into account relevant factors- also provide for a method of recovering uncontrollable cost".

Learned Senior Counsel also contended that the State Commission, in its tariff order dated 22.01.2019 for FY 2018-19 (which is the subject of the true-up in the impugned order under appeal), merely noted that it would "consider" the Appellant's submission on whether the cost impact of higher indirect taxes due to the introduction of GST should be passed on beyond the O&M norms specified in the MYT Order for the control period. The Commission did not commit in the said tariff order that GST changes can be passed on. Therefore, the principle laid down by the Supreme Court ***(in BSES Rajdhani Power Ltd. Vs. Delhi Electricity Regulatory Commission; (2022) SCC Online SC 1450 ("BSES Judgement")*** *that "Truing -up exercise cannot be done to retrospectively change the methodology/principles of tariff determination and reopening the original tariff determination order thereby setting the tariff determination process naught at the true-up stage"-* would not apply as no GST was passed on during the tariff determination done for FY 2018-19.

As regards the argument made by the Appellant that UPERC had previously in the true-up order for FY 2017-18 has allowed a normative GST @ 5.88% over and above the norm for O&M expense, it is submitted that such an interpretation of the relevant Regulations, if not in

accordance with the established principles, cannot bind the Commission (a quasi-judicial body) for all times.

C. CONSIDERATION & OUR VIEW: ISSUE NO 1 - EXPENSES INCURRED DUE TO CHANGE IN LAW-GST – TRUE UP FY 2018-19

State Commission in the Impugned Order has disallowed the claim of Appellant with regard to impact of GST on normative O&M charges mainly holding thus:-

> *3.8.11 With regards to R&M expenses, neither does the Regulation provide any escalation with respect to indices (CPI WPI) for R&M Expenses nor any provision for adjustment of one time expenses. Further, R&M is computed as %age (Kb * GFAn) of GFA, and in True-Up GFA is taken as actuals which already includes the impact of GST in itself. Hence additional impact of GST is not allowed in R&M Expenses.*
>
> *3.8.12 Further the Commission has observed that the issue of GST was also appraised in other State Commission's as well. In this regard MERC in AEML-D Order 325 of 2019 dated 30 March, 2020 in the True Up for FY 2017-18 and FY 2018-19 provided that:*
>
> ***Quote***
> ***Impact of GST**: The Commission is of the view that the change in Tax regime from Service Tax to GST is merely change in name. The taxes levied under Service Tax are of same nature of the taxes levied under GST and therefore, there is no New tax that is being levied on account of GST. **Further, O&M expenses have been linked to escalation index arrived based on WPI and CPI published by the Govt. of India. Both WPI and CPI include the impact of all taxes and duties applicable at that point of time. Therefore, as escalation factor arrived as above already includes impact of all taxes, no separate impact on O&M expenses on account of GST needs to be allowed. Therefore, the Commission does not consider the contentions of AEML-D to separately allow impact of GST as an uncontrollable expenditure under 'Change in Law'.***
>
> ***Unquote***
>
> *3.8.13 The Commission is of the view that even though it has allowed the same in the True Up Order dated September 03, 2019 for FY 2017-18, however, trued up Order for FY 2017-18 is not being disturbed and taking into consideration all the above, impact of GST claimed by the Petitioner is being disallowed for FY 2018-19."*

With regard to reference to the judgement of MERC in AEML-D Order No. 325 of 2019s dated 30.03.2020 for FY 2017-18 and FY 2018-19, which has denied the impact of GST as an uncontrollable expenditure under change in Law, it is a well-known fact that each State's regulatory framework, policies etc. may differ and the State Commission, should ensure that the reasoning given in their judgement aligns with its own legal standard, jurisdiction and scope. The decisions of one State Commission are not binding on another State Commission. Therefore, it is unnecessary for us to delve on the issue why and how MERC disallowed the said claim, and whether the same is right or wrong; since the same is not in issue before us and in any event the present case shall be decided based on its own facts, reasoning and applicable Regulations.

We take note that the State Commission in the Impugned Order has disallowed the said claim holding that the relevant Regulations do not provide any escalation with respect to indices for R&M expenses nor it provided any adjustment for one-time expenses, and as such, in the true up, actual GFA is considered for calculation of normative R&M, which includes impact of GST; however in the submissions before us as contended by the Appellant, they have raised several other contentions, which are not mentioned in the Impugned Judgement and we shall be proceeding on the basis of our observation in previous paragraph.

The true up of FY 2018-19 is covered by " UPERC MYT Regulations 2014" **("MYT Regulation 2014")** , in which occurrence of *"enactment, bringing into effect or promulgation of any new Indian Law"* is covered under Change in Law, and it is not in dispute that new Goods and

Services Tax (GST) regime effective from 1st July, 2017 is a Change in Law event, however the dispute is whether claim on this account is to be passed on in Normative O&M or not. Regulation 9.1 of MYT Regulation 2014 stipulates that 'Uncontrollable factor' shall comprise the factors, which were beyond the Control of and could not be mitigated by the Applicant and includes "Change In Law" and "Taxes and Duties". In Regulation 9.2, illustrative variations which may affect the performance of the applicant attributable to " Controllable factors' are given, in which " variation in Operation and maintenance expenses, except those attributable to direction of the Commission, are considered as Controllable factor".

The Regulation 10 deals with Mechanism for pass through of gain or losses on account of Uncontrollable factors and same is defined as under:

> *"10.* ***Mechanism for pass through of gains or losses on account of uncontrollable factors***
>
> *10.1 The approved aggregate gain or loss to the Distribution Licensee on account of uncontrollable factors shall be passed through, as an adjustment in the tariff of the Distribution Licensee, as specified in these regulations and as may be determined in the Order of the Commission passed under these regulations."*

Operation and Maintenance Expenses are one of the Financial Parameters for determination of ARR and Regulation 25 defines the Operation and Maintenance Expenses as reproduced below:

> ***" 25. Operation & Maintenance Expenses***
>
> *a)The Commission shall stipulate a separate trajectory of norms for each of the components of O&M expenses viz., Employee cost, Repairs and maintenance (R&M) expense and Administrative and General Expense (A&G) expense. Provided that such norms may be specified for a specific Distribution Licensee or a class of Distribution Licensees.*

(b) Norms shall be defined in terms of combination of number of personnel per 1000 consumers and number of personnel per substation along with annual expenses per personnel for Employee cost; combination of A&G expense per personnel and A&G expense per 1000 consumers for A&G expenses and R&M expense as percentage of gross fixed assets for estimation of R&M expenses:

(c) One-time expenses such as expense due to change in accounting policy, arrears paid due to pay commissions etc., shall be excluded from the norms in the trajectory.

(d) The expenses beyond the control of the Distribution Licensee such as dearness allowance, terminal benefits etc. in Employee cost etc., shall be excluded from the norms in the trajectory."……..

In the O&M Expenses, Repair and Maintenance Charges are calculated as percentage of Average Gross Fixed Asset for the year governed by the Formula as given below.

"25.2 Repairs and Maintenance expense

Repairs and Maintenance expense shall be calculated as percentage (as per the norm defined) of Average Gross Fixed Assets for the year governed by following formula:

$R\&M_n = k_b * GFA_n$

Where:

$R\&M_n$*: Repairs & Maintenance expense for nth year*

GFA_n*: Average Gross Fixed Assets for nth year*

K_b*: Percentage point as per the norm."*

It is evident from various provisions of Regulations that the O&M charges are categorised as "Controllable factors" and comprises Employee Cost, R&M Expenses and A&G expenses and separate trajectory norms for each of these components are decided. In our view, the Controllable factor mean that based on defined norms, once these O&M charges are worked out, Distribution Licensee need to manage its affairs within the amount provided, subject to True up based on actuals like Average Gross

Fixed Assets etc. used in calculation of R&M charges at the True Up stage; it is not open to the Distribution licensee to seek for higher O&M charges, if they are not able to manage their affairs within the normative figure so worked out and provided. It has also been clearly specified in the Regulation that one-time expenses such as change in accounting policy, arrears paid due to pay commission etc. as well as expenses beyond the control of Distribution licensee shall be excluded from the norms in the trajectory. In our view, this would mean that though the O&M charges are controllable but if there are one- time expenses or expenses beyond the control of Distribution Licensee, they are payable extra but they shall be excluded from the trajectory of norms so as to avoid inflated norms for the current/ future years. We, therefore, do not find merit in the submissions of State Commission that harmonious reading of Regulation 9.1. and Regulation 9.2, would mean that once O&M charges are defined as Controllable factors, it is out from the purview of uncontrollable factors as per Regulation 9.1, wherein charges taxes and duties are classified as uncontrollable factors, and Regulation 25 itself provides that expenses beyond the Control of Distribution licensee shall be allowed over and above the normative expenses and charges in taxes and duties as uncontrollable factors. We are also of the view that in case applicability of GST on certain services in the O&M was known before the ARR of FY 2018-19, the norms and trajectory so worked out for O&M charges would have factored the enhanced expenditure, if any, on account of applicability of GST and effect of change in statutory taxes ought to have been considered even subsequently at true up stage.

Placing reliance on Supreme Court's decision in "***Chhattisgarh State Coop Bank Maryadit vs Zila Sahkari Kendriya Bank Maryadit"*****(2020 6 SCC 411)",** learned senior Counsel for the State Commission

contended that harmonious construction is to be adopted to ensure that the provisions of both Regulation 9.1 and Regulation 9.2 remain applicable and relevant. The relevant extract of the referred judgement is reproduced below:

> ***"44.*** *As we have noted before, it is settled principle of law that where two provisions of an enactment appear to conflict, courts must adopt an interpretation which harmonises, to the best extent possible, both provisions. Justice G.P. Singh in his seminal work Principles of Statutory Interpretation states:*
>
> *"… It is the duty of the court to avoid "a head on clash" between two sections of the same Act and, whenever it is possible to do so, to construe provisions which appear to conflict so that they harmonise."*
>
> *Francis Bennion in his work Statutory Interpretation states:*
>
> *"Inconsistent enactments — A common application of the principle is in relation to contradictory enactments within the same Act. Enactment A may in itself be clear and unambiguous. So may enactment B, located elsewhere in the Act. But if they contradict each other, they cannot both be applied literally. A undoes B, and B undoes A. The court must do the best it can to reconcile them, but this can be achieved only by giving one or both a strained construction."*
>
> *Where two provisions of an enactment appear to be in conflict, courts do not readily presume an "either/or" situation. Courts must construe the provisions harmoniously to ensure, as far as possible, the effective operation of both provisions in a manner that furthers the purpose of the enactment. Every provision, phrase, clause and word must be interpreted in a manner to further the object of the enactment. No word or part of a statute can be construed in isolation. Courts must be mindful that an interpretation which renders either provision otiose must be avoided unless the conflict does not yield any possible reconciliation.*
>
> ***47.*** *A two-Judge Bench of this Court noted held that while Section 42 operated to expedite the clearance of goods, Section 116 operated to ensure the protection of cargo. Consequently, the two provisions subserved different purposes. Further, by an amendment in Section 148 which was a provision for the liability of an agent of the person-in-charge, sub-section (2) was inserted which stipulated that any person who*

represents himself to any officer of customs as an agent of any such person-in-charge, and is accepted as such by that officer, shall be liable for the fulfilment of any obligation of the person-in-charge. The Court held that effect must be given to the amendment, which would be rendered redundant if the contention of the appellant was accepted. Relying on the principle of harmonious interpretation, the Court held : (British Airways Plc. case [British Airways Plc. v. Union of India, (2002) 2 SCC 95] , SCC p. 100, para 8)

"8. … It is a cardinal principle of construction of a statute that effort should be made in construing the different provisions so that each provision will have its play and in the event of any conflict a harmonious construction should be given. The well-known principle of harmonious construction is that effect shall be given to all the provisions and for that any provision of the statute should be construed with reference to the other provisions so as to make it workable. A particular provision cannot be picked up and interpreted to defeat another provision made in that behalf under the statute. It is the duty of the court to make such construction of a statute which shall suppress the mischief and advance the remedy."

This Court held that courts must ensure that every provision is construed in a manner to render seemingly contradictory provisions workable. In interpreting two provisions of a statute, courts must adopt the interpretation which does not defeat either provision and advances the remedy envisaged by their enactment."

Even on a harmonious construction of the provisions, it would be impermissible for this Tribunal to read the words "uncontrollable factors" in Regulation 9.1 which would be limited by the provisions as per Regulation 9.2 (f), and to carry the same meaning as the words "expenses beyond the control of the distribution licensee" in Regulation 25(e). To harmonize is not to destroy. Accepting the construction placed on the aforesaid two regulations by the Learned Senior Counsel would require us to add words to either of the Regulations which is impermissible. Thus, reliance placed by Learned Senior Counsel on the judgement **Chhattisgarh State Cooperative Bank** *(Supra)* is misplaced.

Relying on the judgement "***Kolkata Metropolitan Development Authority v. Gobinda Chandra Makal*, (2011) 9 SCC 207"**, learned Senior Counsel for the State Commission has contended that the words *"expenses beyond the control of the Distribution Licensee"* in Clause 25(e) must be interpreted as limited to those expenses excluded from the computation of the trajectory of norms, as referenced in Clauses (c) and (d) of Regulation 25; referred para of judgement is given hereunder:

> ***"36.*** *The same words used in different parts of a statute should normally bear the same meaning. But depending upon the context, the same words used in different places of a statute may also have different meaning. (See Justice G.P. Singh's Principles of Statutory Interpretation, 12th Edn., pp. 356-58.) The use of the words "publication of the notification" in Sections 4(1) and 6 on the one hand and in Section 23(1) on the other, in the LA Act, is a classic example where the same words have different meanings in different provisions of the same enactment. The words "publication of the notification under Section 4 sub-section (1)", are used in Section 23(1) for fixing the relevant date for determination of market value. The words "the last of the dates of such publication and the giving of such public notice, being hereinafter referred to as the date of the publication of the notification" in Section 4(1) and the words "one year from the date of the publication of the notification" in the first proviso to Section 6 refer to the special deeming definition of the said words for determining the period of one year for issuing the declaration under Section 6, which is counted from the date of "publication of the notification". Therefore the context in which the words are used in Sections 4(1) and 6, and the context in which the same words are used in Section 23(1) are completely different. In Section 23(1), the words "the date of the publication of the notification under Section 4(1)" would refer to the date of publication of the notification in the Gazette. Therefore, "13-9-2000" will be the relevant date for the purpose of determination of compensation and not 16-11-2000."*

We have no quarrel, in principle, with the submission that, while the same words noted in different parts of the statute should ordinarily bear the same meaning, the context may require the said word to be given a

different meaning. What we are unable to agree is regarding application of this principle to the facts of the present case. As deliberated above, the exclusions of onetime expenses and expenses beyond the control of distribution licensee from the trajectory of norms is to avoid inflation of the norms while working out Normative O&M expenses for current/future years. In our view, scope of Regulations 25 (e) with regard to allowance of expenses beyond the control of Distribution Licensee cannot be considered to be restricted only to the exclusions mentioned in Regulation 25 (c) and (d), as no such restriction is discernible from the Regulations. Regulation 9.1 stipulates that *"the uncontrollable factors shall comprise of the following factors which are beyond the control of and could not be mitigated by the Applicant:*

> *(a) Force Majeure events, such as acts of war, fire, natural calamities, etc.*
> *(b) Change in law,*
> *(c) Taxes and Duties,*
> *(d) Variation in sales,*
> *(e) Variation in the cost of power generation and/or power purchase due to the circumstances specified in Regulation 19 (d) and 20, and*
> *(f) Other expenses- It will cover expenses like salary revision effected because of Pay Commissions or any other expenses allowed by the Commission after prudence check."*

Clauses (a) to (e) of Regulation 9.1 relate to specific factors falling within the ambit of "uncontrollable factors" if they are beyond the control of, and could not be mitigated by the applicant-distribution licensee. Besides the five factors in Clauses (a) to (e), Clause (f) relates to other expenses i.e. expenses other than those specified in clauses (a) to (e). Under the head 'other expenses' in Clause (f) are expenses such as salary revision effected because of pay commission or any other expenses allowed by the Commission after prudence check. Clause (f) again is not confined only to expenses relating to salary revision effected

because of the pay commission. It also includes *"any other expense"* which Commission may allow after prudence check.

Regulation 25 relates to operation and maintenance expenses, and clause (a) thereof requires the Commission to stipulate a separate trajectory of norms for each of the components of O&M expenses. Under clause (e) thereunder are one-time expenses and expenses beyond the control of the distribution licensees which shall be allowed by the Commission over and above the normative operative and maintenance expenses after prudence check.

What Regulation 9.1 comprises of are factors which are beyond the control of and could not be mitigated by the Appellant, and all such factors, as enumerated in clauses (a) to (f) thereunder, must be held to be uncontrollable factors. It does not stand to reason that the uncontrollable factors referred to in Regulation 9.1, including those under Regulation 9.1(f), should be confined only to those expenses which are beyond the control of the distribution licensee in terms of Regulation 25(e), for no such words of limitation find mention in Regulation 9.1.

Therefore, the reliance placed on behalf State Commission on the Supreme Court Judgement "***Kolkata Metropolitan Development Authority vs Gobinda Chandra Makal & Anr"((2011)9SCC 207*** is of no avail as in the present case, the applicable Regulations specifically provides for allowance of expenses beyond the control of Distribution Licensee over and above the normative Operation expenses after the prudence check, even after categorising O&M expenses under controllable factors. Therefore, these contentions of State Commission are rejected.

We find force in the submission of the Appellant that the State commission while approving the ARR for FY 2018-19, has only commented that impact of uncontrollable factors so claimed by the Appellant, with regard to GST and variation in Gratuity ceiling, shall be done at the time of True up. Relevant Portion of the ARR order (FY 2018-19) dated 22.01.2019 is reproduced below:

> *"5.5.4 The Commission has computed the normative O&M Expenses of NPCL as per the provisions of Distribution MYT Regulations, 2014. As regards the O&M Expenses, apart from the norms specified in Distribution MYT Regulations, 2014, the Commission is of the view that all the uncontrollable factors mentioned by the Petitioner for projecting O&M expenses higher than the norms need to be analysed based on the actual expenses at the time of truing up and it would not be appropriate to project these expenses. The Commission will carry out the detailed analysis of actual O&M Expenses vis-a-vis approved O&M expenses at the time of truing up to assess the impact of uncontrollable factors on O&M expenses and accordingly consider the same."*

In case the additional expenses on account of GST in O&M charges was impermissible as per prevailing Regulations, as being contended on behalf of the State Commission as well as stated in Impugned Order, we fail to understand what detailed analysis, the State Commission intended to carry out at the True up stage, while passing ARR order for FY 2018-19. It was open to the State Commission to reject the projections of Appellant at the ARR stage with regard to impact of GST on O&M citing non-applicability of Regulations. In our view, such an observation means that additional expenses projected on account of GST are not to be given at ARR stage, but shall be considered at True Up stage based on actual O&M expenses vis-à-vis approved O&M expenses considering impact of GST. No such analysis seems to have been done by State Commission for disallowing additional expenses due to GST on O&M charges.

In view of above deliberation, we are unable to countenance the view of the State Commission in the Impugned Order that Regulations do not provide for one-time adjustment in the O&M charges, while Regulations itself recognises pass through of one-time expenses as well as expenses beyond the control of Distribution Licensee even after specifying that O&M Charges are Controllable Factor. State Commission ought to pass orders in terms of applicable Regulations **("PTC India Ltd vs CERC & Ors" (2010) 4 SCC 603);** Relevant para of the judgement reproduced hereunder:

> ***"56.*** *Similarly, while exercising the power to frame the terms and conditions for determination of tariff under Section 178, the Commission has to be guided by the factors specified in Section 61. It is open to the Central Commission to specify terms and conditions for determination of tariff even in the absence of the regulations under Section 178. However, if a regulation is made under Section 178, then, in that event, framing of terms and conditions for determination of tariff under Section 61 has to be in consonance with the regulations under Section 178".*

Learned senior Counsel for the Appellant has placed reliance on supreme court judgement **"BSES Rajdhani Power Limited vs DERC ((2023) 4 SCC 788 ("BSES Judgement")** contending that Truing -up exercise cannot be done to retrospectively change the methodology/principles of tariff determination and reopening the original tariff determination order and according GST on the O&M expenses should be allowed, subject to prudence check as noted in ARR order dated 22.01.2019. Per Contra learned senior Counsel for State Commission has contended that referred judgement is not applicable in the present case as impact of GST was not given in ARR order of FY 2018-19.

The Supreme court in this judgement **("BSES Judgement")** held that the function of tariff determination is governed, inter alia, by safeguarding all consumers interest and at the same time recovering the cost of electricity in a reasonable manner, such that "distribution and supply of electricity are conducted on commercial principles" which encourage and reward competition, efficiency, economic use of resources, good performance and optimum investments. The Supreme Court held that "truing up", stage is not an opportunity for State Commission to rethink de novo on the basic principle, premises and issues involved in the initial projections of revenue requirement of the licensee. Supreme Court held that at the stage of Truing up stage, the State Commission cannot change the rules/ methodology/principles used in initial tariff determination by changing the basic principle, premises and issues involved in the initial projection of ARR. Thus Truing exercise cannot be done to retrospectively change the methodology /principles of tariff determination and reopening the original tariff determination order thereby setting at naught the tariff determination process at the True-up stage. Supreme Court held that it is not permissible to amend tariff order made under Section 64 of the Electricity Act 2003 at the 'truing up' exercise'. In the present case, though it is a fact that exact impact of GST on O&M charges was not computed and allowed in the ARR order dated 22.01.2019 for FY 2018-19, however, it was mentioned that detailed analysis shall be carried out at True up stage; and such non determination was not because of inapplicability of Regulations as being the reason for disallowing such claim at True up stage. Thus there is no merit in the contention of State Commission that ratio decided in Supreme court judgement ("BSES Judgement") is not applicable in the present case.

Furthermore, we also do not find merit in the observation of State Commission that GFA considered at the time of True up includes the GST, and hence, additional impact of GST is not allowed in O&M charges; in our view, there is a clear distinction in the GST component in GFA and GST component in R&M. The GST included in the GFA is on account of capital expenditure and GST in R&M is GST payable on R&M services which was not considered while fixing the norms. Thus, in our view, in terms of prevailing Regulations, Appellant is entitled to additional expenses accrued on account of GST on O&M service, already acknowledged as change in Law, subject to prudence Check. We hold this issue in favour of the Appellant.

We note that in True up order for FY 2017-18, the impact of GST @ 5.88%, as worked out below, has been allowed by the State Commission, and same percentage has been sought by the Appellant in the impugned case:

Table 3-48: Details of GST as submitted by the Petitioner

S.No.	GST Item	Service Tax Rate (%)	GST Rate (%)	Variance (%)
1	Service (e.g. security, contractor etc.)	15.00	18.00	3.00
2	Material/service (e.g. vehicle spares)	14.00	28.00	14.00
3	Lawyers fee (reverse charge)	15.00	18.00	3.00
4	Material (others)	14.50	18.00	3.50
	Average	**14.63**	**20.50**	**5.88**

From the above, it is understood that enhanced expenses on GST has been claimed and an average percentage @ 5.88 considering four broad categories like Services, Material, Lawyers Fee and Material (others) has been derived by comparing variance of Service Tax Rate and GST rate and by averaging it; meaning thereby that equal contribution (expenses) of each of these items has been considered in

the R&M expenses for arriving at the uniform rate of 5.88 % for change in law on account of GST. It has been submitted by the State Commission that deducting the service tax from R& M and adding GST in true up would be impossible. We are also of the view that it may be a very tedious exercise, if not impossible, to arrive at the actual impact of GST in the actual R&M charges while working out impact of GST each activity wise at true up stage whereas the O&M charges itself are on Normative basis, however, the derivation of average rate of 5.88 % by considering equal expenditure in the four services is over simplification and not justified. In our view, without going into each specific activity, considering the overall actual expenditure made in these four services for FY 2018-19, the approximate average percentage impact of GST can be considered. For illustration, considering the rates mentioned in the Impugned Order for the four items, the average percentage of extra expenditure on account of GST is given below

Illustration : Average % increase in cost due to GST

S.No.	**GST Item**	**Service Tax Rate (%)**	**GST Rate (%)**	**Variance (%)**	**Average impact (%) considering expenses 25 % each**	**Average impact (%)(Service 1 & 2 40 % each &Service 3 & 4 10 % each)**	**Average impact (%)(Service 1 & 3 40 % each &Service 2 & 4 10 % each)**
1	Service (e.g. security, contractor etc.)	15.00	18.00	3.00	0.75	1.2	1.2
2	Material/service (e.g. vehicle spares)	14.00	28.00	14.00	3.5	5.6	1.4
3	Lawyers fee (reverse charge)	15.00	18.00	3.00	0.75	0.3	1.2
4	Material (others)	14.50	18.00	3.50	0.875	0.35	0.35
	Average %	**14.63**	**20.50**		**5.875**	**7.45**	**4.15**

As what was sought to be urged on behalf of the State Commission, regarding the interpretation to be placed on the applicable statutory regulations, we may not have been justified in refraining from considering it on the ground that a new and additional grounds sought to be raised for the first time in the Appellant proceedings as contended be NPCL. We have considered the submissions in this regard in preceding paragraphs, and did not find any merit in these contentions urged on behalf of State Commission. Further, in view of deliberations held above, we see no reason to deal with the other Judgments cited on behalf of the appellant.

In view of above deliberation, we set aside the observation regarding disallowance of impact of GST on O&M charges and remand this issue to State Commission to carry out prudence check on actual expenditure made in above mentioned four heads (Service, Material/service, Lawyers Fee, Material) to work out average impact of GST on O&M charges subject to maximum average % of 5.88 as sought by Appellant for allowing impact of GST on O&M charges.

ISSUE NO.3 NON TARIFF INCOME - COST OF BORROWING FOR DELAYED PAYMENT SURCHARGE (DPS) – TRUE UP FY 2018-19

A. SUBMISSIONS URGED ON BEHALF OF NPCL

Learned Senior Counsel submitted that the State Commission has disallowed cost of borrowing in respect of DPS, amounting to Rs. 3.28 Crore, which is unlawful and arbitrary as it is a genuine and necessary expenditure of the Appellant and similar expenditure has been consistently approved by the State Commission in its previous Business Plan Order and Tariff Orders on a normative basis like in Business Plan

approval order dated 30.11.2017, cost of Borrowing for DPS has been approved as Rs 3.52 Crore for FY 2017-18, Rs 3.35 Crore for FY 2018-19 and Rs 3.18 Crore FY 2019-20. Likewise in ARR Order (FY 2018-19) dated 22.01.2019, State Commission has approved a cost of borrowing for DPS on normative basis as Rs 4.20 Crore for FY 2018-19. In the True up order dated 03.09.2019, for the FY 2017-18, an amount of Rs 3.33 Crore was approved on this account.

It is submitted that the Regulation 33(a) of the MYT Regulations, 2014 includes DPS as a 'Non-Tariff Income' and the proviso to Regulation 33 provides that 'any expenditure incurred' for generating/earning 'Non-Tariff Income' to be reduced from such income and accordingly, the State Commission has consistently allowed such deductions in previous Tariff Orders, as well as while approving the ARR for FY 2018-19. The observation of the State Commission in the Impugned Order that the MYT Regulations, 2014 do not prescribe any methodology or provision for determining the quantum of DPS and its financing cost is erroneous. It is a well-settled principle that the term 'incurred,' according to its dictionary meaning means to 'become liable to' (***"Indira Gandhi vs. Raj Narain (1975) Supp. sec1;*** & ***CIT Gujarat vs. Tejaji Farasram Karwala Ltd. (1968) 1 SCR 37").***

Learned senior Counsel asserted that the State Commission ought to have recognized that the absence of actual expenditure or borrowings does not imply that the internal funds or shareholders' funds deployed for funding purposes do not carry any cost. On this aspect, this Tribunal has already held that (a) if a utility employs its own funds over and above the threshold equity, there is no reason why it should not earn interest thereon; and (b) interest on internal funds should also be given in addition to return on equity on internal funds/reserves.

(Judgements of this Tribunal dated 15.12.2023 in Appeal No. 143 of 2017 & 17 of 2018: JPL vs. CERC & Ors.; and Judgement dated 31.08.2012 in Appeal Nos.17, 18 and 19 of 2011: TPCL vs. MERC; and Judgement dated 10.12.2008 in Appeal Nos. 151-152 of 2007: NTPC Ltd. vs. CERC)

The State Commission has erroneously disallowed the cost incurred by the Appellant, for the purpose of funding receivables beyond the normative period of 60 days, on which DPS is earned, on the ground that the Appellant did not clearly demonstrate borrowings attributed to such funding. It is further submitted that the State Commission has erroneously observed that excess equity has been considered in the normative debt and interest has been awarded on it. In reality 'Return on Equity' and 'Interest on Loan' allowed by the State Commission are calculated based on capital investment/expenditure. The Appellant's claim herein is for financing debtors (Trade Receivables), which is a revenue cost/expenditure funded from the shareholders' fund. These two concepts are separate and should not be conflated. Even, UPERC MYT Regulations, 2014 envisages separate and distinct provisions for capital expenditure (Regulations 23 and 27) as well as revenue expenditure (Regulation 28).

Contending that the State Commission has erroneously held that the licensee has already received the return on financing cost of DPS, learned senior Counsel submitted that the State Commission has approved the Net CAPEX/capital expenditure of Rs. 147.49 Crore for FY 2018-19 and allowed the 'Equity' and 'Normative loan' on 30 % and 70 % respectively and thus the State Commission has only approved the excess equity (more than 30%) as Normative loan for

the CAPEX/capital expenditure amount and does not include the shareholders fund utilized for funding the DPS.

Learned Senior Counsel submitted that in various Judgements of this Tribunal **viz., "North Delhi Power Limited Vs. Delhi Electricity Regulatory Commission"** (Judgement dated 30.07.2010 in Appeal No. 153 of 2009) and **"BSES Rajdhani Power Limited Vs. DERC** & **Anr." (**Judgement dated 12.07.2011 in Appeal No. 142 & 147 of 2009**),** it has been held that cost of borrowing in respect of DPS is a genuine expense. The primary difference in the Appellant's case is that there is no actual borrowing, however, that does not mean that the shareholders' funds/equity deployed for funding does not warrant payment of interest thereon.

It is submitted that the disallowance of the cost of borrowing for DPS by the State Commission is erroneous and contrary to the settled legal principles viz., (i) the Appropriate Commission cannot change its principles for different Financial Years of the same Control Period and the tariff determination for a particular Control Period regulates the affairs of the parties involved for the period to which it is made applicable ***(Judgement of this Hon'ble Tribunal dated 17.10.2022 in Appeal No. 212 of 2020: BRPL*** & ***Anr. vs. CERC*** & ***Ors.);*** (ii) At the stage of 'truing up', the Appropriate Commission cannot change the rules/methodology used in the initial tariff determination by changing the basic principles, premises and issues involved in the initial projection of ARR. ***(BSES Rajdhani Power Ltd. Vs. Delhi Electricity Regulatory Commission; (2022) sec Online SC 1450("BSES Judgement")*** *and this Tribunal Judgement in* ***Jaigad Power Transco Ltd. v. MERC ('Jaigad Judgement"), SLDC, Gujarat Vs.*** **GERC ("SLDC Gujarat Judgement") and NDPL Vs.**

DERC ("NDPL Judgement"); and (iii) Orders/decisions of the Appropriate Commissions ought to be in accordance with the Regulations framed under the Electricity Act, 2003. **(PTC India Limited Vs. Central Electricity Regulatory Commission; (2010) 4 SCC 603; &** Judgement of this Tribunal in **Haryana Power Generation Corporation Ltd. v. Haryana Electricity Regulatory Commission (2012 SCC Online APTEL 44)**

B. SUBMISSION URGED ON BEHALF OF STATE COMMISSION

Learned Senior Counsel submitted that the legal issue in the present case does not pertain to whether NPCL's internal funds, which were utilized for funding delayed receivables (resulting in income from the delayed payment surcharge, or "DPS"), should be given an interest cost, rather, the issue concerns whether, in the absence of any internal funds being actually used by NPCL, a "normative" interest cost ought to be provided to NPCL for funding delayed receivables/DPS.

It is contended that whilst interest on Working Capital, including "normative" two months receivables, is specified in the Regulations (almost uniformly across various SERCs), no normative standard is prescribed for the funding of DPS under the relevant MYT Regulations 2014 issued by UPERC .

Learned Senior Counsel submitted that the judgment cited by the Appellant, as well as the judgment rendered by the APTEL in "**Tata Power Co. vs. MERC"** (MANU/ET/0133/2012) and decisions in Appeal No. 137 of 2008 and Appeal No. 111 of 2008 (**Reliance Infra vs. MERC & Ors**), pertain specifically to interest on working capital that had been normatively specified under the concerned Tariff

Regulations. However, unlike interest on working capital, there is no normative determination of DPS. Consequently, the judgments relied upon by the Appellant regarding the "normative interest" entitlement for working capital are not applicable to DPS. The reliance has been placed by the Appellants on two judgments pertaining to Interest Cost on Delayed Payment Surcharge, both involving Delhi Discom—NDPL **("2010 APTEL 74")** and BSES Rajdhani Power **("2011 APTEL 107").** The BSES decision merely follows the earlier NDPL decision, which is the reasoned decision in the Delhi Discom cases. However, the Delhi Discom cases have been clearly and categorically distinguished by the APTEL in two separate decisions rendered by two distinct Benches. Both cases, which distinguished the Delhi Discom decisions on DPS, also dealt with claims for interest cost for funding the delayed payment surcharge by the respective distribution licensees (***"Uttarakhand Power Corporation (UPCL) vs UERC" (Appeal No. 180 of 2013), and "The Tata Power Company Limited Versus Maharashtra Electricity Regulatory Commission" (Appeal No. 244 of 2015 Judgment dated 3/6/2016))***

DPS is levied on consumers for delayed payment of electricity bills in accordance with a regulatory mandate set out in the tariff orders issued by the UPERC and DPS is a function of a statutory fiat. Under Regulation 28, "Interest on Working Capital" includes the interest cost for two months of receivables, representing consumer dues for two months. The billing cycle is 30 days, and 15-days payment period is allowed. Thus, consumers are generally required to clear their dues within 50 days (or 55 days, as per NPCL) from the month in which the sale and consumption of electricity occur. It is pertinent to note that the Appellant reports a collection efficiency of

98%. However, the Appellant does not account for the interest cost savings arising from the timely (pre 60 day) payments made by the vast majority of its consumers.

Learned Senior Counsel contended that the Delhi Discom cases are clearly distinguishable, as those decisions were based on the Delhi Commission's acknowledged position ("opinion") that "there is financing cost associated with delayed payment surcharge." In contrast, there is a categorical finding of UPERC in the Impugned Order that NPCL has not applied any separate / additional funds for purposes of funding of delayed payments from consumers.

Learned Senior Counsel submitted that in the Tariff Order dated 03.09.2019, concerning the True-Up for FY 2017-18, APR for FY 2018-19, ARR for FY 2019-20, the State Commission has categorically asked NPCL to demonstrate the financing of Rs 4.2 Crore so claimed for FY 2017-18 on account of late receipt of payment . In response, NPCL during the True-Up proceedings for FY 2017-18, stated: *"…the calculation of financing cost of DPS is being considered on a normative basis irrespective of actual interest /return on equity incurred thereon by Licensee. The State Commission in all subsequent tariff orders has followed the same methodology and approved the financing cost of DPS on normative basis only".* This stance appears to contradict NPCL's subsequent submission of its Petition for the True-Up of FY 2018-19, where the financing cost on DPS is described as compensatory in nature. It is submitted that any amount which is 'compensatory' must necessarily be claimed on actual loss/ expense. A claim for compensation cannot by any measure, be treated as a normative entitlement in the absence of a

statutory provision, such as that applicable in the case of Interest on Working Capital.

It is admitted that UPERC accepted the Appellant's statement at face value that there was actual funding of delayed receivables through internal funding, that does not alter the obligation placed upon the Appellant, under the UPERC Regulations as well as the relevant APTEL decisions concerning the Appellant, to demonstrate the actual deployment of funds (whether internal or external), particularly when such actual deployment of funds for delayed receivables was questioned by UPERC. The UPERC's MYT Order for the current control period (which has been cited to suggest that a principle was established in favor of NPCL) explicitly states that "*Any variations would be taken at the time of True-up*."

Learned Senior Counsel submitted that UPERC has not accepted, as a principle, that the deployment of funds whether through debt or equity, internal or external for funding delayed receivables from consumers (DPS) would not be necessary for allowing an interest pass-through. In the subject appeal, Appellant has not demonstrated the existence of any loans or equity that was left by UPERC, which were specifically employed for funding Rs 23.83 Crores of extra (actual) working capital, which would be needed for delayed recoveries in FY 2018-19 (True-Up). Since no actual loans exist, the normative loan has been computed after deducting 30% equity, on which the Commission has already allowed a return; the Appellant has not pleaded any evidence identifying specific funds earmarked for financing DPS. Such identification is essential, as the interest cost on DPS is not normative in nature (unlike interest on working capital).

In addition to above, it is submitted that, insofar as the claim for interest on DPS pertaining to the Tariff and ARR for FY 2021-22 is concerned, the same would be governed by the MYT Regulations, 2019.

C. SUMMARY OF VARIOUS JUDGEMENTS REFERRED

a) APTEL Judgement dated 15.12.2023 in "**Jindal Power Limited Vs CERC (in Appeal No 143 of 2017 & Appeal NO 17 of 2018) -** Reliance placed by Appellant

In this judgement, it was held that the Appellant is entitled to deploy its own funds for the project cost including free reserves and retained earnings and swap the actual loan taken from lenders and such deployment of funds will be entitled for return on equity/interest and held as under :

> ***"63**. We agree with the contention of the Appellant that the Appellant is entitled to deploy the fund for the project cost including free reserves and retained earnings and swap the actual loan taken from lenders, also, in the instant case was entitled to service the Project Cost from shareholder contributions which in essence amounts to equity, such deployment of fund necessarily has to be recognized for purpose of tariff inter-alia the asset used in the transmission business has, in the present case, been funded by the shareholders, hence, the normative regulated return on equity should have been allowed in tariff.*
>
> ***64.** This Tribunal vide judgment dated 27.08.2007 passed in Appeal No. 13 of 2007 titled Municipal Corporation of Greater Mumbai vs. MERC, has held that interest on internal funds should also be given in addition to return on equity on internal funds/reserves which has been treated as notional equity of the utility.*
>
> ***65**. Further, this Tribunal vide judgment dated 10.12.2008 passed in Appeal No. 151 – 152 of 2007 titled NTPC Ltd. vs. CERC and judgment dated 16.03.2009 passed in Appeal No. 133 of 2008 titled NTPC Ltd. vs. Central Electricity Regulatory Commission &*

Ors. and batch matters, has held that if a utility employs its own funds over and above equity there is no reason why it should not earn interest thereon."

b) APTEL judgement dated 31.08.2012 "**Tata Power Company Vs MERC (in Appeal No 17,18 and 19 of 2011). –** Reliance placed by Appellant

In the order impugned, under one of the issue, the State Commission has contended that applying the ratio of the decision of this Tribunal in Appeal No 111 of 2008, the State Commission must enquire into and consider the actual costs of the funds used by the utility as working capital in the regulated business. In its Order, the State Commission had treated the entire difference between the normative interest on working capital and actual interest as efficiency gain as the entire working capital had been made out from internal funds. This Tribunal in this Judgement, referring to the judgement dated 28.05.2008 in Appeal No 111 of 2008 (**Reliance Infrastructure vs MERC**) and 137 held that *" it must not be missed that in Appeal No 111 of 2008, it has not been held that unless internal fund is located and source out, interest on working capital cannot be given so far as normative portion is concerned. Merely because internal funds were spent as working capital it cannot follow that no cost was associated with it."*

As per this judgement the deployment of internal funds, even if not located and source out, in working capital, is eligible for interest on normative basis considered in working capital.

c) APTEL judgement dated 10.12.2008 "**NTPC Ltd. Vs CERC" (Appeal No 151 & 152 of 2007)–** Reliance placed by Appellant

In this judgement, issue considered was refinancing of loan by Appellant during construction. Appellant has contended that if loans are repaid during construction of the project for which tariff is yet to be fixed and revenue yet to be earned, such repayment should be deemed to have been made out of the internal or borrowed funds and NTPC should be entitled to claim notional interest on such loans as interest during construction. This Tribunal in this judgement held that *"if the project under construction repays a part of loan, the funds for the same has to come either from NTPC i.e. the owner or funds borrowed from other sources. In either case, such sum will entail a return in the form of interest".* It further held that "repayment *assumed for generating station during period prior to the date of commercial operation be deemed as loan from NTPC and interest during construction be allowed on such loans.*"

d.) APTEL Judgement dated 30.07.2010 "**North Delhi Power Ltd v DERC (2010 SCC OnLine APTEL 74)"** Reliance placed by Appellant

In the judgement Impugned in the Appeal, State Commission has held

> "***3.93.*** *As regards the delayed payment surcharge collected by the Petitioner during the year, the Commission is of the opinion that there is a financing cost associated with the delayed payment surcharge. Therefore, while computing the delayed payment surcharge, the Commission has deducted the carrying cost of financing the same @ 9% per annum.*"

This tribunal with regard to financing for DPS observed as under :

> ***18.*** *In the light of the above situation, this issue has got to be considered. Late payment surcharge is levied on consumers who do not make timely payment of their electricity bills. Due to the delay in making the payment, there is a shortfall in cash flow*

available with the distribution company to incur its expenses. In such a situation, to meet such shortfall in cash flow, the Appellant being a distribution company is constrained to meet the expenses either through internal accruals or borrowings. The State Commission having felt that the delay in payment by the consumers beyond the normal period entails the additional cost which needs to be allowed since the late payment surcharge levied which compensates for such a delayed payment is treated as non-tariff income.

In this judgement, it was held that for the delay beyond normative period, the distribution company need to be compensated at the prevalent market lending rate and relevant portion is extracted below:

"58(i) *The normative working capital compensates the distribution company in delay for the 2 months credit period which is given to the consumers. The late payment surcharge is only if the delay is more than the normative credit period. For the period of delay beyond normative period, the distribution company has to be compensated with the cost of such additional financing. It is not the case of the Appellant that the late payment surcharge should not be treated as a non-tariff income. The Appellant is only praying that the financing cost is involved due to late payment and as such the Appellant is entitled to the compensation to incur such additional financing cost. Therefore, the financing cost of outstanding dues, i.e. the entire principal amount, should be allowed and it should not be limited to late payment surcharge amount alone. Further, the interest rate which is fixed as 9% is not the prevalent market Lending Rate due to increase in Prime Lending Rate since 2004-05. Therefore, the State Commission is directed to rectify its computation of the financing cost relating to the late payment surcharge for the FY 2007-08 at the prevalent market lending rate during that period keeping in view the prevailing Prime Lending Rate."*

e) APTEL Judgement dated 12.07.2011 **"BRPL vs. DERC** & **Anr"** (2011 SCC OnLine APTEL 106 (Appeal No. 142 & 147 of 2009) – Reliance placed by Appellant

In this Judgement, referring this Tribunal's Judgement dated 30.07.2010 *in* ***"NDPL v DERC"*** *(2010 SCC OnLine APTEL 74),* it was held that *" Appellant is entitled to the compensation for additional financing cost of outstanding dues limited to late payment surcharge amount at the prevalent market lending rate during that period keeping in view the prevailing Prime Landing Rate"*

f) APTEL Judgement in **"BRPL** & **Anr. vs. CERC** & **Ors"** dated 17.10.2022 in (Appeal No. 212 of 2020) – Reliance placed by Appellant.

It has been observed that though tariff determination is a continuous exercise, however it is also a fact that tariff is determined by formal orders for specified control periods, financial year wise, however in order of maintaining regulatory certainty, law inhibits routine or frequent amendment to the tariff orders, relevant Paragraph 22 of the order is quoted below in this regard :

> ***"22.*** *The tariff determination for a particular control period regulates the affairs of the parties and stakeholders involved for the period to which it is made applicable. A tariff determined on the basis of projections presented by petitions in the nature of Average Revenue Requirement ("ARR") or Annual Performance Review ("APR") is generally followed up by true-up orders based on audited accounts wherein suitable corrections are incorporated. It is with the objective of maintaining regulatory certainty that the law inhibits routine or frequent amendment to the tariff orders, one exception to this general principle being the changes necessary under the terms of fuel surcharge formula [Section 62 (4)]. The law qualifies this inhibition by using this expression "ordinarily". The amendments to tariff orders do become necessary in case errors are found in the tariff order upon appellate scrutiny or, as in the case of UPPCL (supra) some other factors supervene e.g. on account of additional expenditure burden (in that case due to wage revision."*

g) APTEL Judgement **"*Jaigad Power Transco Limited Vs MERC*" (2022 SCC Online APTEL 102)** dated 31.10.2022 **(**Reliance placed by Appellant)

This judgement reiterated the ratio decided in the Supreme Court Judgement (2023) 4 SCC 788 / 2022 SCC On Line SC 1450 regarding True up exercise

h) APTEL Judgement **"*State Load Despatch Centre Vs GERC*" (2015 SCC OnLine APTEL 50)** dated 30.11.2015 **–** reliance placed by Appellant

Referring to its judgement in Karnataka Power Transmission Company limited and North Power Delhi Limited, this Tribunal held that truing –up stage is not an opportunity for the commission to rethink *de novo* on the basic principles, premises and issues involved in the initial projection of revenue requirement of the Licensee.

i) Judgement in **" PTC India Ltd Vs CERC" (2010) 4 SCC 603) -** reliance placed by Appellant

In this judgement Supreme Court held that the hierarchy of regulatory powers and functions under Section 178 of Electricity Act, 2003, which deals with making of regulations by the Central Commission, under the authority of subordinate legislation, is wider than Section 79 (1) of the 2003 Act, which enumerates the regulatory functions of the central commission, in specified areas, to be discharged by orders (decisions). A regulation under Section 178 is made under the authority of delegated legislation and consequently its validity can be tested only in judicial review proceedings before the Courts and not by way of appeal before the Appellate Tribunal for Electricity under Section 111 of the said Act.

The CERC is empowered to take measures/steps in discharge of functions enumerated under section 79 (1) but the same has to be in conformity with the regulations made under section 178. The Supreme Court also held that 'to regulate' is an exercise which is different from making of regulations. However, making of a regulation under Section 178 is not a precondition to the Central Commission before taking any steps/measures under Section 79(1). However, if there is a regulation under Section 178 in that regard, then order under Section 79(1) (g) has to be in consonance with such regulation. The Paragraph 56 of the Judgement is reproduced below:

> ***"56.*** *Similarly, while exercising the power to frame the terms and conditions for determination of tariff under Section 178, the Commission has to be guided by the factors specified in Section 61. It is open to the Central Commission to specify terms and conditions for determination of tariff even in the absence of the regulations under Section 178. However, if a regulation is made under Section 178, then, in that event, framing of terms and conditions for determination of tariff under Section 61 has to be in consonance with the regulations under Section 178".*

j) APTEL Judgement "**HPGCL Vs HERC & Ors" (2012 SCC OnLine APTEL 44)** - reliance placed by Appellant

> ***"5.*** *Bare reading of section 61 would make it clear that the State Commissions have been mandated to frame Regulations for fixing tariff under Section 62 of the Act and while doing so i.e. while framing such Regulations, State Commissions are required to be guided by the principles laid down in by the Central Commission, National Electricity Policy, Tariff Policy etc. It also provide that while framing the Regulations, the State Commissions shall ensure that generation, transmission and distribution are conducted on commercial principles; factors which would encourage competition and safe guard consumer's interest. Once the State Commission has framed and notified the requisite Regulations after meeting the requirement of prior*

publication under Section 181(3), it is bound by such Regulations while fixing Tariff under Section 62 of the Act and the Central Commission's Regulations have no relevance in such cases. However, the State Commission may follow the Central Commission's Regulations on certain aspects which had not been addressed in the State Commission's own Regulations. The Haryana Electricity Regulatory Commission has framed Terms and Conditions for determination of tariff for generation in the year 2008 and the State Commission is required to fix tariff as per these Regulations. However, as per Regulation 33 the State Commission has power to relax any of the provisions of these Regulations after recording the reasons for such relaxation."

k) APTEL Judgement **"UPCL Vs UERC"** dated 18.05.2015 in Appeal No 180 of 2013 - reliance placed by State Commission

In this, the Appellant - UPCL was aggrieved by the Order of the State Commission for not allowing of financing cost incurred by the Appellant in infusing additional capital due to late payment of Bills by the consumers and relied on the Judgement of this Tribunal in Appeal No 153 of 2009, "**NDPL Vs DERC"**. The State Commission contended that UERC tariff regulation not only allow collection inefficiency but also allow two months billing cycle and furthermore information sought with regard to whether short term loan raised exceeded the normative working capital and to justify increase in working capital requirement in view of approved collection efficiency target was not furnished by the UPCL. The State Commission further contended that judgement passed in "**NDPL Vs DERC"** (Appeal No 153 of 2009) is not applicable as norms of working capital specified by DERC does not include capital required to finance such shortfall in collection of current dues, however UERC regulations include this component. The Collection efficiency of UPCL was noted as 92.56 % and 92.67 % for FY 2010-11 & FY 2011-12 respectively against the target of 96 % and 97 %. Accepting the arguments of the State Commission, this Tribunal rejected the contention of Appellant

l) APTEL Judgement **"Tata Power Vs MERC"** dated 03.06.2016 in Appeal No 244 of 2015; Reliance placed by State Commission.

Tata Power challenged MERC's disallowance of financing costs associated with DPS, arguing that the delay in receipt of payment by distribution licensees caused a cash flow strain, necessitating external borrowings. The company sought recognition of interest costs incurred due to this delay. This Tribunal noted that "the appellant clearly admits that no further interest has been included to fund the delayed payment surcharge because the appellant utilized the delayed payment charges collected beyond two months from the billing date for financing its own working capital requirement which does not get covered under the tariff order."

Further this Tribunal at Para 14.3 noted that " Further it appears from the Impugned Order that the State Commission while truing up for the FY 2011-12, 2012-13 and 2013-14 has approved the interest on working capital as per MYT Regulations 2011, as per the submissions of the Appellant. Accordingly, the appellant's contention that delayed payment surcharge collected beyond 60 days from the billing dates for financing its own working capital requirements which does not get covered under tariff order, is also devoid of merits .

The Tribunal distinguished the earlier judgements of this Tribunal and noted as under

> *"14.4) We have also gone through the proposition of law laid down by this Appellate Tribunal in the case of NDPL Vs. DERC (supra) which is not applicable because the judgment relates to the regulations of DERC, hence, the said judgment has been distinguished and limited to an interpretation of Delhi Commission's Regulations by a subsequent judgment dated 18.05.2015 in Appeal No.180 of 2013 in the matter of UPCL Vs. UERC. This Appellate Tribunal, while dealing with the collection inefficiency and two months billing cycle as part of working capital requirement and interest has clearly observed that the judgment*

in Appeal No. 153 of 2009 in the matter of NDPL Vs. DERC reported in 2010 ELR 891 is not applicable because the norms of the working capital specified by Delhi Commission do not include capital required to finance such shortfall in collection of current dues. In view of the above discussions, we do not find any merit in the contentions of the appellant, hence, this issue is also decided against the appellant."

m) ***"Indira Gandhi vs. Raj Narain (1975) Supp. sec1;*** Reliance placed by Appellant**.**

"148. *The word "incur" according to the dictionary meaning means to become liable to. The word "incur" means to undertake the liability even if the actual payment may not be made immediately. The undertaking of the responsibility for the expenditure concerned may be either by the candidate or his election agent. Again, a candidate is also to be deemed responsible for the expenditure if he has authorised a particular expenditure to be made by someone else on his behalf."*

n) CIT Gujarat vs. Tejaji Farasram Karwala Ltd. **1967 SCC OnLine SC 2291** Reliance placed by Appellant**.**

"8. *The judgment of the Allahabad High Court in CIT v. Sharma & Company [57 ITR 470] and especially the observations of Pathak, J., on which reliance was placed by counsel for the Company may also be referred to. In Sharma & Company case [57 ITR 470] the assessee Firm which was the sole selling agent of a "cotton mill", received a sum exceeding Rs 67,000 from the owners of the mills for the purpose of meeting the expenses in connection with the management of a retail cloth shop on behalf of the mill and actually spent only Rs 12,641. The claim of the Firm that it was entitled to exemption from liability to pay tax under Section 44(3)(vi) of the Act (before it was amended in 1955) even in respect of the balance retained by it was upheld by the High Court of Allahabad. Pathak, J., observed that Section 4(3)(vi), as it then stood, required the Income Tax Officer to enquire whether the purpose of the grant was covered by the language of the clause, and he was not concerned to determine whether the amount granted was actually expended by the recipient. The learned Judge in so holding was impressed by two considerations*

: that the expression "incurred" means incurred already, or to be incurred in future; and that income tax being an annual tax in a case where the allowance is an ad hoc allowance which is to cover a period longer than or ending after the year of account, or is a periodical allowance, the Income Tax Officer may under the Act exempt expenditure incurred in the year of account and no more, and thereby the intention of the employer would be wholly frustrated and the employee may be called upon to pay tax on a receipt which is not his income.

9. *The expression "incurred" means for reasons already set out incurred or to be incurred. But that has no bearing on the question whether the unexpended surplus in the hands of the employee is taxable. And we do not feel impressed by the second consideration. The allowance may be in respect of a period longer than the accounting year or which runs into the succeeding accounting year or years. But on that account the whole receipt reduced by the expenses actually incurred in the year of account is not liable to be brought to tax. If it appears from a review of the circumstances that a special allowance is made for a period longer than the year of account, or that the period covered by the grant of a special allowance extends beyond the close of the account year, it would, in our judgment, be the duty of the Income Tax Officer to determine the amount allowed in respect of the year of account in which the expenditure has been incurred, and the difference between the amount so determined and the amount actually expended would alone be brought to tax.*

D. CONSIDERATION & OUR VIEW: ISSUE NO 3 – COST OF BORROWING FOR DELAYED PAYMENT SURCHARGE – TRUE UP FY 2018-19

Main contention of the Appellant is with regard to its entitlement for normative interest rate on the internal funds deployed for delayed receipt of funds, which has earned Delayed Payment Surcharge (DPS) and already considered under Non-Tariff Income. The State Commission, in the Impugned Order has disallowed such claim. The relevant paragraph of the Impugned Order is reproduced below:

" 3.24.20 Taking into consideration, the Commission views are that:

- *The UPERC MYT Regulations, 2014 do not provide any methodology/provision of computing the quantum of DPS & its financing cost, therefore it cannot be taken as normative.*
- *However, seeing the genuineness of the need of financing cost of the DPS if the Petitioner has actually incurred the financing of DPS and Petitioner can clearly demonstrate by the records, the same can be allowed to the Petitioner.*
- *If, the Petitioner has put in its equity in financing the DPS, it is to be noted that any excess equity (more than 30%) has already been considered as normative loan and interest has been given on it. Hence, Licensee has already received return of financing cost."*

We take note that as per Regulation 28 of UPERC **"MYT Regulations 2014",** distribution licensee is allowed interest on working capital for the financial year, computed as reproduced below:

"a) O&M expenses for one month

b) Two months equivalent of expected Revenue

c) Maintenance spares @ 40 % of R&M expenses for two months

less security deposit from the consumers, if any.

Provided that the rate of interest on working capital shall be on Normative basis and rate of interest shall be equal to State Bank Advance Rate (SBAR) on the date on which Petition for determination of Tariff is accepted by the Commission".

The Non-Tariff Income and its treatment is defined in Regulation 33 of the MYT Regulation 2014, which is reproduced below:

"33 Non-Tariff Income

a) All incomes being incidental to electricity business and derived by the Licensee from sources, including but not limited to profit derived from disposal of assets, rents, delayed payment surcharge, meter rent (if any), income from investments other than contingency reserves, miscellaneous receipts from the consumers and income to Licensed business from the Other

Business of the Distribution Licensee shall constitute Non-Tariff Income of the Licensee.

b) Interest earned on security deposits, in excess of the rate specified by the Commission shall be considered as Non-Tariff income of the Licensees.

c) The amount received by the Licensee on account of Non-Tariff Income shall be deducted from the aggregate revenue requirement in calculating the net revenue requirement of such Licensee.

Provided further that any expenditure incurred for generating/ earning Non-Tariff Income may be reduced from such income"

From the perusal of these Regulations, it is observed that the DPS earned by Distribution licensee is included in Non-Tariff Income and the entire Non-tariff Income is to be deducted from Aggregate Revenue Requirement, however, the proviso in the Regulation 33 provides for deduction of any expenditure incurred for generating/ earning Non-tariff Income from such income. There is no dispute that MYT Regulations 2014 do not specifically provide for any methodology for computing financing cost of DPS as submitted by State Commission, however as noted above, proviso under Regulation 33 of MYT Regulation 2014, explicitly provides that any expenditure incurred for generating/earning Non-Tariff Income to be reduced from such Income. Thus any expenditure incurred by Appellant for earning DPS is to be reduced from DPS earned, and only balance income left is to be included as part of Non-Tariff Income. The State Commission has contended that Appellant has not demonstrated the expenditure actually incurred by Appellant on this account. On the other hand, Appellant has sought the financing cost with regard to DPS on normative basis considering average SBAR, which has been allowed by the State Commission in its various previous orders including the Business Plan order dated 30.11.2017, Tariff Order

dated 22.01.2019 and True up order dated 03.09.2019 with specific reference to ARR Order dated 22.01.2019 for FY 2018-19, wherein financing cost of DPS was allowed, relevant extract of various Orders of State Commission are reproduced below :

Business Plan Order dated 30.11.2017

TABLE 5-24 APPROVED COST OF BORROWING APPROVED FOR DPS FOR FY 2017-18 TO FY 2019-20

Particulars	***FY 2017-18***		***FY 2018-19***		***FY 2019-20***	
	Petition	***Approved***	***Petition***	***Approved***	***Petition***	***Approved***
Delayed Payment Surcharge (Rs. Crore)	*4.51*	*4.51*	*4.29*	*4.29*	*4.07*	*4.07*
DPS grossed up at 1.50% per month or 18% per	*18.00%*	*18.00%*	*18.00%*	*18.00%*	*18.00%*	*18.00%*
Amount (Rs. Crore)	*25.07*	*25.07*	*23.82*	*23.82*	*22.63*	*22.63*
Financing cost	*14.05%*	*14.05%*	*14.05%*	*14.05%*	*14.05%*	*14.05%*
Cost of Borrowing (RsCrore)	***3.52***	***3.52***	***3.35***	***3.35***	***3.18***	***3.18***

ARR Order (FY 2018-19) dated 22.01.2019

TABLE 5-47 COST OF BORROWING FOR DPS APPROVED FOR FY 2018-19 (Rs. Crore)

Particulars	Reference	Approved vide T.O. dtd. 30/11/2017	Petition	Approved
Delayed Payment Surcharge Received	a	4.29	**5.53**	5.53
Working Capital Amount Utilisation @ 18% p.a.	b= (a /18%)	23.82	30.70	30.70
Applicable Interest Rate for Working Capital Finance (Weighted average SBI -'PLR)	c	14.05%	13.68%	13.68%
Cost of Borrowing for DPS	**d=b x c**	**3.35**	**4.20**	**4.20**

TABLE 5-48 APPROVED NET NON-TARIFF INCOME FOR FY 2018-19 (Rs. Crore)

Particulars	Reference	Approved vide T.O. dtd. 30/11/2017	Petition	Approved
Non-Tariff Income including DPS	a	6.44	8.99	8.99
Less: Cost of Borrowing for DPS	b	3.35	4.20	4.20
Net Non-Tariff Income	**c=a-b**	**2.91**	**4.79**	**4.79**

TABLE 3-65: Cost of Borrowing for DPS FY 2017-18 (Rs. Crore) – submitted by petitioner

S.No.	Particulars	Reference	Approved	Actual
1	Delayed Payment Surcharge Received	a	4.51	5.82
2	Amount after grossing up of DPS at 1.50% per month or 18% per annum	b=(a/18%)	25.07	32.32
3	Applicable Interest Rate for Working Capital Finance (Weighted average SBI - PLR)	c	14.05%	13.68%
4	Cost of Borrowing for DPS	d=bxc	3.52	4.42

Table 3-66: Non- Tariff Income for FY 2017-18 submitted by the Petitioner (Rs Cr)

Particulars	Reference	Approved	Actual
Non-Tariff Income including DPS	a	6.44	9.05
Less: Cost of Borrowing for DPS	b	3.52	4.42
Net Non-Tariff Income	**c=a-b**	**2.92**	**4.63**

TABLE 3-68: Cost of Borrowing for DPS approved by the Commission for FY 2017-18 (Rs. Cr)

Particulars	Reference a	**Approved I** vide T.O. 30/11/17	True-up Petition	Approved upon Truing Up
Delayed Payment Surcharge Received		4.51	5.82	5.82
DPS grossed up at 1.50% per month or 2% per month	b	18%	18%	24%
Amount after grossing up of DPS	c=(a/b)	25.07	32.32	24.24
Applicable Interest Rate for Working Capital Finaiice (at Weighted average SBI - PLR)	d	14.05%	13.68%	13.75%
Cost of Borrowing for DPS	**e=cxd**	**3.52**	**4.42**	**3.33**

Table 3-69: Non- Tariff Income for FY 2017-18 approved by the Commission (Rs Cr)

Particulars	Reference	Approved vide T.O. 30/11/17	True-up Petition	Approved upon Truing Up
Non-Tariff Income including DPS	a	6.44	9.05	9.05
Less: Cost of Borrowing for DPS	b	3.52	4.42	3.33
Net Non-Tariff Income	**c=a-b**	**2.92**	**4.63**	**5.72**

In above referred orders, State Commission has approved the Cost of Borrowing for DPS considering grossing up of DPS and then applying interest rate as applicable for working capital finance and amount so worked out was reduced from DPS to be included in the Non-Tariff Income. We must express our inability to agree with the contentions put forth on behalf of the State Commission that in past orders, UPERC took NPCL's statements on the face value that there was actual funding of delayed receivables; as in our view, State Commission has unequivocally approved the funding of DPS on normative basis and it is very difficult for us to accept that the State Commission, even on face value, equated the interest cost of funds deployed by Appellant as exactly equal to normative interest rate provided in the working capital.

The State Commission has submitted that any excess equity has already been considered as Normative loan and interest has been given on it and thus Appellant has received return of financing Cost and no loan or equity was left un-serviced by State Commission. Per contra Appellant has contended that Return on Equity and Interest on Loan (Normative) approved by State Commission pertains to the Capital expenditure made/approved by State Commission for the FY 2018-19, in which excess equity, if any, in the capital expenditure (more than 30 %) was treated as normative loan and interest given on it and it does not include share holder funds which are not considered in capital expenditure but used in financing of DPS. We find merit in the submissions of Appellant as Regulators typically allow a fixed percentage return on the specified equity portion of capital expenditure incurred by the licensee and interest cost recovery is allowed on the debt portion of the capital expenditure and any equity deployed over and above specified quantum of equity is treated as a normative loan and interest provided on it; same principle has been

provided in the UPERC Regulations. Such a return on equity and interest on loan is not applicable on the entire shareholder funds (like retained earnings or unrelated equity), but only on the equity/loan deployed in Capital expenditure. Thus, in our view, State Commission has erred in holding that entire funds of Appellant has been serviced either as equity or normative loan and no funds are left un-serviced.

Main issue which emerges for consideration, in essence, relates to the financing cost of the working capital requirement due to any shortfall in receivables from what the Appellant billed in a particular month and earned DPS. In the MYT Regulations 2014, interest on Working Capital has been worked out on normative basis and has been given at State Bank Advance Rate (SBAR), without considering the source of actual funds deployed whether from shareholders fund or borrowings. Interest on Working Capital provided in the Regulations emerges from the basic principle that there is mandatory gap between providing of service and realization of bill as consumers would normally pay the dues to Discom within 50-55 days and Appellant would have the requirement of working capital and normative interest given for the same. However, in case consumers do not pay the bill within stipulated time, there is levy of Delayed Payment Surcharge (DPS) and it cannot be denied that there would be additional working capital requirement beyond what is considered in the Regulations applying the same principle as Working Capital. This additional working capital requirement by Distribution licensee can be met either by additional borrowings or by deploying their own funds, which if deployed elsewhere could have earned return. Denying the cost on such utilization of shareholders' funds, in our view is not justified as in terms of the extent Regulations, DPS earned from the consumers is to be considered under Non-Tariff Income and ARR is

reduced to that extent and proviso in the Regulation 33 of MYT Regulation 2014 provides for expenditure incurred for generating Non-Tariff Income (NTI) to be reduced from such income. Thus in our view, though the MYT Regulations 2014, do not have specific provisions with regard to funding of Working capital for financing DPS, however it does provide for exclusion of expenditure made in generating NTI which also includes DPS, and net NTI to be considered in the ARR calculation. In the past years tariff orders including True up order (FY2017-18) dated 03.09.2019 and ARR order dated 22.01.2019 (FY 2018-19), the State Commission has reduced cost of borrowing for DPS on normative basis from total NTI.

The State Commission has acknowledged the genuineness of the need of financing the cost of DPS and has held that if same can be demonstrated by Appellant with regard to deployment of funds, it can be permitted. Considering the judgements of this Tribunal, we are of the view that deployment of internal funds, even if source not traced, does not come free and are eligible for interest **(Judgement dated 10.12.2008 in Appeal Nos. 151-152 of 2007 "NTPC Ltd. Vs CERC" ; judgement dated 31.08.2012 in Appeal Nos.17, 18 and 19 of 2011 "Tata Power Company Vs MERC ; Judgement dated 15.12.2023 in Appeal No. 143 of 2017 & 17 of 2018 "Jindal Power Limited Vs CERC").**

We do not find merit in the submissions of State Commission that MYT Regulations, 2014 do not provide any methodology/provision of computing the quantum of DPS & its financing cost, therefore it cannot be taken as normative, as State Commission in its ARR order for FY 2018-19 and in earlier Tariff orders has approved the DPS on normative basis under the same Regulations. This Tribunal in its judgement ***dated 17.10.2022 in Appeal No. 212 of 2020*** **"BRPL & Anr vs CERC & Ors"**

has held that appropriate commission cannot change its principle for different financial year of the same control period. Further, it has already been held by supreme Court that at the stage of Truing up, the State Commission cannot change the rules/ methodology/principles used in initial tariff determination by changing the basic principle, premises and issues involved in the initial projection of ARR (**"BSES vs DERC" 2023 4 SCC 788/ 2022 SCC Online SC 1450)**.

This Tribunal in **"NDPL vs DERC, (2013) SCC OnLine (APTEL) 140,** has upheld the decision of State Commission that financing cost of LPSC has to be at the same rate as approved for working capital funding, relevant para reproduced below :

> *"135. The Appellant has submitted that the financing of LPSC is required to meet the requirements of working capital. Delhi Commission has submitted that allowing financing cost for LPSC means allowing of additional working capital for the time period between the due date and the actual date of payment. Hence, financing cost of LPSC has to be at the same rate as that approved for working capital funding. The view taken by the Delhi Commission is correct and need not be interfered with."*

In view of above deliberations and law laid down by this Tribunal ("**North Delhi Power Ltd v DERC (2010 SCC OnLine APTEL 74)**, ***"BRPL vs. DERC*** *&* ***Anr"*** *(2011 SCC OnLine APTEL 106) as well as* by Supreme Court that no change in methodology permitted at the True up stage (**"BSES vs DERC" 2023 4 SCC 788**), we are of the view that Appellant is eligible for financing cost of DPS on Normative basis similar to that approved for working capital.

Reliance have been placed by State Commission on the Judgement of this Tribunal in **"UPCL Vs UERC"** dated 18.05.2015 in Appeal No 180 of 2013 and **"Tata Power Vs MERC"** dated 03.06.2016 in Appeal No

244 of 2015. However, in our view these judgements are not applicable in the present case; This Tribunal in the "UPCL Vs UERC" has accepted the contention of State Commission that earlier judgement of this Tribunal ("**North Delhi Power Ltd v DERC)** is not applicable as norms of working capital specified by DERC does not include capital required to finance such shortfall in collection of current dues, however UERC regulations include this component and further there is reduction in Collection efficiency of UPCL against the target and so inefficiency need not be compensated. No such contentions have been raised in the present case or reference made to specific provisions in UERC Regulation with regard to capital required to finance shortfall in collection in UPERC Regulations.

In the case of **"Tata Power Vs MERC"** this tribunal took note of the submissions of the Appellant that no further interest has been included to fund the delayed payment surcharge because the appellant had utilized the delayed payment charges collected beyond two months from the billing date for financing its own working capital requirement and also noted the observation made in the " *UPCL Vs. UERC*" and distinguished from judgement of "**North Delhi Power Ltd v DERC** on account of collection efficiency and Regulations. No such contentions/observations has been raised by State Commission in the present case. Based on above deliberations, we are of considered view that judgements cited by State Commission **"UPCL Vs UERC"** & **"Tata Power Vs MERC"** are not applicable in the present case on account of facts of the present case.

In view of the above deliberations, we set aside the finding of State Commission with regard to disallowance of financing cost of DPS on normative basis and hold that financing Cost of DPS should be worked out at the same rate as approved for Working Capital on normative basis.

We direct the State Commission to allow financing cost of DPS on Normative basis at the same rate as that for working Capital. Accordingly, we need not consider the other authorities cited by the Appellant.

SECTION 2 : ISSUE NO.7 – INCLUSION OF TREASURY INCOME IN NON TARIFF INCOME FOR REDUCING THE ARR – TRUE UP FY 2018-19

A. SUBMISSION URGED ON BEHALF OF NPCL

Learned senior Counsel submitted that the State Commission in the Impugned Order has erroneously and without any reasoning/justification included the income earned from the investment made by the Appellant from its shareholders' funds i.e., Treasury Income as 'Non-Tariff Income' and deducted the same from the Appellant's Annual Revenue Requirement (**ARR**). The total cost impact of the above disallowance is to the tune of Rs. 6.40 Crore.

It was submitted that during the oral arguments, it was conceded on behalf of the State Commission that the investment made by the Appellant from its shareholders' funds i.e., Treasury Income, cannot be considered as 'Non-Tariff Income' however a factual determination as regards the availability of surplus funds, for investment by the company, was in fact available with the Appellant or not during FY 2018-19, will have to be made by the State Commission. The said submission of the State Commission does not find any mention in the Impugned Order or the reply filed by the State Commission and thus, ought to be rejected by this Hon'ble Tribunal.

State Commission has submitted following reasoning for inclusion of the Treasury Income as 'Non-Tariff Income', which are extraneous to the Impugned Order and the reply filed by the State Commission:

(a) As per Regulation 33(a) of the UPERC (Multi Year Distribution Tariff) Regulations, 2014 (**MYT Regulations 2014**), 'Non-Tariff Income' includes all incomes incidental to the electricity business, including the income from investment. It is well settled that the words 'incidental to electricity business' appearing in Regulation 33(a) would include the investment activities carried out by the licensee company itself.

(b) Appellant ought to demonstrate that the funds in the company's accounts, which have come from internal accrual, have not been otherwise deployed towards funding of capital expenditure through the Return on Equity (**RoE**) or shareholders' loan.

Learned senior Counsel submitted that admittedly, 'Non-Tariff Income' under the MYT Regulations, 2014 includes all incomes related to or incidental to the licensed electricity business of a licensee. However, Treasury Income i.e., income earned from the investments made out of shareholders' funds is neither related to nor incidental to the licensed business of the Appellant and therefore does not qualify as 'Non-Tariff Income' under the MYT Regulations 2014. It is further submitted that while the exclusion of Treasury Income from the definition of 'Non-Tariff Income' is implicit under the MYT Regulations, 2014, however, the subsequent UPERC MYT Regulations, 2019 expressly and unequivocally exclude Treasury Income from the definition of 'Non-Tariff Income'. Learned senior Counsel submitted that in terms of Regulation 31 of the UPERC MYT Regulations, 2014, the Appellant is allowed a Return at the rate of 16% on an equity base, being equivalent to 30% of the annual additions to the Gross Fixed Assets (GFA) every year, excluding capital contributions from consumers. The RoE so earned belongs exclusively to the Appellant, who is at liberty to distribute the same by way of dividend or to retain and/or reinvest it in any business,

including activities other than the licensed business. When such retained/reinvested RoE is placed in fixed deposits and/or mutual funds ("Treasury Instruments"), it generates income unrelated to the licensed business ("Treasury Income"). The Treasury Income so generated may itself be reinvested in Treasury Instruments, thereby earning further income on a cumulative basis, thus RoE earned grows over time through reinvestment.

Appellant, in its True-up Petition for FY 2018-19, had declared an amount of Rs11.81 Crore as 'Non-Tariff Income', and furnished justification for the exclusion of income from treasury operations amounting to Rs 6.40 Crore, on the ground that such income was generated from funds accrued through the internal resources of the Appellant, i.e., shareholders' funds. However, without returning any finding on this specific issue, the State Commission has erroneously observed that the audited accounts of the Appellant provided the details of the 'Non-Tariff Income' of Rs 18.22 Crore, and included the Treasury Income within the computation of 'Non-Tariff Income'.

It is submitted that for the preceding years in question, namely FY 2016-17 and FY 2017-18, the Appellant had, in its respective True-up Petitions for the said years, furnished its audited accounts along with detailed statements of income arising from investments in fixed deposits, which the State Commission, while undertaking the truing-up exercise for the said years, did not include it as 'Non-Tariff Income'. In complete deviation from its own past practice and methodology, the State Commission, in the Impugned Tariff Order for FY 2018-19, has erroneously included Treasury Income as 'Non-Tariff Income'.

Reliance placed by Respondent Commission upon the judgment of the Supreme Court in **"*Royal Talkies, Hyderabad v. Employees***

***State Insurance Corporation"*, (1978) 4 SCC 204,** is misconceived as the said judgements pertain to interpretation of an activity being related to or incidental to the main business, whereas Treasury Income is neither related nor incidental to the Appellant's licensed business, and accordingly does not fall within the ambit of 'Non-Tariff Income' under the MYT Regulations, 2014.

It is submitted that, though the State Commission has not disputed the amount of Rs. 6.40 Crore earned by the Appellant as Treasury Income, but has nevertheless contended that the Appellant ought to justify the factual basis of its claim thereto; such an contention is baseless as the State Commission (a) has not included the income earned from treasury operations/internal accruals as 'Non-Tariff Income' in the past; and (b) not raised any query as regards the factual basis for the Appellant's claim towards Treasury Income, despite the Appellant having submitted its audited accounts/statements.

Learned senior counsel submitted that the State Commission has violated the settled principles of law inasmuch as (i) if the income cannot be reasonably linked to any cost item allowed by the Commission as part of the ARR, the same should not be adjusted against the ARR of the Appellant, in the absence of specific Regulations, as noted in "***Maharashtra State Power Generation Co. Ltd. Vs. Maharashtra Electricity Regulatory Commission" [(2008) SCC Online APTEL 46)]***; *(ii)* Appropriate Commissions ought to follow the regulations framed under the Electricity Act, 2003, as held in "***PTC India Limited Vs. Central Electricity Regulatory Commission" (2010) 4 SCC 603***; *(iii)* At the stage of 'truing up', the Appropriate Commission cannot change the rules/methodology used in the initial tariff determination by changing the basic principles, premises and issues involved in the initial projection

of ARR, as noted in "***BSES Rajdhani Power Ltd. Vs. Delhi Electricity Regulatory Commission" (2022) SCC Online SC 1450; (iv)*** The 'Matching Principal' by only considering the income earned by Appellant, without allowing the corresponding expenditure incurred by the Appellant to earn such income, as also held in "***JK Industries Vs Union of India*****" (2007) 13 SCC 673.**

It is submitted that the contentions advanced by the State Commission are devoid of merit, and this Tribunal may adjudicate upon the factual basis of the Appellant's claim towards Treasury Income or, in the alternative, remit the matter to the State Commission for the said factual determination.

B. SUBMISSION URGED ON BEHALF OF STATE COMMISSION

Learned senior Counsel submitted that it is an admitted position that the Appellant, being the licensed entity (distinct from its shareholders), has, in the course of its operations, earned an amount of Rs 6.40 Crore as treasury income during the FY 2018-19. The Appellant in its petition for true-up for the FY 2018-19, excluded Rs 6.40 Crore from the Non-Tariff income as it is the income generated upon the funds accrued through internal resources and not utilised for the purpose of capital expenditure or other operational expenses. State Commission however observed that the audited accounts of the licensee company disclose details of non-tariff income amounting to Rs 18.22 Crore and treated the entire said amount as Non-Tariff Income.

It is submitted that the Appellant has failed to demonstrate that the funds earmarked for disbursal to shareholders were maintained in a separate account and were deployed therefrom into treasury operations. It is an admitted position that a common till from licensee is carrying out

both capital expenditure and treasury operations; except for a bare assertion, no material has been placed before the State Commission to establish that the funds utilized for treasury operations had not already been re-invested into the licensed business for the purpose of meeting capital expenditure through equity and loan. This issue relating to the deployment of funds generated through internal accruals by the licensee company has assumed significance in the present year, as no actual loans, other than notional loans, remained on the company's books. Therefore, in absence of proof that the treasury income was a separate sum of money not otherwise earmarked for funding of Capex and earning of ROE and interest on notional loan, the State Commission has gone by the audited accounts.

Learned senior Counsel further submitted that mere fact that in the previous years, such a factual enquiry was not asked of Appellant, would not entitle the Appellant to claim that all treasury operations of the company and the income arising therefrom is on behalf of the shareholders alone. It is incumbent upon the Appellant to demonstrate that the funds in the company's account arising from internal accruals (i.e., profits meant for distribution to shareholders) have not been otherwise deployed towards funding of capital expenditure through Return on Equity (ROE) or shareholders' loan.

In terms of Regulation 33(a), "non-tariff income" expressly includes "*all incomes being incidental to the electricity business and derived by the licensee from sources, including... income from investment."* Hence, *ipso facto* income earned by the company from its investment constitutes non-tariff income. The Appellant would need to make good its assertion made in True up Petition for FY 2018-19 that *"this income is … not utilised for the purpose of capital expenditure or other operational*

expenses" or that *this income… has not been considered as part of ARR"*.

Learned senior Counsel submitted that it is also well settled that the words "incidental to the electricity business" as employed in Clause (a) of Regulation 33 would include investment activities carried out by the licensee company itself and placed reliance on the Judgement ***"Royal Talkies, Hyderabad v. Employees State Insurance Corporation"*, (1978) 4 SCC 204,** where, Supreme Court considered whether the operation of a canteen within a cinema premises could be regarded as incidental to the business of running a cinema and held that facilities such as a canteen, cycle stand, or magazine booth cannot be excluded from being incidental to the business of a cinema. Similarly, the Supreme Court in "***State of Tamil Nadu v. Binny Ltd., Madras"***, 1980 (Supp) SCC 686, rejected the contention that a store run in the factory premises by a leading textile manufacturing company for sale of provisions to workmen and employees was not incidental to its business of manufacture of sale and textile. Supreme Court, relying upon its earlier decision in *Royal Talkies* (supra), held that "…. *We fail to see how a Store run by the owner of a textile undertaking for sale of provisions to the workmen employed in the factory can be said to be anything other than incidental to the business of manufacture of textiles. We are clearly of the view that the activity of selling provisions to workmen in the Store was incidental to the business of manufacture of textiles and the sales were, therefore, transactions falling within the definition of 'business' in clause (ii) of Section 2(d)".*

Learned senior Counsel further submitted that it is not in dispute that any income derived from "other business" of the distribution licensee is to be excluded from the computation of Non-Tariff Income under

Regulation 33(a) however as rightly noted by the Appellant, Section 51 of the Electricity Act mandates that such "other business" may be undertaken only with prior intimation to the Appropriate Commission. Appellant has neither demonstrated nor placed on record whether such prior intimation in respect of the treasury operations was undertaken by the licensee company.

C. CONSIDERATION AND OUR VIEW : INCLUSION OF TREASURY INCOME IN NON TARIFF INCOME FOR REDUCING THE ARR – TRUE UP FY 2018-19

The Appellant in its petition for true up for FY 2018-19, had submitted audited accounts which indicated total Non-Tariff Income as Rs. 18.22 Crore; and after excluding Rs. 6.40 Crore towards treasury income and Rs. 3.72 Crore towards financing cost of DPS, the Appellant claimed that only Rs. 8.55 Crore was liable to be considered towards Non-Tariff Income for ARR purposes. The issue of financing cost of DPS has been dealt with in previous paragraphs, and the issue of inclusion of Treasury Income in Non-tariff Income for the purpose of calculation of ARR is dealt herewith.

With regard to the disallowance of exclusion of Treasury Income from total Non-tariff Income earned by the Appellant, the State Commission, in the Impugned Order extracted the table - Details of Non-tariff Income ("NTI") as per audited accounts as given below and considered the entire NTI of Rs 18.22 Crore for the purpose of Truing up for FY 2018-19.

Table 3-103: Details of Non Tariff Income as per Audited Accounts

Sl. No.	Description	Amount (Rs. Cr.)	Remark
1	Delayed payment charges	5.72	Note-26 of Audited Accounts
2	Processing charges	0.32	Note-26 of Audited Accounts
3	Disconnection and reconnection fees	1.28	Note-26 of Audited Accounts

4	Meter testing charges	0.36	Note-26 of Audited Accounts
5	Interest on investment & Dividend	0.16	Note-27 of Audited Accounts
6	Interest on Refund of Transmission Charges	2.39	Note-27 of Audited Accounts
7	Liquidated Damages recovery	0.99	Note-27 of Audited Accounts
8	Other Miscellaneous income	0.60	Note-27 of Audited Accounts
9	Interest Income on bank deposits	5.64	Note-27 of Audited Accounts
10	Gain on Sale of Short-Term investments	0.76	Note-27 of Audited Accounts
11	**Total Non-Tariff Income**	**18.22**	

We note with concern that no justification/reason with regard to disallowance of Treasury Income, so claimed by Appellant, from NTI is discernible from the Impugned Order as being put forth before us on behalf of State Commission, to imply that treasury income is incidental to the Licensed business. The Impugned Order further suffers from the absence of any factual determination on this aspect.

The UPERC (Treatment of other Business of Transmission and Distribution Licensee) Regulations, 2004 **("other Business Regulations"**) note the following broad category of income for a licensee i.e Distribution Licensee:

> *(i) Income from Licensed Business ……..*
> *(ii) Income from business incidental to electricity business/Non Tariff Income. …….*
> *(iii) Income from other Business ……..*
>
> *(iv) **Treasury income:** Income generated from the management of a company's cash and other financial assets, primarily including interest, dividends, and gains on investments. It's a broad category that encompasses various sources of income related to treasury activities*

Regulation 3.1(18) and Regulation 33(a) of the UPERC MYT Regulations, 2014 with regard to 'Non-Tariff Income' are given as under:

> *"3.1(18) Non-Tariff Income" means income relating to the licensed business other than from tariff (wheeling and retail*

supply), and excluding/deducting any income from other business, cross-subsidy surcharge, additional surcharge and expenditure incurred to earn such income;

…

33 Non-Tariff Income

a) All incomes being incidental to electricity business and derived by the Licensee from sources, including but not limited to profit derived from disposal of assets, rents, delayed payment surcharge, meter rent (if any), income from investments other than contingency reserves, miscellaneous receipts from the consumers and income to Licensed business from the Other Business of the Distribution Licensee shall constitute Non-Tariff Income of the Licensee.

Thus, as per UPERC "Other Business Regulations", Treasury Income is is expressly treated as distinct from both Non-Tariff Income and "Income from Other Business", and not regarded as incidental to the Electricity Business. As per MYT Regulations, 2014, income is considered "incidental" to the licensed business only if it arises from activities or assets directly linked to the distribution function. The said Regulations, however, also makes no reference that for the purpose of calculation of ARR, treasury income shall be considered as part of Non-Tariff Income. The Judgements referred by State Commission (***"Royal Talkies, Hyderabad v. Employees State Insurance Corporation", (1978) 4 SCC 204***, & "***State of Tamil Nadu v. Binny Ltd., Madras"***,) deals with the interpretation of an activity being related to or incidental to the primary business, like issue of running of canteen within a cinema premises and store run in the factory premises by a leading textile manufacturing company and held that these activities are incidental to their primary business. These judgements are not applicable to the facts of the present case as UPERC "Other Business Regulations" specify the

Treasury income to be separate from NTI & “Income from other Business” and MYT Regulations 2014, also does not specify that Treasury Income shall be included in NTI for the purpose of working out ARR.

As such, we find conflicting submissions put forth on behalf of State Commission; on one hand, it is submitted that in the absence of proof that the treasury income was a separate sum of money not otherwise earmarked for funding of Capex and earning of ROE and interest on notional loan, the State Commission has relied upon the audited accounts meaning thereby that subject to factual determination, treasury Income should have been reduced from Non-Tariff Income, as being non incidental to License business and on the other hand State Commission has contended that Treasury income is incidental to Licensee business and, therefore, forms part of Non-Tariff Income liable to be reduced while determining the ARR.

Treasury income typically refers to earnings generated from the investment of surplus funds in financial instruments such as fixed deposits, Government securities (including Treasury Bills), Bonds, Money market instruments. These investments are usually made by entities/ utilities to optimize returns on idle cash while maintaining liquidity and safety. The income so generated can be considered incidental to Licensee business if surplus funds arise from regulated operations e.g., consumer collections, working capital margins, depreciation reserves and investments are made until the funds are deployed for approved purposes, however same cannot be considered incidental to licensee business if generated out of shareholders own resources, and not utilised for the purpose of approved capital and operation expenditure. In the present case, the Appellant has claimed a treasury Income amounting to

Rs. 6.4 Crore to be excluded from Total Non-Tariff Income, as same has been generated upon the funds accrued through internal resources and not utilised for the purpose of capital Expenditure or other operational purposes.

The Electricity Act, 2003 imposes a clear obligation on State Commissions to conduct a prudence check of costs claimed by distribution licensees, especially at the stage of tariff determination. This duty is rooted in the Commission's role as a regulator ensuring fairness, efficiency, and consumer protection. As per Section 61 of the Electricity Act, 2003, the State Commission is to safeguard consumer interests and at the same time facilitate recovery of the cost of electricity in a reasonable manner, thereby ensuring commercial viability of the licensee. Prudence checks are indispensable to uphold these principles by verifying that claimed costs are necessary and reasonable, and not inflated. We fail to understand why exercise of factual determination of Treasury Income could not be undertaken by the State Commission at the time of passing of Impugned Order and is being contended that the Appellant would need to make good its assertion made in True up Petition for FY 2018-19 that *"this income is … not utilised for the purpose of capital expenditure or other operational expenses"* or that *this income… has not been considered as part of ARR"*. It is pertinent to note that through various deficiency notes/data gap notes, State Commission has sought further details about financing Cost of DPS, however our attention is not drawn towards any such details sought by the State Commission, which would facilitate the factual determination of treasury Income of Rs 6.4 Crore claimed by Appellant.

We are also of the view that the claim of Rs 6.4 crore for treasury Income would require factual determination as part of prudence check, and the

Appellant has also consented for such factual determination either by this Tribunal or by State Commission upon remand of the matter. We therefore feel, it is unnecessary for us to deliberate various other rival contentions raised on behalf of the Appellant and the State Commission.

In view of above deliberations, we are of considered view that Treasury Income so generated out of shareholders' funds is to be excluded from total Non-Tariff Income appearing in Audited accounts for working out the ARR requirement in True up of FY 2018-19. The matter is remanded to the State Commission to undertake exercise of factual determination of such Treasury Income and Appellant shall provide all requisite information as desired by State Commission in this regard.

SECTION 3 (POWER PURCHASE ISSUES): ISSUE NOs. 3 TO 5 COST OF SHORT-TERM POWER, BANKING OF POWER AND SALE OF SURPLUS POWER,

ISSUE 3 : DISALLOWANCE OF THE ACTUAL COST OF SHORT-TERM POWER PROCURED BY THE APPELLANT DURING FY 2018-19.

A. SUBMISSION URGED ON BEHALF OF NPCL

Learned senior Counsel pointed out that reasons for disallowance of actual cost of Short Term power procured beyond 191.85 MUs are mentioned in Paras 3.6.57, 3.6.58, 3.6.65, 3.6.68 to 3.6.70, of the Impugned Order, however during the hearing, learned senior Counsel on behalf of State Commission, without substantiating the reasons given in Impugned Order, has tried to justify such disallowance on the reasons which are extraneous to the Impugned Order itself as well as the reply filed by the State Commission. State Commission has effectively, not only sought to supplant its findings in the Impugned Order, but has virtually created a new Impugned Order, both of which are impermissible

in law. Without prejudice to the admissibility of such contentions, the same along-with the response to the reasons contained in the Impugned Order are dealt herewith.

In the Tariff Order dated 22.01.2019 (ARR for FY 2018-19), State Commission has approved the total quantum of 2015.01 MUs power procurement, which included quantum of short-term power procurement of 315.71 MUs and based on the said approval, the tariff was determined and recovered by the Appellant. From the approved quantum of 315 MUs for short-term power procurement, a quantum of 191.85 MUs were from named sources i.e., from AD Hydro Power Ltd. and APPCPL and the balance quantum was to be procured from sources not named or approved, while the quantum for power procurement stood approved. The Tariff Order dated 22.01.2019 has approved Rs. 4.76/kWh as average rate for short-term power procurement (excluding transmission charges) and basing on that Appellant, in addition to the named sources, procured required quantum of power from Power Exchange, Mittal Processors Pvt. Ltd., Shree Cements Ltd. and other sources at a rate of Rs. 4.54/kWh (excluding transmission charges), which is less than the rate approved in the Tariff Order dated 22.01.2019 (ARR for FY 2018-19).

It is submitted that, while allowing the entire quantum of short-term power procurement, State Commission, in the Impugned Order, instead of approving the actual rate which was within the approved weighted average rate under the Tariff Order dated 22.01.2019, has reduced the same by drawing reference to the first proviso to Regulation 19(d) of the MYT Regulations, 2014. This disallowance of the actual rate is contrary to the Tariff Order dated 22.01.2019 and to Regulation 19(d) of the MYT

Regulations, 2014. Learned senior Counsel submitted that State Commission, having approved the quantum and rate for power procurement in the ARR for FY 2018-19, could not have changed the same at the stage of true-up. This is contrary to the settled position of law, as laid down by the Hon'ble Supreme Court in **BSES Rajdhani Power Ltd. vs. Delhi Electricity Regulatory Commission, (2022) SCC Online SC 1450 ("BSES Judgement").**

It is submitted that reliance placed by State Commission now on Regulation 19(d) of the MYT Regulations, 2014 is misplaced as it is applicable only when the licensee procures power over and above the total quantum approved by the State Commission. However, in the present case, procurement by the Appellant licensee is within the approved quantum of 2015.85 MUs and within the approved rate of Rs. 4.76/kWh for short term power procurement. Also, the arguments addressed by learned senior Counsel on behalf of State Commission with reference to Section 86(1)(b) of the Electricity Act, 2003, are inconsistent with the mandate of law. Notably, the learned senior Counsel for the State Commission, while seeking to justify the application of Regulation 19(d) of the MYT Regulations, 2014, has also accepted the error in applying the first proviso to Regulation 19(d), to the extent it has taken weighted average rate for the whole year, instead of the rate for the same quarter. Furthermore, the State Commission, while observing in the Impugned Order that a prior approval was not obtained by the Appellant, has itself approved the power procured from Mittal Processors Pvt. Ltd. and other sources, including renewable energy sources, which also fall under the same category as other procurements. For the above reasons, Impugned Order is unsustainable and need to be set aside and disallowance made in the Impugned Order to be allowed by this Tribunal

along with Carrying cost.

B. SUBMISSION URGED ON BEHALF OF STATE COMMISSION

Learned senior Counsel submitted that during the tariff period FY 2018–19, the Appellant, procured a total of 551.69 MUs of electricity on short-term basis, of which 315.42 MUs were purchased from Shree Cements Limited **("SCL")**, out of the said 315.42 MUs, a substantial quantum of 204.91 MUs was banked for utilization by the Appellant in FY 2019–20 and a quantum of 99.42 MUs was utilized by the Appellant in FY 2018-19, the State Commission approved a rate of Rs.3.85/unit as against the claim of Appellant for Rs.4.67/Unit. It is submitted that the said procurement of power from SCL during FY 2018-19 was effected through a series of bilateral agreements negotiated between the Appellant and SCL without obtaining prior approval from the UPERC as required under Section 86(1)(b) of the Electricity Act, 2003. As per the proviso - 1 to Regulation 19 of the UPERC MYT Regulations 2014, the cost of additional power procured through bilateral "shall be capped by the lower of the weighted average price of power exchange rates or bilateral market purchases".

It is undisputed that the weighted average price of purchase from the power exchange during FY 2018-19, at Rs. 3.88/unit, is lower than the price shown by the Appellant for bilateral purchase from SCL at Rs. 4.67/unit. The Appellant has indicated that it purchased 84.27 MUs from the power exchange at Rs. 3.85/unit throughout FY 2018-19. Though the Appellant has not demonstrated that it suffered any loss or prejudice due to UPERC applying the weighted average price of the power exchange for the entire FY 2018-19 instead of on a quarterly basis. it has

contended that Regulation 19, along with Proviso 1 thereto, has no application to its bilateral power purchase from SCL for FY 2018-19.

As regards the contention of the Appellant that Regulation 19 (d) applies only when "short-term requirement of power by the Distribution Licensee" is "over and above the quantum as approved by the Commission" in the concerned Annual Revenue Requirement" (ARR) order, (i) since only 99.42 MUs were purchased from SCL for use in FY18-19, NPCL did not exceed the total quantum of 2015.01MU approved by the UPERC in NPCL's ARR for FY2018-19 inasmuch as NPCL's aggregate power purchase quantum on True-up for FY 18-19 stood at 2010.94MUs; (ii) that the price of short-term power procured during FY18-19 from SCL is within the rate of Rs.4.76 /Unit that was approved by the UPERC in the said order; (iii) that the information about short-term purchase of power from SCL during FY18-19 was conveyed to the UPERC which has approved the said procurement from SCL; (iv) that UPERC has not given any reason for reducing the rate of short-term purchase from SCL, learned senior Counsel submitted that no approval was obtained from UPERC for any procurement of power from SCL during FY 2018-19, either in the ARR or APR Orders. The Appellant, vide its letter dated 24.09.2018, submitted some information regarding ongoing short-term power procurement during FY 2018-19 but made no reference to any such procurement from SCL, though relied on this letter for claiming that UPERC was informed and had approved such procurement. However, the said letter only disclosed previous purchases from SCL for FY 2016-17 and FY 2017-18 for true-up purposes and made no disclosure for FY 2018-19. Learned senior Counsel submitted that it is settled law that the approval of the State Commission under section 86 (1) (b) for any or all power purchase agreements entered by the

distribution licensee is mandatory, absence of which makes the said agreement void as held in the judgement of this Tribunal in **Ritwik Energy Generation Pvt. Ltd. Vs. Karnataka Power Transmission Corporation Ltd (in Appeal 51 of 2011) dated 21.10.2011 and Adani Power Ltd. vs. PSERC & Anr. (in Appeal No. 167 of 2020) judgement dated 25th September, 2024.**

Learned senior Counsel submitted that UPERC's approval of short-term power procurement at Rs. 4.76/unit for 315.71 MUs in the ARR Order dated 22.01.2019 is merely an estimate and not an approval under Section 86(1)(b) of the Electricity Act, inasmuch as Regulation 19(d) exists to permit cost of power purchase from short term requirement (over and above the quantum approved by the UPERC) to be directly passed on to the customer without prior approval of the Commission. Proviso-1 to Regulation 19(d) caps such cost recovery to the weighted average price of power exchange rates, which serve as a transparent and market-based benchmark for short-term power market price. Regulation19 (d) takes colour from section 86 (1) (b) and thereby provides a post-facto approval/ cap/ disapproval mechanism for power purchased by Discom/ NPCL to tide over "a short-term requirement".

It is submitted that even if a Discom furnishes timely information to the State Commission as regards power purchases exceeding the approved quantum, UPERC has no discretion to relax the cap under Proviso-1 to Regulation 19(d) in the case of bilateral short-term purchases.

Learned senior Counsel contended that in case interpretation posited by the Appellant that Regulation 19 (d) comes into play only in case the short -term requirement of Discom/ NPCL is over and above the aggregate quantum, including estimated power purchase, previously

approved in the ARR, is accepted then it would lend to several inconsistencies and absurdities, besides leaving a gap in the regulatory power of the Commission under section 86 (1) (b).

In the present case, if the entire short-term power procurement of 315.42 MUs from SCL during FY 2018-19 is considered, then NPCL has exceeded the approved quantum of 2015.01 MUs, thereby attracting Regulation 19(d), even assuming the interpretation advanced by the Appellant to be correct. The Appellant, however, contends that only 99.42 MUs be considered under Regulation 19(d), as the remaining was banked and not utilized during FY 2018-19. Learned senior Counsel submitted that this interpretation would lead to splitting of same source of short term purchases into two part- one part excluded from regulation under Reg. 19 (d); and another part of the same source of short-term purchase included for Regulation19 (d).

The ARR order for FY 2018-19, like all ARR orders, merely records estimated short-term power requirements and projected costs, based on anticipated market conditions, and that does not constitute approval of specific contracts and therefore, the procurement from SCL during FY 2018-19 squarely falls within the ambit of Regulation 19(d). Learned Counsel further submitted that the interpretation posited by the Appellant would lead to many situations in which short -term power purchase contracts would remain unregulated as long as they remain within the estimated quantum and estimated cost that is “approved” in advance by the Commission in the ARR order. It is submitted that this would be contrary to the provisions of section 86 (1) (b) read with section 61, 62 and 63 of the Electricity Act. Regulation 19 (d) should be interpreted in a manner consistent with section 86 (1) (b) and in aid of the aforesaid statutory scheme.

Learned senior counsel placed reliance on the following judgments in support of the proposition that the expression “over and above the quantum as approved by the Commission” in Regulation 19 (d) may be interpreted in accordance with the scheme of the statutory provisions namely, section 81 (1) (b), section 61, 62 and 63 & 64 of the Electricity Act, 2003:

1. **Swedish Match AB vs Securities and Exchange Board of India reported in (2004) 11 SCC 641**
2. **UP Bhoodan Yagna Vs Braj Kishore (1988) 4 SCC 274**
3. **Narendra Madivalapa Kheni vs Manikrao Patil (1977) 4 SCC 16**
4. **Avishek Goenka Vs UOI (2012) 5 SCC 321**

It is submitted that in the Impugned Order, State Commission has observed that apart from SCL there were four other sources from which Appellant procured short-term power for distribution to consumers during FY2018-19 viz, (i) Arunachal Power Corporation Pvt Limited (APPCPL): 82.82MUs; (ii) AD Hydro Power Ltd: 58.27 MUs; (iii) Mittal Processor Private limited : 9.45MUs; and (iv) Actual purchase from Power Exchange: 84.27 Mus; in case of APPCPL and AD Hydro, the State Commission has allowed as per its previous approval and in case of Mittal Processors the State Commission has allowed at the rate of Rs. 4.11/Unit, however, insofar as the short-term power purchased from SCL is concerned (i.e. 99.42 MU admittedly utilized in FY18-19 by NPCL) the Commission has applied proviso-1 to Regulation 19 (d).

C. CONSIDERATION AND OUR VIEW : DISALLOWANCE OF THE COST OF SHORT-TERM POWER PROCURED BY THE APPELLANT DURING FY 2018-19.

In FY 2018-19, the Appellant has procured a total of 551.69 MUs of power, out of which some power has been banked for use in FY 2019-

20. In view of submissions made by the Appellant, that for the purpose of truing up of FY 2018-19, the procurement of short term power done in FY 2018-19 which was banked for utilisation in FY 2019-20 is not an issue, deliberation/adjudication is being limited with regard to procurement of short term power for utilisation in FY 2018-19.

The relevant paragraphs from the Impugned Order related to short-term power procurement are reproduced here in below :

> ***"3.6.57*** *Further, it is observed that the Petitioner bought short term power of 326.33 MUs at the rate of 4.65/kWh amounting to Rs. 151.96 Crore from unapproved sources and did not even inform the Commission.*
>
> ***3.6.58*** *Further, the excess quantum of 326.33 MU bought by the Petitioner, it engaged in Banking of power also, as discussed hereunder.*
>
> ---
>
> ***3.6.65*** *In terms of the above Regulations, the Commission is of the view that the Petitioner indulged in excess purchase of short-term power and Banking therein without any prior approval of the Commission. Also, neither it took consent about the Banking of Power and neither did it inform the Commission about the same. Accordingly, in terms of Regulation 19 of UPERC (Multi Year Distribution Tariff) Regulations, 2014, the Commission disallows additional short-term power bought and Banking of Power done in FY 2018-19 except for the approved portion of Banking of power which was allowed in FY 2017-18.*
>
> ---
>
> ***3.6.67*** *The Commission for the True Up of FY 2018-19, approves the short-term power which was approved by the Commission i.e. power procured from APPCL and A.D Hydro. The Commission has also approved the contingency power procured by the Petitioner i.e. MPPL and the power procured from exchanges.*
>
> ***3.6.68*** *Further, the Commission observed that the Petitioner had purchased extra quantum from short-term sources and indulged in banking the power. The power procured by the Petitioner from*

unapproved sources is being disallowed, the Commission directs the Petitioner to take prior approval of Commission for short-term procurement (other than from exchanges) and for banking of power in future. The Commission, for approval of power procured from Short-Term other than APPCL, AD hydro and MPPL, has considered the remaining requirement to be fulfilled through power exchanges. The Commission has approved the same rate of power purchase from exchanges as claimed by the Petitioner i.e. Rs. 3.85/kWh, which translates to Rs 4.08/kWh at NPCL bus, since it is lower than the average rate of RTC power for FY 2018-19 i.e. Rs. 3.88/kWh. The Commission directs the Petitioner that in future it should strictly follow the Central Government Guidelines for Procurement of power for short term (i.e. for a period more than one day to one year) by Distribution Licensees through tariff-based bidding process using National e-bidding portal-reg dated March 30, 2016. The link for the same is provided below:"

3.6.69 *Accordingly, the Commission for FY 2018-19 for procurement of power from short term allows the power as shown in Table below:*

Table 3-32: Power procurement for Short-Term for FY 2018-19 (excluding Transmission)

Supplier's Name	True up Petition (FY 2018-19)			Approved (FY 2018-19)		
	MU	Per Unit Cost	Total (in Rs. Cr)	MU Imported at NPCL bus	Per Unit Cost	Total (in Rs. Cr)
Arunachal Power Corporation (P) Ltd. (APPCPL)	82.82	4.81	39.84	82.82	4.81	39.84
Shree Cements Ltd	315.42	4.67	147.25			
Mittal Processors Private Limited (MPPL)	9.45	4.23	4.00	9.45	4.11	3.89
AD Hydro Power Ltd	58.27	4.12	24.01	58.27	4.12	24.01
Power Exchange (actual)	84.27	4.08	34.40	84.27	4.08	40.71
Power Exchange (Deemed)				99.72	4.08	40.71
Others	1.45	4.88	0.71	1.45	4.11	0.60
Subtotal	**551.69**	**4.54**	**250.22**	**336.01**	**4.27**	**143.45**

Main observation discernible from the Impugned Order with regard to disallowance of procurement of short term power are; i) the Appellant

procured Power from unapproved sources without obtaining the prior approval of the State Commission for such procurement; and ii) the Appellant indulged in excess procurement of short term power and banking of power without prior approval of the State Commission, which is not permitted as per Regulation 19 of UPERC MYT Regulations, 2014 and therefore, such procurement has been disallowed/capped.

We take note that the State Commission in its ARR order dated 22.01.2019 for FY 2018-19, under Paragraph 5.4.11, has approved following Power Purchase Quantum & Cost:

*"**5.4.11** Accordingly, the power purchase cost approved by the Commission for FY 2018-19 is less than that claimed by the Petitioner as shown in the Table below:*

TABLE 5-10 APPROVED POWER PURCHASE QUANTUM & COST FOR FY 2018-19

Sources of Power Purchase	***Petition***			***Approved***		
	Energy (MU)	***Avg. (Rs. /kWh)***	***Cost (Rs. Crore)***	***Energy {MU)***	***Avg. (Rs. /kWh)***	***Cost (Rs. Crore)***
Long Term Power	***1417.38***	***4.52***	***640.71***	***1417.38***	***4.27***	***604.98***
Long Term Power- DIL	*1170.54*	*4.42*	*516.97*	*1170.54*	*4.42*	*516.97*
Medium Term MTPPA	*246.84*	*3.57*	*88.00*	*246.84*	*3.57*	*88.00*
Arrears			*35.73*			*0.00*
Unscheduled Interchange	***-43.38***	***-1.00***	***4.34***			***0.00***
Power Purchase from Traders	***376.36***	***4.76***	***179.17***	***315.71***	***4.76***	***150.28***
Power Purchase from Traders (RTC)	*209.08*	*4.63*	*96.80*	*166.81*	*4.62*	*77.04*
Power Purchase from Traders (Peak)	*167.28*	*4.92*	*82.37*	*148.89*	*4.92*	*73.24*
Power Purchase from RE	***280.89***	***4.81***	***135.04***	***281.44***	***4.80***	***135.04***
Power Banking	***-9.08***		***-3.51***			
Excess power for sale						
Sub-Total	***2022.17***	*4.73*	***955.74***	***2015.01***	***4.42***	***890.30***
Total Transmission charges		***0.79***	***160.43***		***0.64***	***129.71***

Transmission charges of PGCIL			*98.87*			*88.06*
Transmission charges of UPPTCL			*61.56*			*41.65*
Total Power Purchase Cost	***2,022.17***	***5.52***	***1,116.17***	***2,015.01***	***5.06***	***1,020.01***

From the above table, it is observed that a total of 2015.01 MUs quantum of power was approved for FY 2018-19 consisting of 1417.38 MUs under Long term arrangements, 315.71 MUs from traders, and 281.44 MUs from RE sources. Out of the 315.71 MUs of power purchase from traders, which is under short term power procurement, about 166.81 MUs is estimated to be on Round The Clock (RTC) basis and 148.89 MUs as peak power.

Impugned Order noted that for procurement of short term power FY 2018-19, only two sources were approved by the State Commission namely Arunachal Pradesh Power Corporation (P) limited (Non RTC) and M/s PTC India Limited (RTC Power – AD Hydro), aggregating to approximately 191.85 MUs and since no prior approval was taken for procurement of short term power from sources other than the approved sources, and more than required short term power was procured and banked, the same is disallowed in terms of Regulation 19 of UPERC MYT Regulations, 2014. Referred Regulation is reproduced hereunder:

UPERC MYT Regulation 2014

"19. Power Purchase Quantum and Cost

a) Based on the demand estimates the power purchase quantum and cost shall be Calculated.

b) The approved Power Purchase cost shall be net of expected revenue from sale of Surplus power, if any, during lean period.

c) Revenue from sale of surplus power shall be estimated at per unit weighted average price of bilateral purchases and power exchange rates for the same quarter, subject to truing up.

d) If there is a short term requirement of power by the Distribution licensee over and above the quantum as approved by the Commission and such requirement is on account of any factor beyond the control of the Licensee (shortage / non availability of fuel, snow capping of hydro resources inhibiting power generation in sources stipulated in the plan, unplanned / forced outages of power generating units or acts of God), then the cost shall be directly passed on to the customer without prior approval of the Commission.

Provided that the cost of the additional power shall be capped by the lower of the weighted average price of power exchange rates or bilateral market purchases for the same quarter.

Provided further that in such a case, the Distribution Licensee shall inform the Commission about the purchase of power over and above approved quantum with all the details. In case the Commission is not satisfied by the quantum and/or rates, the Commission may disallow the same in the True Up"

Learned senior Counsel for the Appellant has contended that since total power procurement for the FY2018-19 is within the overall approved quantum of 2015.85 MUs as per ARR Order for FY 2018-19, the same ought to be approved in entirety, in terms of Regulation 19(d) of the MYT Regulations, 2014. *Per Contra*, learned Senior Counsel for the State Commission has contended that since only two sources were approved for short term power procurement for FY 2018-19, any short term power purchase from non-approved sources be regulated as per proviso to Regulation 19 (d) of MYT Regulations, 2014 and furthermore accepting the interpretation advanced by Appellant with regard to Regulation 19 would lend inconsistency and absurdities besides leaving a gap in the regulatory power of the commission under Section 86 (1) (b) of the Electricity Act, 2003.

There is no dispute that State Commission vide its order dated

06.08.2018, adopted the Tariff under Section 63 of the Electricity Act, 2003 for procurement of short term Power for FY 2018-19 from M/s PTC India Limited (AD Hydro) and M/s APPCL, in the petition filed by Appellant. It is also noted from Table 5-10 of the ARR order dated 22.01.2019, that though the Appellant has claimed a total requirement of 2022.17 MUs for FY 2018-19 including 376.36 MUs under Short Term power procurement, State Commission has approved a total Power procurement of only 2015.01MUs which included 315.71 MUs under short Term. The average rate of such procurement of short term power was also indicated as Rs 4.76/kWh, which seems to have been arrived after considering the price of power from sources approved vide order dated 06.08.2018. Thus, in our view, while passing the ARR order dated 22.01.2019 for FY 2018-19, the State Commission did approve a total quantum of 315.71MUs under short term power procurement at average price of @ Rs.4.76/kwh for entire short term procurement of 315.71 MUs against what is claimed by Appellant. Our attention has not been drawn to any observation of the State Commission in the ARR Order dated 22.01.2019, that approval of balance quantum in 315.71 MUs (over and above 191.85 MUs) under short term procurement is subject to any further approval from State Commission. Generally, when an ARR order is approved for a particular Financial Year, with no specific direction, then during it's True up stage, State Commission's role becomes one of retrospective validation and adjustment. At the ARR stage, data used is projected or partial actual data and at True up stage it is Audited actuals so at the True up stage, State Commission is to compare actual audited figures (expenses, revenues, sales, losses) with those used in APR and Identify deviations—whether under- or over-recovery. In this regard, reference is made to the judgment of the Supreme Court in "***BSES Rajdhani Power Ltd. vs. Delhi Electricity Regulatory Commission***'**,**

(2022) SCC Online SC 1450 ("BSES Judgement"), wherein it has been held that State Commission, at the *True-Up* stage, cannot change the rules/ methodology used in initial tariff determination by revisiting or reinterpreting the basic principles, premises and issues involved in the initial projection of ARR; the relevant Paragraphs of the said judgment is quoted below :

> ***"55.*** *"Truing up" has been held by APTEL in State Load Despatch Centre v. Gujarat Electricity Regulatory Commission [State Load Despatch Centre v. Gujarat Electricity Regulatory Commission, 2015 SCC OnLine APTEL 50, para 17] to mean the adjustment of actual amounts incurred by the licensee against the estimated/projected amounts determined under the ARR. Concept of "truing up" has been dealt with in much detail by APTEL in its judgment in North Delhi Power Ltd. v. Delhi Electricity Regulatory Commission [North Delhi Power Ltd. v. Delhi Electricity Regulatory Commission, 2007 SCC OnLine APTEL 16 : 2007 ELR (Aptel) 193] wherein it was held as under : (North Delhi Power case SCC OnLine APTEL para 60)*
>
> *"**60**. Before parting with the judgment we are constrained to remark that the Commission has not properly understood the concept of truing up. While considering the Tariff Petition of the utility the Commission has to reasonably anticipate the Revenue required by a particular utility and such assessment should be based on practical considerations. … The truing up exercise is meant (sic) to fill the gap between the actual expenses at the end of the year and anticipated expenses in the beginning of the year. When the utility gives its own statement of anticipated expenditure, the Commission has to accept the same except where the Commission has reasons to differ with the statement of the utility and records reasons thereof or where the Commission is able to suggest some method of reducing the anticipated expenditure. This process of restricting the claim of the utility by not allowing the reasonably anticipated expenditure and offering to do the needful in the truing up exercise is not prudence."*
>
> ***56.*** *This view has been consistently followed by APTEL in its subsequent judgments and we are in complete agreement with the above view of APTEL. In our opinion, "truing up" stage is not an*

opportunity for the DERC to rethink de novo on the basic principles, premises and issues involved in the initial projections of the revenue requirement of the licensee. "Truing up" exercise cannot be done to retrospectively change the methodology/principles of tariff determination and reopening the original tariff determination order thereby setting the tariff determination process to a naught at "true-up" stage."

In our view, the State Commission has erred in failing to adhere to the ratio laid down by the Supreme Court in the "***BSES Rajdhani Power Limited v. Delhi Electricity Regulatory Commission"*** (2022) SCC OnLine SC 1450, while passing the Impugned Order for the True-Up of FY 2018-19.

The State Commission has disapproved the quantum and rate of short-term power procurement that had already been approved in its ARR Order dated 22.01.2019 for the same financial year, thereby departing from the settled regulatory principles governing the *True-Up* process. We also find contradiction in the approval methodology adopted by State Commission in the Impugned Order; on one hand it is stated that short term power procurement from unapproved sources (sources other than M/s APPCL and M/S AD Hydro), shall not be approved and accordingly short power purchase from Shree Cement Limited ("SCL") was unapproved and balance short term power consumed in FY 2018-19, was deemed to be taken from power Exchange and price capped at Rs 4.08.kwh as against the claimed purchase cost of Rs 4.67/kwh for SCL applying proviso to Regulation 19 (d) of UPERC MYT Regulations, 2014, while on the other hand, short Term power purchase from Mittal Processor Private Limited (other unapproved source as per State Commission) has been approved as claimed. Thus, we note with concern the selective approval methodology and inconsistency in the approval approach adopted by the State Commission in the Impugned Order for

discrimination amongst unapproved sources even if we accept the interpretation positioned by State Commission with regard to Regulation 19 of MYT Regulation, 2014.

Distribution Licensees typically procure power based on a quantum approved by the Commission through long-term PPAs and other planning exercises as per ARR Order. However, in actual operation, unexpected shortfalls may arise due to factors beyond the control of Distribution Licensee, thereby necessitating short-term requirement for additional power due to uncontrollable factors, such as Fuel shortages or non-availability, Snow capping of hydro resources (seasonal/geographic constraints), Forced or unplanned outages of generating units and *Acts of God* (natural disasters, etc.). In this context, we are of the view that Regulations 19 of UPERC MYT Regulations, 2014, contemplates such circumstances as being in the nature of *force majeure*-like events and, accordingly, exempts the Licensee from prior regulatory scrutiny. At the same time, in order to safeguard consumer interests, the regulation provides that the cost of such additional power is capped at lower of weighted average price of power exchange (e.g., IEX, PXIL) for the same quarter and bilateral market purchase price for the same quarter. This shall ensure that even in exigency, the Licensee cannot pass on exorbitant costs to the consumer. Regulation 19 allows flexibility to the Distribution Licensee, while at the same time, price cap ensures fairness. It balances operational exigency with regulatory oversight.

In the present case, the issue involved is not about purchase of additional power over and above quantum approved or of additional short term power purchase due to the exigencies as mentioned above so as to substitute quantum of power already approved. The issue in the present case is of purchase of short-term power, within the quantum of short-term

power approved as part of ARR order for FY 2018-19. Learned Senior Counsel for State Commission has contended that since such a procurement is from unapproved sources, the proviso to Regulation 19 (d) will apply. However, we have already held above that as per ARR order (FY 2018-19) dated 22.01.2019, State Commission has already approved quantum of 315.74 MUs of short term power and average purchase price for such short term power, we are therefore of the considered view that proviso to Regulation 19 (d) is not applicable in the present case and there is no gap in the Regulatory oversight by the State Commission over power procurement by Distribution Licensee and principle of True up should be followed with regard to verifying the cost of such procurement with audited accounts of the relevant financial year.

There is no dispute that it is the State Commission which regulates the entire process of purchase and procurement of power by each distribution licensee in the State by virtue of power conferred upon it under Section 86(1)(b) of the Electricity Act 2003. It is also important to note the basic difference between the Long term and short term power procurement by Distribution licensee, while the long term power procurement is usually for 7 to 25 years to ensure stable and predictable supply over time mostly either through government allocation or competitive bidding, while the short term power procurement is to meet temporary demand spikes or deficits and is generally through bilateral contracts, power exchanges or auctions. Such procurement is governed by guidelines issued by the regulatory commissions, encompassing provisions related to open access and real-time market mechanisms.In the present case, it is observed that no specific regulations/guidance were referred/provided to by the learned senior Counsel on behalf of State Commission, which specifies requirement of prior approval for each contract under short term

power procurement.It is further noted that similar short-term power procurement arrangements had been duly approved by the State Commission during the *True-Up* proceedings of previous years as well as in the ARR Order for FY 2018-19 and from some sources other than approved sources .

Learned Senior counsel for State Commission has placed reliance on two judgements of this Tribunal (**Ritwik Energy Generation Pvt. Ltd. Vs. Karnataka Power Transmission Corporation Ltd** (in Appeal 51 of 2011) dated 21.10.2011 and **Adani Power Ltd. vs. PSERC & Anr.** (in Appeal No. 167 of 2020) dated 25th September, 2024**)** to contend that approval of the State Commission under section 86 (1) (b) for any or all power purchase agreements entered by the distribution licensee is mandatory, absence of which makes the said agreement void. In the Ritwik Energy judgement *(supra)*, Ritwik Energy developed a 24.75 MW hydel project and signed a PPA with BESCOM on 3rd May 2007. The PPA was forwarded to KERC for approval but was returned by Commission on 6th june2007 citing exhaustion of BESCOM's procurement quota from renewable sources under the 2004 Regulations. However, Ritwik Energy later entered into a new PPA with M/s PTC India Ltd. and sought open access. KERC rejected Rithwik Energy's plea that the original PPA with BESCOM was invalid as same was not approved. In the Appeal before this Tribunal, Rithwik Energy challenged this rejection and sought clarity on whether the returned PPA constituted a valid and binding agreement. This Tribunal in the judgement noted that the distribution licensee has to obtain the consent of the State Commission for procurement of power against the PPA. If the consent is denied by the State Commission, the PPA shall become void as per Section 25(3) of the Karnataka Electricity Reform Act and Section 86 (1)(b) of the 2003 Act, however the PPA had only been returned by the

Commission and had not been formally rejected or terminated. This Tribunal upheld the decision of State Commission for not allowing Ritwik Energy to wriggle out of the signed PPA, though not approved by State Commission, however pointed out lack of procedural clarity at the end of State Commission and held that Ritwik Energy's reliance on the returned PPA to justify entering a new agreement was not legally sustainable without formal termination of the earlier PPA. The relevant Paragraph from the judgement is noted below:

"On the first issue regarding the validity of the PPA, we find that the State Commission had returned the PPA on 6.6.2007 as the quantum of power purchase by the respondent no. 2 from the renewable sources exceeded the limit of 10% of input energy as stipulated in the Regulations but with the intimation that the State Commission had floated a discussion paper for amending the Regulations following the order from the State Government. These Regulations were subsequently amended. In March Page 65 of 69 Appeal No. 51 of 2011 & I.A. No. 113 of 2011 2008 the State Commission asked the respondent no. 2 to inform the appellant to pay the necessary processing fee to process the PPA. Accordingly, the respondent no. 2 informed the appellant to pay the processing fee. The appellant instead of approaching the State Commission signed a PPA with PTC Ltd. for sale of power from its hydro project on 27.6.2008, at the back of the respondent no. 2. The power plant of the appellant was originally scheduled for commissioning in August 2008 but was actually commissioned only in September 2009. The appellant was aware of the provisions of the Regulations regarding upper limit of renewable purchase obligation of the respondent no. 2 and order of the State Government regarding increase in the upper limit to 20% at the time of signing of the PPA. Time taken in the regulatory process to revise the Page 66 of 69 Appeal No. 51 of 2011 & I.A. No. 113 of 2011 Regulations should not be a reason for the appellant unilaterally considering the PPA as void and signing another PPA with PTC Ltd. at the back of the second respondent, when the Regulatory process was completed much before the commissioning of the project and before signing of the PPA with PTC Ltd. Accordingly, this issue is decided against the appellant. The appellant and the respondent no. 2 are directed to approach the State Commission with the necessary processing fee for obtaining the formal consent of the State Commission to the PPA."

In the said judgement, when Rithwik energy entered into subsequent PPA with M/s PTC India Limited, even when PPA between Rithwik energy and BESCOM was not approved by the State Commission, this Tribunal held that the PPA entered with BESCOM is legally valid and parties to approach State Commission for obtaining formal approval. In our considered view referred judgement is not applicable to the facts of the present case, as in the instant case, State Commission itself has approved the quantum and rates for short term procurement under the ARR Order for FY 2018-19.

In **"Adani Power Ltd. vs. PSERC (in Appeal No. 167 of 2020)**, issue pertained to approval of long term PPA signed on 29.09.2006 between Discom (PSPCL) and Udipi power), for 10 % of power generated from the project (2*600 MW), in which Discom expressed its inability to schedule power from the Udipi project, vide its letter dated 17.12.2018, till the PPA dated 29.09.2006 is approved by the Commission. The capital cost of the project was approved by Central Commission vide its order dated 25.10.2005. Discom had not scheduled any power from the Udipi Project subsequent to commissioning of its units (units commissioned in Nov 2010 and Aug 2012) and entire power was scheduled to other Discoms (Karnataka) with which it had agreement for sale of 90 % of power from the project. On the request of PSPCL in Nov 2015, Udipi Power agreed to divert share of PSPCL to Karnataka Discom for a period of three years without any financial implications to PSPCL. In Sept 2018, Udipi power approached PSPCL for scheduling of their share power as period of three years is getting expired in December 2018, however PSPCL informed it is not viable for them to procure power from the project and asked Udipi power to continue to sell it to third parties, which was not accepted by Udipi power. Subsequently, in Dec 2018, PSPCL informed Udipi Power/ Adani Power

that scheduling of power from the Udipi project under the PPA shall be only subsequent to approval of PPA dated 29.09.2006 by State Commission and approached State Commission for the approval of PPA. The State Commission, in its order dated 07.08.2020 held that need for Discom (PSPCL) to procure power from Udipi project on long term basis has not been established and it would not be economically viable preposition for Discom to purchase power at the given price so determined by CERC, when cheaper power is available in the market. State Commission further held that approving the PPA dated 29.09.2006, would affix liability on Discom to pay fixed charges, even if power is not availed, which would not be in the interest of consumer and did not approve the PPA. The order of State Commission was assailed before this Tribunal by Udipi project / Adani Power. The issue involved in this case pertains to long term procurement of power and this Tribunal opined that by virtue of power conferred under Section 86(1) (b) of the Electricity Act, it is the State commission which regulates the entire process of purchase and procurement of power by each Distribution Licensee in the State. This Tribunal took note of the Regulation 46 of PSERC(Conduct of business Regulation), 2006, which specifically mandates *that* ***" Distribution licensee shall not enter into binding or enforceable contractual commitments of such long term power purchase till the commission by a general or special order approves the procurement of electricity by the distribution licensee"*** and held that it is mandatory for DISCOM within the state to satisfy the commission about the need of additional power on long term basis and that such procurement is economical and held that PPA becomes effective only upon getting approval from the State Commission and till then parties are precluded from enforcing any right under the same.

Reliance placed on this judgement is of no avail to State Commission, considering that the facts of the present case are different from the facts in the referred Judgement. Present case pertains to short term procurement of power for the FY 2018-19, and our attention has not drawn by State Commission to any Regulations which mandates approval of PPA for short term procurement of power and as such in the present case, the State Commission has already approved quantum and rate of such short-term power procurement under ARR Order dated 22.01.2019 for FY 2018-19.

Placing reliance on the judgements of Supreme Court; **Swedish Match , UP Bhoodan Yagna, Narendra Madivalapa Kheni, Avishek Goenka (Supra),** Learned senior Counsel for the State Commission contended that the expression "over and above the quantum as approved by the Commission" in Regulation 19 (d) may be interpreted in accordance with the scheme of the statutory provisions namely, section 81 (1) (b), section 61, 62 and 63 & 64 of the Electricity Act, 2003)

The law declared by the Supreme Court, in **Swedish Match AB v. SEBI, (2004) 11 SCC 641,** is that, where an expression is capable of more than one meaning, the Court would attempt to resolve that ambiguity in a manner consistent with the purpose of the provisions and with regard to the consequences of the alternative constructions; a construction which would defeat the plain intention of the Legislature must be rejected even though there may be some inexactitude in the language used; and Regulations, being regulatory in nature, the intended object sought to be achieved thereby must be firmly complied with.

In **U.P. Bhoodan Yagna Samiti v. Braj Kishore, (1988) 4 SCC 274,** the Supreme Court held that the words in a Statute must be given its plain ordinary dictionary meaning. In **Narendra Madivalapa Kheni v.**

Manikrao Partil, (1977) 4 SCC 16, the Supreme Court held that a provision must be given a purposive construction. In **Avishek Goenka v. Union of India, (2012) 5 SCC 321,** the Supreme Court observed that Courts should give a provision, such an interpretation which would serve the legislative intent and the object of framing such rules, in preference to one which would frustrate the very purpose of enacting the Rules.

Regulation 19(d) stipulates that, if there is short term requirement of power by the distribution licensee over and above the quantum as approved by the Commission and such requirement is on account of any factor beyond the control of the licensee (shortage/non-availability of fuel, snow capping of hydro resources inhibiting power generation in sources stipulated in the plan, unplanned/forced outages of power generating units or acts of god), then the cost shall be directly passed on the customer without prior approval of the Commission.

It is true that it is only in situation stipulated in Regulation 19(d), of such requirement being on account of any factor beyond the control of the licensee (as detailed in the said clause), can the cost be directly passed on to the customers without prior approval of the Commission. As Regulation 19(d) itself permits, in the specified contingencies, for such cost to be directly passed on the consumers without prior approval of the Commission where such requirement is over and above the quantum approved by the Commission, reference by the Learned Senior Counsel to Section 81(1)(b), Sections 61, 62, 63 and 64 of the Electricity Act, 2003 is wholly misplaced. The Regulations made under Section 181 of the Electricity Act are binding on the Commission and, as long as the Regulations remain in force, the Commission cannot exercise its regulatory power contrary to what is expressly stipulated therein. (**PTC India Ltd. v. CERC: (2010) 4 SCC 603)**.

As Regulations 19(d) does not suffer from any ambiguity, the words used therein must be given its plain ordinary dictionary meaning **(U.P. Bhoodan Yagna Samiti v. Braj Kishore, (1988) 4 SCC 274)**. It is only where a provision suffers from ambiguity, and the words used therein are capable of more than one meaning, can resort be had to any other cannon of interpretation of statutes. As we are satisfied that Regulation 19(d) does not suffer from any such lacuna, reliance placed on behalf of the Appellant on the aforesaid judgments is of no avail.

In view of above deliberations, we therefore hold that short term procurement of power by distribution Licensee is to be allowed at the cost at which it was actually procured, provided that (i) the quantum of power utilised during FY 2018-19 remains within the approved short-term procurement quantum of 315.74 MUs; and (ii) the procurement price does not exceed the approved average cost of short-term power as specified in the ARR Order dated 22.01.2019. State Commission is directed to allow the actual cost of procurement of short-term power, which was utilized in FY 2018-19, provided the quantum and price of such short-term power is within the approved quantum of 315.74 MUs and price as approved in ARR order dated 22.01.2019 for short term power.

ISSUE 4 : DISALLOWANCE OF THE POWER BANKING DONE BY THE APPELLANT ALONG-WITH THE ASSOCIATED TRANSMISSION CHARGES DURING FY 2018-19.

A. SUBMISSION URGED ON BEHALF OF NPCL

Learned Senior Counsel submitted that though the State Commission has allowed power banking for power purchase in FY 2017-18, it has disallowed all power banking transactions undertaken by the Appellant in FY 2018-19, this is contrary to (i) Regulation 19.2(2) of the MYT

Regulations, 2014, which specifically contemplates no prior approval/consent is required to be obtained for power banking from the State Commission ii) ARR Order dated 22.01.2019 (for ARR of FY 2018-19) noted the Appellants submission to procure power through Banking (iii) ARR Order dated 22.01.2019 (for ARR of FY 2018-19), which observed that no advance approval for banking can be taken as the same cannot be projected in advance. State Commission disallowed power banking holding that it was done without any prior approval. State Commission did not at any point in the past, i.e., prior to issuance of the Impugned Order, provide any adverse remark on the power banking done by the Appellant. In any event, no prior approval for banking is contemplated under the UPERC MYT Regulations 2014.

It is submitted that the State Commission, during the hearing, sought to justify the Impugned Order by stating that at the time of ARR approval for FY 2018-19, the Appellant had projected only 9.08 MUs towards power banking and the same cannot be used as *carte blanche* by the Appellant for the next financial year and as such there is a significant increase in the actual power banking by the Appellant i.e., as against 9.08 MUs projected by the Appellant for FY 2018-19, it has indulged in power banking of 204.9 MUs. In this regard, learned senior Counsel submitted that as against the projected 9.08 MUs of power banking for FY 2018-19, the Appellant had banked power to the tune of 29.56 MUs for FY 2018-19, while 175.34 MUs power was banked by the Appellant for drawl in FY 2019-20, which is the subject matter of FY 2019-20, and not the present Appeal. Moreover, out of the 29.56 MUs of power banking in FY 2018-19, the State Commission has allowed 14.85 MUs of power banking, which the Appellant has returned as its return obligation for power banking undertaken by it in FY 2017-18. Therefore, the

contention of the State Commission that there has been a significant increase in the actual power banking *vis-à-vis* the estimates for FY 2018-19, is incorrect and ought to be rejected.

Regarding the contention of the State Commission that the Appellant was purchasing power on a day-ahead basis and banking the same power, learned senior Counsel submitted that during April 2018 to September 2018, the Appellant was purchasing power on a day-ahead basis as per its day-ahead contract(s), but no forward banking was done during this period except for 1.58 MUs in July, 2018, whereas for the period between October 2018 to March 2019, the Appellant had a firm Power Purchase Agreement with Shree Cements Ltd. dated 28.09.2018, and was scheduling part of the contracted quantum on a day-ahead basis, due to open access denial/constraints by UPSLDC and/or as per its demand requirements.

It is further submitted that the State Commission has disallowed all the power banking undertaken by the Appellant in FY 2018-19, including the associated transmission charges and losses, without any reasoning. Banking transactions inherently involve transmission charges, and disallowing these charges on an erroneous interpretation of the UPERC MYT Regulations 2014 is contrary to the regulatory framework since the said Regulations nowhere prohibit recovery of transmission charges for banking transactions. Thus, the State Commission's decision to disallow the associated transmission charges with power banking violates Regulation 19.2(2) of the MYT Regulations, 2014, which explicitly contemplates power banking as a permissible activity. This Tribunal may set aside the findings of the State Commission in the Impugned Order on this issue and banking of power allowed along with Carrying cost.

B. SUBMISSION URGED ON BEHALF OF STATE COMMISSION

Learned Senior Counsel submitted that Appellant, during oral submissions, has contended that the present Appeal (No.98/2021) would not concern the banking done by them during FY 2018-19 from the power purchased from SCL (that stood disallowed by the UPERC) and State Commission treatment and implication of this banked power will be relevant only in the year when the banked power is utilized. Accordingly, no submissions are being made on the issue of banking of power purchased from SCL during FY 2018-19, except to submit the following from the record:

Large quantum of banking was done to the extent of about 10% of the total quantum of NPCL's power procurement in FY 2018-19 without any prior approval. In its ARR submissions before the UPERC, NPCL had shown that it would be doing a very small quantum of banking for which Power Banking charges amounting to Rs. 3.51 Crore as claimed by NPCL It was basis this submission that the UPERC had observed that the same would be trued-up. Subsequently, based on NPCL's submissions in the ARR for FY 2018-19, the UPERC approved a negative banking of (-) 9.08 MUs at a cost of (-) Rs. 3.51 crores @Rs.3.87 /Unit during FY 2018-19 .

The submission made by the Appellant in the ARR regarding banking during FY 2018-19 does not at all support its subsequent conduct of undertaking banking to the extent of about 10% of its total procurement of 2015.01MU. Hence, such banking of power by NPCL, out of short-term power purchased from SCL was disallowed in the Impugned Order.

State Commission in the Impugned Order has allowed NPCL to receive back the power (14.85MUs) that it had banked in FY 2017-18 as reflected

in Table 3-35 of the Impugned Order. The rate provided for the banked power is Rs.4.40/unit and the total cost is Rs. (-) 6.54 Crore. Appellant seems to be aggrieved by the fact that UPERC allowed NPCL to receive back banked power without transmission charges**.**

It is submitted that whatever cost and charges was shown by NPCL for banking of 14.88 MUs (at generator bus) or 14.01 MUs (at NPCL periphery) has been allowed to NPCL in the said order dated 03-09-2019 whilst Trueing-up for FY 2017-18 at table 3-12 in which power transmission charges on the banked power of 14.01 MUs was also included in FY 2017-18.The Impugned Order merely reiterates that accounting position for the purposes of accounting the return of banked power (14.01/14.85 Mus) in FY 2018-19.

C. CONSIDERATION AND OUR VIEW: DISALLOWANCE OF THE POWER BANKING ALONG WITH THE ASSOCIATED TRANSMISSION CHARGES DURING FY 2018-19.

In view of the submissions made on behalf of the Appellant that 175.34 MUs power, though procured in FY 2018-19, was banked by the Appellant for drawl in FY 2019-20, and is the subject matter of FY 2019-20, and not the instant Appeal, which has also been noted on behalf of the State Commission, therefore deliberation in present issue is limited to Banking of power utilized in FY 2018-19. With regard to Banking of Power, the State Commission, in the impugned order, has disallowed additional short-term power bought and Banking of power done in FY 2018-19, except for the return of approved portion of Banking of power which was allowed in FY 2017-18. Relevant paragraph of the Impugned Order is extracted below:

> ***"3.6.65*** *In terms of the above Regulations, the Commission is of the view that the Petitioner indulged in excess purchase of short-term power and Banking therein without any prior approval of the Commission. Also, neither it took consent about the Banking of Power*

and neither did it inform the Commission about the same. Accordingly, in terms of Regulation 19 of UPERC (Multi Year Distribution Tariff) Regulations, 2014, the Commission disallows additional short-term power bought and Banking of Power done in FY 2018-19 except for the approved portion of Banking of power which was allowed in FY 2017-18.

***3.6.70** As regards banking of power, the Commission is of the view that only the banking of power purchase approved in FY 2017-18, is allowed without transmission charges. All other excess and unapproved short-term power purchased and banked in FY 2018-19 are disallowed and the Petitioner is directed to take prior approval of Commission for short-term procurement (other than from exchanges) and for banking of power in future. Banking of power in approved is as under:*

Table 3-33: Power banking approved for FY 2018-19

Type of Contract	Energy Purchase at NPCL Bus (MU)	Energy Charges (Rs.	PGCIL Charge (Rs. Cr.)	UPPTCL Charge (Rs. Cr.)	Transmission (Rs. Cr.)	Total Cost (Rs. Cr.)
Return of Power Procured through	(16.39)	(6.54)				(6.54)

The main reason for denial of Banking of power in the Impugned Order is that “no prior approval for the same was taken”. A perusal of the ARR Order (FY 2018-19) dated 22.01.2019, we note that Appellant had projected a banking of about 9.08 MUs of power for the FY2018-19 and indicated the amount as Rs. 3.51 Crore under revised power purchase Quantum and cost.State Commission in the ARR Order dated 22.01.2019 at Paragraph 5.4.7, noted as under:

5.4.7. As regards unscheduled Interchange transactions amounting to Rs 4.34 Cr and Power Banking charges amounting to Rs 3.51 Cr as claimed by the Petitioner, the Commission is of the view that these charges cannot be projected while approving the ARR and need to be considered based on actuals at the time of truing up. Hence the Commission has not approved these charges and the same shall be considered at the time of Truing Up based on actuals subject to prudence check.

It is a fact that State Commission, in the ARR order did not approve the Power Banking Charges and rightly stated that since these charges cannot be projected, same shall be considered at the true up stage based on actuals subject to prudence Check. What does the Prudence Check mean? In our view, a prudence check when used in regulatory contexts means an assessment to see whether an expenditure, investment, or decision was made in a reasonable, careful, and responsible manner under the circumstances existing at that time. It is not about hindsight perfection, but about whether the decision would appear sensible to a reasonable person exercising due diligence. Our attention was not drawn towards any provision, in the MYT Regulations, 2014, with regard to specific direction /prohibition for Banking of power by the Distribution licensees. Under Power Procurement on Merit Order Principle, attention was drawn towards Regulation 19.2(2) of the UPERC MYT Regulations, 2014, which read as under and does not provide for requirement of prior approval for banking of power:

> ***"19.2 Power Procurement on Merit Order Principle***
>
> *2. For the tariff year, the cost of energy available from State Generating Stations shall be assessed as per tariffs approved by the Commission and that of energy from Central Sector Station shall be taken as per tariffs approved by Central Electricity Regulatory Commission. The cost of energy from other sources shall be assessed as per the power purchase/banking/trading agreements and tariffs approved by the Commission."*

It has been contended on behalf of the Appellant that though in past, the State Commission has allowed power banking for power purchase in FY 2017-18, it has disallowed all power banking transactions undertaken by the Appellant in FY 2018-19 and there has been no specific direction for requirement of prior approval for such banking, either in ARR Order or by way enactment /amendment of the relevant Regulations, thus Banking of

power should be allowed. We take note that State Commission, in the Impugned Order, disallowed the Banking of power, other than the return of Banked Power approved in FY 2017-18, and advised the Appellant to take prior approval in future, however, no such direction/ advise was given at the ARR stage or in the earlier years of ARR/True up Orders. We find merit in the submissions made on behalf of Appellant and are of the view that establishing regulatory certainty is very critical in sectors like energy, where long-term investments hinge on trust in the regulatory framework. Regulatory Certainty mainly entails i) Legislative Clarity **-** that Statutes and subordinate legislation are precise, consistent, and free from ambiguity; ii) Predictable Regulatory Behaviour i.e. Commissions must adhere to established principles and avoiding abrupt shifts in interpretation or methodology; iii) Transparent Order Writing - Regulatory orders should indicate the reasons based on which the Commission has arrived at its conclusions, and should be grounded in statutory authority.

Thus, for the purposes of prudence check, in our view, State Commission is required to undertake the exercise to check the reasonableness of power banked at the True up stage instead of summarily disallowing it on the basis that no prior approval was taken, when no such requirement was stated in the ARR Order or discernible from the extant Regulations. Further involvement of Transmission charges is integral for Banking of power, same need to be considered/ approved along with banking of power and its return, if any. In view of the foregoing, we are of the opinion that the State Commission erred in disallowing the Transmission charges associated with the return of Banked power approved in FY 2017-18 in the Impugned Order and same is hereby allowed.

Regarding the Contention of the State Commission, during proceedings before this Tribunal, that there has been large quantum of banking done

by Appellant to the extent of about 10% of the total quantum of NPCL's power procurement in FY 2018-19 without any prior approval, however no specific provisions in regulations for such prior approval was referred to. We are of the view that there is absence of regulatory clarity with regard to procedure and permitted quantum for Banking of power and therefore it would be appropriate and prudent for the State Commission to evolve a consistent methodology and State Commission may consider issuing guidelines to ensure transparency, consistency, and procedural fairness in the matter of power banking.

In view of the above deliberations, the findings of the State Commission in the Impugned order with regard to disallowance of Banking of power in FY 2018-19 is hereby set aside and matter is remanded to the State Commission to undertake Prudence check on the power banking undertaken by Appellant for use in FY 2018-19. The applicable Transmission charge for return of banked power approved earlier, as well as for banked power utilized in FY 2018-19 is allowed.

ISSUE 5 : DISALLOWANCE OF SALE OF POWER

A. SUBMISSION URGED ON BEHALF OF NPCL

Learned Senior Counsel submitted that the State Commission in the Impugned Order has merely observed that since the short-term power purchased and banked has been disallowed, there is no occasion to consider for the sale of surplus power. It is therefore submitted that, apart from the merits, if the Appellant's claim on short-term power purchase were to be upheld by this Tribunal, the disallowance of surplus power would have to be consequentially reversed.

It is submitted that Regulations 19(b) and 19(c) of the MYT Regulations 2014 specifically contemplate the sale of surplus power by a

licensee, if any, during lean period and benchmarking of its rate with that of power exchange. Though the entire sale of power has been done at the benchmark price of IEX, the State Commission arbitrarily chose to disallow sale of power completely. State commission itself at paragraph 3.6.74 of the Impugned Order directed the Appellant to indulge in real time markets for management of surplus power. At the stage of 'truing up', the State Commission cannot change the rules/methodology used in the initial tariff determination by changing the basic principles, premises and issues involved in the initial projection of ARR **[BSES Judgement]** and it has to pass Orders in accordance with the applicable Regulations**.** ***[PTC India Limited vs. CERC & Ors. (2010) 4 SCC 603]***

Learned Senior Counsel submitted that Appellant prays for setting aside the findings of the State Commission on the issue of disallowance of cost of short-term power, banking of power and sale of surplus power, to the extent impugned in the Appeal and allow the cost of Rs. 45.11 Crore, along with Carrying Cost.

B. RESPONDENT NO 1 : STATE COMMISSION SUBMISSIONS

Learned Senior Counsel submitted that since the short-term power purchased and banked was disallowed by State Commission in the Impugned Order, the sale of power consequentially was disallowed, however, if on account of any direction from this Tribunal, short -term purchase by NPCL stands allowed at the rate claimed by NPCL, the short-term sale of power by NPCL would also require an concomitant adjustment.

C. CONSIDERATION AND OUR VIEW : DISALLOWANCE OF SALE OF POWER

It has already been held in previous paragraphs that short term

procurement of power by distribution Licensee is to be allowed at the cost of procurement, provided that the quantum used in FY 2018-19 remains within the approved short term quantum of 315.74 MUs and price is within the approved average cost of short Term power as per APR Order dated 22.01.2019, accordingly short-term sale of power by the Appellant is allowed, with appropriate concomitant adjustments. State Commission is directed to effect concomitant adjustment for sale of power in True up for FY 2018-19

SECTION 4 (CAPITAL EXPENDITURE) : ISSUE NO.1 : CAPITAL EXPENDITURE ON PROJECTS ABOVE RS 10 CRORE

A. SUBMISSION URGED ON BEHALF OF NPCL

Learned Senior Counsel submitted that Appellant is aggrieved by:

i) Disallowance of 25% of the opening Gross Fixed Assets (GFA) of the Knowledge Park-1 (KP-1) and Knowledge Park-4 (KP-4) assets, with a corresponding 25% deduction in accumulated depreciation till FY 2017-18, citing the Appellant's failure to obtain prior approval of Capital Expenditure (CAPEX) exceeding Rs. 10 Crores, as required under Regulation 23A of the UPERC MYT Regulations, 2014; and

(ii) Disallowance of 25% of the overall CAPEX claimed for FY 2018-19, citing the Appellant's failure to seek prior approval for the CAPEX exceeding Rs. 10 Crore, despite repeated directives from the State Commission.

It is submitted that during the hearing on the instant issue, the State Commission, without defending or substantiating the reasons given in the Impugned Order, has attempted to justify the Impugned Order with reasons and justifications which are extraneous to the Impugned Order as well as the Reply filed by the State Commission. State Commission has effectively, in its oral arguments not only sought to supplant its

findings in the Impugned Order, but has virtually created a new Impugned Order, both of which are impermissible in law. Without prejudice to the admissibility of such contentions, the same along-with the response to the reasons contained in the Impugned Order are dealt with in the present Submissions.

It is submitted that the Appellant has complied with the requirement of obtaining prior approval of the State Commission in terms of MYT Regulations 2014, as while seeking approval of the Business Plan/ARR, the financial principles contained in Part-V, were taken into account as provided in Regulation 4.10. Hence, Regulation 23A, which forms part of the financial principles contained in Part-V, is factored in the Business Plan, capital investment plan and the ARR, which were presented for approval of the State Commission, thus satisfied the requirement of prior approval. Further, neither "MYT Regulations, 2014" or the previous Orders of the State Commission contemplate filing of a separate application for prior approval for CAPEX greater than Rs10 Crore by a licensee. Indeed, Regulation 23A only contemplates by way of Regulation 23A (f), for the licensee to make an application, if it is required to take up any emergency work for post-facto approval.

In the background of the scheme of the "MYT Regulations, 2014" and a reference to the Business Plan/ARR Petitions as also the Orders passed approving the Business Plan and the ARR, followed by True-up Orders, would reflect that the Appellant licensee has presented all the schemes seeking approval, prior to their execution/incurring expenditure and after approval, such schemes have been incurred and later, affirmed by State Commission in its True-Up orders.

As regards the observation of the State Commission at Para 3.9.45 of the Impugned Order that it had directed the Appellant to submit the

capital investment plan and take prior approval of the CAPEX schemes greater than Rs. 10 Crore, as per Regulation 23A of the UPERC "MYT Regulations, 2014", it is submitted that the said direction is erroneous in as much as the said direction was issued by the State Commission in the Tariff Order dated 03.09.2019 i.e., for ARR/Tariff of FY 2019-20 after passing of APR for FY 2018-19 on 22.01.2019. Thereafter, in terms of the "MYT Regulations, 2019", the Appellant has complied with the provisions thereunder.

It is further submitted that the State Commission, while truing up FY 2018-19, has erroneously reopened the trued-up and approved closing GFA of FY 2017-18, which constitutes the opening GFA for FY 2018-19. The State Commission reduced 25% of the opening GFA of the KP-1 and KP-4 assets, as recorded in the Fixed Asset Register (FAR) of FY 2018-19, with a corresponding reduction in accumulated depreciation up to FY 2017-18. Further, the CAPEX for KP-1 and KP-4 assets was incurred between FY 2013-14 and FY 2017-18 with the State Commission's knowledge and approval during the respective ARR/Tariff determination processes. The said CAPEX was duly trued up by the State Commission in its Tariff Orders from 18.06.2015 (Truing-up of FY 2013-14) to 03.09.2019 (Truing-up of FY 2017-18), thereby affirming its prudence and necessity. The earlier Tariff Orders up to FY 2017-18, having not been challenged on Capital Expenditure issues, have attained finality. Therefore, the State Commission cannot reopen them under the guise of a true-up for FY 2018-19, especially when the true-up for previous years stands concluded. In this regard, the Judgement of the Hon'ble Supreme Court in "***BSES Rajdhani Power Ltd. Vs. Delhi Electricity Regulatory Commission', (2022) SCC Online SC 1450***, forbids a true-up exercise to revise the basis of the ARR, much less, what is sought to be done here

i.e., revising what is already trued-up in the previous year, during true-up of FY 2018-19.

Learned Senior Counsel contended that in FY 2018-19, the CAPEX for KP-1 and KP-4 assets did not exceed Rs. 10 Crore. Despite this, the Impugned Order imposed a disallowance of 25%, which is completely irrational and arbitrary. Further, neither in the Impugned Order nor during the hearings was any reasoning provided for this 25% reduction/disallowance. The learned senior Counsel for the State Commission has also conceded that the percentage stated in the Impugned Order lacks any basis.

It is contended that the disallowance by the State Commission is not on the grounds of inefficiency or imprudence, but it is on the perceived non-compliance with Regulation 23A of the Regulations 2014, which requires prior approval for schemes exceeding Rs. 10 crore; same is factually incorrect as prior approval was sought through the Business Plan/ARR Petitions and was duly approved and trued up. Further, as held by this Tribunal, the State Commission cannot convert its tariff determination power into a penalty proceeding, especially when the UPERC "MYT Regulations, 2014" do not prescribe any consequence for non-compliance with Regulation 23A (***Maharashtra State Electricity Distribution Co. Ltd. vs. MERC (2009) SCC OnLine APTEL 73; & Order dated 02.01.2025 passed in Appeal No. 264 of 2024 & I.A. No. 1274 of 2024: Jharkhand Bijli Vitran Nigam Ltd. vs. JERC & Ors.]***

In view of the foregoing, it is submitted that this Tribunal may set aside the findings of the State Commission on the issue of disallowance of capital expenditure on projects above Rs. 10 Crore**,** to the extent impugned in the Appeal and, allow the cost of approximately Rs. 46.05 Crore along-with all consequential reliefs, as prayed for by the Appellant.

B. SUBMISSION URGED ON BEHALF OF STATE COMMISSION

In regard to the contentions of the Appellant that i) it has submitted the Business Plan and Capital Expenditure plan, which was approved by State Commission vide Tariff Orders dated 22.01.2019 and 03.09.2019, State Commission approved the Capital Expenditure for F.Y. 2018-19 and accordingly, the requirement of Regulation 23A as regards obtaining prior approval of the State Commission has been complied with ii) State Commission has not directed the Appellant to obtain a separate approval under Regulation 23A, either for its capital investment plan or for the CAPEX above Rs.10 Crores iii) State Commission has not given any cogent reason for altering its earlier position and for now insisting upon strict compliance with Regulation 23A, learned senior Counsel submitted that the legal issue sought to be raised for the first time in the present appeal is whether Regulation 23A is mandatory in nature or whether its compliance stands subsumed within the approval granted by the Commission to the Capital Investment Plan under Regulation 5.2. It is submitted that none of the contentions now urged were ever placed before the State Commission during the proceedings culminating in the Impugned Order. In fact in response to the query from State Commission that whether Appellant has taken prior approval of the schemes more than Rs. 10 Crore, the Appellant has responded that none of the projects during FY 2018-19 is greater than Rs. 10 Crore requiring prior approval.

Learned Senior Counsel submitted that the Appellant before this Tribunal had not contested that the State Commission is wrong in its assessment that the schemes exceeding Rs.10 Crore were implemented during FY 2018-19; however, the challenge by Appellant in present Appeal is confined only to the applicability of Regulation 23A based on above contentions. It is submitted that a perusal of Regulation 23A makes it

clear that the said provision has been made applicable to all CAPEX schemes undertaken by the Distribution Licensee, the only distinction is the manner of compliance between schemes exceeding Rs.10 Crore and those below Rs.10 Crore; while schemes above Rs.10 Crore require *prior approval of* the Commission (Clause (b)), schemes below Rs.10 Crore require only simultaneous intimation with all supporting documents (Clause (h)). Regulation 23A also covers works of emergent nature, where the Distribution Licensee must file an application with all relevant information, but is permitted to commence work on the strength of a certificate from its Board of Directors, with the Commission's approval being obtained post facto, as provided under Clauses (f) and (g). Thus, Regulation 23A comprehensively brings within its sweep the entire gamut of capital expenditure, irrespective of nature or value that may be undertaken by the Distribution Licensee. Further, the scrutiny envisaged thereunder is intended to ensure continuous and detailed regulatory oversight of CAPEX activities throughout the year, as is evident from the requirement that supporting documents must include, inter alia, the purpose of investment, capital structure, capitalization schedule, financing plan and cost-benefit analysis, in terms of the proviso to Clause (c). Compliance with Regulation 23A also encompasses the issues of time and cost overrun on the part of Discom and the allocation of such time and cost overrun to distribution licensee and the consumer tariff in terms of *Clause (a) of Regulation 9.2.* The Business Plan and Capital Investment Plan by the Distribution Licensee is only required to separately indicate ongoing and new projects with justification. Further, in terms of Regulation 21.3, the CAPEX proposals in the ARR are necessarily derived from the approved Capital Investment Plan.

The Appellant has failed to demonstrate before this Tribunal that the requirements of Regulation 23A were complied with on a scheme-wise

basis in its Capital Investment Plan approved by the Commission. The plan merely foreshadows individual schemes that are to be implemented by the Distribution Licensee.

The ARR Order for FY 2018-19 dated 22.01.2019 merely contains a table of CAPEX proposed by the Appellant with broad estimates of a few schemes. These contain only headline numbers and gross estimates. The Appellant has not demonstrated before this Tribunal that any material was placed before the State Commission to establish compliance with Regulation 23A in respect of individual schemes. The Regulation 23A is integral to the True-up process, as CAPEX incurred is directly co-related to the creation of asset and assets value, forming the basis for the Appellant's return on equity which is the pre-dominant source of its earning from distribution business. The Regulation also ensures scrutiny of the Discom's efficiency in managing cost and time overruns, which determines its liability.

Learned Senior Counsel submitted that it is a settled proposition of law, as laid down by the Supreme Court while affirming the principle in ***Taylor v. Taylor*** **(1875),** that when a statute explicitly requires a specific method to perform a certain act, the act must be performed in that prescribed manner or not at all, as also noted in "**Sharif-Ud-Din vs. Abdul Gani Lone" (1980) 1 SCC 403** ; **"Ramchandra Keshav Adke (Dead) by LRs and Ors. Vs. Govind Jyoti Chavare and Ors." (1975) 1 SCC 559 ; and "Bhikraj Jaipuria vs. Union of India" 1961 SCC OnLine SC 34: (1962) 2 SCR 880: (AIR 1962 SC 113)**

It is further submitted that the omission of the Appellant to make the requisite filings has resulted in the circumvention of the mandate of Regulation 23A. The Appellant cannot, in law, be permitted to derive any benefit from such omission, which effectively deprived the State

Commission of its statutory oversight under the said Regulation. It is a well-settled principle that no party can be allowed to take undue or unfair advantage of its own default or wrong so as to secure a favorable interpretation of the law. Reliance is placed upon the following decisions of the Hon'ble Supreme Court in support of the aforesaid fundamental principle: "**Ashok Kapil Vs. Sana Ullah (dead) and Ors." (1996) 6 SCC 342** ; "**Kusheshwar Prasad Singh Vs. State of Bihar & Ors'. (2007) 11 SCC 447** ; "**Goaplast (P) Ltd. Vs. Chico Ursula D'Souza and Anr." (2003) 3 SCC 232** .

The Appellant cannot invoke the doctrines of waiver or estoppel against the Commission with regard to the applicability of Regulation 23A, particularly if the same is held to be mandatory in nature. Regulation 23A has been enacted to safeguard consumer interest by ensuring that every Capex scheme of the Appellant is subject to regulatory scrutiny in terms of prudence, cost efficiency, timelines, and cost–benefit analysis. Such oversight is essential to prevent gold-plating, cost overruns, and inefficiencies in the execution of Capex schemes. Under the circumstances there can be no estoppel or waiver to the applicability of the Regulation 23A (judgment of the Supreme Court in **"*Maharshi Dayanand University v. Surjeet Kaur*' (2010) 11 SCC 159) .**

It is submitted that due to the Appellant's non-compliance with Regulation 23A, the State Commission, instead of rejecting the entire Capex claim, prudently deducted an estimated 25% of the claimed amount. Such an approach was adopted to maintain a balance between the interest of consumers and the Appellant, and falls squarely within the regulatory powers of the Commission under Section 86 of the Electricity Act, 2003, particularly as the Regulations are silent on the consequences of such non-compliance.

Learned Senior Counsel while referring to the judgement of the Supreme Court in the case of ***Power Grid Corporation of India Ltd. Vs. Madhya Power Transmission Company Limited & Ors. (2025 INSC 697)*** submitted that in the aforesaid judgment, the Supreme Court has placed reliance upon its earlier decision in "*Airports Economic Regulatory Authority of India v. Delhi International Airport Ltd. & Ors'.* 2024 INSC 791), and held that Tariff determination constitutes a composite exercise involving both quasi-judicial and regulatory functions.

C. SUMMARY OF JUDGEMENTS REFERRED

a)BSES Rajdhani Power Limited vs DERC ((2023) 4 SCC 788)/2022 SCC online SCC 1450 - Relied upon by Appellant (Supra)

b) Maharashtra State Electricity Distribution Co Ltd v MSERC (2009 SCC OnLine APTEL 73 - Relied upon by Appellant

This Tribunal in this order, considered the issue of levy of penalty by MSERC by way of reduction in the ARR and observed as under:-

> *" The striking feature of this case is that the disallowance of Rs.96 Crores is in the nature of penalty, not on account of inefficiency but on account of an act perceived as disobedience. The purpose of determining the ARR and designing the tariff is to regulate power purchase, supply and distribution in an equitable manner so that the consumer is able to get the power at the price reflecting the cost while the distributor is able to recover the cost of supply along with the normal profit. The sole attention of the Commission while doing this exercise is to balance the cost of procurement and the revenue. The Commission has to be alert all the time that no distribution licensee is able to pass on to the consumers any cost unwisely or inefficiently incurred. At the same time the Commission has to see that the distribution licensee can survive in the business by getting the due returns and the cost. The Commission has to be entirely objective, dispassionate and professional in its approach in doing this tedious exercise. The Electricity Act has sufficient provision for handling the situation of disobedience. As already mentioned above, section 142, gives the Commission, power for punishment in such a situation. The Commission is a creation of the statute. Even if such power given is*

considered by the Commission to be insufficient the Commission cannot convert its power of tariff fixation given by section 61 and 62 of the Electricity Act 2003 into a proceeding for imposing penalty".

c)Jharkhand Bijli Vitran Nigam Ltd. vs. JERC & Ors. Order of this Tribunal dated 02.01.2025 passed in Appeal No. 364 of 2024 & I.A. No. 1274 of 2024 - Relied upon by Appellant

Considering the law declared in above referred judgement **i.e** Maharashtra State Electricity Distribution Co Ltd v MSERC (2009 SCC OnLine APTEL 73, this Tribunal observed that it does appear that commission has exceeded its jurisdiction in imposing a penalty of reduction of 2% of the ARR of the Appellant –DVC for their failure to comply with their Solar Power RP Obligation and set aside such reduction in ARR and remanded the matter back to State Commission to pass order afresh.

d)**Power Grid Corporation Ltd vs Madhya Pradesh Transmission Company Limited & Ors (2025 INSC 697) –** relied upon by the State Commission

Central commission in its order has fastened compensation on State Transmission Utility due to delay in implementation of connected intra-State Transmission System resulting in mismatch for Implementation of Western Region Strengthening Scheme by Central Transmission utility i.e. Power Grid Corporation of India ltd. Judgement of CERC was interfered with High court of Madhya Pradesh, which was assailed before the Supreme Court. Issue pertained to the regulatory authority of CERC in granting compensation with regard to implementation of Western Region Strengthening Scheme. Issue considered by Supreme court in its judgement related to scope of CERC's Powers under Section 79 of the Electricity Act, 2003, Distinction between Regulatory and Adjudicatory Functions and Jurisdictional Validity of CERC's Orders challenged via writ petitions before the Madhya Pradesh High Court. Supreme Court in

its judgement held that CERC's powers under Section 79 are not confined to adjudication alone they include regulatory and administrative functions; Electricity Act does not draw a rigid line between these functions the adjudicatory and Regulatory function of Central commission; CERC, as a quasi-judicial body, is empowered to issue orders that fill regulatory gaps on a case-by-case basis. The Supreme Court held that the High Court erred in admitting the writ petitions, as CERC acted within its statutory mandate when passing the impugned orders and Supreme Court set aside the High Court's decision and held that the compensation granted for delay in the CERC order was deemed a valid exercise of regulatory power under Section 79 of Electricity Act.

e)***Sharif-ud-Din v. Abdul Gani Lone*****, (1980) 1 SCC 403 ;** relied upon by State Commission,

> ***"9.*** *The difference between a mandatory rule and a directory rule is that while the former must be strictly observed, in the case of the latter substantial compliance may be sufficient to achieve the object regarding which the rule is enacted. Certain broad propositions which can be deduced from several decisions of courts regarding the rules of construction that should be followed in determining whether a provision of law is directory or mandatory may be summarised thus: The fact that the statute uses the word "shall" while laying down a duty is not conclusive on the question whether it is a mandatory or directory provision. In order to find out the true character of the legislation, the court has to ascertain the object which the provision of law in question has to subserve and its design and the context in which it is enacted. If the object of a law is to be defeated by non-compliance with it, it has to be regarded as mandatory. But when a provision of law relates to the performance of any public duty and the invalidation of any act done in disregard of that provision causes serious prejudice to those for whose benefit it is enacted and at the same time who have no control over the performance of the duty, such provision should be treated as a directory one. Where, however, a provision of law prescribes that a certain act has to be done in a particular manner by a person in order to acquire a right and it is coupled with another provision which confers an immunity on another when such act is not done in that manner, the former has to be regarded as a mandatory one. A procedural rule ordinarily should not be construed as mandatory if the defect in the act*

done in pursuance of it can be cured by permitting appropriate rectification to be carried out at a subsequent stage unless by according such permission to rectify the error later on, another rule would be contravened. Whenever a statute prescribes that a particular act is to be done in a particular manner and also lays down that failure to comply with the said requirement leads to a specific consequence, it would be difficult to hold that the requirement is not mandatory and the specified consequence should not follow.

19. *An election to a Legislative Assembly can be called in question only by filing an election petition and not otherwise. The right to challenge the election by filing an election petition is a statutory right and not a common law right. A successful candidate is entitled to enjoy the privileges attached to the membership of the Legislative Assembly unless his right to do so is successfully challenged in an election petition filed within the prescribed period and in accordance with law. Section 89(3) of the Act consists of two parts. The first part requires that every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition and the second part requires that every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition. The first part of Section 89(3) of the Act has been held to be a mandatory requirement by this Court in the case of Satya Narain [(1974) 4 SCC 237 : AIR 1974 SC 1185 : (1974) 3 SCR 20] as this Court was of the view that the copies of the election petition should be filed along with it in order to prevent the delay in the disposal of the election petitions. The question whether a provision of law is mandatory or not, as observed already, depends upon its language, the context in which it is enacted and its object. Sub-section (3) of Section 89 of the Act provides that a copy of the petition shall be attested by the petitioner "under his own signature" to be a true copy of the petition. The emphasis in the above provision appears to be on the words "under his own signature". We do not find the same expression used in Section 91(1)(c) of the Act which provides that an election petition shall be signed by the petitioner and verified in the manner laid down in the Jammu and Kashmir Code of Civil Procedure (Act 10 of 1977), for the verification of pleadings. Sub-section (3) of Section 89 of the Act was inserted by Jammu and Kashmir Act 1 of 1962. Section 94 of the Act which requires the High Court to dismiss an election petition when the petitioner has not complied with the provisions of Section 89 was enacted in the place of the former Section 94 of the Act by Jammu and Kashmir Act 11 of 1967 by the legislature with the full knowledge of the requirements of Section 89(3) of the Act. The object of requiring the copy of an election petition to be attested by the petitioner under his own signature to be a true copy of the petition appears to be that the*

petitioner should take full responsibility for its contents and that the respondent or respondents should have in their possession a copy of the petition duly attested under the signature of the petitioner to be the true copy of the petition at the earliest possible opportunity to prevent any unauthorised alteration or tampering of the contents of the original petition after it is filed into court. We have no doubt that the records and documents in the custody of courts are taken due care of by the courts and the courts would not by themselves give any scope for tampering with them. But still experience shows that allegations are sometimes made that records in the court have been tampered with notwithstanding the care and caution taken by courts. Such allegations may not always be without basis. It is probably to obviate any scope for such an allegation being made or to protect the interest of the respondent, the legislature thought of enacting sub-section (3) of Section 89 of the Act so that the respondent may rely on the copy served on him when he finds that the original document in the court contains allegations different from those in the copy in his custody. A respondent would not have the same degree of assurance if a copy served on him is one attested by any person other than the petitioner himself. The attestation by the advocate for the petitioner cannot be treated as the equivalent of attestation by the petitioner under his own signature. If the requirement of the second part of Section 89(3) that copy of the petition should contain the signature of the petitioner himself is not one of substance, there was no need to enact it as the first part of sub-section (3) of Section 89 of the Act would have been sufficient for it provides that every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition and the word "copies" mentioned therein can only mean "true copies". The importance of the provision contained in Section 94 of the Act which makes it obligatory on the part of the High Court to dismiss a petition when it is established that Section 89 of the Act had not been complied with also cannot be overlooked in this context.

***20.** We are, therefore, of the view that the requirement that every copy of the election petition which is intended for service on the respondent should be attested by the petitioner under his own signature is a mandatory requirement and the non-compliance with that requirement should result in the dismissal of the petition as provided in Section 94 of the Act. The High Court was, therefore, right in dismissing the petition on the above ground."*

f) Ramchandra Keshav Adke v. Govind Joti Chavare, (1975) 1 SCC 559 relied upon by State Commission, referred paras are reproduced below :

*"**13.** Mr Desai, learned counsel for the appellants contends that the provisions of Rule 2-A are directory and not mandatory; that in any case there has been a substantial compliance with the requirements of relevant provisions of the Act and the rule. It is submitted that the deed of surrender executed by the tenant was presented along with the application of the landlord, to the mamlatdar; that the Circle Officer exercising the powers of Aval Karkun, then made an enquiry and recorded the statements of the tenant and the landlord to ascertain whether the surrender had been intelligently and voluntarily made by the tenant and, that it was only after verifying the requisite facts, the officer made the order directing delivery of possession to the landlord and deletion of the tenant's name from the record of rights. It is argued that the mere fact that the Circle Officer's order or endorsement was strictly not in the form prescribed, would not invalidate the surrender. In this connection, the learned counsel drew our attention to this sentence in the judgment of the Tribunal: "But there is no doubt that the above formalities were gone through before the Circle Officers."*

***14.** Thus, the first point to be considered is, whether the requirements of these provisions are mandatory or directory. "No universal rule", said Lord Campell [Liverpool Borough Bank v. Turner, (1861) 30 LJ Ch 379, 383; Craies on Statute Law, 7th Edn., p. 262] , "can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope". Such intention of the legislature is therefore to be ascertained upon a review of the language, subject-matter and importance of the provision in relation to the general object intended to be secured, the mischief, if any, to be prevented and the remedy to be promoted by the Act.*

***15.** Prior to the enactment of the Bombay Tenancy Act, 1939, the laws governing the relations between landlords and tenants in the State did not ensure equal status of contract or agreement to the contracting parties inasmuch as the tenants were in a much inferior position. The tenants had no security of tenure, nor any protection against eviction or rack-renting. Bombay Act 29 of 1939 was the first measure enacted to remedy these evils and to improve the condition of tenants of agricultural lands in the Province.*

***19.** The language of Section 5(3)(b) and Rule 2-A is absolute, explicit and peremptory. The words "Provided that" read with the words "shall be", repeatedly used in Section 5(3)(b), make the termination of tenancy by surrender entirely subject to the imperative conditions laid down in the proviso. This proviso throws a benevolent ring of protection around tenants. It is designed to protect a tenant on two fronts against*

two types of dangers — one against possible coercion, undue influence and trickery proceeding from the landlord, and the other against the tenant's own ignorance, improvidence and attitude of helpless self-resignation stemming from his weaker position in the tenant-landlord relationship.

20. *Thus, the imperative language, the beneficent purpose and importance of these provisions for efficacious implementation of the general scheme of the Act, — all unerringly lead to the conclusion that they were intended to be mandatory. Neglect of any of these statutory requisites would be fatal. Disobedience of even one of these mandates would render the surrender invalid and ineffectual.*

21. *Having seen that the requirements of Section 5(3)(b) and Rule 2-A are obligatory, and not directory, it remains to be considered whether these imperatives have been substantially complied with in the manner prescribed, and if not, what is the consequence of non-compliance?*

that the Circle Officer did in this case, was that he recorded the statements of the tenant and landlord and made the order — which we have reproduced in full earlier in this judgment. Although in this order he referred to the tenant's statement "that he does not want to cultivate the same any longer and so he is surrendering the possession willingly alongwith crops and also the right as pro-tenant", he did not say a word that he was satisfied that the tenant had voluntarily made the surrender after understanding its nature and consequences, much less did he endorse his satisfaction on the tenant's deed of surrender as required by Rule 2-A. Verification of the surrender implies that the authority was satisfied as to the statutory requisites after due enquiry. Such satisfaction of the authority was the essence of the whole thing. In other words, this requirement as to the recording of its satisfaction by the authority in the manner prescribed by the rule, was the substance of the matter and not an empty formality. In the absence of the requisite endorsement, therefore, it cannot be said that there has been even a substantial compliance with the statutory requirements.

23. *Mr Desai's contention that the Tribunal had found that the Circle Officer had complied with all the formalities prescribed by law, does not appear to be correct. The sentence from which it is sought to be spelled out should not be torn from its context. Earlier in its judgment, the Tribunal had clearly said in concurrence with the Deputy Collector, that the surrender had not been verified as required by law.*

24. *Next point to be considered is, what is the consequence of non-compliance with this mandatory procedure?*

25. *A century ago, in Taylor v. Taylor [(1876) 1 Ch D 426] Jassel, M.R. adopted the rule that where a power is given to do a certain thing*

in a certain way, the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden. This rule has stood the test of time. It was applied by the Privy Council, in Nazir Ahmed v. Emperor [AIR 1936 PC 253 : LR 63 IA 372] and later by this Court in several cases [Shiv Bahadur Singh v. State of U.P., AIR 1954 SC 322 : AIR 1954 SC 1098 : 1954 SCR 1098 : 1954 Cri LJ 910; Deep Chand v. State of Rajasthan, AIR 1961 SC 1527 : (1962) 1 SCR 662 : (1961) 2 Cri LJ 705] , to a Magistrate making a record under Sections 164 and 364 of the Code of Criminal Procedure, 1898. This rule squarely applies "where, indeed, the whole aim and object of the legislature would be plainly defeated if the command to do the thing in a particular manner did not imply a prohibition to do it in any other." [Maxwell's Interpretation of Statutes, 11th Edn., pp. 362-63] The rule will be attracted with full force in the present case, because non-verification of the surrender in the requisite manner would frustrate the very purpose of this provision. Intention of the legislature to prohibit the verification of the surrender in a manner other than the one prescribed, is implied in these provisions. Failure to comply with these mandatory provisions, therefore, had vitiated the surrender and rendered it non est for the purpose of Section 5(3)(b)."

***g) Bhikraj Jaipuria v. Union of India*, 1961 SCC OnLine SC 34 :** relied upon by State Commission,

***"16.** The question still remains whether the purchase orders executed by the Divisional Superintendent but which were not expressed to be made by the Governor-General and were not executed on behalf of the Governor-General, were binding on the Government of India. Section 175(3) plainly requires that contracts on behalf of the Government of India shall be executed in the form prescribed thereby; the section however does not set out the consequences of non-compliance. Where a statute requires that a thing shall be done in the prescribed manner or form but does not set out the consequences of non-compliance, the question whether the provision was mandatory or directory has to be adjudged in the light of the intention of the legislature as disclosed by the object, purpose and scope of the statute. If the statute is mandatory, the thing done not in the manner or form prescribed can have no effect or validity : if it is directory, penalty may be incurred for non-compliance, but the act or thing done is regarded as good. As observed in Maxwell on Interpretation of Statutes, 10th Edn., p. 376:*

"It has been said that no rule can be laid down for determining whether the command is to be considered as a mere direction or instruction involving no invalidating consequence in its disregard, or as imperative, with an implied nullification for disobedience, beyond the fundamental one that it depends on the scope and object of the enactment. It may perhaps be found generally correct to say that nullification is the natural and usual consequence of disobedience, but the question is in the main governed by considerations of convenience and justice, and when that result would involve general inconvenience or injustice to innocent persons, or advantage to those guilty of the neglect, without promoting the real aim and object of the enactment, such an intention is not to be attributed to the legislature. The whole scope and purpose of the statute under consideration must be regarded."

Lord Campbell in Liverpool Borough Bank v. Turner [(1861) 30 LJ Ch 379] observed:

"No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed."

17. *It is clear that the Parliament intended in enacting the provision contained in Section 175(3) that the State should not be saddled with liability for unauthorised contracts and with that object provided that the contracts must show on their face that they are made on behalf of the State, i.e., by the Head of the State and executed on his behalf and in the manner prescribed by the person authorised. The provision, it appears, is enacted in the public interest, and invests public servants with authority to bind the State by contractual obligations incurred for the purposes of the State.*

18. *It is in the interest of the public that the question whether a binding contract has been made between the State and a private individual should not be left open to dispute and litigation; and that is why the legislature appears to have made a provision that the contract must be in writing and must on its face show that it is executed for and on behalf of the head of the State and in the manner prescribed. The whole aim and object of the legislature in conferring powers upon the head of the State would be defeated if in the case of a contract which*

is in form ambiguous, disputes are permitted to be raised whether the contract was intended to be made for and on behalf of the State or on behalf of the person making the contract. This consideration by itself would be sufficient to imply a prohibition against a contract being effectively made otherwise than in the manner prescribed. It is true that in some cases, hardship may result to a person not conversant with the law who enters into a contract in a form other than the one prescribed by law. It also happens that the Government contracts are sometimes made in disregard of the forms prescribed; but that would not in our judgment be a ground for holding that departure from a provision which is mandatory and at the same time salutary may be permitted."

***h) Ashok Kapil v. Sana Ullah*, (1996) 6 SCC 342** : relied upon by State Commission,

***"6.** It is clear from the definition that any structure without roof cannot fall within the ambit of the definition. Here the factual position is this: The structure remained a roofed building when it became vacant but the roof was later dismantled by the owner. So on the date of allotment order it remained roofless.*

***7.** If the crucial date is the date of allotment order, the structure was not a building as defined in the Act. But can the respondent be assisted by a court of law to take advantage of the mischief committed by him? The maxim "Nullus commodum capere potest de injuria sua propria" (No man can take advantage of his own wrong) is one of the salient tenets of equity. Hence, in the normal course, the respondent cannot secure the assistance of a court of law for enjoying the fruit of his own wrong."*

***i)Kusheshwar Prasad Singh v. State of Bihar*, (2007) 11 SCC 447 :** relied upon by State Commission,

***"14.** In this connection, our attention has been invited by the learned counsel for the appellant to a decision of this Court in Mrutunjay Pani v. Narmada Bala Sasmal [AIR 1961 SC 1353] wherein it was held by this Court that where an obligation is cast on a party and he commits a breach of such obligation, he cannot be permitted to take advantage of such situation. This is based on the Latin maxim commodum ex injuria sua nemo habere debet (no party can take undue advantage of his own wrong).*

15. *In Union of India v. Major General Madan Lal Yadav [(1996) 4 SCC 127 : 1996 SCC (Cri) 592] the accused army personnel himself was responsible for delay as he escaped from detention. Then he raised an objection against initiation of proceedings on the ground that such proceedings ought to have been initiated within six months under the Army Act, 1950. Referring to the above maxim, this Court held that the accused could not take undue advantage of his own wrong. Considering the relevant provisions of the Act, the Court held that presence of the accused was an essential condition for the commencement of trial and when the accused did not make himself available, he could not be allowed to raise a contention that proceedings were time-barred. This Court (at SCC p. 142, para 28) referred to Broom's Legal Maxims (10th Edn.), p. 191 wherein it was stated:*

"It is a maxim of law, recognised and established, that no man shall take advantage of his own wrong; and this maxim, which is based on elementary principles, is fully recognised in courts of law and of equity, and, indeed, admits of illustration from every branch of legal procedure."

16. *It is settled principle of law that a man cannot be permitted to take undue and unfair advantage of his own wrong to gain favourable interpretation of law. It is sound principle that he who prevents a thing from being done shall not avail himself of the non-performance he has occasioned. To put it differently, "a wrongdoer ought not to be permitted to make a profit out of his own wrong".*

j) Goaplast (P) Ltd. v. Chico Ursula D'Souza, (2003) 3 SCC 232 : relied upon by State Commission, referred paras are reproduced below :

"7.*NEPC Micon Ltd. v. Magma Leasing Ltd. [(1999) 4 SCC 253 : 1999 SCC (Cri) 524] was a case in which the drawer of the cheque closed the account in the bank before presentation of the cheque and the cheque when presented was returned by the bank with the remark "account closed". The question arose whether in this situation Section 138 of the Act would be attracted. It was contended on behalf of the appellant that Section 138 being a penal provision it should be strictly interpreted. Section 138 according to the appellant applied only in two situations i.e. either because the money standing to the credit of the account of the drawer is insufficient to honour the cheque or it exceeds the amount arranged to be paid from that account by an agreement made with the bank. Rejecting the contentions raised on behalf of the*

accused this Court held that return of a cheque on account of account being closed would be similar to a situation where the cheque is returned on account of insufficiency of funds in the account of the drawer of the cheque. Before one closes his account in the bank he withdraws the entire amount standing to credit in the account. Withdrawal of the entire amount would therefore mean that there were no funds in the account to honour the cheque which squarely brings the case within Section 138 of the Act. On the question of strict interpretation of penal provisions raised on behalf of the accused it was observed : (SCC p. 259, para 9)

"If the interpretation, which is sought for, were given, then it would only encourage dishonest persons to issue cheques and before presentation of the cheque close 'that account' and thereby escape from the penal consequences of Section 138."

Any interpretation which withdraws the life and blood of the provision and makes it ineffective and a dead letter, should be averted. It is the duty of the court to interpret the provision consistent with the legislative intent and purpose so as to suppress the mischief and advance the remedy. The legislative purpose is to permit the efficacy of banking and of ensuring that in commercial or contractual transactions, cheques are not dishonoured and credibility in transacting business through banks is maintained. The Court relied upon its earlier judgment in Modi Cements Ltd. [(1998) 3 SCC 249] We would like to quote the following observations contained in NEPC Micon Ltd. v. Magma Leasing Ltd. [(1999) 4 SCC 253 : 1999 SCC (Cri) 524] : (SCC p. 262, para 15)

"15. In view of the aforesaid discussion we are of the opinion that even though Section 138 is a penal statute, it is the duty of the court to interpret it consistent with the legislative intent and purpose so as to suppress the mischief and advance the remedy. As stated above, Section 138 of the Act has created a contractual breach as an offence and the legislative purpose is to promote efficacy of banking and of ensuring that in commercial or contractual transactions cheques are not dishonoured and credibility in transacting business through cheques is maintained. The above interpretation would be in accordance with the principle of interpretation quoted above 'brush away the cobweb varnish, and shew the transactions in their true light' (Wilmot, C.J.) or (by Maxwell) 'to carry out effectively the breach of the statute, it must be so construed as to defeat all attempts to do, or avoid doing, in an indirect or circuitous manner that which it has prohibited'. Hence, when the cheque is returned by a bank with an endorsement 'account closed', it would amount to returning the cheque unpaid because 'the amount of money standing to the credit of that account is insufficient to honour the cheque' as envisaged in Section 138 of the Act."

k)Maharshi Dayanand University v. Surjeet Kaur, (2010) 11 SCC 159 : relied upon by State Commission,

> ***"11.*** *It is settled legal proposition that neither the court nor any tribunal has the competence to issue a direction contrary to law and to act in contravention of a statutory provision. The Court has no competence to issue a direction contrary to law nor the court can direct an authority to act in contravention of the statutory provisions.*
>
> ***18.*** *There can be no estoppel/promissory estoppel against the legislature in the exercise of the legislative function nor can the Government or public authority be debarred from enforcing a statutory prohibition. Promissory estoppel being an equitable doctrine, must yield when the equity so requires. [Vide H.S. Rikhy (Dr.) v. New Delhi Municipal Committee [AIR 1962 SC 554] , M.I. Builders (P) Ltd. v. Radhey Shyam Sahu [(1999) 6 SCC 464] , Shish Ram v. State of Haryana [(2000) 6 SCC 84] , Chandra Prakash Tiwari v. Shakuntala Shukla [(2002) 6 SCC 127 : 2002 SCC (L&S) 830] , ITC Ltd. v. Agricultural Market Committee [(2004) 2 SCC 794 : AIR 2004 SC 1796] , State of U.P. v. U.P. Rajya Khanij Vikas Nigam Sangharsh Samiti [(2008) 12 SCC 675 : (2009) 1 SCC (L&S) 237] and Sneh Gupta v. Devi Sarup [(2009) 6 SCC 194] .]"*

D. CONSIDERATION AND OUR VIEW : CAPITAL EXPENDITURE ON PROJECTS ABOVE RS 10 CRORE

With regard to the contention of the Appellant, that State Commission, in the Impugned Order, has reduced the opening Gross Fixed Asset with respect to Knowledge Park-1 (**KP-1**) and Knowledge Park-4 (**KP-4**) by 25%, along with corresponding 25% reduction in accumulated depreciation up to FY 2017-18 and disallowed 25% of the overall CAPEX claimed for FY 2018-19, citing the Appellant's failure to seek prior approval for the CAPEX exceeding Rs.10 Crore, the relevant extracts from the Impugned Order are reproduced below*:*

*"3.9.42 Further the Commission observed that certain assets such as KP-I and KP-IV are of amount more than Rs. 10 Crore, however, the Petitioner did not take prior approval from the Commission for incurring capex more than Rs. 10 Crore**. Hence the Commission has reduced the 25% of the opening GFA from the net GFA***

and corresponding 25% depreciation till FY 2017-18 for opening balance of Accumulated depreciation of FAR is also being deducted*. The details of such assets as per FAR of FY 2018-19 is shown in the Table below" .*

Table 3-61: Details of KP-I substation as per Fixed Asset Register (FAR) submitted by the Petitioner for FY 2018-19

Asset Description	Quantity	Gross Block (Opening)	Addition	Retirement	Gross Block (Closing)	Accumulated Depreciation (Opening)	Depreciation for the year	Depreciation on Retired Assets	Accumulated Depreciation (Closing)
-----	-	-	-	-	-	-	-	-	-
---	-	-	-	-	-	-	-	-	-
Total	-----	34.73	0.74	---	35.74	1.23	2.13	--	3.26

Table 3-62: Details of KP-IV substation as per Fixed Asset Register (FAR) submitted by the Petitioner for FY 2018-19

Asset Description	Quantity	Gross Block (Opening)	Addition	Retirement	Gross Block (Closing)	Accumulated Depreciation (Opening)	Depreciation for the year	Depreciation on Retired Assets	Accumulated Depreciation (Closing)
-----	-	-	-	-	-	-	-	-	-
---	-	-	-	-	-	-	-	-	-
Total	-----	69.13	1.88	---	71.01	2.57	5.34	--	7.91

3.9.43 *The Commission also finds that, for FY 2018-19, the Petitioner have neither provided the Capital investment plan in terms of the Regulation 23A nor they have taken any prior approval of any scheme having capital expenditure greater than INR 10 Crore, from the Commission. On enquiry, the Petitioner submitted that the Commission has already approved the same, vide the Multi Year Tariff Order dated 29.11.2017. It seems the Petitioner breaks up its project / scheme into parts to avoid the approvals required as per the above Regulations.*

*"**3.9.45** The Commission, from time to time, in its Tariff Orders has directed the Petitioner to submit the Capital investment plan and take prior approval of the schemes greater than INR 10 Crore as per Regulation 23A of the UPERC MYT Regulations, 2014. Further, the Petitioner has claimed an investment of Rs. 125.38 Crore (excluding GNIDA assets) in FY 2018-19, however, the Petitioner did not take prior approval from the Commission for any of the schemes with capital expenditure greater than INR 10 Crore.*

Accordingly, the Commission has decided to disallow 25% of the Capital investment of NPCL Assets for FY 2018-19.

Table 3-63: Net Impact of disallowance considered in GFA

Particular	Reference	Claimed in True Up of FY 2018-19 (Rs. Crore)	Amount (Rs. Crore)
Opening GFA	A	1,358.32	1,358.33
Addition / Capitalisation (during the year) as per audited accounts	B	125.38	125.38
Deduction / Retirement during the year as per audited accounts	C	4.30	4.30
Closing GFA	D=A+B-C	1479.40	1,479.40
Opening Balance of 132 kV and above assets as per FAR of FY	E		83.38
Opening Balance of Vehicles as per FAR of FY 2018-19	F		4.25
Opening Balance of 25% of KP-I and KP-IV assets as per FAR of FY 2018-19	G =(Rs. 34.73 Crore+ Rs. 69.13 Crore)*25%		25.97
Total Opening Balance considered for Disallowance for FY 2018-19 as per FAR	H=E+F+G		113.60
Addition of 132 kV and above assets as per FAR of FY 2018-19	I		5.80
Addition of vehicles in FY 2018-19 as per FAR of FY 2018-19	J		1.93
Disallowance of 25% of additions after adjustments of item I and J for FY 2018-19	K= (B-(I+J))*25%		20.08
Total Opening Balance considered for Disallowance	**H=E+F+G**		**113.60**
Addition of 132 kV and above assets as per FAR of FY 2018-19	I		5.80
Addition of vehicles in FY 2018-19 as per FAR of FY	J		1.93
Disallowance of 25% of additions after adjustments of item I and J	K= (B-(I+J))*25%		20.08
Total addition of GFA considered for	**L=I+J+K**		**27.81**
Net Opening Balance of GFA	M=A-H		1,244.72
Addition during the year (after all disallowance)	N=B-L		97.57
Retirement during the year	C		4.30
Closing balance of GFA	P=M+N-C		1,337.99

It is an established principle that the approved closing GFA of an asset in the previous Financial Year becomes the opening GFA of the particular asset in the subsequent Financial Year; and it appears, on this basis, opening GFA of the aforesaid assets (KP1 & KP4) was considered and approved in the ARR order dated 22.01.2019 for FY 2018-19. It is pertinent to note that it is not even the contention of the State Commission that closing GFA of the said assets have not been approved by the State Commission in the preceding year. It has been informed by the Appellant, that capital expenditure in these assets (KP 1 and KP 4) have accrued in FY 2013-14 to FY 2017-18, which was approved in the tariff orders corresponding to those years. Thus, disallowing the opening GFA of these assets in subsequent year tariff determination that too in True up order for FY 2018-19 would tantamount to amending the GFA already approved for these assets in the tariff orders of previous years, which are not under challenge and have attained finality, and furthermore ARR order for FY 2018-19 approved the opening GFA of these assets, same as that approved in the previous year orders; such disallowance, in our view, also results in an anomalous situation where two different GFAs stand approved for the same assets namely, the closing GFA as approved for FY 2017-18 (based on approvals granted in the preceding years) and a reduced opening GFA now considered in the True-Up Order for FY 2018-19, whereas, principally, the two ought to be identical. It is well settled that tariff orders are binding on both the Distribution Licensee as well as the State Commission, unless revised in accordance with the procedure established by law. Considering tariff orders are also regulatory in nature, as contended on behalf of State Commission, the principle of regulatory certainty demands that once GFA is approved in a final tariff order, it should not be altered arbitrarily in subsequent years. Generally, the Distribution Licensee structures its operations and

financial planning based on the approved GFA in the previous tariff orders, and any deviation, save in exceptional circumstances and for fair and valid reasons, should be avoided.

With regard to disallowance of 25 % Capital Expenditure made in FY 2018-19 in the True up order, it has been contended on behalf of State Commission that since prior approval as per Regulation 23 A of " UPERC MYT Regulation 2014" has not been taken, so instead of disapproving entire capex, only 25 % disallowance in the capex made for FY 2018-19, as well as disallowance of 25% in opening GFA of the said two assets have been effected.

We note from the State Commission Order dated 30.11.2017, which accorded approval of Business Plan, determination of Multi Year Aggregate Revenue Requirement (ARR) and tariff for the first Control period (FY 2017-18 to FY 2019-20), the Appellant herein has provided details of Capital Expenditure for FY 2017-18, FY 2018-19, FY 2019-20 as per Regulation 21 of "UPERC MYT Regulations 2014", as noted in the Order and tabulated here in below:

***"5.4.2** The details of the capital expenditure claimed by the petitioner for the control period are as follows:*

TABLE 5-5 BREAK UP OF CAPITALISATION AS CLAIMED BY THE PETITIONER FOR FY 2017-18 TO FY 2019-20

S.No.	New Schemes	FY 2017-18	FY 2018-19	FY 2019-20
1	New Connection	13.09	14.66	16.34
2	Replacement Stock	1.97	2.08	2.31
3	Metering	2.66	2.94	3.25
4	220/33 and 33/11 kV Substation	84.84	111.30	99.75
5	33 kV Network Development	4.16	4.29	5.12
6	11 kV Network Development	14.72	15.18	14.22
7	LT Network Development	3.62	4.01	4.24
8	Network at Villages	4.21	4.34	4.34
9	Network Renovation	1.40	1.44	1.32

10	Process System Automation	14.78	18.21	19.79
11	Civil Works, Office Infrastructure Facility & Customer Care Center	39.96	13.53	14.19
12	IT Projects	13.00	9.00	10.00
13	Tools / Testing Equipment, Vehicles etc.	1.99	2.47	3.00
14	Demand Side Management	2.00	3.00	3.00
15	Land	4.00	4.50	5.00
16	Misc/ Contingent Works	6.50	7.50	8.00
17	**Total**	**212.89**	**218.44**	**213.87**
18	Add: Interest Capitalised	5.67	5.86	5.84
19	Add: Employee Cost Capitalised	10.69	13.17	15.04
20	**Total**	**229.26**	**237.46**	**234.75**

The State Commission at Para 5.4.6 of Order dated 30.11.2017 approved the capital expenditure considering Debt: Equity ratio in accordance with Regulation 23 of the "MYT Regulations 2014" given as under:

"*5.4.6* *capital expenditure financed through loan and 30% of capital expenditure financed through equity after deducting consumer contribution from the total capital expenditure in accordance to the Regulations 23 of the Distribution MYT Regulations, 2014. The details of the capital expenditure allowed by the Commission are as follows:*

"TABLE 5-6 CAPEX DETAILS FOR FY 2017-18 TO FY 2019-20 AS APPROVED BY THE COMMISSION (Rs. Crore)

	FY 2017-18		FY 2018-19		FY 2019-20	
Particulars	***Petition***	***Approved***	***Petition***	***Approved***	***Petition***	***Approved***
Total Additions to Assets (excluding interest capitalisation)	*223.59*	*218.88*	*231.60*	*225.63*	*232.99*	*226.12*
Add: Closing CWIP	*2.00*	*2.00*	*2.00*	*2.00*	*2.00*	*2.00*
Less: Opening CWIP	*2.00*	*2.00*	*2.00*	*2.00*	*2.00*	*2.00*
Total Capex (excluding interest capitalisation)	***223.59***	***218.88***	***231.60***	***225.63***	***232.99***	*226.12*
Add: Interest	*5.67*	*5.67*	*5.86*	*5.86*	*1.76*	*1.76*
Total Capex	***229.26***	***224.55***	***237.46***	***231.49***	***234.75***	***227.87***
Consumer Contribution	*15.41*	*15.41*	*16.90*	*16.90*	*18.41*	*18.41*
Net Capex	***213.85***	***209.14***	***220.56***	***214.58***	***216.34***	***209.46***
Debt @ 70%	*149.69*	*146.40*	*154.39*	*150.21*	*151.44*	*146.62*
Equity @ 30%	*64.15*	*62.74*	*66.17*	*64.37*	*64.90*	*62.84*

The State Commission while granting approval to such capital expenditure sought by Appellant, has referred to the Regulation 23 of the "UPERC MYT Regulations, 2014", however in the Impugned Order, disallowance of the opening GFA of the two assets referred above, as well as the partial disallowance of the overall Capital Expenditure in FY 2018-19 , has been justified on the ground of non-compliance with Regulation 23A.Thus it is not as if cognizance of Regulation 23, which also includes Regulation 23 A was not taken by State Commission, however our attention has not been drawn towards any reference made in the Order dated 30.11.2017, while approving capital expenditure for FY 2017-18, FY 2018-19 and FY 2019-20 with regard to separate specific approval under Regulation 23A before taking up the implementation of schemes above Rs. 10 Crore.

Regarding the observation of the State Commission at Paragraph 3.9.45 of the Impugned Order that it had directed the Appellant to submit the capital investment plan and take prior approval of the CAPEX schemes greater than Rs. 10 Crore as per Regulation 23A of the " UPERC MYT Regulations 2014", it has been submitted by the Appellant that said direction was issued by the State Commission in the Tariff Order dated 03.09.2019 i.e., for ARR/Tariff of FY 2019-20 after passing of ARR order for FY 18-19, which was passed on 22.01.2019; this fact has not even been disputed by the State Commission before this Tribunal. The Appellant has also submitted that in terms of the " UPERC MYT Regulations 2019", the Appellant has complied with the provisions thereunder.

We also note that till the passing of Impugned Order, the State Commission has considered the approval granted for capital

expenditure as per Business Plan Order dated 30.11.2017, as the basis for considering the approval of capital expenditure in subsequent tariff Orders. In the ARR of FY 2017-18, which has been approved along with Business Plan Order dated 30.11.2017, same capex as approved in Business plan order was considered and no requirement of prior approval has been specified/sought either in ARR of FY 2017-18 or in True up Order for FY 2017-18. Further, in this context, it is of relevance to reproduce the para 5.6.22 of the ARR Order dated 22.01.2019 for FY 2018-19, which also makes mention of Regulation 23 of " UPERC MYT Regulations 2014":

> ***"5.6.22*** *The Commission while working out debt and equity has considered 70% of the capital expenditure financed through loan and 30% of capital expenditure financed through equity after deducting Consumer Contribution from the total capital expenditure in accordance with Clause 23 of the Distribution MYT Regulations, 2014 and details of the capital expenditure allowed by the Commission are as follows:*
>
> ***"TABLE 5-22 CAPEX DETAILS FOR FY 2018-19 APPROVED BY THE COMMISSION (Rs. Crore)***

Particulars	***Approved in T.O dtd. 30.11.2017***	***Petition***	***Approved***
Total Additions to Assets (excluding interest	*225.63*	*192.73*	*168.73*
Add: Closing CWIP	*2.00*	*42.30*	*42.30*
Less: Opening CWIP	*2.00*	*33.58*	*33.58*
Total Capex (excluding	***225.63***	***201.46***	***177.46***
Add: Interest Capitalisation	*5.86*	*3.76*	*3.76*
Total Capex	***231.49***	***200.37****	***181.22***
Consumer Contribution	16.90	33.73	33.73
Net Ca pex	**214.58**	**166.64**	**147.49**
Debt @ 70%	150.21	116.65	103.24
Equity @ 30%	64.37	49.99	44.25

**After deducting Rs 4.85 Crs for Assets retired."*

From the above table, while referring to the total additions in the Assets in FY 2018-19 amounting to Rs 225.63 Crore as approved vide Order dated 30.11.2017 and Appellant seeking approval of addition in assets as only Rs.192.73 Crore during FY 2018-19, the State Commission approved the additions to Assets as Rs. 168.73 Crore after disallowing expenditure of Rs. 24 Crore pertaining to BZP and KP5 substation as per their order dated 31.10.2018 and deducting Consumer Contribution. We have been informed that the disallowance of expenditure in BZP and KP5 in the order dated 31.10.2018 was based on consideration other than non-compliance of Regulation 23 A of "UPERC MYT Regulations 2014". Thus, even in ARR order for FY 2018-19, dated 22.01.2019, earlier approval granted by State Commission vide its order dated 30.11.2017 has been considered and the State Commission in the ARR order dated 22.01.2019 (FY 2018-19) has only stated that they shall undertake prudence check of Capital expenditure at the stage of True up. Accordingly, it can be reasonably assumed that, subject to prudence check, the capital expenditure has been approved in ARR order for FY 2018-19. As also observed elsewhere in this judgement, in our view, a prudence check when used in regulatory contexts means an assessment to see whether an expenditure, investment, or decision was made in a reasonable, careful, and responsible manner under the circumstances existing at that time. It does not involve a test of hindsight perfection, but about whether the decision would appear sensible to a reasonable person exercising due diligence. Prudence check undertaken at the True up stage cannot change the methodology/ interpretation/ principle followed while approving the ARR **(BSES Rajdhani Power Ltd Vs Delhi Electricity Regulatory Commission; (2022) SCC Online SC 1450)**

The law laid down in **Taylor v. Taylor (1876) 1 ChD 426**, that "*where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden*" has been followed in **Nazir Ahmed vs Emperor: AIR 1936 PC 253.** This principle has been applied to hold provisions to be mandatory in **Shraif-ud-din v. Abdul Gani Lone (1980) 1 SCC 403,** and **Bhikraj Jaipuria v. Union of India, 1961 SCC OnLine SC 34;** and has been followed in **Ramchandra Keshav Adke v. Govind Joti Chavare, (1975) 1 SCC 559.**

It is true that Regulation 23 A(b) requires a distribution licensee to seek prior approval of the Commission for capital expenditure of scheme greater than Rs. 10 Crore. It is also not in dispute that the Appellant did not obtain such prior approval and, consequently, it can be said to have acted contrary to and in violation of Regulation 23 A(b) of the Regulations. Curiously the Respondent-Commission has, for such non-compliance, disallowed 25% of the over-all capex incurred by the Appellant for projects above Rs. 10 Crore. Neither does the Impugned Order refer to the source of power for such disallowance nor is it referable to any provision in the Regulations. While the Commission could have chosen to provide for the consequences of such non-compliance in the statutory Regulations made by it under Section 181 of the Electricity Act, in the absence of any such stipulation in the statutory regulations, deduction of 25% is not only unduly harsh but appears whimsical and arbitrary. Regulatory certainty would require the Commission to prescribe, by way of Regulations, for the consequence of non-compliance with Regulation 23 A(b).

It is a well-recognized maxim, as held by the Supreme Court in **(i) Ashok Kapil Vs. Sana Ullah (dead) and Ors. : (1996) 6 SCC 342,**

(ii) Kusheshwar Prasad Singh Vs. State of Bihar and Ors. : (2007) 11 SCC 447, and (iii) Goaplast (P) Ltd. Chico Ursula D'Souza and Anr. : (2003) 3 SCC 232, that no one can take advantage of his own wrong, and this maxim is one of the salient tenets of equity. It is also well settled that no person can secure the assistance of a court of law for enjoying the fruits of his own wrong. As noted hereinabove what the Appellant-distribution licensee was required to do was to obtain prior approval of the Commission for capital expenditure of projects greater than Rs.10 Crore. It is not as if the State Commission would have invariably rejected any such request if its approval had been sought. While there has been a lapse on the part of the Appellant in not seeking such prior approval of the State Commission, bearing in mind the fact that the consequences of their failure to do so is not stipulated in the Regulations, ends of justice would be met if the disallowance is set aside, and the Commission is directed to cause a prudence check of the capital expenditure incurred by the Appellant greater than Rs. 10 Crore, more so, as in the business plan approval order, the capital expenditure has been approved by the State Commission, and this expenditure has been considered for approval in the APR, ARR and true up order for FY 2017-18.

In **Maharshi Dayanand University v. Surjeet Kaur, (2010) 11 SCC 159**, the Supreme Court held that neither the court nor any Tribunal has the competence to issue a direction contrary to law or to act in contravention of the statutory provisions; there can be neither estoppel against the legislature in the exercise of the legislative functions nor can a public authority be debarred from enforcing a statutory prohibition; and promissory estoppel is an equitable doctrine which must yield when equity so requires.

Complying with the tests referred to in the said judgement, would only mean that the obligation of a distribution licensee, under Regulation 23 A(b), to seek prior approval of the Commission for capital expenditure greater than Rs. 10 Crore necessitates compliance. As noted hereinabove what the Regulation does not stipulate is for the consequence of such non-compliance. Ordinarily, where the statute provides that failure to observe a particular rule would lead to a specific consequence, the provision should be construed as mandatory. [***Sharif-ud-Din* v. *Abdul Gani Lone* (1980) 1 SCC 403 : AIR 1980 SC 303; *Balwant Singh* v. *Anand Kumar Sharma* · (2003) 3 SCC 433 : AIR 2003 SC 1637; *Bhavnagar University* v. *Palitana Sugar Mills Pvt. Ltd* · (2003) 2 SCC 111 : AIR 2003 SC 511; *Chandrika Prasad Yadav* v. *State* of *Bihar* · (2004) 6 SCC 331 : AIR 2004 SC 2036; *May George* v. *Special Tahsildar* · (2010) 13 SCC 98].** Often the question whether a mandatory or directory construction should be given to a statutory provision may be determined by the result that would follow non-compliance with the said provision. As a corollary to this rule, the fact that no consequences of non-compliance are stated in the statute, has been considered as a factor tending towards a directory construction. **(Balwant Singh: (2003) 3 SCC 433 : AIR 2003 SC 1637; Sutherland's Statutory Construction, 3rd Edn., Vol. 3)**.

The arbitrary deduction of 25% of such capital expenditure, solely on the ground that prior approval was not sought, is irrational, unreasonable and highly excessive, and does not find support in the Regulations in force. Even if the Commission had granted approval, such a grant would not have disabled them from causing a prudence check of the capital expenditure incurred by the Appellant-distribution licensee. Since such prudence check is now being directed to be undertaken by the Commission, suffice it to observe that regulatory

certainty would require the Commission to stipulate, in the Regulations itself, for the consequences of non-compliance by a distribution licensee of its obligations under Regulation 23 A(b).

It has been held by this Tribunal that Commission in its tariff orders cannot convert its power of tariff fixation given under section 61 and 62 of the Electricity Act 2003 into a proceeding for imposing penalty (**Maharashtra State Electricity Distribution Company Limited Vs. MERC (2009 SCC OnLine APTEL 73)** The State Commission is a statutory authority constituted under the Electricity Act, and the jurisdiction which it is entitled to exercise must be confined to what is stipulated under the Electricity Act, together with the Rules and Regulations framed thereunder. The jurisdiction conferred on the Regulatory Commission, both Central and States, is by the Electricity Act, 2003, which is an enactment of Parliament. It is a well-settled principle that where jurisdiction is given to a court (or Tribunal) by an Act of Parliament, and such jurisdiction is only given upon certain specified terms contained in that Act, these terms must be complied with, in order to create and confer jurisdiction on it for, if they be not complied with, it would lack jurisdiction. There is no provision in the Electricity Act, 2003 as well as in Regulations framed by the State Commission, that confers jurisdiction on State Commission to impose arbitrary disallowance of approved Gross Fixed asset and of capital expenditure undertaken by a distribution licensee, having already approved the same in various Tariff Orders and which has not been interfered in appeal by this Tribunal or in the second appeal by the Supreme Court.

Learned Senior Counsel of the State Commission placed reliance on the judgement in ***"Power Grid Corporation of India Ltd. Vs. Madhya Power Transmission Company Limited & Ors. (2025 INSC 697)",*** to contend that the State Commission exercising its regulatory power under

Section 86 of the Electricity Act, 2003 is justified in disallowing opening GFA as well as effecting a percentage reduction in capital expenditure in FY 2018-19 particularly when the Regulations are silent on the consequences of non-compliance to the Regulations is on no avail. It is fact that Regulation do not provide for consequences of Non-compliance of Regulation 23 A, however, there are provisions in Electricity Act 2003 which provides for the consequences for non-compliance of the Act, Rules/Regulations made thereunder or directions issued by the Commission. In our considered view, State Commission could have either denied the capital expenditure sought by Appellant in ARR of FY 2018-19 or given conditional approval subject to compliance of Regulation 23 A, while passing the ARR Order for FY 2018-19 dated 22.01.2019 and in that situation it would have been Appellant's choice to undertake capital expenditure as per their own risk without seeking specific approval so directed.

Further, arbitrary reduction of opening GFA by the State Commission, also amounts to indirectly reopening the tariff orders of earlier years, which have attained finality, as already held in preceding paragraphs is not only illegal but also undermines regulatory certainty. Therefore, once the Gross Fixed Asset value has been duly approved by the Commission in a prior tariff determination, any unilateral alteration of the opening GFA is arbitrary, illegal and is contrary to the settled principles of tariff determination under Section 61 and 62 of the Electricity Act, 2003.

In view of the above deliberations, we are of considered view that State Commission has exceeded its jurisdiction in imposing a disallowance of 25 % of opening Gross block of two assets namely KP 1 and KP 4 in FY 2018-19 (which is closing Gross Block for FY 2017-18, already approved) as penalty for non-compliance of Regulation 23 A of " UPERC MYT

Regulations 2014" in the True up of FY 2018-19 and such disallowance is set aside. Further, under the true up exercise for FY 2018-19, as also stated by the State Commission in ARR order dated 22.01.2019, State Commission is required to undertake prudence check of the capital expenditure incurred and arbitrary reduction in capital expenditure, after approving the same in its ARR Order (FY 2018-19) dated 22.01.2019 is not permissible in law. The State Commission, without undertaking the prudence check, has arbitrarily disallowed 25 % of the capital expenditure made in FY 2018-19 in true up exercise. The said finding of the State Commission is set aside and the issue of approval of capital expenditure in FY 2018-19 under True up exercise is remanded to the State Commission to undertake prudence check of the cost incurred.

SECTION 4 (CAPITAL EXPENDITURE) : ISSUE NO.2 : DISALLOWANCE OF COST OF VEHICLES PURCHASED BY THE APPELLANT

A. SUBMISSION URGED ON BEHALF OF NPCL

Learned Senior Counsel submitted that the Appellant is aggrieved by

i. Disallowance/reduction of the vehicles purchased by the Appellant till FY 2017-18, from the opening Gross Fixed Assets (**GFA**) of FY 2018-19, along-with corresponding deduction in accumulated depreciation till FY 2017-18.

ii. Disallowance/reduction of the vehicles purchased by the Appellant in FY 2018-19.

It is submitted that the State Commission, in the Impugned order has disallowed the cost of vehicles, *inter-alia* contrary to its own practice followed in the earlier Tariff Orders, stating that Appellant has not been able to substantiate the basis of high-end vehicles clearly, rise in number of vehicles is not proportionate to the increase in number of consumers, load and sales and costs of high-end luxury vehicles cannot be passed

on to the consumers.

It is submitted that the UPERC (Multi Year Distribution Tariff) Regulations, 2014 ("MYT Regulations 2014") do not impose any restriction on the procurement of vehicles by a licensee for the purpose of conducting its distribution business or operations. On the contrary, Regulation 26 of the "MYT Regulations 2014", which sets forth the Depreciation Schedule, expressly includes vehicles within the list and description of assets. In compliance with the mandate of the referred Regulations, the Appellant had submitted its plan for the procurement of vehicles in its Business Plan and Tariff Petitions, which have been approved by the State Commission from time to time, including through the Business Plan Order dated 30.11.2017, ARR Order (FY 2018-19) dated 22.01.2019 and the Tariff Order dated 03.09.2019 (APR for FY 2018-19). However, for the first time at the truing-up stage of FY 2018-19, the State Commission has disallowed all the vehicles, including those purchased from FY 2006-07 onwards and previously approved by the State Commission from time to time. The State Commission, at the stage of truing up also disallowed the vehicles purchased and capitalized in FY 2018-19, for which approval was granted by State Commission in its Business Plan Order dated 30.11.2017 and Tariff order dated 22.01.2019 (ARR for FY 2018-19)

The Appellant is entrusted with the distribution of electricity in Greater Noida area, covering 335 sq. km, including 118 villages, with demand increasing at a CAGR of over 10% over the past five years in a row. To efficiently serve its licensed area, the Appellant's staff, executives, and laborers are required to move into the area 24x7 throughout the year. For this purpose and to ensure efficient distribution operations, the Appellant has been procuring, utilizing, and retiring

vehicles over the past 25 years in accordance with its internal vehicle policies, revised from time to time. In fact, the State Commission, in its recent Tariff Order dated 10.10.2024 (for the ARR of FY 2024-25 and the truing-up of FY 2022-23), has expressly recognized the importance and necessity of vehicles for day-to-day operations and the movement of officers.

Learned Senior Counsel, submitted that at the stage of 'truing up', the State Commission cannot change the rules/methodology used in the initial tariff determination ("***BSES Rajdhani Power Ltd. Vs. Delhi Electricity Regulatory Commission" (2022) SCC Online SC 1450,***). Referring to ***"PTC India Limited vs. CERC & Ors." (2010) 4 SCC 603*** learned senior Counsel submitted that the Appropriate Commissions ought to pass Orders in accordance with the applicable Regulations.

It is prayed that this Tribunal may set aside the findings of the State Commission regarding the disallowance of vehicle costs, to the extent challenged in the present Appeal, and allow the cost of approximately Rs. 6.18 Crore, along with all consequential reliefs.

B. CONSIDERATION AND OUR VIEW : DISALLOWANCE OF COST OF VEHICLES

We note from the Impugned Order that after noting the details of Two wheelers and Four wheelers purchased by the Appellant since FY 2013-14 till FY 2017-18, as well as those purchased in FY 2018-19, disallowed the entire opening GFA pertaining to vehicles at FY 2018-19 (closing GFA of FY 2017-18) along with accumulated depreciation and capital expenditure made on vehicles in FY 2018-19 and observed as under:

> *"3.9.40 It was analysed that over the years, NPCL has accumulated large number of vehicles. The usual business of the Petitioner is of*

distribution of electricity to its consumers and purchasing high number of luxury vehicles is not in synchronisation with its core / usual business. Hence the Commission for True Up of FY 2018-19 has disallowed the vehicles accumulated by the Petitioner till FY 2018-19. A query vide mail dated October 07, 2020 related to number of vehicles accumulated by NPCL was sought. The Petitioner vide mail dated October 08, 2020 submitted the details as shown in the Table below:

Table 3-59: Details of Two-Wheelers as submitted by the Petitioner (Rs. Crore)

Year	Opening		Addition during the year		Retirement / deletion during the year		Closing balance	
	No.	Amount	No.	Amount	No.	Amount	No.	Amount
FY 2013-14	2	0.01	0	0	0	0	2	0.01
FY 2014-15	2	0.01	3	0.02	0	0	5	0.03
FY 2015-16	5	0.03	0	0	0	0	5	0.03
FY 2016-17	5	0.03	0	0	0	0	5	0.03
FY 2017-18	5	0.03	1	0.01	0	0	6	0.03
FY 2018-19	6	0.03	0	0	0	0	6	0.03

Table 3-60: Details of Four-Wheelers as submitted by the Petitioner (Rs. Crore) - only few columns extracted

Year	Opening		Addition during the year		Retirement / deletion during the year		Closing balance	
	No.	Amount	No.	Amount	No.	Amount	No.	Amount
FY 2014-	**22**	**1.59**	**9**	**0.67**	**4**	**-0.2**	**27**	**2.05**
FY	27	2.05	7	0.61	6	-0.36	28	2.3
FY	28	2.3	9	0.84	5	-0.44	32	2.69
FY	32	2.69	15	1.29	10	-0.76	37	3.22
FY	37	3.22	8	1.41	7	-0.41	38	4.22
FY	38	4.22	14	1.93	6	-0.64	46	5.51

"3.9.41 It is noted that the Petitioner has not been able substantiate the base of high-end vehicles clearly. Further, such costs of high-end luxury vehicles cannot be passed on to the consumers. Further in the above tables it can be seen that the Petitioner has 50 vehicles. Therefore, the rise in number of vehicles is not in proportion to the increase in number of consumers, load and sales. The vehicles added till FY 2017-18 are being disallowed and reduced from the opening GFA of FY 2018-19. Further vehicles added in FY 2018-19 are being reduced from the GFA addition during the year. Further 100% depreciation till FY 2017-18 for vehicles is also being deducted from the accumulated depreciation."

It is surprising to note that though the observations in the impugned order pertained to high end vehicles, without referring to any particular vehicle (s) which may fall in that category, the State Commission has disallowed all vehicles purchased including two wheelers along with accumulated depreciation till FY 2017-18.

The Distribution Licensee's network generally spans urban, semi-urban, and rural areas, and in the present case Appellant has submitted that it covers about 335 sq Kms of area. As per Electricity Act, the Distribution Licensee is obligated to maintain an efficient, coordinated and economical distribution system for supply of electricity in its licensed area. Licensee is obligated to ensure reliability, safety, and quality of supply to consumers and adequate mobility. Vehicles are as such required for inspection, patrolling, preventive maintenance, and rectification of faults in the distribution system; quick deployment during breakdowns, storms, accidents, and disasters to minimize outage durations; mobility for complaint resolution, new connection inspection, disconnection/reconnection work, and safety checks etc. Thus, deployment of adequate number of Vehicles enable Distribution Licensee in timely restoration of supply and reduction in outage duration, thereby improving consumer satisfaction. In our view, requirement of vehicles is integral and unavoidable for discharge of statutory duties by the distribution licensee. It contributes in ensuring quality and reliable supply, protecting consumer interest, and achieving regulatory compliance with regard to standard of supply. Disallowance of all the vehicles purchased up to FY 2017-18, which have already been approved in their respective Tariff orders would mean that in commission's view, no vehicles were required/necessary for managing the operation of Distribution Licensee and accordingly distribution

licensee was/is not entitled for the recovery of cost of any vehicles, as part of the ARR. The State Commission did not draw our attention to any provision in the "UPERC MYT Regulations 2014" that prohibits/caps pass through of cost of vehicles purchased by distribution licensee to perform its obligation. In fact, Appellant drew our attention to the Depreciation schedule, Annexure C of "UPERC MYT Regulations 2014", which separately specify the depreciation rate for Vehicles, meaning thereby that depreciation on vehicles is permitted. Without delving any further on the importance and necessity of vehicles for effective operation of the distribution system by a distribution licensee, detailed deliberations have been held in above paragraphs, that the Gross Fixed Asset value which has been duly approved by the Commission in a prior tariff determination and which tariff order has attained finality, cannot be reopened, that too in a tariff determination exercise undertaken for a subsequent year. In the present case, purchase of vehicles up to FY 2017-18 has already been capitalised as per approval accorded in respective year tariff order in which these were purchased and reflected as opening GFA of Vehicles in FY 2018-19. Thus, the observation in the Impugned Order with regard to disallowance of opening GFA of vehicles accumulated up to FY 2017-18, and reduction in accumulated depreciation on this account till FY 2017-18 needs interference and must be set aside.

For the vehicles purchased in FY 2018-19, we note from the Business Plan order dated 30.11.2017, Appellant has estimated a capital expenditure of Rs 2.47 Crore on this account in its overall capital expenditure and no disallowance under this head was discernible from the order dated 30.11.2017. Likewise, from the ARR order dated 22.01.2019 (FY 2018-19), and APR Order dated 03.09.2019, it is observed that Appellant had estimated an expenditure of about Rs 5.91

Crore under the head Tools/Testing Equipment/ Vehicles and no disallowance on account of Vehicles has been mentioned in these orders while approving overall Capital Expenditure. In the Impugned Order (True up for FY 2018-19), Appellant has claimed capital expenditure of Rs. 1.93 Crore for purchase of 14 vehicles, which works out an average cost of vehicle as Rs. 13.85 lakh/vehicle. In the Impugned Order, no observations have been made with regard to which specific high end vehicles is being referred to. Having approved the procurement of vehicles in Business Plan for the year FY 2018-19, ARR order dated 22.01.2019 (FY 2018-19), APR order dated 03.09.2019 (FY 2018-19), in our view State Commission is not justified in disallowing the cost of vehicles purchased in FY 2018-19, subject to prudence check and as held above, State Commission at the True up stage cannot change the methodology/ interpretation/ principle followed while approving the ARR & APR **(BSES Rajdhani Power Ltd Vs Delhi Electricity Regulatory Commission;(2022) SCC Online SC 1450).** Disallowance of capital expenditure on Vehicles in FY 2018-19 need interference.

In view of above deliberation, we set aside the disallowance of opening GFA of vehicles accumulated up to FY 2017-18, along with reduction in accumulated depreciation on this account till FY 2017-18 in the Impugned Order. We also set aside the disallowance of cost of vehicles purchased in the FY 2018-19 under the Impugned Order and remand the matter to the State Commission to undertake prudence check of the cost incurred on Vehicles in FY 2018-19.

SECTION 4 (CAPITAL EXPENDITURE) : ISSUE NO. 3 : DISALLOWANCE OF CAPITAL EXPENDITURE INCURRED BY THE APPELLANT ON 132 KV AND ABOVE ASSETS

A. SUBMISSION URGED ON BEHALF OF NPCL

Learned senior Counsel submitted that the Appellant is aggrieved by:

(i) disallowance and deduction of 132 kV and above assets, namely assets capitalized up to FY 2017-18 to the extent of Rs. 83.38 Crore from the opening Gross Fixed Assets (GFA) of FY 2018-19, and assets added in FY 2018-19 to the extent of Rs. 5.80 Crore;

(ii) Deduction of 100% depreciation till FY 2017-18 in respect of the 132 kV and above assets from the opening balance of accumulated depreciation, thereby disallowing the cost incurred as capital expenditure on seven Extra High Voltage (EHV) assets, namely the 220/132/33 kV RC Green Substation, 220/33 kV Gharbara Substation, 220 kV LILO at RC Green Substation, 5 Nos. 33 kV bays at Sector 148 Substation, Noida, KP-5 Substation, BZP Substation and the 132/33 kV Surajpur Substation.

The State Commission, in the Impugned Order, while disallowing the 132 kV and above assets has observed that in its earlier Orders dated 31.10.2018 in Petition No. 987/2014 (RC Green) and 1020/2015 (Gharbara) as well as Order dated 04.06.2020 in Review Petition No. 1512/2019 (RC Green LILO), it has categorically held that a distribution licensee cannot establish, own, operate, and maintain a distribution system comprising 132 kV and 220 kV assets; however, despite such rulings, the Appellant has capitalised 132 kV and above assets in FY 2018-19, and since the Appellant continues to capitalise such assets in its Fixed Asset Register (FAR), the same have been deducted from the opening GFA of FY 2018-19.

It is submitted that, the reasons for disallowance given in the Impugned Order are unsustainable; firstly, the State Commission in its Orders dated 31.10.2018 and 04.06.2020 has neither ruled nor held that

a distribution licensee cannot own, operate, and maintain 132 kV and above assets, nor has it deducted or disallowed the cost of such assets; secondly, there exists no bar or restriction under the Electricity Act, 2003 read with the applicable Rules, Regulations, and legal precedents on a distribution licensee owning, operating, and maintaining 132 kV and above assets; and, factually, the investment in such assets has been made year after year with the express approval of the State Commission and/or the same having been trued-up in all previous years up to the Impugned Order. Accordingly, the findings of the State Commission on the present issue as recorded in the Impugned Order are liable to be set aside, and the State Commission be directed to duly allow the impact of capitalization of the 132 kV and above assets together with Carrying Cost, in accordance with law.

Learned Senior Counsel contended that State Commission through its Counsel, sought to justify above disallowance with reasons that are not forthcoming from the Impugned Order or from the Reply to the Appeal filed by the State Commission, which is impermissible in law. Without prejudice to the inadmissibility of the contentions submitted on behalf of the State Commission, the Appellant submits as under.

The State Commission, by disallowing the aforesaid 132 kV and above assets at the stage of truing-up for FY 2018-19, despite having allowed the same while approving the ARR for FY 2018-19 as well as in its earlier Tariff Orders, has acted in contravention of the settled legal principle that, at the stage of truing-up, the Appropriate Commission cannot change the rules/methodology used in the initial tariff determination by changing the basic principles, premises and issues involved in the initial projection of ARR, as held in "***BSES Rajdhani***

Power Ltd. vs. Delhi Electricity Regulatory Commission" **(2022) SCC Online SC 1450.**

Regarding the contention of the State Commission that it has rightly implemented its earlier Orders dated 31.10.2018 (RC Green and Gharbara Orders) and the ARR Order dated 22.01.2019 to disallow the capital expenditure towards all 132 kV and above assets, it is submitted that the Order dated 31.10.2018 were confined only to the RC Green and Gharbara Substations and, therefore, could not have been applied to disallow the other five EHV assets; further, the finding therein is that it was efficient, economical, and in consumer interest that such assets are owned, operated and maintained by a transmission utility i.e., UPPTCL. The aforesaid finding does not constitute a general enunciation of legal principle but is fact-specific, dependent upon the circumstances of each case, and therefore cannot be mechanically extended to other assets. Moreover, neither the Orders dated 31.10.2018 nor the ARR Order (FY 2018-19) dated 22.01.2019 contain any deduction or disallowance of the cost pertaining to the 132 kV and above assets.

In the RC Green & Gharbara Orders dated 31.10.2018, the State Commission merely (i) directed the Appellant to seek refund from GNIDA towards the cost of land and construction of the 220 kV RC Green/Gharbara Substations along with the associated lines; and (ii) observed that the investment shall be subject to truing-up after accounting for such refund. Likewise, in the ARR Order dated 22.01.2019, the State Commission only directed the Appellant to (i) apprise it regarding compliance with the aforesaid RC Green & Gharbara Orders dated 31.10.2018; and (ii) submit the consequential impact on the year-wise ARR at the stage of truing-up.

It is submitted that the findings in the RC Green and Gharbara Orders dated 31.10.2018 has been challenged by the Appellant in Appeal No. 336 of 2018 and Appeal No. 40 of 2019 before this Tribunal, and further, GNIDA, by its letter dated 18.11.2020, has rejected the request for refund (albeit in the context of LILO works at the RC Green Substation) on the ground that the Appellant is mandated to incur all costs for development of the electrical network in its licensed area of supply; accordingly, the issue of refund and any consequent truing-up do not arise, and in the absence of any refund, the said amounts could not have been deducted or disallowed in the Impugned Order by placing reliance on the Orders dated 31.10.2018 or the ARR Order dated 22.01.2019, particularly when the State Commission has no jurisdiction over GNIDA and any such direction is inherently unenforceable. In any event, it is significant to note that even after passing of the RC Green and Gharbara Orders dated 31.10.2018, the State Commission itself, in the ARR Order dated 22.01.2019, and had approved a capital expenditure of Rs. 17 Crore towards augmentation of the RC Green Substation for FY 2018-19.

Regarding the contention of the State Commission that the matter of capitalization of the RC Green Substation has been pending before the State Commission since 2014, learned Senior Counsel submitted that Petition No. 987 of 2014 was filed by the Appellant only in relation to its dispute with UPPTCL regarding possession and ownership of the RC Green Substation, and not in respect of its alleged capitalization; moreover, the State Commission has, consistently allowed capitalization of various components of the RC Green Substation in its Tariff Orders dated 01.09.2008, 19.10.2012 and 31.05.2013 up to the ARR Order of FY 2018-19 dated 22.01.2019.

Regarding the contention of the State Commission that there is no financial impairment of the Appellant's investment in the RC Green and Gharbara Substations as (i) State Commission has not tinkered with the money recovered up to FY 2017-18, by keeping intact, both the Return on Equity and Interest on Loan, already recovered by the Appellant; and (ii) from FY 2018-19 onwards, the Appellant will be getting back its entire investment by way of refund from GNIDA, it is submitted that the State Commission has sought to justify its illegal disallowance of the 132 kV and above assets both those capitalized up to FY 2017-18 from the opening GFA of FY 2018-19 and those added during FY 2018-19 on the ground that the Return on Equity and Interest on Loan recovered by the Appellant towards such assets have been kept intact; however, such reasoning cannot in law justify the removal of assets validly capitalized, and the impugned disallowance has effectively rendered redundant the expenditure legitimately incurred on these assets. Further in view of letter dated 18.11.2020 from GNIDA, in which it has expressly rejected the Appellant's request for refund in respect of the LILO works at the RC Green Substation, negates the State Commission's assumption that the Appellant would recover its entire investment by way of refund from GNIDA, which is wholly baseless, particularly when the RC Green & Gharbara Orders themselves contemplated that truing-up would arise only upon actual refund being received from GNIDA.

Regarding the contention of State Commission that the capital expenditure proposed for the BZP and KP-5 Substations was rejected by the State Commission in the ARR Order dated 22.01.2019, it is contended that this was not the basis of rejection in the Impugned Order; further, even as regards the disallowance in the ARR Order dated 22.01.2019, it is pertinent to note that the land and boundary walls of KP-

5 and BZP had already been approved, capitalized and trued-up by the State Commission in FY 2013-14 and FY 2014-15, respectively, with consequential tariff benefits allowed to the Appellant; (b) in the ARR for FY 2018-19, the Appellant had only proposed Rs. 24 Crore for construction of the Substations at KP-5 and BZP i.e., electrical equipment, which was not approved, and accordingly, no expenditure was incurred or claimed during truing-up of FY 2018-19; and (c) the ARR Order dated 22.01.2019, therefore, only rejected the cost of construction of the KP-5 and BZP Substations, while continuing to approve the opening GFA balance which included the cost of land and boundary walls; (d) however, in the Impugned Order, the State Commission has disallowed even the land and boundary wall costs of the KP-5 assets and the boundary walls of the BZP assets, which had never been disallowed earlier, rendering the present contention of the State Commission factually incorrect and contrary to record.

In reference to the observation of the State Commission with regard to absence of prior authorization/approval for KP-5 and BZP Substations, learned senior Counsel - submitted that the BZP asset was approved by the State Commission vide Tariff Orders dated 01.10.2014 and 01.08.2016, while the KP-5 asset was approved through successive Tariff Orders dated 31.05.2013, 18.06.2015, 01.08.2016, 30.11.2017 and 03.09.2019, thereby evidencing due approvals granted by the State Commission itself.

In view of the foregoing, it is prayed that this Tribunal may set aside the findings on the present issue in the Impugned Order and the State Commission be directed to allow the impact of capitalization on the 132 kV and above assets, with Carrying Costs as per law.

B. SUBMISSION URGED ON BEHALF OF STATE COMMISSION

a) Reversal and Removal of Capax of RC Green and Gharbara substation

Learned senior Counsel submitted that the RC Green (RCG) sub-station was commissioned by GNIDA, which engaged UP Power Transmission Co. Ltd. (UPPTCL), in 2009 for commissioning and in 2011 for upgradation. GNIDA also handed over operation and maintenance of RC Green to UPPTCL. Later, GNIDA agreed to transfer RC Green substation to the Appellant for Rs. 67.50 Crore. However, when the Appellant sought to take over, UPPCL resisted, claiming it to be a transmission asset to be retained by UPPTCL. In these circumstances, the Appellant instituted Petition No. 987 of 2017 before UPERC *inter alia* seeking a declaration that it was the lawful owner of the 220 kV RC Green Sub-Station at Greater Noida and entitled to own, operate and maintain the same as a distribution licensee. After prolonged litigation, State Commission/UPERC, by order dated 31.10.2018, held that RCG should not be handed over to the Appellant and must remain with UPPTCL. The Appellant has preferred Appeal No. 336 of 2018 before this Tribunal assailing the said order dated 31.10.2018, which remains pending adjudication before this Tribunal. In the absence of any stay granted by this Tribunal, the said order dated 31.10.2018 continues to remain operative and is liable to be implemented by UPERC against the Appellant.

While passing the ARR Tariff Order for FY 2018-19 dated 22.01.2019, the State Commission, after referring to its RC Green Order dated 31.10.2018, directed the Licensee to report compliance of the said orders and to submit the impact on year-wise ARR, including True-Up, in respect of investments in the 220 kV Gharbara and RC Green Sub-

Stations. The ARR Order dated 22.01.2019 has attained finality, since no appeal having been preferred by the Appellant therefrom.

In the Impugned Order dated 04.12.2020 (True-up for FY 2018-19), the State Commission proceeded to implement its earlier orders dated 31.10.2018 and 22.01.2019, and recorded its findings on the continued capitalization of 132 kV and above assets by the Appellant despite consistent rulings that a distribution licensee cannot own or operate such assets; accordingly, the State Commission removed the capital expenditure incurred by the Appellant towards payment to GNIDA for the RC Green sub-station, thereby disentitling the Appellant from FY 2018-19 onwards to claim any return on equity, interest on loan, or depreciation in respect thereof. It is significant that the State Commission has not disturbed the time value of money already recovered by the Appellant on its investment in RC Green up to FY 2018, having kept intact both the return on equity and interest on loan allowed through tariff till 31.03.2018, and thus the Appellant is in no manner out of pocket for the period prior to FY 2018-19; further, by the Impugned Order, the State Commission has removed from the regulatory accounts, both the total Capex claimed in respect of RC Green and the corresponding depreciation already received, while ensuring that, going forward from FY 2018-19, the Appellant would recover its entire investment through refund of the amount paid to GNIDA towards the said Capex, thereby resulting in no financial impairment of the Appellant's investment in the RC Green sub-station.

It is submitted that during MYT proceedings, consumers had specifically objected to such capitalization in respect of tariffs for control periods FY 2016-17, FY 2018-19 and FY2019-20. The State Commission, in its MYT Order dated 30.11.2017, recorded that

objections regarding construction of Gharbara and RC Green Sub-station were sub-judice and appropriate decision would be taken. Therefore, it is clear that the Appellant was fully aware that the issue of capitalization of RC Green was pending before UPERC in Petition No. 987 of 2017 at the start of the control period and that any adverse finding could impact it, which is limited only to the loss of opportunity to earn return on equity on the investment in RC Green from FY 2018-19 onwards.

It is further submitted that there is no inconsistency between the ARR Order dated 22.01.2019 for FY 2018-19 and the Impugned True-up Order dated 04.12.2020. While approving Capex for FY 2018-19, the State Commission, in ARR Order, had already put the Appellant to notice stating that the impact of year-wise investment in RC Green sub-station would be assessed, which has attained finality as no appeal was filed.

As regards, Gharbara Sub-Station learned senior Counsel submitted that the submissions regarding disallowance of capital expenditure for the Gharbara Sub-station are broadly similar to those made in respect of RC Green Sub-station and that the Impugned True-up Order dated 04.12.2020, the ARR Order dated 22.01.2019 for FY 2018-19, and the MYT Order have treated both RC Green and Gharbara Sub-stations on the same footing, subject to certain distinctions. The case concerning Gharbara Sub-station was filed before UPERC under Petition No. 1020 of 2015 and was adjudicated separately by the State Commission through its Judgment and Order dated 31.10.2018 (“Gharbara Order”), against which the Appellant has preferred Appeal No. 40 of 2019, which is also pending adjudication before this Tribunal. Further, no addition has been claimed by the Appellant in the FY 2018-19 True-up under the Impugned Order in relation to Gharbara Sub-

station, whereas a Capex addition of Rs. 5.80 Crore has been submitted by the Appellant for RC Green Sub-station.

b- Reversal of capex of BZP & KP-5 Sub-stations

Learned senior Counsel submitted that the capital expenditure proposed in respect of the BZP and KP-5 Sub-Stations for FY 2018-19, had been categorically rejected by the State Commission in the ARR Order dated 22.01.2019 for FY 2018-19 and while rejecting the proposed Capex for BZP and KP-5 Sub-Stations, the State Commission expressly reserved its right to undertake a detailed prudence check of capital expenditure at the stage of the True-Up for FY 2018-19. Subsequently, during the True-Up proceedings for FY 2018-19, an objection was raised by one consumer, Mr. Ramashankar Awasthi, in respect of capitalization of 132 kV and 220 kV sub-station assets by the Appellant in earlier years praying that in the true up for FY 2018-19, all capex & depreciation, interest on capex etc. already claimed in previous years by the Petitioner in RC Green, Gharbara, Knowledge Park-5 (KP- 5) and BZP sector must be disallowed and carrying cost at the rate of interest of working capital shall be adjusted in the True up for FY 2018-19. In response, the Appellant categorically submitted that all the aforesaid matters are sub-judice before this Tribunal and therefore, any action, which may impinge on such judicial process is not warranted in the matter; and there is no illegitimate assets creation with respect to 220 KV Substations as falsely alleged by the Objector. Even with respect to the proposed capital investment for FY 2018-19 in BZP and KP-5 Sub-Stations, the Appellant has admitted that no further investment shall be made therein pending the outcome of the appeals against the UPERC Orders dated 31.10.2018. It is submitted that neither in response to objections raised by the consumer nor to the queries of the State Commission did the

Appellant disclose any prior authorization or approval from the Commission with regard to the alleged capital expenditure on the BZP and KP-5 Sub-Stations. However, before this Tribunal on 19.05.2025, it is stated therein that certain Capex was incurred on KP-5 substation *inter alia* in 2013-14 amounting to Rs.23.72 Crore and similarly for BZP Rs.11.42 Crore was incurred in FY 2014-15, but it was pointed out by the State Commission that no reference to any approval of such expenditure was traceable in the relevant Tariff Orders for FYs 2013-14, 2014-15, and 2015-16, nor the same was approved by the State Commission for these two Sub-Stations. Moreover, the Appellant, in the extract of its Business Plan for the MYT period, filed along with the brief note on Issue No.4 of Section 4 (dated 22.05.2025, has categorically described the BZP and KP-5 Sub-Stations are “new” sub stations.

C. CONSIDERATION AND OUR VIEW: DISALLOWANCE OF CAPITAL EXPENDITURE INCURRED ON 132 KV AND ABOVE ASSETS

Heard the elaborate submissions made by learned senior Counsels for the Appellant and Respondent State Commission and peruse the written submissions made and relevant portion of Impugned Order and other referred Orders. Para 3.9.37 of the Impugned Order, is reproduced below with regard to disallowance and deduction of 132 kV and above assets capitalized up to FY 2017-18 from the opening Gross Fixed Assets (GFA) of FY 2018-19 along with accumulated depreciation till FY 2017-18.

> *“3.9.37 Since the Petitioner is continuously capitalising the 132 kV and above assets in its FAR, the Commission is constraint to take an adverse decision. The assets related to 132 kV and above assets (as per the list above) capitalised till FY 2017-18 and addition in FY 2018-19 are being deducted from GFA. Further 100% depreciation till FY 2017-18 for 132 kV assets and above in the FAR, is also being deducted from opening balance of Accumulated depreciation.”*

Our views on disallowance of Opening GFA of 2018-19 with regard to assets 132 kV and above and capital expenditure in FY 2018-19 are discussed hereunder:

Reversal and Removal of Capax of RC Green and Gharbara substation

In the Impugned Order, with regard to reversal and removal of capex for RC Green and Gharbara substation, the State Commission has observed as under :

> *"3.9.35 The Commission in its various Orders i.e. in Petition No. 987 of 2018, Petition No. 1020 of 2015 and Petition No. 1512 of 2019 has ruled that a distribution licensee cannot establish, own, operate, and maintain a distribution system of 132 and 220 kV assets, however the Petitioner still capitalised 132 kV and above assets in FY 2018-19. The Commission further sought the details of 132 kV and above assets capitalised in FY 2018-19. In this regard the Petitioner submitted the details of 132kV and above assets capitalized in FY 2018-19 as shown in the Table below"*

Thus, the basis of reversal and removal of capex for assets 132 kV and above, including RC Green and Gharbara substation is mainly on account of Order passed by State Commission in Petition No. 987 of 2014 (though mentioned as Petition No 987 of 2018, acknowledged as typographical error), Petition No 1020 of 2015 and Petition No 1512 of 2019. It is important to quote the relevant portion from these Orders of the State Commission. The State Commission in its order dated 31.10.2018 in Appellant's Petition No 987 of 2014 for owning, operating and maintaining RC Green 220 KV substation directs as under :

> *"86. Keeping in view the overall efficiency, economical and integrated operations of state transmission sector, interest of consumers of Greater Noida area coupled with the obligation of GNIDA to provide free land and bear the cost of substation up to 220 kV, the Commission decides that*

(i) NPCL petition for owning, operating and maintaining 220 kV sub-station as distribution licensee is dismissed.

(ii) NPCL shall claim refund of the amount deposited with Greater Noida Authority towards cost of land and construction of 220 kV sub-station at RC Green and associated 220 kV line to NPCL.

(iii) The investment allowed by this commission to NPCL in the distribution tariff shall be trued up again after deducting this refund.

(iv) UPPTCL as STU and transmission licensee, shall own, operate and maintain 220 kV Sub-Station at RC Green."

The State Commission in its order dated 31.10.2018 in Petition No 1020 of 2015 pertaining to 220 KV Gharbara substation directs as under :

"49. Keeping in view the overall efficiency, economical and integrated operations of state transmission sector, interest of consumers of Greater Noida area coupled with the obligation of GNIDA to provide free land and bear the cost of substation up to 220 kV, the Commission decides that

a. NPCL petition for direction to UPPTCL to grant connectivity of Gharbara Substation from 400 kV Greater Noida (Pali) sub- station is dismissed.

b. NPCL shall claim refund of the amount deposited with Greater Noida Authority towards cost of land and construction of 220 kV Gharbara sub station and associated 220 kV line from GNIDA.

C. Since the Petitioner did not comply with the provisions of U.P. Electricity Regulatory Commission (Terms and Conditions for Determination of Distribution Tariff) Regulation-2006, before making investment in the 220 kV Gharbara sub- station, this expenditure cannot be allowed in distribution ARR. The Commission shall review this investment in the True-up of ARR filed by the Petitioner.

d. UPPTCL as STU and transmission licensee, shall own, operate and maintain 220 kV Sub-Station at village Gharbara.

e. UPPTCL shall arrange adequate transmission capacity for NPCL as per their power distribution plan without creating any obstacle."

The State Commission order dated 04.06.2020 in Petition No 1512 of 2019, pertains to review of disallowance of CWIP of Rs. 19.12 Crore

towards LILO of one circuit of 220 KV line at 220 kV RC Green substation in True up order of FY 2017-18 dated 03.09.2019; same has been assailed by the Appellant vide its Appeal No 40 of 2023 and is pending on the file of this Tribunal. Since no stay is operating in the referred order of State Commission, its consequences in the present Appeal are discussed in subsequent paragraphs.

The State Commission Orders dated 31.10.2018 in Petition Nos 987 of 2014 and Petition Nos 1020 of 2015 pertaining to RC Green and Gharbara Substation has directed the Appellant herein to claim refund of the amount from GNIDA. In the case of RC Green, State Commission has mentioned that investment allowed by the commission shall be true up after deducting the refund. The finding of the State Commission in the referred order appears to be on the basis of overall efficiency, economical and integrated operation of State transmission sector, etc. and our attention has not drawn to any finding of State Commission that distribution licensee cannot own the 132 kV and above assets in the referred orders in in Petition No. 987 of 2018, Petition No. 1020 of 2015 and Petition No. 1512 of 2019 as mentioned in the Impugned Order. Thus, it appears that the issue that distribution licensee cannot own 132 kV and above assets has not been deliberated in the Orders referred in the Impugned Order and has neither been contended before us by the State Commission in the present *lis*.

For RC Green substation, the investment made has been acknowledged to be approved by State Commission as part of distribution tariff in State Commission order dated 31.10.2018 in Petition No 987 of 2014 as referred above and it has been held that true-up of same shall be undertaken after deducting the refund. In the ARR order dated 22.01.2019 for FY 2018-19, capital expenditure of Rs. 17 Crore for RC

Green substations were approved and Appellant was to submit the impact on the allowed ARR in RC Green and Gharbara substations at the true up stage. In our view, such a direction, in the ARR order does not mean that in the true up entire approved GFA in this regard for RC Green would be disallowed. Moreover capital expenditure for the RC Green Substation was approved in the ARR order for FY 2018-19. The fact also remains that the Petition No 987 of 2014 was filed by the Appellant in relation to its dispute with UPPTCL regarding possession and ownership of the RC Green Substation, and the State Commission had, allowed capitalization of various components of the RC Green Substation in its previous years Tariff Orders, as contended by Appellant and not disputed by State Commission, as well as in ARR order dated 22.01.2019 for FY 2018-19. We, therefore, do not find merit in the submissions made on behalf of State Commission that the appellant had been put to sufficient notice regarding such disallowance while approving the Capex for the FY 2018-19 in the ARR order dated 22.01.2019 and moreover, in the referred order dated 31.10.2018, true up of the investment allowed by the commission was to happen after deducting refund from GNIDA.

In the order dated 31.10.2018 in Petition No 1020 of 2015 pertaining to 220 KV Gharbara substation, Appellant has been directed to seek refund of the amount for land and 220 KV substation from GNIDA and as such capital investment projected by Appellant for this substation in ARR order dated 22.01.2019 has not been disallowed, however we have been informed that no capital expenditure has been claimed in the True up of FY 2018-19 for Gharbara substation. Appeals have been filed by the Appellant herein assailing both the orders dated 31.10.2018 for RC Green and Gharbara substation, and are pending on the file of this

Tribunal, and no stay is operating in these orders. As stated by the learned senior Counsel of the State Commission, the ARR order dated 22.01.2019, Orders dated 31.10.2018 are binding on all the parties unless varied by competent authority.

In our view, the State Commission has erred in disallowing the entire opening GFA of RC Green substation and Gharbara substation citing State Commission orders dated 31.10.2018 in Petition No 987 of 2018, & Petition No. 1020 of 2015 while apparently no deliberations have been made in these orders that distribution licensee cannot own 132 kV & above assets in these orders; and as per these orders, true up was to happen after getting the refund for the investment made by Appellant from GNIDA. As held above, prudence check undertaken at the True up stage cannot change the methodology/ interpretation/ principle followed while approving the ARR **(BSES Rajdhani Power Ltd Vs Delhi Electricity Regulatory Commission;(2022) SCC Online SC 1450).** Thus having approved the capital expenditure for RC Green and Gharbara substation in the past tariff Orders as well as in ARR Order (FY 2018-19) dated 22.01.2019, the State Commission is required to undertake the prudence check with regard to the expenditure made instead of disallowing the entire expenditure made in FY 2018-19 and disapproving the GFA and Depreciation approved in previous years True up Orders.

In view of the above deliberations and as already held above in previous paragraphs that arbitrary reduction/removal of opening GFA by the State commission without cogent justification or adherence to principle of natural justice is illegal, and accordingly we set aside the disallowance of opening GFA in True up of FY 2018-19 along with accumulated depreciation up to FY 2017-18 for RC Green and Garbhara substation. Since the Appeal Nos 336 of 2018 & Appeal No 40 of 2019 filed against the Orders of State Commission dated 30.10.2018 in

respect of RC Green and Gharbara substations is still pending on the file of this Tribunal, we have confined our examination to only those aspects, which did not form part of the said orders of the State Commission. The Appeal No 336 of 2018 and Appeal No 40 of 2019 shall be examined on its merit uninfluenced by any observation made in this order.

Further, under the true up exercise for FY 2018-19, as also stated by State Commission in ARR order dated 22.01.2019, State Commission is required to undertake prudence check of the capital expenditure incurred and arbitrary disallowance of capital expenditure made for these substation in FY 2018-19 having approved the same in its ARR Order (FY 2018-19) dated 22.01.2019 is not permissible in law. The said finding of State Commission is set aside and the issue of approval of capital expenditure in FY 2018-19 for these two substation under True up exercise is remanded to State Commission to undertake prudence check of cost incurred vis a vis approval granted in ARR order dated 22.01.2019 for FY 2018-19.

Reversal of capex of BZP&KP-5 Sub-stations

There is no dispute that the Capital Expenditure of Rs. 24 Crore proposed for BZP and KP-5 S/S in the ARR for FY 2018-19 has not been approved in its ARR order dated 22.01.2019 and we have been informed that no expenditure has been claimed by the Appellant for these substation in the True up FY 2018-19 and accordingly the issue in the present Appeal is confined to the disallowance of opening GFA in FY 2018-19 for these substation along with accumulated depreciation till FY 2017-18 under disallowance of 132 kV assets and above as noted in the para 3.9.37 of the Impugned Order.

As observed above, the orders of State Commission dated 31.10.2018 has not deliberated the issue that distribution licensee cannot establish, own, operate and maintain distribution system of 132 kV & above assets and there is no ruling to this effect in these Orders and our attention has not been drawn to any other order of State Commission to this effect. Thus, the basis of the observation of State Commission in para 3.9.35 that *" distribution licensee cannot establish, own, operate and maintain distribution system of 132 and 220 KV assets"* is not discernible from the earlier Orders and it has also not been contested by State Commission before this Tribunal in the present *lis*. However, it appears that such an observation has become the basis for disallowing the GFA of BZP&KP-5 Sub-stations as part of disallowance of GFA of 132 kV and above assets including accumulated depreciation till FY 2017-18. It has been contended on behalf of the Appellant that the land and boundary walls of KP-5 and BZP were already approved, capitalized, and trued-up by the State Commission in FY 2013-14 and FY 2014-15, respectively, and the Appellant has been allowed consequential tariff benefits since then and in the ARR Order dated 22.01.2019, State Commission has considered and approved opening GFA of these assets and only cost of construction was not approved. Per Contra, learned senior Counsel on behalf of State Commission has contended that there were no references to be found with regard to any approval by the State Commission for either BZP or KP-5 in the concerned tariff orders for FYs 2013-14; 2014-15 and 2015-16. It is unnecessary for us to go through these contentions as it is an established principle that approved closing Gross block of all assets as per True up Order for FY 2017-18 should form the basis for opening GFA under True up for FY 2018-19, unless same has been interfered by superior court. It has already been held above that State Commission cannot arbitrarily disallow/reduce the GFA of assets approved in earlier

Orders of State Commission in subsequent tariff orders that too a true up order without following due process.

In view of the above deliberations and already held above, we set aside the disallowance of opening GFA in True up of FY 2018-19 along with accumulated depreciation up to FY 17-18 for KP5 and BZP substation.

The Impugned Order list various other 132 kV and above assets and State Commission in Para 3.9.27 has deducted the GFA of all the 132 kV & above assets as noted in a table, capitalized till FY 2017-18 and deducted 100 % depreciation till FY2017-18 for 132 kV and above assets from opening balance of accumulated Depreciation; in view of above deliberation we set aside this finding and hold that closing GFA for all the Assets, along with accumulated depreciation till FY 2017-18 as approved in True up order of FY 2017-18 to be taken as opening GFA and accumulated depreciation for the 132 kV & above Assets in True up Order of FY 2018-19.

SECTION 4 (CAPITAL EXPENDITURE) : ISSUE NO. 4 : DISALLOWANCE OF CAPITAL WORKS UNDER PROGRESS

A. SUBMISSION URGED ON BEHALF OF NPCL

Learned Senior Counsel submitted that the Appellant is aggrieved by erroneous disallowance and deduction of certain Capital Works in Progress (CWIP), namely

(a) Rs. 19.12 Crore (i.e., Rs. 14.59 + Rs. 4.53 Crore) towards LILO works of 220 kV RC Green Substation,

(b) Rs. 20.48 Crore towards 5 Nos. 33 kV bays at the Sector-148 Substation, Noida,

(c) Rs. 1.28 Crore paid to Power Grid Corporation of India Ltd. (PGCIL) for preparation of the Detailed Project Report (DPR) and Tender Document for construction of the 220 kV Substation and associated 220 kV lines at BZP and KP-5 Substations, Greater Noida.

The State Commission has disallowed the aforesaid CWIP by erroneously placing reliance on its earlier Orders dated 31.10.2018 in Petition No. 987/2014 (RC Green) and Petition No. 1020/2015 (Gharbara), as well as Order dated 04.06.2020 in Review Petition No. 1512/2019 (RC Green LILO), wherein it allegedly held that a distribution licensee cannot establish, own, operate and maintain a distribution system comprising 132 kV and 220 kV assets. It is submitted that the State Commission had conceded to and/or did not dispute the Appellant's claim of Rs. 1.28 Crore paid to PGCIL towards preparation of the DPR and tender documents for the BZP and KP-5 Substations. The only reasoning for disallowance given in the Impugned Order is unsustainable on account of the following:

(a) Firstly, the State Commission has nowhere in the Orders dated 31.10.2018 or 04.06.2020 (i) ruled/held that a distribution licensee cannot own, operate and maintain 132 kV and above assets; and/or (ii) deducted/disallowed the cost of the 132 kV and above assets; and

(b) Secondly, there is no bar/restriction on a distribution licensee to own, operate and maintain 132 kV and above assets, under the Electricity Act, 2003 (Act) read with the applicable Rules/Regulations and legal precedents.

Referred Orders dated 31.10.2018 were specifically in relation to the RC Green and Gharbara substations and do not pertain to either the LILO works of 220 kV RC Green Substation or the 5 Nos. 33 kV bays at the Sector-148 Substation, Noida or the BZP and KP-5 substations. The

findings of State Commission on the instant issue in the Impugned Order, premised on the Order dated 31.10.2018, ought to be set aside and the State Commission be directed to allow the impact of the afore-mentioned CWIP, with Carrying Costs as per law.

Despite the above, during the oral arguments, the disallowance is sought to be justified with reasons that are not forthcoming from the Impugned Order or from the Reply to the Appeal filed by the State Commission**.** This is impermissible in law. Without prejudice to the inadmissibility of the contentions submitted on behalf of the State Commission, point wise submissions are as under.

Disallowance of Rs 19.12 Crore for LILO works of 220kV RC Green substation

The expenditure of Rs. 19.12 Crore was incurred by Appellant towards construction of the 220 kV LILO connecting the 400 kV substations at Pali and Sector-148 to the 220/132/22 kV RC Green substation, and not for the construction of the 220 kV substations and associated lines forming the subject matter of the RC Green & Gharbara Orders dated 31.10.2018, and hence reliance on the said Orders is wholly misplaced. The said amount had been advanced by the Appellant to GNIDA in March 2018 (FY 2017-18), for onward payment to UPPTCL for construction of the 220 kV LILO at RC Green substation, much prior to passing of the RC Green Order dated 31.10.2018, and was included in CWIP for FY 2017-18 in the APR Petition for FY 2017-18 and the revised ARR Petition for FY 2018-19. The State Commission , in its Tariff Order dated 22.01.2019 (ARR for FY 2018-19 and APR of FY 2017-18), approved the CWIP of Rs. 19.12 Crore, yet in the subsequent Tariff Order dated 03.09.2019 (ARR for FY 2019-20 and True-up of FY 2017-18),

erroneously disallowed the said expenditure by relying on the RC Green Order dated 31.10.2018. The findings in the Tariff Order dated 03.09.2019 are already under challenge in Appeal No. 40 of 2023 before this Tribunal. Regarding the contention of State Commission that the Appellant is raising this issue for the first time in the present Appeal is misconceived, as the Appellant could not have anticipated the subsequent disallowance of the CWIP and thus had no occasion to raise such submissions earlier before the State Commission.

It is submitted that aggrieved by the above disallowance, Appellant filed a Review Petition contending that the LILO expenditure was not related to the RC Green Substation, and during pendency of the said Review Petition, the asset stood capitalized in December 2019; however, vide Review Order dated 04.06.2020, the State Commission directed the Appellant to seek refund of Rs. 14.59 Crores from GNIDA and held that the balance amount of Rs. 4.53 Crores would be subject to the outcome of Appeal No. 336 of 2018 (RC Green matter), and both the Review Order dated 04.06.2020 as well as part of the Tariff Order dated 03.09.2019 are presently under challenge before this Tribunal in Appeal No. 40 of 2023; the objection of the State Commission, in the para 5.13.1 of ARR Order (FY 2018-19) dated 22.01.2019 is wholly misconceived, as it merely records that a detailed prudence check of various components would be undertaken at the stage of truing-up of FY 2017-18. In any event, the Impugned Order does not rely upon Para 5.13.1 for disallowing the CWIP of Rs. 19.12 Crore. The observation in the ARR Order dated 22.01.2019 did not entitle the State Commission to disallow the CWIP of Rs. 19.12 Crore at the stage of truing-up of FY 2017-18, as truing-up is confined to adjustment of actual expenditure incurred against estimated/projected figures under the ARR and does not permit wholesale disallowance, a

position settled in law by this Court in "***BRPL v. DERC"*** **(2023) 4 SCC 788**. Furthermore, in the RC Green/Gharbara Order dated 31.10.2018, the State Commission had directed the Appellant to claim refund of the cost of land and construction of the 220 kV RC Green & Gharbara Substation and associated lines, subject to truing-up after deducting the refund, and in the subsequent Order dated 04.06.2020, the State Commission similarly directed the Appellant to claim refund of the expenditure on LILO works from GNIDA. However, GNIDA, by its letter dated 18.11.2020, categorically refused the refund by rejecting the Appellant's request and stating that the Appellant is mandated to bear all costs towards development of the electrical network in its licensed area of supply; in such circumstances, the State Commission erred in disallowing/deducting the said amount.

Disallowance of Rs 20.48 Crore towards 5 Nos 33 kV bays at Sector 148 Substation, Noida

Learned Senior Counsel contended that the 33 kV bays do not qualify as 132 kV and above assets, yet the State Commission, without proper application of mind, erroneously relied on the RC Green Order dated 31.10.2018 to disallow the said cost. Owing to an emergent requirement for evacuation of power, the Appellant, during FY 2018-19, approached UPPTCL for grant of connectivity at 33 kV from its 400/220/132/33 kV Substation at Sector 148, Noida, whereupon UPPTCL issued an estimate of Rs. 20.48 Crore on 15.01.2019, which was paid by the Appellant on 23.01.2019 for allocation and construction of five 33 kV bays, and the said amount was included in the CWIP of FY 2018-19. The State Commission, vide its Business Plan Order dated 30.11.2017, had approved capital expenditure of Rs. 224.55 Crores for FY 2017-18, Rs. 231.49 Crore for FY 2018-19, and Rs. 227.87 Crores for FY 2019-20. The, expenditure incurred towards the 33 kV bays during

FY 2018-19 was well within the approved capital expenditure for the said year. Despite such approval, the State Commission disallowed the same in the Impugned Order; and though the asset stood capitalized on 31.03.2020 in FY 2019-20, prior to issuance of the Impugned Order dated 04.12.2020, the expenditure was disallowed in the Tariff Order dated 26.08.2021 while truing-up of FY 2019-20, by erroneously citing the RC Green Order dated 31.10.2018, which is under challenge before this Tribunal in Appeal No. 343 of 2021.

The State Commission has, however, now sought to contend that: (i) notwithstanding the clear findings in Para 48(ix) and 74(ix) of the Gharbara and RC Green Orders dated 31.10.2018, which recorded that the Appellant ought not to make its own investment in substations owned by UPPTCL, the Appellant nevertheless proceeded to make the payment; and (ii) the Appellant failed to obtain separate approval for the said expenditure as mandated under the "UPERC MYT Regulations 2014".

It is submitted that the disallowance of the aforesaid CWIP by the State Commission at the stage of truing-up for FY 2018-19, despite having approved the same under the Business Plan for FY 2016-17 to FY 2019-20, is contrary to the settled principle of law that, at the stage of 'truing up', the Appropriate Commission cannot change the rules/methodology used in the initial tariff determination by changing the basic principles, premises and issues involved in the initial projection of ARR, as noted in "***BSES Rajdhani Power Ltd. vs. Delhi Electricity Regulatory Commission"* (2022) SCC Online SC 1450**

<u>Disallowance of Rs 1.28 Crore paid to PGCIL for preparation of tender etc for 220 kV substation and lines at BZP and KP-5 substation,</u>

It is submitted that the State Commission has erroneously contended that, in the ARR Order dated 22.01.2019 (for FY 2018-19), it had disallowed the capital expenditure towards the BZP and KP-5 assets and noted that a detailed prudence check would be undertaken at the stage of truing-up of FY 2018-19; however, reliance on the ARR Order dated 22.01.2019, which in turn is based on the RC Green/Gharbara Orders dated 31.10.2018, to disallow the said expenditure is wholly misplaced, inasmuch as the total expenditure of Rs. 1.28 Crore had been substantially incurred prior to issuance of the said orders, with only the balance 10% being paid in FY 2019-20 upon formal closure of deliverables. It is further submitted that work order was issued to PGCIL on 29.01.2018 (in FY 2017-18) much before the issuance of RC Green/ Gharbara Orders dated 31.10.2018. Such an work order was placed in furtherance of the approval granted by State Commission to the Land and boundary wall for KP5 and BZP and subsequent approval in Business Plan Order dated 30.11.2017. Advance payment of Rs. 0.51 crore was made on 09.02.2018 (in FY 2017-18) and payment of 0.63 crore was made on 23.07.2018 before issuance of RC Green and Gharbara Orders dated 31.10.2018 and ARR order dated 22.01.2019. The closing CWIP in True up order of FY 2017-18 (in the order dated 03.09.2019) included this Rs. 1.28 Crore towards Consultancy work.

In view of the foregoing, it is submitted that this Hon'ble Tribunal may set aside the findings of the State Commission on the present issue, and the State Commission be directed to allow the impact of the afore-mentioned CWIP, with Carrying Costs as per law.

B. SUBMISSION URGED ON BEHALF OF STATE COMMISSION

Disallowance of Rs 19.12 Crore for LILO works of 220kV RC Green substation

It is submitted that the Appellant has claimed as CWIP a payment of Rs.19.12 Crore made to UPPTCL under a deposit scheme for construction of LILO during FY 2017-18 and reflected it in the True-Up for FY 2017-18 (prior to the Impugned True-Up of FY 2018-19) as CWIP. However, the State Commission, in the True-Up Order dated 03.09.2019 for FY 2017-18, disallowed the said claim of Rs.19.12 Crore towards the said LILO. Notwithstanding such disallowance, Appellant reintroduced the said amount of Rs.19.12 Crore in the ARR of FY 2018-19 as a CWIP item. Aggrieved by which, the Appellant filed Review Petition No. 1512 of 2019 before the State Commission, which was disposed of vide order dated 04.06.2020 directing the Appellant to seek refund of Rs.14.59 Crore deposited with GNIDA towards the cost of the 220 kV LILO, while the remaining Rs.4.53 Crore pertaining to two 220 kV bays at RC Green Sub-Station, the same was made subject to the final decision of Appeal No.336 of 2018 before this Tribunal.

It is further submitted that in the ARR order dated 22.01.2019 of FY 2018-19, the State Commission specifically noted that since the True Up of FY 2017-18 was pending (*including LILO claim of Rs.19.12 crores),* the ARR order for FY 2018-19 was proceeding on the basis of Appellant's CWIP claim figures of FY 2017-18 (which were yet to be trued up). The State Commission, in the Impugned Order, records the background of the payment made to UPPTCL in FY 2017-18 and the rejection of the LILO Capex claim in its earlier order dated 03.09.2019, takes note of Review Petition No.1512 of 2019 filed by the Appellant against the said

order (which was then pending before UPERC), and Appellant's submission that it had reintroduced the claim of Rs.19.12 Crore in the opening balance of the normative term loan, equity base, and regulatory asset for FY 2018-19. Though the Appellant had filed Appeal No. 40 of 2023 before this Tribunal challenging the UPERC's order dated 03.09.2019 and review order dated 04.06.2020, whereby inclusion of LILO in CWIP for FY 2017-18 was rejected, however the said appeal is pending, and no stay has been granted on the issue concerning LILO; it is therefore evident that the State Commission, in the impugned order, has duly considered the entire history of the LILO Capex claim and reiterated its earlier rejection through the orders dated 03.09.2019 and 04.06.2020.

Regarding the contention of the Appellant that LILO was approved as CWIP in the ARR order dated 22.01.2019 for FY 2018-19, however disallowed in Impugned Order for True Up of FY 2018-19, learned senior Counsel submitted that such contention is being urged for the first time in this appeal and is an attempt to take undue advantage of the time sequence in which the three orders were passed viz., i) ARR order for FY 2018-19 dated 22.01.2019 ii) True up order for FY 2017-18 dated 03.09.2019 and iii) True Up order for FY 2018-19 dated 04.12.2020 – the Impugned Order.

Disallowance of Rs 20.48 Crore towards 5 Nos 33 kV bays at Sector 148 Substation, Noida

Learned Senior Counsel submitted that an amount of Rs.20.48 Crore was paid by the Appellant to UPPTCL in FY 2018-19 pursuant to UPPTCL's letter dated 01.05.2019. The Appellant proceeded to make

payment to UPPTCL towards Capex of an asset admittedly owned and operated by UPPTCL, despite the categorical finding of the Commission in its Gharbara order dated 31.10.2018 that NPCL should not make its own investment in sub-stations owned by UPPTCL. The State commission has also observed that if there was any difficulty in getting extra transmission capacity from UPPTCL, the Appellant can approach the State Commission for redressal of the grievances. Finding given by the State Commission in the Gharbara order dated 31.10.2018 (prior to the payment for 5 bays made to UPPTCL) applies to the Appellant in all instances where the appellant seeks additional transmission capacity from UPPTCL for bringing power to its distribution network. The State Commission placing reliance on its earlier orders dated 31.10.2018 in Petition No. 987 of 2014 (RC Green) and Petition No. 1020 of 2015 (Gharbara), while undertaking the True-up exercise for FY 2018-19, rejected the Appellant's claim for inclusion of the advance paid to UPPTCL for 5 bays at the 220 KV/33 KV Sub-station, Sector-148, Noida, under CWIP for FY 2018-19.

Regarding the contention of the Appellant that these 5 nos. bays were previously approved by the Commission as a part of the business plan is ex-facie incorrect. The table 5.6 which is relied upon by the appellant does not reflect any previous approval of the commission specifically for these 5 bays at Sector 148, Noida in the sub-station owned by the UPPTCL.

It is submitted that the findings of the State Commission in the Gharbara order are binding upon the Appellant in respect of any payment sought to be made by Appellant to UPPTCL for creation of assets at UPPTCL's sub-stations, including 33 KV bays. The Appellant has failed

to establish or demonstrate any justification, despite specific queries raised by the Commission, for assuming liability towards the cost of such bays, even at the 33 kV level, when the same were admittedly installed at UPPTCL sub-station. Arguendo, even if the Appellant's plea that these bays were at 33 KV (below 132 KV) is considered, no scheme under Section 23A of the 2014 Regulations was either framed or placed before the Commission for approval, notwithstanding the admitted fact that the cost of the said project exceeded Rs.10 Crore. Even before this Tribunal, the Appellant has not furnished any justification for incurring expenditure towards the said 5 bays.

Disallowance of Rs 1.28 Crore paid to PGCIL for preparation of tender etc for 220 kV substation and lines at BZP and KP-5 substation,

The Appellant has contended that consultancy services were engaged from PGCIL for preparation of a detailed project report and assessment of technical and financial parameters for establishing the proposed sub-stations at BZP and KP-5 and a work order was issued to PGCIL during FY 2017-18, consistent with NPCL's earlier submissions in its Business Plan/ARR Petitions, and much before issuance of the RC Green/Gharbara orders dated 31.10.2018 and total expenditure of Rs.1.28 Crore was incurred prior to issuance of the said orders, with only the balance 10% being paid in F.Y. 2019-20 upon formal closure of the deliverables.

In the Impugned Order, the State Commission first relied upon its ARR Order dated 22.01.2019 (unchallenged) for FY 2018-19, wherein, it disallowed the capital expenditure of Rs.24.00 Crore claimed by the Appellant towards BZP and KP-5, 220 kV substations for FY 2018-19.

The State Commission further observed that a detailed prudence check of such expenditure would be undertaken at the stage of truing-up for FY 2018-19. In the Impugned Order, the State Commission had recorded the Appellant's undertaking that no cost had been incurred on the said substations as of then, and that necessary action would be taken depending upon the outcome of the pending appeals before this Tribunal. Even assuming, without admitting, that the PGCIL consultancy charges are to be passed through, it is submitted on behalf of the State Commission that undertaking of the Appellant that no investments would be made in BZP and KP-5 SS/ may not be disturbed and payment made to PGCIL cannot be considered by Appellant as an imprimatur to continue making capital investment in BZP and KP-5 sub-station, without the approval of the State Commission in accordance with the applicable regulations.

C. CONSIDERATION AND OUR VIEW : DISALLOWANCE OF CAPITAL WORKS UNDER PROGRESS

Disallowance of Rs 19.12 Crore of CWIP for LILO works of 220kV RC Green substation

It has been contended on behalf of Appellant that this amount had been advanced by the Appellant to GNIDA in March 2018 (FY 2017-18), for onward payment to UPPTCL for construction of the 220 kV LILO at RC Green substation. This amount of Rs. 19.12 Crore thus pertains to CWIP works in FY 2017-18 and carried forward to opening CWIP works in FY 2018-19. We note that in the True Up order dated 03.09.2019 for FY 2017-18, the above referred CWIP of Rs. 19.12 Crore has been disallowed relying on the RC Green Order dated 31.10.2018. The said expenditure of Rs 19.12 Crore was also not approved in the review order

dated 04.10.2020 passed by State Commission in Petition No 1512/2019 (for partial review of order dated 03.09.2019) with a direction to seek refund of Rs. 14.59 Crore from GNIDA and balance Rs. 4.53 Crore shall be subject to the outcome of Appeal No 336 of 2018 (assailing the RC Green Order dated 31.10.2018). Appellant has also filed Appeal no 40 of 2023 assailing the Review Order dated 04.10.2020 and part of order dated 03.09.2019 (True up of FY 2017-18), and same is pending on the file of this Tribunal, however no stay is operating.

As already held above, the closing CWIP approved in true up order for FY 2017-18 to be considered as opening CWIP of FY 2018-19; even though opening CWIP as proposed by Appellant was considered in ARR Order (FY 2018-19) dated 22.01.2019 which also included the amount of Rs. 19.12 Crore as projected by the Appellant, but the fact remains that at the time of passing of True up order of FY 2018-19, the approved closing CWIP in the True up order for FY 2017-18 is available and since the disallowance of CWIP of Rs. 19.12 Crore in the True Up Order dated 03.09.2019 has been assailed under the Appeal no 40 of 2023, no view in this regard can be taken by this Tribunal in present Appeal. In these circumstances we are of the view that, State Commission's disallowance of Rs 19.12 Crore in opening CWIP for LILO works of 220kV RC Green substation in the Impugned Order (True up order FY 2018-19) based on approved closing CWIP of FY 2017-18 need no interference. Since appeal 40 of 2023 against the Review Order dated 04.10.2020 and part of order dated 03.09.2019 (True up of FY 2017-18) is still pending on the file of this Tribunal, we have confined our examination to only those aspects, which did not form part of the said order of the commission. Needless to state that Appeal no 40 of 2023 shall be examined on its merit uninfluenced by any observation made in this order.

Disallowance of Rs 20.48 Crore towards 5 Nos 33 kV bays at Sector 148 Substation, Noida

The relevant paragraphs of the Impugned Order with regard to disallowance of CWIP of Rs. 20.48 towards above referred 5 Nos 33 kV bays is reproduced below:

> "*3.9.49 The Commission has already disallowed the 132kV and above assets, hence the same is been disallowed from the closing CWIP of FY 2018-19. The Commission further observed that the Petitioner in Note 8 of the Audited Accounts of FY 2018-19 has mentioned the capital advances of Rs. 40.63 Crore. In this regard the Petitioner was asked to provide the detail of such advances with respect to the asset for which such advances has been provided and details of the party to which such advances has been given. The Petitioner in this regard submitted the details of capital advances of Rs. 40.63 Crore as shown in the Table below:*

Table 3-65: Details of Capital Advances for FY 2018-19 as submitted by the Petitioner

S. No.	Particular	Amount (Rs. Crore)
1	*Advance for 5 nos. 33 kV bays at 220/33 kV Substation at Sec- 148, Noida*	*20.48*
2	*Advance for construction of LILO from 220 kV Substation Sec-148 Noida to 220 kV RC Green Substation paid to UPPTCL through GNIDA*	*14.59*
3	*Advance for construction of 2nos. 220 kV bays at RC Green Substation paid to UPPTCL through GNIDA*	*4.53*
4	*Advance for Power Transformer*	*0.17*
5	*Other capital Advances*	*0.87*
Total		***40.63***

After noting the capital advances made by Appellant which included advance of Rs 20.48 Crore for 5 no. 33 kV bays, at paragraph 3.9.50, State Commission disallowed the amount of Rs. 20.48 Crore paid to UPPTCL from the closing CWIP of FY 2018-19. The premise of this disallowance of 33 kV bays is based on disallowance of investment made in 132 kV & above assets as recorded in the Impugned Order.

As already observed in above paragraphs that Orders of State Commission dated 31.10.2018 (RC Green and Gharbara) has not dealt

with this issue and there is no finding in these orders that Distribution Licensee cannot own, operate, maintain etc. 132 kV & above Assets and we have set aside the findings of State Commission on this account in the Impugned Order.

The Appellant has contended, that such an expenditure was approved as part of capital expenditure in the ARR Order dated 22.01.2019, which was also approved as part of capital Expenditure in the Business Plan Order dated 30.11.2017. It has been already held above, that Commission cannot change the rules/methodology used in the initial tariff determination by changing the basic principles, premises and issues involved in the initial projection of ARR, at the True Up stage as noted in "***BSES Rajdhani Power Ltd. vs. Delhi Electricity Regulatory Commission"*** **(2022) SCC Online SC 1450.**

In view of summarily disallowance of CWIP of Rs 20.48 Crore for 5 Nos 33 KV bays, we observe that no prudence check of the cost incurred was undertaken vis-a-vis approval of capital expenditure in the ARR order dated 22.01.2019, while passing the Impugned Order. We accordingly set aside the disallowance of Rs 20.48 Crore of CWIP for 5 no. 33 kV bays, in the Impugned Order, with a direction to State Commission to undertake prudence check of the cost incurred on this account *vis- a- vis* Capital expenditure approved in ARR Order dated 22.01.2019.

Disallowance of Rs 1.28 Crore paid to PGCIL for preparation of tender etc for 220 kV substation and lines at BZP and KP-5 substation

The Appellant has contended that consultancy services were engaged from PGCIL for preparation of a detailed project report and assessment of technical and financial parameters for establishing the proposed sub-

stations at BZP and KP-5 and a work order was issued to PGCIL during FY 2017-18, consistent with NPCL's earlier submissions in its Business Plan/ARR Petitions, and much before issuance of the RC Green/Gharbara orders dated 31.10.2018 and total expenditure of Rs.1.28 Crore was incurred prior to issuance of the said orders, with only the balance 10% being paid in FY 2019-20 upon formal closure of the deliverables. Per Contra, State Commission submitted that in the ARR order dated 22.01.2019, entire capital expenditure of Rs. 24 Crore for these substation was disallowed and Appellant's undertaking has been noted that no cost had been incurred on the said substations as of then.

We note from the ARR order dated 22.01.2019 that Appellant has mentioned that PGCIL has submitted the draft report estimating the cost of 220 KV substation at BZP and KP-5 and associated lines and final report is expected by August 2018. The ARR order dated 22.01.2019 further notes the submission of Appellant, that though the cost of these two substation shall be around Rs. 240 Crore (excl. transmission) and post receipt of final DPR, the same shall be actualised and construction shall be spread over FY 2018-19 to FY 2020-21 for the capex estimates for these years. Thus, no expenditure seems to have been made with regard to construction of the substations for which consultancy has been obtained from PGCIL. It has been submitted on behalf of State Commission that even if this consultancy cost is considered as pass through, the undertaking of the Appellant that no investments would be made in BZP and KP-5 S/S may not be disturbed and no capital investment in BZP and KP-5 sub-station should be made without the approval of the Commission in accordance with the applicable regulations.

In view of above deliberation and considering the fact that cost of land and boundary wall for BZP and KP 5 substation was approved in earlier tariff orders, CWIP for said consultancy service has been approved in the closing CWIP in True up order for FY 2017-18, and only balance 10 % has been paid in FY 2018-19, we set aside the finding of the State Commission with regard to disallowance of Rs. 1.28 Crore paid to PGCIL as consultancy charges for theses substation as CWIP. We however make it clear that such an approval of CWIP for the consultancy works, in no way be construed as approval for construction of these substation and capital expenditure for physical construction of these substations to be made by Appellant after due approval of State Commission as per applicable Regulations.

ISSUES CONCERNING ARR OF FY 2020-21:

SECTION 2 (MISCELLANEOUS ISSUE)

ISSUE NO1 : DISALLOWANCE OF LOSS ON RETIREMENT / IMPAIRMENT OF ASSETS

A. SUBMISSION URGED ON BEHALF OF NPCL

Learned Senior Counsel submitted that the Appellant is aggrieved with the disallowance of the loss on sale of assets to the tune of Rs. 1.77 Crore, by erroneously observing under that Regulation 47.2(b) of UPERC (Multi Year Tariff for Distribution and Transmission) Regulations, 2019 **("MYT Regulations 2019")** considers the income from sale of scrap under *'Non-Tariff Income'*; and any loss from sale of assets will not be allowed separately. It is submitted that during oral arguments, disallowance of loss on retirement/impairment of assets, is sought to be justified with reasons that are not forthcoming in the Impugned Order or in the Reply filed by the State Commission, which is

impermissible in law. The State Commission in its Written Submissions raised contentions, which were not even argued orally. Without prejudice to the inadmissibility of such contentions, the Appellant is providing its response to the same.

It is submitted that the disallowance of loss on retirement/impairment of assets in the Impugned Order is inconsistent with the earlier Tariff Orders passed by the State Commission. Since truing-up for FY 2007-08, the State Commission has consistently treated such losses as genuine business expenditure, retained the retired/decapitalized assets in the Gross Fixed Assets (GFA) for debt and equity calculations, and allowed the Appellant to continue receiving Return on Equity and Interest on Loan on such assets. In the Tariff Order dated 22.01.2019 (true-up of FY 2016-17 and ARR for FY 2018-19) and the Tariff Order dated 03.09.2019 (true-up for FY 2017-18 and ARR/Tariff for FY 2019-20), the State Commission has specifically considered and permitted the loss on sale of assets as a legitimate expenditure. Accordingly, the oral contention advanced on behalf of the State Commission that the Appellant had not obtained any approval for retirement of assets is untenable, inasmuch as such approval already stands embedded in the earlier Tariff Orders, which were duly subjected to truing-up. In any event, the said contention does not form part of the Impugned Order, and there is no requirement under the "UPERC MYT Regulations 2019" for a separate approval to be obtained for early retirement of assets and State Commission has also erroneously relied upon Regulation 21.1(b) of the said Regulations, which is misplaced as it pertains only to recovery of depreciation.

In deviation from its past practice, the State Commission, for the first time in the Impugned Order on truing-up for FY 2018-19, rejected

the loss on retirement of assets while nevertheless retaining such assets in the GFA for purposes of debt and equity calculations and during oral submissions contended that since the assets had not been retired from the GFA, the Appellant was already being allowed Return on Equity and Interest on Loan thereon, and on that basis, the Appellant withdrew its claim for FY 2018-19, with liberty to raise the same at an appropriate stage. However, in a complete departure from the aforesaid stand, the State Commission, while determining the ARR for FY 2020-21 in the Impugned Order and passing the subsequent Tariff Order dated 20.07.2022, has removed the decapitalized/retired assets from the GFA for debt and equity computations. As a result, the Appellant is being deprived not only of recognition of loss on sale of assets under 'Non-Tariff Income' but also of Return on Equity and Interest on Loan on such assets, in direct contravention of the first and second provisos to Regulation 20.2.

It is further submitted that Regulation 47.1 read with Regulation 47.2(b) of the "UPERC MYT Regulations 2019", inter alia, provides that (i) 'Non-Tariff Income' relating to the distribution business shall be deducted from the ARR of the licensee, and (ii) 'Income from sale of scrap' shall be considered as 'Non-Tariff Income'. Significantly, there is no express prohibition under the "UPERC MYT Regulations 2019" against allowance of loss on retirement/impairment of assets. The inclusion of 'Income from sale of scrap' under *'Non Tarriff Income' in Regulation* 47.2(b) makes it evident that proceeds from sale of scrap are to be treated as 'Non-Tariff Income', and the term 'income' necessarily connotes the difference between the sale proceeds of the asset and its cost at the time of retirement/de-capitalization, which ought to be recognized in favor of the Distribution Licensee. Furthermore,

retirement/impairment of assets on account of obsolescence, inefficiency, or damage constitutes a routine and inevitable operational necessity for any utility, undertaken to ensure efficient and reliable supply of electricity in terms of Section 61(c) and 61(d) of the Electricity Act, 2003. Accordingly, a utility cannot be put to loss on account of necessary retirement of an asset. In some cases, the assets are retired early leaving unrecovered costs and such cost are reduced by the scrap value of such asset results in (a) either positive income, which forms part of *'Non-Tariff Income'*; or (b) negative income, which ought to be allowed to the licensee and netted off from the *'Non-Tariff Income'*.

It is well settled that, pursuant to Section 61 of the Act, tariff determination must be carried out on commercial principles, and that losses or negative income form an integral part of income accounting. In this regard, the Hon'ble Supreme Court, in "***CIT Joint Commissioner of Income Tax, Surat v. Saheli Leasing & Industries Ltd.", (2010) 6 SCC 384***, with reference to the charging provisions of the statute, held that the expression "*income*" is to be understood as including losses.

It is submitted that Regulation 47.2(b) of the " UPERC MYT Regulations 2019", which provides for '*Income from sale of scrap'*, also encompasses negative income or loss on the sale of such assets. The State Commission has sought to draw an irrelevant distinction between Regulation 47 of the "UPERC MYT Regulations 2019" and Regulation 33 of the earlier "UPERC MYT Regulations 2014", which pertained to any expenditure incurred in generating 'Non-Tariff Income'. Such distinction is wholly misplaced, as 'Income from sale of scrap' equally includes negative income, as detailed above. Without prejudice to the submissions regarding the disallowance of retirement of assets under Regulation 47.2(b) of the 2019 Regulations, it is submitted that,

alternatively, the disallowance of Return on Equity and Interest on Loan on the retirement of assets in the Impugned Order is in teeth of the first and second provisos to Regulation 20.2 of the "UPERC MYT Regulations 2019", which categorically provide for the allowance of Return on Equity and Interest on Loan for retired or decapitalized assets.

The loss of approximately Rs. 1.77 Crore on the projected sale of fixed assets in FY 2020-21 constitutes a legitimate commercial cost and ought to be allowed in the ARR with the applicable Carrying Cost; and the disallowance in the Impugned Order is arbitrary, inconsistent with past regulatory practice, and contrary to applicable accounting and legal principles, and therefore ought to be set aside. Further, in the alternate and without prejudice to the same, if, for any reason, this Tribunal is not inclined to allow the claim under Regulation 47.2(b) of the "UPERC MYT Regulations 2019", the Appellant would, in any event, be entitled to receive the Return on Equity and Interest on Loan on such retired assets in accordance with the first and second provisos to Regulation 20.2 of the " UPERC MYT Regulations 2019", along with the applicable Carrying Cost.

B. SUBMISSION URGED ON BEHALF OF STATE COMMISSION

Learned senior Counsel submitted that the Appellant has failed to demonstrate that any specific approval was sought or obtained for the premature retirement or impairment of distribution assets pertaining to FY 2020–21. Under the UPERC (Multi Year Tariff for Distribution and Transmission) Regulations, 2019 **("MYT Regulations 2019"),** distribution assets of various kinds are required to be depreciated at a specified annual rate and over a specified period. Any premature retirement of assets without specific approval of the State Commission would be contrary to the Regulations. The Appellant has not cited any

facts or circumstances justifying premature impairment of assets for ARR of FY 2020–21. In the absence of such factual basis or approval, the licensee cannot claim any expenditure or loss on account of premature retirement or impairment of assets in its ARR. It is submitted that the "MYT Regulations 2019" are applicable for the determination of ARR for FY 2020–21, whereas the True-Up for FY 2018–19, which also forms part of the Impugned Order, is governed by the "MYT Regulations 2014". Accordingly, the Appellant is not *ipso facto* entitled to the same treatment in the ARR of FY 2020-21 by simply citing the treatment on the same issue given by the State Commission in the True-Up of FY 2018-2019.

The claim for loss on retirement or impairment of assets is referable to Regulation 47 of the "MYT Regulations 2019", which governs Non-Tariff Income of the licensee. Under Regulation 47.2(b), "income from sale of scrap" is specifically included within the definition of Non-Tariff Income, and Regulation 47.1 mandates that such Non-Tariff Income relating to the distribution business, as approved by the Commission, shall be deducted from the ARR while determining tariff for retail supply and wheeling charges. The Appellant, however, seeks to claim expenditure in the form of undepreciated cost of retired or impaired assets on the plea that such cost has not been recovered through tariff in previous years. It is submitted that the legislative intent underlying the "MYT Regulations 2019" concerning Non-Tariff Income is explicit and unequivocal. Notably, the "MYT Regulations 2019" have omitted the proviso to Regulation 33 of the 'MYT Regulations 2014", which had hitherto permitted the Licensee to claim deduction of expenditure incurred in generating or earning Non-Tariff Income. Accordingly, for the purposes of the ARR for FY 2020–21, the Appellant is not entitled to claim any expenditure on account of assets sold as scrap, purportedly

arising from retirement or impairment of such assets, in terms of Regulations 47.1 and 47.2 of the "MYT Regulations 2019".

Learned Senior Counsel placed reliance upon the judgment of the Supreme Court in "***State of Rajasthan & Ors. v. Trilok Ram*, (2019) 10 SCC 383,**" to contend that omission of the proviso in the "MYT Regulations 2019" reflects a clear legislative intent to exclude any deduction of expenditure or loss from Non-Tariff Income. Thus, the legislative intent to preclude any claim of expenditure by the Licensee in generating or earning Non-Tariff Income clearly indicates that the term "income" under Regulations 47.1 and 47.2 cannot be construed to include "loss" to the Licensee that they might have incurred in selling the asset as scrap. It is submitted that if the legislative is to exclude "expenditure" from being deducted from Non-Tariff Income then the question of income turning into loss could not arise at all. This would also hold true for several other items of Non-Tariff Income from Clauses (a) to (q) of Regulations 47.2.

Regarding the reliance of the Appellant upon the "existing methodology" prevailing prior to the "MYT Regulations 2019", that such loss be allowed as pass-through expenses, it is submitted that the State Commission, having duly taken note of the amended Regulation 47 of the "MYT Regulations 2019" in para 5.19, has categorically rejected the Appellant's claim, holding in para 5.19.7 that from FY 2020–21 onwards, income from sale of scrap shall be considered as income and that any loss on such sale shall not be allowed separately.

C. CONSIDERATION AND OUR VIEW : DISALLOWANCE OF LOSS ON RETIREMENT / IMPAIRMENT OF ASSETS

In the Impugned Order, for disallowance of Rs. 1.77 Crore, as claimed by the Appellant, on account of sale/retirement of fixed assets,

the State Commission, while referring to the Regulation 47 of the "MYT Regulations 2019", that the Non-Tariff Income includes income from sale of scrap has noted at para 5.19.7 that *" hence it can be easily ascertained that from FY 2020-21, the income from sale of scrap will be considered as Income and any loss from the sale will not be allowed separately".* The State Commission has contended that this interpretation was premised on the inclusion of income from sale of scrap under the head "Non-Tariff Income" and the omission of the proviso previously contained in the corresponding Regulation under the "MYT Regulations 2014", i.e. "Provided further that any expenditure incurred for generating/earning Non-Tariff Income may be reduced from such income", which permitted deduction of expenditure incurred in earning such income.

The Appellant placed reliance on the judgement of the Supreme Court, in "***CIT Joint Commissioner of Income Tax, Surat v. Saheli Leasing & Industries Ltd.", (2010) 6 SCC 384***, to contend that the expression "income" must be construed to include "loss", and that the regulatory treatment of income should not exclude the possibility of netting losses arising from the same transaction. Per Contra, State Commission relied on "***State of Rajasthan & Ors. v. Trilok Ram*" (2019) 10 SCC 383**, to argue that the deliberate omission of the proviso in the "2019 Regulations" reflects a clear legislative intent to exclude any deduction of expenditure or loss from Non-Tariff Income and accordingly State Commission's decision to disallow the claimed loss is consistent with the regulatory framework and does not warrant interference.

The Hon'ble Supreme Court in **CIT v. Saheli Leasing & Industries Ltd., (2010) 6 SCC 384** clarified that under the Income Tax Act, the term **"income"** is inclusive of both positive and negative figures, i.e., profits as well as losses. This interpretation is especially significant for penalty

provisions, where the concealment or furnishing of inadequate particulars subjects the assesse to penalty even if the returned income is a loss or nil, and even if no tax is technically payable. The Court held that statutory precedents (including the Gold Coin and Harprasad cases) have established that losses are an integral part of income computation for tax and penalty purposes, thus overruling earlier contrary views and confirming that penalty can be levied where the addition of concealed income reduces the returned loss or results in a negative figure.

The Supreme Court in *"**State of Rajasthan and Ors. vs. Trilok Ram, reported in 2019 (10) SCC 383"*** has held that when a statutory provision is substituted by an amending Act, it involves two things, one repeal of the existing provision and the other is re-enactment of the new one. Placing reliance *on "**State of Rajasthan v. Mangilal Pindwal (1996) 5 SCC 60"***, the Court explained that substitution completely wipes out the earlier provision (including its parts such as provisos) unless expressly saved and replaces it with the new wording as though it always stood in that form from the date of substitution. Thus, when Rule 266(3) was substituted in 2006, the previous version of the rule along with its proviso (added in 2004) stood repealed as the substitution did not expressly preserve the earlier proviso.

The core interpretive conflict arises from the juxtaposition of a general principle of fiscal jurisprudence that "income" may include "loss" for the purpose of net computation against a sector-specific regulatory framework that has consciously excluded such netting. The judgment in ***"Saheli Leasing"*** pertains to income tax law, where the term "income" is expansively defined under statutory provisions to include negative income (i.e., losses). However, such interpretation cannot be mechanically transposed to tariff regulations, which operate within a

distinct statutory and regulatory architecture. The omission of the proviso in Regulation 47 of the "MYT Regulations 2019", which previously allowed deduction of expenditure incurred in earning Non-Tariff Income, is a significant textual change. Applying the principle of *expressio unius est exclusio alterius*, the exclusion of loss or expenditure from the regulatory scheme must be presumed intentional. The reliance on "*Trilok Ram"* is apposite, as it reinforces the principle that legislative intent must be gathered from the language of the statute or regulation, and that deletion of a provision is indicative of a shift in policy.

We are saved the trouble of further deliberating the issue with respect to Regulation 47 of "MYT Regulations 2019" in the present *lis* as Appellants in its alternative submission, have relied upon the Regulation 22 of the "MYT Regulations 2019", which has not been given effect to in the Impugned Order with regard to treatment of applicable debt and equity for the retired assets. The referred Regulation 22 of "MYT Regulations 2019" applicable for ARR of 2020-21 is reproduced below:

> *"20 Debt : Equity Ratio*
>
> *20.1 For a capital investment Scheme declared under commercial operation on or after April 1, 2020, debt-equity ratio as on the date of commercial operation shall be 70:30 of the amount of capital cost approved by the Commission under Regulation 18, after making appropriate adjustment of Assets funded by Consumer Contribution/ Deposit Works/ Capital Subsidies/ Grant subject to prudence check for determination of Tariff:*
>
> *Provided that if the equity actually deployed is more than 30% of the capital cost, equity in excess of 30% shall be treated as normative loan for the Licensee for determination of Tariff:*
>
> *Provided further that the Licensee shall submit documentary evidence for the actual deployment of , equity and explain the source of funds for the equity:*
>
> *Provided also that where equity actually deployed is less than 30% of the capital cost of the capitalised asset, the actual equity shall be considered for determination of Tariff:*

Provided' alsꞏo that the equity invested in foreign currency shall be designated on the date of each investment.

20.2 In case of the Licensee, for the fixed assets capitalised on account of Capital Expenditure Scheme prior to April 1, 2020, the debt-equity ratio allowed by the Commission for determination of ARR/Tariff for the period ending March 31, 2020 shall be considered:

Provided that in case of retirement or replacement or de-capitalisation of the assets, the equity capital approved as mentioned above, shall be reduced to the extent of 30% (or actual equity component based on documentary evidence, if it is lower than 30%) of the original cost of such assets:

Provided further that in case of retirement or replacement or de-capitalisation of the assets, the debt capital approved as mentioned above, shall be reduced to the extent of outstanding debt component based on documentary evidence, or the normative loan component, as the case may be, of the original cost of such assets. "

The Regulation 20.1 deals with applicability of debt: equity ratio with respect to capital expenditure schemes to be commissioned w.e.f. 01.04.2020, while the Regulation 20.2 deals with the treatment of debt: equity ratio for schemes commissioned up to 31.03.2020. On perusal of the referred Regulation 20.2, we are of the view that for the schemes commissioned up to 31.03.2020, debt: equity ratio already approved shall continue to be applicable; and it also specifies the treatment of Debt: equity in case of retirement or replacement or de-capitalisation of the assets. As per the proviso to the Regulation 20.2 for retired assets, the equity shall be reduced to 30 %, meaning thereby that even if such a retired asset was allowed an equity more than 30 % earlier and earning return accordingly, subsequent to its retirement, the equity shall be capped at 30 % and return be allowed accordingly. Likewise, debt capital for such retired asset shall be reduced to the extent of outstanding debt component or the normative loan component, as the case may be, of the original cost of such assets.

Even considering the contention of State Commission, that as per Regulation 47 of "MYT Regulations 2019" loss on account of sale is not to be excluded from the Non-Tariff Income, in our view, the Debt and equity treatment in the Gross Fixed Asset of Retired Assets is to be accounted in terms of Regulation 20.2 of "MYT Regulations 2019". Thus, in terms of the proviso to Regulation 20.2 of "MYT Regulations 2019", it is not permissible to remove the equity (equal to 30% of the original cost of retired / replaced asset) and debt amount in cases of retired / replaced/ decapitalized assets in the ARR for 2020-21 and necessitates interference.

Regarding the contention put forth on behalf of the State Commission that no permission was taken by Appellant for retirement of Assets, we note that such a reasoning has neither been provided in the Impugned Order for disallowance nor our attention has been drawn towards any specific provision in the Regulation for such a prerequisite and therefore such contention is dismissed, being devoid of merit.

In view of above deliberation, we set aside the observation in the Impugned Order with regard to disallowance of Return on Equity and interest on debt for the assets retired and remand the matter to State Commission for allowing return on equity and interest on Debt of the Retired Assets in terms of Regulation 20.2 of "MYT Regulations 2019" for assets referred in the ARR of 2020-21.

ISSUE NO2 : DISALLOWANCE OF O&M EXPENSES A) DISALLOWANCE OF FINANCING COST OF DELAYED PAYMENT SURCHARGE (DPS)

A. SUBMISSION URGED ON BEHALF OF NPCL

At the outset, it is submitted that disallowance of cost of borrowing

of DPS is now sought to be justified by State Commission with reasons that are not forthcoming in the Impugned Order or in the Reply filed by the State Commission**,** which is impermissible in law. Without prejudice to the inadmissibility of such contentions of State Commission, the Appellant is responding to the same.

It is submitted that the Appellant's claim pertaining to the financing cost of DPS ought to be allowed as part of O&M, a claim squarely covered by the application of the proviso to Regulation 45.3 of the "MYT Regulations 2019", which expressly provides that *"…Interest and Finance Charges such as … financing cost of Delayed Payment Surcharge … shall be part of A&G Expenses*." The only basis for disallowance in the Impugned Order is contained in Para 5.5.40, wherein the State Commission has merely relied on its reasoning in the true-up for FY 2018-19. Such reasoning, however, is wholly inapplicable to the present period since the earlier "MYT Regulations 2014" did not contain any provision akin to the mandatory stipulation in the current Regulation 45.3 of "MYT Regulations 2019". Even otherwise, in the FY 2018-19 true-up, the disallowance was made only on the erroneous ground that the Appellant had not established any actual borrowings. Although that finding was incorrect and has already been argued by the Appellant in Issue No. 5 of Section-2 (Miscellaneous Issues), the simple fact is that the current "MYT Regulations 2019" contain a mandatory obligation on the State Commission to allow the same. As held by a catena of Judgments, including in "***PTC India Ltd. vs. CERC", 2010 SCC OnLine SC 364*** (Constitution Bench), the Regulations being binding on the State Commission itself, the binding nature of the Regulations cannot be defeated by the Commission reverting to its finding for FY 2018-19 under a different regulatory dispensation.

The State Commission, has sought to erroneously contend that the Appellant, in Writ Petition No. 24992 of 2020 before the Allahabad High Court, Lucknow Bench, while challenging the MYT Regulations 2019, had also assailed the removal of the financing cost of DPS from the O&M expenses. The State Commission has further sought to obfuscate the issue by referring to the Appellant's submissions as recorded in Paras 5.5.13 and 5.5.14 of the Impugned Order, suggesting that the Appellant itself had not claimed the financing cost of DPS as part of O&M expenses. In this regard it is submitted that it was the Appellant's contention and continues to be (as also taken in the Writ Petition) that the Financing Cost of DPS ought not to be included as a part of the Normative A&G expenses but ought to be given as a part of O&M expenses after looking at the real level of such funding; that is the same argument that is noted in Paras 5.5.13 and 5.5.14. The State Commission now contends that since the Appellant had itself sought Financing Cost of DPS not as part of the normative A&G expenses but as a separate item, thus, its finding for FY 2018-19 ought to hold good to the effect that the Appellant has not shown any actual borrowings on this account; the State Commission has to come clean with its stand i.e., whether the Financing Cost is to be a part of the A&G expenses or a separate item. If the State Commission concedes that the Financing Cost of DPS is to be a part of O&M and not a part of A&G expenses, then the Appellant's Writ Petition ought to succeed on that stand alone; if, however, the State Commission continues to stand by its Regulations and considers the Financing Cost of DPS as a part of A&G expenses, then the State Commission ought to allow the same as claimed.

In view of foregoing, it is submitted that this Tribunal may set aside the Impugned Order on the present issues and direct the State Commission

to recompute the O&M expenses, in terms of Regulation 45 of the MYT Regulations, 2019 and grant the same to the Appellant with applicable Carrying Cost.

B. SUBMISSION URGED ON BEHALF OF STATE COMMISSION

Learned Senior Counsel submitted that the Disallowance of financing cost of Delayed Payment Surcharge (DPS) are being dealt in two parts; Firstly, the Appellants claim before the State Commission for allowance of expenditure is in the form of financing costs to be deducted from computation of Delayed Payment Surcharge (DPS) as an item of Non-Tariff Income under Regulation 47.1 & 47.2 of the "MYT Regulations 2019" and Secondly, the Appellant's contention that financing cost of Delayed Payment Surcharge (DPS) ought to be included for computation of Administrative and General (A&G) expenses in terms of Regulation 45.3 of the "MYT Regulations 2019".

Under the "MYT Regulations 2014", actual expenditure incurred in generating or earning Non-Tariff Income, such as DPS, could be deducted under the proviso to Regulation 33, and in such cases the actual financing cost (as opposed to normative financing cost) could be allowed to the Licensee. However, under the "MYT Regulations 2019", particularly Regulations 47.1 and 47.2, there is no provision for the Licensee to claim any deduction from Non-Tariff Income such as DPS, and accordingly, the question of admitting any financing cost for DPS does not arise under the "MYT Regulations 2019". It is also submitted that the Appellant has challenged certain provisions of the "MYT Regulations 2019", including Regulations 47.1 and 47.2 and the removal of financing cost while computing DPS, before the Allahabad High Court (Lucknow Bench) in Writ Petition No. 24992 of 2020, which remains pending.

Regarding the second contention of Appellant for its alleged non-inclusion within the A&G expenses for ARR of FY 2020–21, it is submitted that the Appellant has contended before the State Commission that DPS does not fall within the scope of A&G expenses and, accordingly, it was not included by the Appellant in the computation of A&G expenses under the "MYT Regulations 2019" as noted in Paragraphs 5.5.13 and 5.5.14 of the Impugned Order.

For disallowance of financing cost of DPS, the State Commission has relied upon its findings in the Impugned Order relating to DPS in the True-Up for FY 2018–19, wherein it was observed that financing of DPS could only be allowed if actual expenditure had been incurred. In view of the absence of any data or evidence from the Appellant in support of including the financing cost of DPS within A&G expenses for FY 2020–21, same has been disallowed as noted in Para 5.5.40 of the Impugned Order.

It is further submitted that if the Appellant were to furnish actual data or evidence in support of its claim for inclusion of financing cost of DPS in the computation of A&G expenses for ARR of FY 2020–21, the same may be examined by the State Commission, subject to the directions of this Tribunal.

C. CONSIDERATION AND OUR VIEW : DISALLOWANCE OF FINANCING COST OF DELAYED PAYMENT SURCHARGE (DPS)

Reasoning provided in the Impugned Order with regard to disallowance of financing cost of DPS is as enumerated at para 5.5.40 and is reproduced below:

> *"5.5.40. The Finance charges has been considered as part of the A&G expenses as per the above said Regulation. As regards financing of delayed payment charges, since the Commission has already deliberated for the same in True-Up chapter for this Order, the same is not considered while approving the norms for O&M expenses for FY 2020-21."*

We note that even after acknowledging that finance charges has been considered as part of A&G Expenses as per extant "MYT Regulations 2019", State Commission has relied upon the reasoning provided with regard to the True Up order for FY 2018-19 for disallowance of financing cost of DPS, while State Commission ought to have followed the Regulations ("***PTC India Ltd. vs. CERC", 2010 SCC OnLine SC 364)***. The issue of allowing financing cost of DPS has been deliberated in detail while dealing with the issue of True up of FY 2018-19 and it has already been held above that the financing cost of DPS is to be allowed on normative basis as that of working capital interest rate even when the Appellant has used its own funds for the purpose. Though there is omission of the proviso in "MYT Regulations 2019" previously contained in the corresponding Regulation under the "MYT Regulations 2014", i.e. "Provided further that any expenditure incurred for generating/earning Non-Tariff Income may be reduced from such income", there is specific provision with regard to inclusion of finance cost of delayed payment surcharge in A&G in the "MYT Regulations 2019" applicable for the ARR of 2020-2021 and same is reproduced below:

"45.3 Administrative and General Expense

A&G expense shall be computed as per the following formula escalated by wholesale price index (WPI) and adjusted by provisions for confirmed initiatives (IT etc. initiatives as proposed by the Distribution Licensee and validated by the Commission) or other expected one-time expenses:

$A\&G_n : A\&G_{n-1}$ *(1+ WPI inflation)*

Where:

$A\&G_n$*: A&G expense for the nth year;*

$A\&G_{n-1}$*: A&G expense for the* $(n-1)^{th}$ *year;*

WPI inflation is the average of Wholesale Price Index (WPI) for immediately preceding three Financial Years:

Provided that Interest and Finance charges such as Cred Rating charges, collection facilitation charges, financing cost of Delayed Payment Surcharge and other finance charges shall be a part of A&G expenses.

Illustration: For FY 2020-21, (n-1)th year will be FY 2019-20 which is also the base year."

Thus in "MYT Regulations 2019", Administrative and General Expenses includes financing cost of DPS. Regarding the contention of State Commission, that Appellant chose not to include the financing cost of DPS in the A&G expenses, it would be relevant to quote from the averments of Appellants as noted in Impugned Order :

> *"5.5.13…….. Consequently, it may be concluded that the financing cost of Delayed Payment Surcharge is nothing but interest on the money arranged/provided by the Discom to fund delayed payment of electricity dues by the Consumers and has no similarity with nature of other A&G Expenses.*
>
> *5.5.14. In view of the above, the Petitioner requested not to include the above finance charges in determination of base year normative O&M Expenses and the same should be allowed separately. Accordingly, the Petitioner has not included the above-mentioned Finance Charges and Financing Cost of DPS in the computation of Average A & G Expenses for 5 years and claimed the separately as have been approved by the Commission hitherto."*

Thus, it is not as if Appellants have altogether not claimed financing cost of DPS for the ARR of FY 2020-21, and the State Commission is justified in not allowing it, Appellant has sought the financing cost of DPS to be allowed separately instead of A&G Expenses. Regarding the contention of State Commission, that Appellant in its Writ Petition No. 24992/2020 before the Hon'ble Allahabad High Court, Lucknow Bench, in its challenge to the "MYT Regulations 2019", has challenged the removal of the Financing Cost of DPS from the O&M expenses. In

this context, Appellant has attached the relevant portion of Writ Petition and it is noted that Appellants has only challenged the inclusion of Financing Cost of DPS as part of A&G Expenses and since there is no decision on the referred writ petition, the calculation of base average O&M charges for working of the normative charges for next control period shall have to be in accordance with the applicable provisions of "MYT Regulations 2019" ("***PTC India Ltd. vs. CERC", 2010 SCC OnLine SC 364***).

In light of the above deliberation and in view of the specific provisions contained in the "MYT Regulations 2019", the Impugned Order, insofar as it disallows the financing cost of Delayed Payment Surcharge (DPS) in ARR of FY 2020-21, is unsustainable and accordingly set aside. The matter is remanded to the State Commission for fresh consideration of the A&G expenses, after considering the financing cost of DPS in terms of deliberation held under True-up for FY 2018-19.

ISSUE NO2 : DISALLOWANCE OF O&M EXPENSES B) ERROR IN COMPUTATION OF NORMATIVE O&M EXPENSES BASED ON TRUE UP O&M EXPENSES OF FY 2014-15 TO FY 2018-19

A. SUBMISSION URGED ON BEHALF OF NPCL

Learned senior Counsel submitted that the Impugned Order suffers from fundamental errors namely: (a) the incorrect consideration of "Net" Operation & Maintenance (O&M) expenses for FYs 2014-15 to 2016-17 and "Gross" O&M expenses for FYs 2017-18 and 2018-19 while arriving at the base year figure for the next Control Period; (b) omission to take into account the trued-up additional O&M expenses allowed by the State Commission in previous years over and above the normative

O&M expenses; (c) the omission to consider the impact of Goods and Services Tax (GST).

At the outset, it is submitted that during oral arguments as well as in the Written Submissions filed by the State Commission, the erroneous computation of O&M expenses sought to be justified with reasons that are not forthcoming in the Impugned Order or in the Reply filed by the State Commission**,** which is impermissible in law. Without prejudice to the inadmissibility of such contentions of State Commission, the Appellant is responding to the same.

In terms of Regulation 45(b) of the UPERC (Terms and Conditions for Determination of Distribution Tariff) Regulations, 2019 **("MYT Regulations 2019"),** the State Commission is required to derive the base year expenses on the basis of the average of the "trued up values" for the last five financial years, subject to prudence check. However, in the Impugned Order, while considering the O&M expenses for FYs 2014-15, 2015-16 and 2016-17, the State Commission erroneously considered the trued-up "Net" O&M expenses, despite admitting that what ought to have been taken were the trued-up "Gross" O&M expenses, whereas for FYs 2017-18 and 2018-19, the State Commission correctly considered the trued-up "Gross" O&M expenses. The error is evident from a simple comparison between the first three years and the subsequent two years, since it would be wholly absurd for the State Commission to adopt the "Net" for three years and the "Gross" for two years. The fact that the "Gross" O&M expenses are to be considered is further confirmed by the narration in Row 6 of the table 5.28 of the Impugned Order, which explicitly reads "Gross O&M Expenses" and whose summation has admittedly been relied upon by the State Commission in arriving at the

base figure. That the figures for those three years were in fact the "Net" O&M expenses is clear from the earlier years' tariff and true-up orders. The numbers reflected in Row 8 of Table 5.28 (purportedly "Net" O&M) for those three years are identical to the numbers reflected in Row 6 (purportedly "Gross" O&M), which would imply that the "Gross" O&M is equal to the "Net" O&M, an impossibility in itself, as the "Gross" O&M must necessarily be higher than the "Net" O&M. The Appellant has claimed net O&M charges as Rs 47.09 Crore for FY 2014-15, Rs 57.70 Crore for FY 2015-16 and Rs 67.15 Crore for FY 2016-17 and the figures of Rs. 39.26 Crore for FY 2014-15, Rs. 45.20 Crore for FY 2015-16, and Rs. 51.44 Crore for FY 2016-17 represent the "Net" approved trued-up amounts. The correct table with the correct numbers is as given below:-

Table-1						
Particulars	**FY 2014-15**	**FY 2015-16**	**FY 2016-17**	**FY 2017-18**	**FY 2018-19**	**Avg. FY 2016-17**
Emp Exp.	15.26	17.92	21.93	26.37	29.61	**22.22**
R&M Exp.	22.45	26.34	32.24	38.78	39.89	**31.94**
A&G Exp.	6.68	7.84	9.59	11.54	12.32	**9.59**
Gross O&M Excluding Finance Charges	**44.39**	**52.10**	**63.76**	**76.69**	**81.82**	**63.75**
Finance Charges	4.02	3.07	1.71	1.64	1.58	**2.40**
Gross O&M including Finance Charges	**48.41**	**55.17**	**65.47**	**78.33**	**83.40**	**66.16**
Expense Capitalised	(5.13)	(6.90)	(12.32)	(10.34)	(8.99)	(12.32)
Net O&M Expenses (Normative)	**43.28**	**48.27**	**53.15**	**67.99**	**74.41**	**53.84**

The State Commission has now contended that the numbers reflected in Row 6 of Table 5-28 of the Impugned Order represent the

"Gross" O&M expenses; however, such contention is factually untenable for the reasons set out hereinabove, and in any event, if Row 6 were to be treated as containing the "Gross" O&M figures, then Row 8 would ex facie be erroneous, since "Gross" can never be equal to "Net." In the circumstances, the State Commission ought to be directed to adopt the correct figures of "Gross" O&M expenses for each of the three years, namely FYs 2014-15, 2015-16 and 2016-17, and thereafter re-compute the Base Figure for the MYT period, as also consequently re-determine the allowable O&M expenses for FY 2020-21 together with the applicable Carrying Cost.

Learned Senior Counsel contended that the Regulation 45(b) of the "MYT Regulations 2019" mandates the State Commission to consider the "trued-up" expenses of the past years, and does not restrict such consideration to only the "trued-up" normative expenses of the previous years. Under the "MYT Regulations 2014" [Regulation 25(c), (d) and (e)], the framework specifically contemplated approval of actual expenses, such as "one-time expenses" and other expenses "beyond the control" of the licensee, over and above the normative expenses, and such 'additional' O&M expenses were duly "trued-up" by the Commission in those years and allowed as part of the O&M expenses. This position is reinforced by the Commission's own earlier truing-up orders dated 01.08.2016 (for FY 2014-15), 30.11.2017 (for FY 2015-16), 22.01.2019 (for FY 2016-17) and 03.09.2019 (for FY 2017-18), wherein statutory expenses beyond the control of the licensee, including the financing cost of DPS, were approved over and above the normative O&M. Notwithstanding the fact that such additional expenses were "trued-up" in those years, the State Commission has failed to consider them while computing the Base Year figure in the Impugned Order, thereby acting

contrary to Regulation 45(b) of the "MYT Regulations 2019". In effect, the Commission has confused the notion of "trued-up" O&M with "normative O&M" and wrongly excluded the additional O&M expenses, despite the fact that the exercise being undertaken in the Impugned Order (while determining the ARR for FY 2020-21) is to determine the Base Year O&M expenses, for which all additional O&M expenses ought to have been considered.

Learned Senior Counsel submitted that impact of GST, as already trued-up by the State Commission in the previous control period over and above the normative O&M expenses, ought to have been taken into account while computing the O&M expenses. GST expenses has already been approved for FY 2017-18 in the Tariff Order dated 03.09.2019, and yet same have been excluded in the Impugned Order. The Appellant has further raised the claim for GST in the true-up for FY 2018-19 as Issue No. 1 in Section-2 (Miscellaneous Issues), which, if allowed by this Tribunal, would also necessarily have to be considered by the State Commission. In terms of Regulation 45(d) of the "MYT Regulations 2019", any '*additional'* O&M expenses trued-up by the State Commission are required to form part of the O&M consideration for the next control period. The Commission has, once again, sought to conflate the distinct issues pertaining to the claim of GST already paid and claimed as a statutory expense, with the claim of GST that was pending adjudication. It is submitted that the GST actually paid and claimed pertained to materials and services falling under Repair & Maintenance Expenses and Administrative & General Expenses, which were duly leviable with GST. In contrast, the claim of GST that was kept pending related to various consumer services, such as application fees for new connections, rental for metering equipment, duplicate bill charges, testing

fees, and labour charges for shifting of service lines, all falling under Revenue from Operations, which were the subject matter of challenge and remained sub judice before various Courts. In these circumstances, the State Commission ought to be directed to include the trued-up GST in the O&M computations for the Base Year of the control period FY 2020-21 to FY 2024-25, together with applicable carrying cost.

State Commission's inconsistent treatment of O&M expenses has a cascading effect on the computation for subsequent years of the control period. As the Base Year (FY 2019-20) has been erroneously determined on account of the exclusion of legitimate expenses, the computation for the subsequent year (FY 2020-21), which forms the subject matter of the present Appeal, has likewise been rendered inaccurate. This error further perpetuates into the remaining years of the control period, thereby distorting tariff determinations and prejudicially affecting cost recovery. The consequences of this flawed methodology are not confined to the year under appeal but extend to other financial years that remain pending adjudication before this Tribunal.

In view of above it is submitted that this Tribunal may set aside the Impugned Order on the present issues by directing the State Commission to recompute the O&M expenses, strictly in terms of Regulation 45 of the MYT Regulations, 2019 and grant the same to the Appellant with applicable Carrying Cost.

B. SUBMISSION URGED ON BEHALF OF STATE COMMISSION

Learned Senior Counsel submitted that the State Commission has taken the Trued-up value of O&M for each of the requisite previous five years

[under Regulation 45(b)] from the relevant True-up order pertaining to that year, as is evident from the reference table prepared below:

Year	**Gross Value shown in Table 5.28 of the Impugned order (Row 6)**	**Value of O&M as per relevant True-up order with table and para number**	
FY 2014-15	39.26	39.26 in Table 5.9	Discussion in para 5.5.12 above table 5.9 would indicate that 39.26 is gross value
FY 2015-16	45.20	45.20 in Table3-10	Discussion in para 3.6.15 above table 3-10 would indicate that 45.20 is gross value
FY 2016-17	51.44	51.44 in Table 3-10	Discussion in para 3.7.10 above table 3-10 would indicate that 51.44 is gross value
FY17-18	76.69	76.69 in Table 3-18	Row 4 of said table 3-18 indicates that 76.69 is Gross value
FY 18-19	81.82	81.82 in Table3-46	4th Row of said table 3-46 indicates that 81.82 is Gross value of O&M

Based on the actual True-up values, the State Commission has computed the average O&M expenses for the past five years at Rs. 61.29 Crore and there is no discrepancy in the computation of the said average in terms of clause (c) of Regulation 45. Under the “MYT Regulations 2019”, financing charges were introduced as a new component forming part of A&G expenses, and consequently O&M expenses, whereas under the “MYT Regulations 2014”, such financing charges were not included within A&G/O&M but were allowed on actuals. Therefore, while computing the average O&M expenses in accordance with clause (c) of Regulation 45 of the “MYT Regulations 2019”, the State Commission has rightly included the

financing charges, resulting in the average figure of Rs. 61.29 Crore for the past five years.

The contention of the Appellant that State Commission ought to proceed on the basis of either “gross” or “net” O&M for the relevant years is misconceived and not borne out by the wording of Regulation 45(a) to (c), which merely mandates consideration of the Trued-Up values (without efficiency gain/loss) for the last five financial years ending March 31, 2019. Efficiency gain is not an issue, and the exact Trued-Up values, as per the relevant Tariff Orders and as indicated in the table above, have duly been considered by the State Commission.

Learned senior counsel further submitted that the allegation of non-inclusion of statutory expenses in the computation of average O&M is misconceived. The Trued-Up values considered, as summarized in the table above, do not include any statutory expenses. In those previous tariff orders, the Appellant’s statutory expenses were indeed considered and allowed separately under a different heading not being part of O&M True-up. Accordingly, statutory charges have rightly been kept outside the scope of O&M computation.

It is further stated that the one-time expenses are allowed as pass through in tariff in terms of clause (d) of Regulations 45 and accordingly, such of the expenses which are covered under clause (d) are not to be included in computation of average O&M under clause (a) to (c) of Regulation 45.

Learned senior counsel contended that the grievance of the Appellant regarding non-inclusion of GST in computation of average O&M under clauses (a) to (c) of Regulation 45 is misconceived. Firstly, GST was introduced as a replacement for service tax and other indirect taxes, which

were already factored into the True-up values of O&M for the previous five years as contemplated under clause (b) of Regulation 45. Therefore, inclusion of GST over and above the True-up values of O&M, which already accounted for service tax and other indirect taxes, would result in double counting of indirect taxes in the computation of O&M under the "MYT Regulations 2019". Furthermore, the Appellant themselves had sought time to work out the exact impact of GST on O&M and Appellant has also cited certain proceedings they had taken out challenging the imposition of GST and sought time to assess and claim impact if any due to GST as noted in paras 5.6.8 & 5.6.9 of the Impugned Order.

C. CONSIDERATION AND OUR VIEW ; COMPUTATION OF NORMATIVE O&M EXPENSES BASED ON TRUE UP O&M EXPENSES OF FY 2014-15 TO FY 2018-19

Learned Senior Counsel for the Appellant has contended that for arriving at the base year O&M expenses for the next control period, State Commission though has rightly considered the Gross O&M expenses (True up) for FY 2017-18 & FY 2018-19, has erroneously considered only net O&M (True up) expenses for FY 2014-15, to FY 2016-17, thus excluding the trued up additional O&M expenses allowed for these years, as well as non consideration of impact of GST; exclusion of these legitimate expenses shall have cascading effect on the value of allowable normative O&M charges for the subsequent year of the Control Period. Per Contra, learned senior Counsel for the State Commission has contended that based on the actual True-up values for preceding five years, as appearing in tariff order of respective years have been considered and there is no discrepancy in the computation of the said average in terms of clause (c) of Regulation 45 of " MYT Regulations 2019". State Commission further clarified that financing charges for the previous years, has been included while working out the

average figure of Rs. 61.29 Crore, however statutory charges have not been included in these calculation as such charges were allowed separately under "MYT Regulations 2014" and not considered as part of O&M charges.

Table 5.28 of the Impugned Order depicting calculation of average O&M value based on O&M (trued up) value for proceeding five years, is quoted below :

Table 5-28: Normative O&M Expenses for FY 2019-20 (Rs. Crore)

Sr. No.	Particulars	Trued-Up O&M Expenses (Without Efficiency Gains/Loss)					Average expenses for past 5 years= Mid-year FY 2016-17
		FY 2014-15	FY 2015-16	FY 2016-17	FY 2017-18	FY 2018-19	FY 2016-17
1	Employee Expenses	13.50	15.54	17.69	26.37	29.61	20.54
2	R & M Expenses	19.85	22.86	26.01	38.78	39.77	29.48
3	A&G Expenses	5.91	6.80	7.74	11.54	12.32	
4	Finance Charges	4.02	3.07	1.71	1.64	1.58	
5	**Net A&G Expenses (3+4)**	**9.93**	**9.87**	**9.45**	**13.18**	**13.90**	**11.27**
6	Gross O&M Expenses (1+2+5)	**39.26**	**45.20**	**51.44**	**76.69**	**81.82**	**61.29**
7	Expenses Capitalised				(10.34)	(8.99)	
8	Net O&M Expenses (6-7)	**39.26**	**45.20**	**51.44**	**66.35**	**72.83**	

The relevant extract of Regulation 45 of "MYT Regulations 2019" for working out the average of the Trued up value and factors to be considered under O&M expenses are reproduced below:

45. Operation and Maintenance Expenses

a) The Operation and Maintenance expenses for the Distribution Business shall be computed as stipulated in with these Regulations.

b) The Operation and Maintenance expenses shall be derived on the basis of the average of the Trued-Up values (without efficiency gain / loss) for the last five (5) financial years ending March 31, 2019 subject to prudence check by the Commission. However, if Trued-Up values (without efficiency gain / loss) are not available for FY 2018-19, then last five (5) available Trued-Up values

(without efficiency gain / loss) will be considered and subsequently when the same are available the base year value (i.e. FY 2019-20) will be recomputed.

c) The average of such operation and maintenance expenses shall be considered as Operation and Maintenance expenses for the middle year and shall be escalated year on year with the escalation factor considering CPI and WPI of respective years in the ratio of 60:40, for subsequent years up to FY 2019-20.

d) The One-time expenses such as expense due to change in accounting policy, arrears paid due to Pay Commissions, etc., and the expenses beyond the control of the Distribution Licensee such as dearness allowance, terminal benefits, etc., in Employee cost, shall be allowed by the Commission over and above normative Operation & Maintenance Expenses after prudence check.

e) At the time of Truing-up of the O&M expenses, the actual point to point inflation over Wholesale Price Index numbers as per Office of Economic Advisor of Government of India and the actual Consumer Price Index for Industrial Workers (all India) as per Labour Bureau, Government of India, in the concerned year shall be considered.

There is no dispute that calculation of base year O&M charges based on average O&M (true up) charges for the preceding five years is to derive normative O&M charges for the next control period. In our view, the rationale for using normative Operation & Maintenance (O&M) charges in tariff determination is rooted in regulatory efficiency, predictability, and fairness and it also avoids the need to audit actual O&M expenses annually, which can be resource-intensive and prone to disputes. The Normative values also reduce the scope of retrospective adjustments, streamlining tariff orders, encouraging operational efficiency and prevents utilities from inflating actual expenses to claim higher tariffs. We have been informed that UPERC derives utility wise normative O&M charges based on its actual O&M charges (Trued UP) for the preceding years. Thus the fixation of normative O&M charges based on preceding years' actuals is a rational and empirically grounded approach. It ensures that the normative benchmarks reflect utility's realistic data. By averaging actuals over a representative period typically five years, avoids anomalies and ensures that the norms are neither punitive nor unduly generous.

It is noted, that Regulation 45 specify the O&M Charges (True Up), without efficiency gain/loss of preceding 5 years to be used without distinguishing between whether same would be Net O&M or Gross O&M charges and State Commission has submitted that it has considered True up value of O&M as appearing in the respective year Tariff Order.

We took note that for the year FY 2017-18, State Commission has considered Gross O&M (True up) charges as Rs 76.69 Crore appearing in Table 3-18 of True up Order (FY 2017-18) dated 03.09.2019, while the same Table 3-18 also notes net O&M charges of Rs 66.35 Crore after excluding employee expenses capitalised. Table 3-18 is reproduced below:

Table 3-18: Approved O&M expenses for FY 2017-18 (Rs Cr)

S.N	Particulars	Approved in **TO** dtd 30.11.2017	Audited	True- Up	Approved upon Truing Up
1	Employee Expenses	26.75	43.87	43.87	26.37
2	Repair & Maintenance Expenses	39.53	41.48	39.88	38.78
3	Administrative and General Expenses	11.95	14.03	13.00	11.54
4	**Gross O&M Expenses**	**78.23**	**99.38**	**96.75**	**76.69**
5	Less: Employee Expenses capitalized	5.99	10.34	10.34	10.34
6	**Net O&M Expenses**	**72.24**	**89.04**	**86.40**	**66.35**

Likewise from Table 3-46 of the Impugned Order for True up for FY 2018-19, Gross O&M Charges of Rs 81.82 Crore has been considered, including the Employee expenses capitalised.

Table 3-46: O&M Expenses as approved by the Commission for FY 2018-19 (Rs. Crore)

Particulars	Approved vide T.O. 22/01/2019	Audited Accounts	True Up Petition	Normative	Approved upon Truing up
Employee Expenses	29.89	48.81	48.81	29.61	29.61
Repair & Maintenance	45.40	44.19	44.19	39.89	39.89

Administrative and General Expenses	13.24	12.78	12.78	12.32	12.32
Gross O&M Expenses	**88.53**	**105.78**	**105.78**	**81.82**	**81.82**
Less:					
Employee Expenses	5.95	8.99	8.99	8.99	8.99
Net O&M Expenses	**82.58**	**96.79**	**96.79**	**72.83**	**72.83**

For the first three years, as submitted on behalf of the State Commission, net O&M charges of Rs 39.26 Crore for FY 2014-15 (order dated 01.08.2016), Rs 45.20 Crore for FY 2015-16 (order dated 30.11.2017) and Rs 51.44 Crore for FY 2016-17 (order dated 22.01.2019), as appearing in their respective year tariff order has been considered. We take note that in these years tariff orders, the net True up O&M charges are excluding the employee cost capitalisation, as Net O&M (True Up) charges approved are vis a vis Net O&M charges claimed (excluding Employee cost capitalisation) by the Appellant. The employee Cost capitalisation claimed by Appellant in respective year petition are Rs 5.13 Crore for FY 2014-15, Rs 6.90 Crore for FY 2015-16 and Rs. 12.32 Crore for FY 2016-17, which is contended to be approved accordingly by Appellant. We fail to understand the rational of excluding the Employee Cost capitalisation expenses approved by State Commission from FY 2014-15 to FY 2017-18, while such expenses has been considered as part of O&M expenses for FY 2017-18 and FY 2018-19 for working out the base year O&M charges for next control period. In our view same needs to be included along with True Up O&M charges for these years (FY 2014-15 to FY 2016-17)

The Appellant has also contended that in addition to Net O&M and employee cost capitalisation, additional statutory Expenses of Rs. 1.42 Crore for FY 2014-15, Rs. 2.23 Crore for FY 2016-17, and Rs. 3.17 Crore for FY 2017-18 have been approved as part of O&M Charges. Similarly for FY 2017-18 & FY 2018-19, over and above Gross O&M Charges (

True up), Impact of GST have been approved for FY 2017-18 and same was disallowed in true up for FY 2018-19 and is an issue in present Appeal and provided following table and details:

Table – 1 : Summary of Trued-up O&M Expenses by the State Commission
(In Rs. Cr.)

Financial Year	**Gross O & M Expenses without Addnl Statutory Expenses**	**Employee Cost Capitalisation**	**Net O & M Expenses**	**Additional Statutory Expenses**	**Impact of GST**	**Gross O & M Expenses with Addnl. Statutory Expenses + GST**
	(1)	**(2)**	**(3)=(1)-(2)**	**(4)**	**(5)**	**6=(1)+(4)+(5)**
2014-15	44.39	(5.13)	39.26	1.42	-	45.81
2015-16	52.10	(6.90)	45.20	2.23	-	54.33
2016-17	63.76	(12.32)	51.44	3.17	-	66.93
2017-18	76.69	(10.34)	66.35	-	2.22	78.91
2018-19	81.82	(8.99)	72.83	-	3.56	85.38

NOTES:

1. The Appellant in its Tariff Petition duly submitted the Gross O&M Expenses as show in Column 6 above before the State Commission and also submitted the Employee Cost Capitalisation as shown in Column 2 above.
2. For Computing the O&M Expenses for FY 2020-21, the State Commission has considered the following values:

   (a) For FY 2014-15 to FY 2016-17:

   (i) the State Commission considered Net O&M Expenses as shown in Column (3) above (without considering the employee cost capitalisation as shown in Column (2) above); and

   (ii) the State Commission did not consider Additional Statutory Expenses (column (4) above) which were trued-up by it vide various tariff orders,

   (b) For FY 2017-18 & FY 2018-19

   (i) the State Commission considered Gross O&M Expenses as shown in column 1 above (including the Employee Cost Capitalisation as shown column (2) above); and

   (ii) the State Commission did not consider the Impact of GST, as shown in column (5) above, which was trued-up by it for FY 2017-18 vide tariff order dated 03.09.2019;

(iii) The Impact of GST amounting to Rs. 3.56 Crores for FY 2018-19 has been disallowed by the State Commission in the Impugned Order and the same is under challenge in this Appeal.

Learned senior Counsel for State Commission has contended that statutory charges have not been included in while arriving the base year charges for next control period as such charges were allowed separately under "MYT Regulations 2014" and not considered as part of O&M charges. In our view, such Statutory charges, which are allowed separately in previous years (FY 2014-15 to FY 2016-17), but cannot be claimed separately under "MYT Regulations 2019" as part of O&M charges in next control period, are to be included in O&M (True up) of these year charges (FY 2014-15 to FY 2016-17) for calculation of Base O&M Charges for next control period.

For the year FY 2017-18, impact of GST on O&M charges have been additionally approved by State Commission in its True up order and same for the FY 2018-19 has been allowed by this Tribunal in present appeal as held in above paragraphs, under change in Law with introduction of GST in the middle of previous control period. In our view, since the entire exercise of base year O&M charge calculation is to work out Normative O&M charges for next control period, which will also include GST in O&M services, impact of GST allowed as part of O&M for previous years is to be included in respective year's O&M Charges.

Summing up, in our view, such portion of O&M charges which were trued up, and allowed separately, though not appearing as part of O&M (Trued up) for the preceding years in the tariff order for the respective years and such charges have been subsumed as part of Normative O&M charges, and are not allowed separately under Regulation 45 of "MYT Regulations 2019" for the next Control period are to be included while calculating base

year O&M charges to avoid understatement. However to avoid duplication/ over statement, such charges which are to be claimed over and above the Normative O&M charges as per “MYT Regulations 2019”, are to be excluded from the previous year’s O&M (True up) Charges. With these observations, the calculation of base year O&M charges for working out the Normative O&M charges in the Impugned Order for next control period is set aside and issue is remanded to the State Commission for redetermination of Base Year O&M charges in above terms. With respect to disallowance of specific components as contended by Appellants is to be considered for calculation of average O&M charges for base year for next control period charges in following terms:

- Employee cost capitalisation approved for FY 2014-15, FY 2015-16, FY 2016-17 and if not appearing in Net O&M Charges (True up) considered for these years, to be included in these years O&M charges.

- Impact of GST on O&M charges as approved in True up Order for FY 2017-18 and that calculated for FY 2018-19, subsequent to remand of the issue as held in above paragraphs, is to be included in these years O&M charges (True up).

- Those Statutory Expenses, as approved additionally for FY 2014-15, FY 2015-16, FY 2016-17, and are not allowed to be claimed separately under “MYT Regulations 2019”, to be included in O&M charges (True up) of these years.

ISSUE NO3: DEVIATION FROM MYT REGULATIONS WITH RESPECT TO COMPUTATION OF DEBT : EQUITY RATIO FOR ARR OF FY 2020-21

A. SUBMISSION URGED ON BEHALF OF NPCL

Learned senior Counsel submitted that, Appellant is aggrieved with the erroneous determination of debt-equity ratio for the assets capitalized prior to 01.04.2020 at 70:30 in the Impugned Order, by overlooking the main part of Regulation 20.2 of "MYT Regulations 2019", which is applicable to the assets existing in the Gross Fixed Assets (**GFA**) as on 01.04.2020; and misapplying the provisos to Regulation 20.2 to the existing assets in the GFA as on 01.04.2020, whereas the said provisos only apply to the retired, replaced or decapitalized assets.

It is submitted that the Impugned Order itself shows that the approved debt balance (as on 31.03.2020) is Rs. 487.31 Crore and the approved equity balance (as on 31.03.2020) is Rs. 383.58 Crore, thereby yielding a debt-equity ratio of 56:44 and same has to be the basis of capitalization on 01.04.2020, in terms of the main part of Regulation 20.2. Further, the said ratio has to be applied to the approved Net Fixed Assets (NFA) of Rs. 1313 Crore after deducting accumulated depreciation.

It is submitted that the State Commission has not only committed the error indicated in Para 5.7.42 but has also compounded the same in Paras 5.9.7 and 5.15.4 of the Impugned Order. In Para 5.9.7, while computing the debt, the State Commission has erroneously held that the opening loan base as on 01.04.2020 *"shall be reduced to the outstanding debt component of the fixed asset base computed as on 31.03.2020 or the normative closing loan base of FY 2019-20, whichever is lower……,"* and a similar treatment has been accorded to equity in Para 5.15.4. Such dispensations are ex facie erroneous, inasmuch as (i) no part of Regulation 20.2 even remotely contemplates such treatment; and (ii) the

State Commission has misapplied the first and second provisos of Regulation 20.2, which apply only to retired, replaced, or decapitalized assets and not to the existing assets in the GFA. Consequently, the action of applying a fresh 70:30 debt-equity ratio to the existing assets in the GFA as on 01.04.2020, not only violates the explicit mandate of Regulation 20.2 but also results in arbitrary suppression of the equity base, leading to distorted computation of return on equity and jeopardizing the financial viability of the regulated business.

It is submitted that the State Commission has failed to acknowledge and accept that the debt-equity ratio of 70:30 is only for the initial/original approval of capitalization of the asset**.** Thereafter, with the passage of time, depreciation erodes the value of the asset and the debt gets repaid, while the equity remains invested in the business, thereby causing the debt-equity ratio to change for each asset and each year. The main part of Regulation 20.2 mandates that the debt-equity ratio approved by the State Commission as on 31.03.2020 be used for capitalization, and if the debt-equity ratio were to be treated as a constant 70:30 right from the time of initial capitalization till 31.03.2020, the entire scheme of Regulation 20 would be rendered otiose. A bare comparison of the language of the main part of Regulation 20.2 with that of its provisos, as well as with Regulation 20.1, clearly brings out this distinction.

Secondly, the State Commission has erroneously sought to contend that it has not computed the equity base retrospectively by applying a normative debt-equity ratio of 70:30 but has instead considered the actual equity base of Rs. 383.58 Crores (as against a so-called ‘normative’ equity base of Rs. 393.92 Crores). This contention is

wholly untenable. The figure of Rs. 393.92 Crores is nothing but 30% of the Net GFA of Rs. 1313 Crore (i.e., Gross GFA of Rs. 1499 Crores less Consumer Contribution of Rs. 186 Crores), which is contrary to the main part of Regulation 20.1 that expressly requires application of the debt-equity ratio approved as on 31.03.2020 (i.e., 56:44) to the NFA and not a normative 30%. Further, the figure of Rs. 393.92 Crore cannot be compared with the closing balance of equity of Rs. 383.58 Crores as on 31.03.2020, which is the culmination of accumulated equity computed year after year from FY 2007-08 onwards which included the impact of retirement/replacement of assets, accretion of assets, changes in CWIP, repayment of debt, etc., and thus cannot be equated with 30% of the opening GFA. If at all any comparison is to be drawn, the comparison would have to be between Rs 383.58 Crore (as on 31.03.2020) and an application of the debt-equity ratio of 56:44 to the Net GFA of Rs. 1313 Crores (i.e., the main part of Regulation 20.2). This would come to an equity of Rs 577.72 Crore as on 01.04.2020. However, the correct computation would be to apply the debt-equity ratio of 56:44 (approved as on 31.03.2020) to the Net GFA of Rs. 1313 Crores less accumulated depreciation of Rs. 393 Crores. That would result in an equity of Rs. 405 Crores in terms of the main part of Regulation 20.2. Therefore, the assumption of the State Commission that by allowing Rs. 383.58 Crore as on 01.04.2020 (and comparing it to a hypothetical Rs. 393.92 Crore), it is accepting the Appellant's position, is entirely flawed. It is also pertinent to note that the figure of Rs. 383.58 Crore is not the 'actual' equity invested in the business but merely the 'approved' equity as per earlier Regulations and Tariff Orders, whereas the actual equity as on 01.04.2020, as per the audited balance sheet of the Appellant, is Rs. 1022.17 Crores.

The State Commission has erroneously relied upon the provisos to Regulation 20.2 to contend that the same is applicable only to certain assets where equity approved is greater than 30%, which the State Commission is not authorized to allow. This contention is fundamentally flawed, as the afore-mentioned contention betrays the underlying belief that the debt-equity ratio can never be different than 70:30. The question of the applicability of the provisos of Regulation 20.2 to retired/replaced and decapitalized assets (i) is to show as to how the same does not apply to assets in the GFA; and (ii) to also show as to how the Regulations contemplate the treatment of retired/replaced assets. The Appellant's reliance on the provisos to Regulation 20.2 was also as an alternate submission in relation to the issue of allowance of the loss on sale of retired assets. It is not entirely clear as to whether the State Commission is trying to argue the said issue here. It is only if this Tribunal were pleased not to accept the main contention of adjustment of the loss on sale of retired assets that the question of applicability of the provisos to Regulation 20.2 would be necessitated. In that event, since there is no treatment at all in the Impugned Order on retired/replaced assets, the consideration and applicability of the provisos to Regulation 20.2 to retired/replaced/decapitalized assets may have to be remanded back to the State Commission.

In view of above submission, it is contended that the contentions and justifications advanced by the State Commission are devoid of merit and it is prayed that this Tribunal be pleased to direct the State Commission to permit capitalization of the fixed assets forming part of the GFA as on 01.04.2020 in accordance with the debt-equity ratio as approved by the State Commission in the ARR/Tariff Order(s) as on 31.03.2020, strictly in terms of the main part of Regulation 20.2 of the "MYT Regulations 2019", together with the applicable Carrying Cost.

B. SUBMISSION URGED ON BEHALF OF STATE COMMISSION

Regarding the contention of the Appellant that State Commission has re-determined the entire debt- equity ratio as on 0.1.04.2020 by applying a fresh normative ratio of 70:30 on the fixed asset base as on 31.03.2020, learned senior Counsel submitted that it is evident from the Impugned Order that the normative equity of Rs. 393.92 Crore, based on 30:70 split of GFA (as on 31-03-2020) was not ultimately used to compute either the equity base or the RoE; instead, the State Commission has used the actual equity base of Rs.383.58 Crore (as on 31-03-2020) and proceeded on that basis.

Regarding the contention of the Appellant with respect to the two provisos to Regulation 20.2, that in case of retirement, replacement, or decapitalization of assets, the equity capital is to be reduced to 30% (or actual equity if lower) of the original cost of the asset retired/replaced; and the debt capital is to be reduced by the outstanding or normative loan corresponding to such decapitalized asset, learned Senior Counsel submitted that this would have limited application, where equity approved is greater than 30%, since notification of 2006 Regulation, the State Commission is not authorized to allow equity component of more than 30%.

It is further submitted that it is not clear from the contention of the Appellant that _ whether any part of the equity of a retired asset must be continued if the original approved equity is less than 30% or equal to 30% and in fact, the language of proviso-1 does not at all support any retention of equity from a retired/ replaced asset where the equity is less than or equal to 30% of original cost. The State Commission in the ARR for FY

2020-21, in cases of retired / replaced/ decapitalized assets, has removed equity amount of the said asset (equal to 30% of the original cost of retired / replaced asset).

Learned senior Counsel submitted that equity amount pertaining to an asset/ project/ scheme for RoE can be maximum 30% of original project cost and said equity component does not go up year on year as debt is repaid. By allowing depreciation for an asset in its annual tariff orders, the State Commission does not approve any reset of the debt-equity ratio for the asset. Contentions of Appellant could be counter-productive as since 2006 onwards, as per Regulations, debt equity ratio cannot be more then 70:30. As the amount of debt falls and equity portion starts to exceed 30% - any part of the equity that resultantly exceeds 30% would get converted to notional debt, and not even be eligible for RoE. The approval of capex and corresponding Debt – equity ratio is always done "asset-wise". The Appellant's submission w.r.t purported annual resetting of debt: equity by virtue of permitted depreciation/ loan repaid of an asset would run counter to the express mandate of various Regulations; "MYT Regulations 2019", "MYT Regulations 2014" and "MYT Regulations 2006".

C. CONSIDERATION AND OUR VIEW : DEVIATION FROM MYT REGULATIONS WITH RESPECT TO COMPUTATION OF DEBT : EQUITY RATIO FOR ARR OF FY 2020-21

The main contention urged on behalf of the Appellant is with regard to redetermination of debt:equity ratio for the assets capitalised prior to 01.04.2020 by misapplying the proviso to Regulation 20.2 and overlooking the main part of Regulation 20.2 of "MYT Regulations

2019” and has not considered ROE and Interest on debt in terms of Regulation 20.2. Per Contra, contentions put forth on behalf of the State Commission is that Normative equity of Rs. 393.92 Crore, based on 30:70 split of GFA (as on 01.04.2020) was not used either for the equity base or ROE, instead the State Commission has used actual equity base of Rs. 383.58 Crore (01.04.2020) and proceeded on that Basis and the State Commission in the ARR for FY 2020-21, in cases of retired / replaced/ decapitalized assets, has removed equity amount of the said asset (equal to 30% of the original cost of retired / replaced asset).

It is profitable to re-note the provisions of “MYT Regulations 2019” with regard to the treatment of Debt : Equity ratio

“20:Debt-Equity Ratio

20.1 For a capital investment Scheme declared under commercial operation on or after April 1, 2020, debt-equity ratio as on the date of commercial operation shall be 70:30 of the amount of capital cost approved by the Commission under Regulation 18, after making appropriate adjustment of Assets funded by Consumer Contribution/ Deposit Works/ Capital Subsidies/ Grant subject to prudence check for determination of Tariff:

Provided that if the equity actually deployed is more than 30% of the capital cost, equity in excess of 30% shall be treated as normative loan for the Licensee for determination of Tariff:

Provided further that the Licensee shall submit documentary evidence for the actual deployment of , equity and explain the source of funds for the equity:

Provided also that where equity actually deployed is less than 30% of the capital cost of the capitalised asset, the actual equity shall be considered for determination of Tariff:

Provided' also that the equity invested in foreign currency shall be designated on the date of each investment.

20.2 In case of the Licensee, for the fixed assets capitalised on account of Capital Expenditure Scheme prior to April 1, 2020, the debt-equity ratio allowed by the Commission for determination of ARR / Tariff for the period ending March 31, 2020 shall be considered:

Provided that in case of retirement or replacement or de-capitalisation of the assets, the equity capital' approved as mentioned above, shall be reduced to the

extent of 30% (or actual equity component based on documentary evidence, if it is lower than 30%) of the. original cost of such assets:,

Provided further that in case of retirement or replacement or de-capitalisation of the assets, the debt capital approved as mentioned above, shall be reduced to the extent of outstanding debt component based on documentary evidence, or the normative loan component; as the case maybe, of the original cost of such assets."

Regulation 20.1, deals with the treatment of debt equity of capital investment schemes with commercial operation date on or after 01.04.2020 in which case Debt : Equity ratio shall be capped at 70:30 and thus for new schemes, with COD on and after 01.04.2020, equity more than 30 % cannot be approved. The Regulation 20.2, deals with the treatment of Debt: Equity ratio of the fixed assets capitalized prior to 01.04.2020, and it states that for such schemes, Debt: Equity ratio as earlier approved would continue meaning thereby that if equity approved is more than 30 % of its approved capital cost, it shall earn ROE on the equity approved; thus higher equity continues to be recognized for tariff purposes until the asset is retired or replaced. The proviso to regulation 20.2 is applicable when such a project, which has been capitalized before 01.04.2020, is retired/replaced/decapitalized post 01.04.2020, the equity adjustment will be limited to 30% of original cost, or actual equity if lower and accordingly it is to be accounted for in Tariff calculation.

Though State Commission has stated that computation of Debt: Equity by applying 70:30 ratio on net opening GFA resulting in calculation of equity component of Rs 393.92 Crore is not used to compute either equity base or ROE, however rational of such computation is not clear and in our view it cannot be sustained in the Impugned Order and is set aside.

There is no dispute with regard to the submission of State Commission that prior to “MYT Regulations 2019”, as per “MYT Regulations 2014” as well as “MYT Regulations 2007”, the equity component in any scheme cannot be more than 30 % and any amount of equity more than 30 % shall be considered as loan. However, it is also a fact, as also contended by Appellant, that Debt equity ratio of 70: 30 is for the original approval of capitalised cost and over the years value of the asset is eroded on account of depreciation and debt get repaid and with equity remaining invested in the business, the resultant Debt: Equity ratio of the particular assets and all assets put together gets changed year after year. This may very well result in higher component of equity than 30 % in the Net Fixed asset value. Our attention has not been drawn to any provisions in the UPERC Regulations, which specifies the resetting/redetermining of the net fixed Asset Debt : Equity to 70:30. In the “MYT Regulations 2019”, recalibration of equity of a project i.e. capping of equity at 30 % of original, or actuals if lower than 30% has been specified for the assets under retirement/ replacement / decapitalised after 01.04.2020.

In view of our observations as noted above, with regard to Regulation 20.2, that proviso to regulation resetting/capping the equity and Debt is applicable only for the assets being retired/replaced/decapitalised post 01.04.2020 and the observation of state Commission in the Impugned Order at paragraph 5.9.7 as reproduced below can not be sustained and is set aside.

> *5.9.7 As per Regulation 20.2, the debt capital i.e. opening loan base as on 1.4.2020 shall be reduced to the extent of outstanding debt component of the fixed asset base computed as on 31.03.2020 or the normative closing loan base of FY 2019-20, whichever is lower. The same has been considered.*

The normative long term loan outstanding as on 01.04.2020 is to be worked out by deducting the repayment as admitted by the State Commission up to 31.03.2020 from the Gross normative loan in terms of Regulation 23.2 of “MYT Regulations 2019”.

In view of above deliberation, recalibration of debt : equity in the ratio of 70 : 30 in the ARR of FY 2020-21 is in the teeth of “MYT Regulations 2019” and cannot be sustained and accordingly Impugned Order on this score is set aside; the issue is remanded to the State Commission for consideration of capitalization of fixed assets as on 01.04.2020 in the debt-equity ratio allowed by the State Commission in the ARR/ True up Tariff Order(s) as on 31.03.2020, in terms of Regulation 20.2 and normative long term loan outstanding as on 01.04.2020 is to be worked out in terms of Regulation 23.2 of the “MYT Regulations 2019”. Treatment of Debt: equity of Retired asset has already dealt in previous paragraphs

SECTION 4 (CAPITAL EXPENDITURE)

ISSUE NO1 : CAPITAL EXPENDITURE DISALLOWANCE ON VEHICLES

Appellant is aggrieved by the disallowance of the projected cost of the vehicles amounting to Rs 2.40 Crore in the ARR for FY 2020-21, citing similar disallowance during truing up of FY 2018-19 and submitted that such a rejection is contrary to the UPERC MYT Regulations 2019, which do not restrict vehicle procurement.

Appellant further submitted that the disallowance of actual procurement of one vehicle amounting to ₹0.14 Crore for FY 2020–21, as recorded in the True-Up Order dated 20.07.2022 for FY 2020-21, has already been

challenged by them in Appeal No. 398 of 2022, which is presently pending before this Tribunal and sought liberty to pursue this issue in the said Appeal No 398 of 2022.

In view of the submission made by the Appellant, we do not find it necessary to adjudicate upon this issue in the present Appeal. Liberty, as prayed for, is granted. The Appellant shall be at liberty to raise and pursue this issue in Appeal No. 398 of 2022.

DELIBERAION IN APPEAL NO 465 OF 2023

A. SUBMISSION URGED ON BEHALF OF APPELLANT - CONSUMER

Mr Anand Ganeshan, learned Counsel on behalf of Appellant submitted that in the Impugned Order, various claims have been disallowed by State Commission for the FY 2018-19, but no adjustment has been given for the previous years, though same has been acknowledged to be wrongly/inadvertently given in FY 2017-18. These issues were raised by Appellant in review petition filed before the State Commission, however these have not been favourably considered. Learned Counsel submitted that though Appellant has raised various issues in the Appeal, they are seeking adjudication on following issues without prejudice to their right to raise such issues in future tariff proceedings of Distribution licensee-NPCL.

j) For the 220 KV substations on which tariff has been denied in True up of FY 2018-19; these assets ought to be decapitalized in the books and all depreciation, interest etc. already claimed in the previous years should be adjusted in the true up for FY 2018-19

k) Investment already made in land and boundary wall for construction of sub-station and thermal power plant at BZP, KP-5 and Jaun Samana, which have not fructified, but already capitalized should be disallowed.

l) There are serious discrepancies in the assets created from consumer contributions, based on comparison between the Fixed Asset Register for FY 2018-19 and Cost Book Data, 2016. No details of transformer locations, whether put to use or not has been indicated; out of 328 transformers, 24 are shown as asset of NPCL and balance as consumer contribution (92%) and there appears to be inflation of cost without corresponding asset, at the cost of the consumers.

m) Unmetered sales to agricultural consumers; Learned counsel submitted that though this issue is being remanded to State Commission in the appeal of NPCL (No 98 of 2021), however this issue was raised by Appellant in review petition before the State Commission, that impact ought to be given for the past period as the excess allowed unmetered sale should not be to the benefit of NPCL

n) Recovery of EHV losses: The State commission has disallowed the EHV losses in FY 2018-19 based on the fact that the connectivity agreement was never brought on record by the NPCL, and that the assets were part of UPPTCL's network. In the review petition filed before UPERC, Appellant has alleged fraud that NPCL never disclosed its connectivity agreement with UPPTCL and has been wrongly recovering the charges in the past, which need to be adjusted.

o) Disallowance of short-term power: The State Commission had disallowed the same in FY 2018-19, on the ground that no approval was taken by NPCL. In the review petition filed before UPERC, Appellant has asked that any such past procurement from unapproved sources need to be examined and excess amounts recovered by NPCL to be recovered.

p) GST disallowances; State Commission has disallowed the same for FY2018-19, and also acknowledged that there was an error in FY 2017-18, however same is not being disturbed. The State Commission ought to have disallowed the GST impact for the past period also.

q) Revenue from sale of power : Learned counsel submitted that in terms of the balance sheets of Distribution Licensee-NPCL over the years, the revenue from sale of power has been higher than as projected in the tariff proceedings and the difference is about Rs. 374.38 Crore over the years. Issue was raised by Appellant in the review petition before the State Commission, but has not been considered.

r) Electricity Duty : Learned Counsel submitted that it is a tax payable to the Government, and cannot be part of the working capital requirement of NPCL. Though it has been disallowed for the FY 2018-19 and State Commission in the Impugned order has acknowledged that it was allowed inadvertently for FY 2017-18. Appellant in the review Petition filed before State Commission that adjustment for the previous year should be given in the True up of FY 2018-19

s) Excess cost in relation to procurement from Dhariwal Infrastructure Limited for the past period; Not pressing in the present appeal for the past period, as same is pending in Civil Appeal No. 7471-72 of 2021 before the Hon'ble Supreme Court.

Learned counsel further submitted that the State Commission has not trued up the financials of NPCL for FY 2007-08, after the revision of the input price of supply by UPPCL in the truing up exercise of UPPCL. Same is not pressed in the present appeal, with liberty to approach the State Commission in accordance with law seeking such truing up exercise for the FY 2007-08.

B. SUBMISSIONS URGED ON BEHALF OF RESPONDENT - NPCL

Learned senior counsel on behalf of Respondent – NPCL made following submissions with respect to specific issues raised by Appellant – Consumer

	Issues raised by Appellant- Consumer	**NPCL's Reply**
a.	For the 220 KV substations on which tariff has been denied in True up of FY 2018-19; these assets ought to be decapitalized in the books and all depreciation, interest etc. already claimed in the previous years should be adjusted in the true up for FY 2018-19.	These issues does not pertain to FY 2018-19 and instead relates to earlier years i.e starting from FY 2007-08. NPCL has already challenged the disallowance of these assets in the Impugned order vide its Appeal No. 98 of 2021, and has made detailed submission in the said appeal. It is submitted that in the event NPCL succeeds in its Appeal, the Appellant- Consumer contention will automatically fail, and even if NPCL's claim does not succeed, the Appellant's attempt to retrospectively disallow the cost of 220 kV and above assets along with depreciation and return on equity for years prior to FY 2018-19 is unsustainable, as the earlier Tariff orders from FY 2007-08 onwards have already been trued-up and attained finality and cannot be reopened at this stage, as settled in ***BSES Rajdhani Power Ltd. v. DERC (2023) 4 SCC 788*** *and judgments of this Hon'ble Tribunal dated* ***30.09.2019 (Appeal No. 246/2014), 28.01.2025 (Appeal No. 301/2015)*** *and* ***21.07.2025 (Appeal No. 69/2018)****.* Further, with regard to non utlisation of land for BZ5, KP 5 and Jaun Samana, it is submitted that even if certain land remains unutilized at a given time, NPCL deploys such land for its power distribution functions by developing substations or other distribution assets, and since the associated cost has already been approved in earlier years, it ought not to be disallowed; moreover, in the scheme of planning of a distribution business, land cannot be
b.	Investment already made in land and boundary wall for construction of sub-station and thermal power plant at BZP, KP-5 and Jaun Samana, which have not fructified, but already capitalized should be disallowed.	

		procured immediately when needed and is allotted only when available, making it an established industry practice to procure land in advance to meet future contingencies.
c.	There are serious discrepancies in the assets created from consumer contributions, based on comparison between the Fixed Asset Register for FY 2018-19 and Cost Book Data, 2016.	This issue has not been raised/challenged by the Appellant in its Appeal and accordingly, the Appellant cannot agitate the same at this stage.
d.	Unmetered sales to agricultural consumers. This issue was raised by Appellant in review petition before the State Commission, that impact ought to be given for the past period as the excess allowed unmetered sale should not be to the benefit of NPCL	This issue is not being pressed by NPCL and has been remanded to State Commission, NPCL is not delving into the response to the same.
e.	Recovery of EHV losses: The State commission has disallowed the EHV losses in FY 2018-19 based on the fact that the connectivity agreement was never brought on record by the NPCL, and that the assets were part of UPPTCL's network. In the review petition filed before State Commission, Appellant has alleged fraud that NPCL never disclosed its connectivity agreement with UPPTCL and has been wrongly recovering the charges in the past, which need to be adjusted	The Appellant cannot be allowed to raise this issue at this stage as Appellant has not raised this issue in its objections during the impugned tariff proceedings; moreover, the present issue does not pertain to FY 2018-19 and relates to FY 2012-13 and FY 2013-14. Appellant for the first time in its Review Petition before State Commission, alleged that NPCL had induced UPERC to allow EHV losses fraudulently by not disclosing the Connectivity Agreement with UPPTCL. Agitating this issue in the present Appeal effectively amounts to challenging the Review Order dated 21.04.2022, which is impermissible under Order 47 Rule 7 CPC. In any case, the Appellant (i) could not have alleged fraud for the first time at the review stage for past tariff years, having failed to allege fraud in its objections, and (ii) cannot allege fraud beyond the scope of the Tariff Petition filed by NPCL in terms of the Electricity Act, 2003. Furthermore, the earlier orders from FY 2012-13 onward have already been trued-up and attained finality, and hence cannot be reopened at this stage, as

		settled in *BSES Rajdhani Power Ltd. v. DERC*, (2023) 4 SCC 788 and the judgments of this Hon'ble Tribunal dated 30.09.2019 (Appeal No. 246/2014), 28.01.2025 (Appeal No. 301/2015) and 21.07.2025 (Appeal No. 69/2018).
f.	Disallowance of short-term power: The State Commission had disallowed the same in FY 2018-19, on the ground that no approval was taken by NPCL. In the review petition filed before UPERC, Appellant has asked that any such past procurement from unapproved sources need to be examined and excess amounts recovered by NPCL to be recovered.	The issue of short-term power procurement has already been challenged by NPCL in Appeal No. 98/2021, and this Tribunal has heard the parties at length on the matter. As such the issue involves retrospective revision of a Tariff Order that has already been trued-up and has attained finality and as submitted above same is impermissible in law.
g.	GST disallowances; State Commission has disallowed the same for FY2018-19, and also acknowledged that there was an error in FY 2017-18. The State Commission ought to have disallowed the GST impact for the past period also.	The Appellant cannot be allowed to raise this issue at this stage as it was not part of its objections during the impugned tariff proceedings; moreover, the grievance does not pertain to FY 2018-19 and instead relates to FY 2017-18, and State Commission has rightly observed in the Impugned Order that the trued-up Order for FY 2017-18 is not being disturbed since the year in question is FY 2018-19. Further, NPCL has already challenged the disallowance of GST for FY 2018-19 in Appeal No. 98/2021, and as this Tribunal has already heard the parties at length on this issue, NPCL is not reiterating its submissions. In any event, any retrospective revision of a Tariff Order that has already been trued-up and has attained finality is impermissible in law.
h.	Revenue from sale of power : In terms of the balance sheets of Distribution Licensee-NPCL over the years, the revenue from sale of power has been higher than as projected in the tariff	The Appellant has not raised this issue in its objections filed during the impugned tariff proceedings. Accordingly, the Appellant cannot be allowed to agitate the same at this stage; moreover, the present issue does not pertain to FY 2018-19 and instead relates to past years beginning FY 2007-08 onwards. The Appellant's submissions on this issue

	proceedings and the difference is about Rs. 374.38 Crore over the years. Issue was raised by Appellant in the review petition before the State Commission, but has not been considered.	are vague and unsubstantiated, and in the audited accounts NPCL discloses Gross Revenue as the cumulative of (i) revenue from sale of electricity, (ii) regulatory surcharge approved by the State Commission, and (iii) revenue gap/surplus treated as accrued revenue adjustable in future tariff, whereas State Commission approves revenue only as the cumulative of (i) revenue from sale of electricity and (ii) regulatory surcharge as approved. The Appellant has inconsistently compared figures by using Gross Revenue from audited accounts in some years while excluding regulatory surcharge in others, resulting in a flawed and non-like comparison that has artificially created a gap. Further, while comparing revenues, the Appellant has failed to consider adjustments of regulatory assets and the impact of regulatory surcharge reflected in audited accounts, leading to distorted calculations and wholly misleading conclusions. By comparing trued-up numbers with audited balance sheet figures without necessary adjustments, the Appellant is misleading this Tribunal, and in any event, any retrospective revision of a tariff order that has been trued-up and has attained finality is impermissible in law.
i.	Electricity Duty cannot be part of the working capital requirement of NPCL. Though it has been disallowed for the FY 2018-19 and though State Commission acknowledged that it was allowed inadvertently for FY 2017-18. The Appellant in the review Petition filed before State Commission sought that adjustment for the previous year should be given in the True up of FY 2018-19	The Appellant has not raised this issue in its objections filed during the impugned tariff proceedings. Accordingly, the Appellant cannot be allowed to agitate the same at this stage; moreover, the issue does not pertain to FY 2018-19 and instead relates to FY 2017-18, and the Appellant's submissions on this aspect are vague and unsubstantiated. The rejection of this issue for FY 2018-19 in the Impugned Order has been challenged by NPCL in Appeal No. 98/2021, but NPCL is not pressing the issue and has withdrawn the same. It is reiterated that the issue strictly pertains to FY 2017-18, which is not the subject matter of the present appeal, and the mere fact that Electricity Duty was inadvertently allowed as part of Working Capital in FY 2017-18 does not imply that approval was obtained fraudulently. In any event, there is no scope for the Appellant to

		allege fraud in the present proceedings, as its objections are confined to the Tariff Petition filed by NPCL in terms of the mandate of the Electricity Act, 2003.

Learned senior Counsel submitted that Appeal of Appellant- consumer is devoid of merit and need to be dismissed.

C. CONSIDERATION AND OUR VIEW : APL 465 of 2023

The various Issue raised by the Appellant, as noted above, pertains to the revision of previous years tariff orders on the basis that cost/tariff claimed against these issues has been disallowed in the True-up order for FY 2018-19 and State Commission has also noted that it had inadvertently allowed the same in previous years as well as discrepancies have occurred from past many years. Per Contra learned senior counsel for Respondent NPCL submitted that the issues raised does not pertain to FY 2018-19 (i.e., the year in question) and relates to earlier years i.e., starting from FY 2007-08 and such orders have attained finality and cannot be reopened at this stage.

This Tribunal has made detailed observations on most of issues in the preceding paragraphs while deliberating Appeal No. 98 of 2021. In the present appeal, the Appellant (Consumer) is seeking adjustment for allowances given by State Commission in the previous year's tariff order in the True up Order for FY 2018-19, based on disallowances given in Impugned Order and discrepancies observed from past period. Based on the deliberations held in Appeal No 98 of 2021, following issues have either been decided in favour of the Appellant–NPCL in Appeal No. 98 of 2021 / Already been disallowed in the Impugned Order and not being challenged by the Appellant–NPCL /been withdrawn by the Appellant–

NPCL; or being remanded to the State Commission under the True-Up for FY 2018–19

i) Disallowance of opening GFA of 132 kV and above assets (issue a & b) - decided in favour of Appellant in True up of FY 2018-19;

ii) Unmetered sales to agricultural consumers (issue d); remanded to State Commission

iii) Recovery of EHV losses (issue e).: Already disallowed in the Impugned Order for FY 2018-19

iv) Disallowance of short-term power (Issue f): Allowed in favour of NPCL for FY 2018-19, provided same is within quantum and cost, as approved in ARR Order dated 22.01.2019

v) GST disallowances for O&M (issue g) : Decided in favour of Appellant for the year FY 2018-19

vi) Electricity Duty(issue i): Already disallowed in the Impugned Order for FY 2018-19

With respect to the issues which have been held to be in favour of Appellant -NPCL as per deliberation held in previous paragraphs while deliberating Appeal 98 of 2021, the contention of Appellant to seek adjustments for the allowances made by State Commission on these issues in previous years tariff order, in true up order for FY 2018-19, is devoid of merit. The other issues (c, h) pertains to the discrepancies not limited to the period under consideration i.e. FY 2018-19, but appear to relate to past periods.

It has already been held in previous paragraphs that only a person who has suffered a legal injury due to a tariff order can be considered aggrieved and entitled to prefer an appeal. If the Appellant was aggrieved

thereby, he ought to have filed an appeal against the said tariff order under Section 111 within the period stipulated for such an appeal to be filed. Having failed to do so, it is not open to the appellant, after the period for which the tariff order was passed has elapsed, to now seek to have these items reopened in an appeal preferred against the tariff order passed for a subsequent period.

As already held in previous paragraphs that amendments to a tariff order must be carried out within the same financial year ; a review of an earlier tariff order can only be undertaken under Section 94(1)(f) of the Electricity Act, read with Section 114 and Order 47 of the Civil Procedure Code. While determining tariff under Section 64(3) read with Section 62 of the Electricity Act, the Appropriate Commission cannot amend or revoke tariff orders for earlier years without following the procedures under Sections 62(4), 64(6), or 94(1)(f)—especially after the relevant financial year has elapsed or the tariff order has attained finality. It is reiterated that tariff orders for earlier years, having attained finality, cannot be reopened or interfered with by the Commission while adjudicating tariff applications for subsequent years.

In view of the above deliberations, Appeal No. 465 of 2023 is disposed of as being devoid of merit and not in accordance with law. With regard to true up of financials of FY 2007-08 for NPCL, after revision of input price of supply by UPPCL, liberty as sought by Appellant – consumer is granted liberty to take up this issue before State Commission in accordance with law.

D. CONCLUSION

Appeal No 98 of 2021: In view of the above deliberations, decision on all the issues is summarised in following table:

ISSUE		Paragraph	Summary of Directions
Section – 1 (License Issue)			
1.	Terms of License of Appellant		This Tribunal in its order dated 23.08.2022 in Appeal No. 72 of 2021 decided the Tenure of License up to 09.06.2029. Same has been challenged before the Hon'ble Supreme Court, vide various civil Appeals, which are presently pending adjudication. Issue of License involved in the present appeal shall be in accordance with the order of Supreme Court in the Civil Appeals.
Issue regarding True-Up for FY 2018-19			
Section – 2 (Miscellaneous Issues)			
1.	Expenses Incurred Due to Change in Law – GST		Decided in favour of the Appellant. The matter is remanded to the State Commission to work out average % increase under Change in Law - GST.
2.	Miscellaneous Expenses		Withdrawn by Appellant
3.	Non-tariff Income-Cost of Borrowing for Delayed Payment Surcharge (DPS)		Allowed on normative basis same as working capital interest rate. State Commission is directed to work out financing cost of DPS accordingly
4.	Efficiency Gain on loan swapping.		Withdrawn by Appellant

5.	Disallowance of Un-metered sales		Remanded to State Commission in terms of this Tribunal order dated 09/09/2025 & 02/01/2025
6.	Sharing of gains or loss on account of controllable factors		Remanded to State Commission in terms of this Tribunal order dated 09/09/2025 & 08/11/2024
7.	Inclusion of Treasury income in the Non-tariff Income for reducing the ARR		Decided in favour of the Appellant. Inclusion of Treasury Income under Non-tariff income in Impugned order is hereby set aside. The matter is remanded to State Commission to undertake the exercise of factual determination of Treasury Income claimed by Appellant, for the purpose of its exclusion from Non–tariff Income in the working of ARR.
8.	Disallowance of working capital on electricity duty		Withdrawn by Appellant
Section – 3 (Power Purchase Issues)			
1.	Long Term Power Purchase From M/s DIL		Withdrawn by Appellant
2.	Medium Term Power Purchase		Remanded to State Commission in terms of this Tribunal order dated 12.09.2025 & 09/01/2025
3.	Short Term Power		Allowed on actuals as claimed by Appellant, provided the total short term procurement for utilization in FY 2018-19 is within approved quantum and average rate as per ARR Order dated 22.01.2019 for FY 2018-19. Transmission charges are allowed for banking of power.
4.	Banking of Power		
5.	Sale of Surplus Power		
6.	Erroneous computation of Renewable Purchase Obligation ("**RPO"**) (		Withdrawn by Appellant

	Non-consideration of Net-Metering power and) disallowance of Transmission Charges of RE Power.		
Section – 4 (Capital Expenditure)			
1..	CAPEX on projects above Rs. 10 cr.		Reduction of Opening GFA for FY 2018-19 in Impugned Order, is hereby set aside. Opening GFA of FY 2018-19 to be taken as same as approved closing GFA of FY 2017-18 as per its True up Order. Overall 25 % disallowance in Capex for FY 2018-19 is also set aside, and the matter is remanded to State Commission to undertake a Prudence Check of CAPEX incurred in FY 2018-19 *vis-a-vis* capex approved in ARR order dated 22.01.2019 for FY 2018-19.
2.	Vehicles		
3..	CAPEX on 132 kV and above assets		
4.	Disallowance of CWIP • Rs 19.12 Crore for LILO works at GC Green • Rs 20.48 Crore on account of 33 kV Bays • Rs 1.28 Crore paid to PGCIL as Consultancy charges.		• Rs 19.12 Crore: Decision in Impugned Order upheld. • Rs 20.48 Crore disallowance set aside, and matter remanded to State Commission to undertake Prudence Check on the cost incurred. • Disallowance of Rs 1.28 Crore as Consultancy fee paid is set aside and to be considered in CWIP for FY 2018-19
5.	Justification for optimum utilization of unutilized lands		Withdrawn by Appellant
6.	Consequential per Annum Disallowances		Covered under issue 1-4 above

	on the account of above		
Issue regarding APR of FY 2019-20			
Section – 4 (Capital Expenditure)			
1.	Capital Works in Progress (CWIP)		CWIP allowed for FY 2018-19 to be considered under CWIP of FY 2019-20
Issue regarding ARR for FY 2020-21			
Section – 2 (Miscellaneous Issue)			
1.	Loss on Retirement/Impairment of Assets		Disallowance of Return on Equity and interest on debt for the Assets retired in Impugned Order is set aside. Matter is remanded to the State Commission for working out the Debt and equity of the Assets retired in terms of Regulation 20.2 of UPERC MYT Regulations, 2019.
2.	Disallowance of O&M Expenses		
	a)Disallowance of financing cost of DPS		Disallowance of Financing cost of DPS in the ARR of FY 2020-21 in the Impugned Order is set aside. The matter is remanded to the State Commission for re-calculation of the A&G expenses, considering the financing cost of DPS on normative basis as decided for FY 2018-19, in accordance with the provisions of the UPERC MYT Regulations, 2019.
	b)Due to error in computation of normative O&M expenses based on true-up O&M expenses of FY 2015-16 to FY 2019-20		Calculation of Base O&M charges for working out the Normative O&M charges for next control period, in the Impugned Order is set aside and the matter is remanded to State Commission for re-determination of Base O&M

			charges with respect to disallowance of specific components in Impugned Order in following terms: • Employee cost capitalisation approved for FY 2014-15, FY 2015-16, FY 2016-17 to be included in these years true – up O&M cost (True up). • Impact of GST on O&M charges as approved in True up Order for FY 2017-18 and that recalculated for FY 2018-19, subsequent to remand of the matter, is to be included in these years O&M charges (True up). • In case, Statutory Expenses, as approved additionally for FY 2014-15, FY 2015-16, FY 2016-17, are allowed to be claimed separately under UPERC MYT Regulations 2019, then same not to be included for working out the base O&M charges, otherwise same need to be considered as part of O&M charges for FY 2014-15, FY 2015-16 and FY 2016-17 for working out base O&M charges for next control period
	c)No additional allowance to meet		Withdrawn by Appellant

	expenses on Standards of Performance compliance.		
3.	Deviation from MYT Regulation with respect to computation of Debt-Equity Ratio		Recalibration/redetermination of debt : equity in the ratio of 70 : 30 for assets commissioned prior to 01.04.2020 in the ARR of FY 2020-21 in the Impugned Order, is set aside. The matter is remanded to the State Commission for consideration of capitalization of fixed assets as on 01.04.2020 with the debt-equity ratio allowed by the State Commission in the ARR/ True up Tariff Order(s) as on 31.03.2020, in terms of Regulation 20.2 and working of normative long term loan outstanding as on 01.04.2020 in terms of Regulation 23.2 of the UPERC MYT Regulations 2019.
4.	Energy Balance / Distribution Loss.		Withdrawn by Appellant
5.	Provision for write-off of bad and doubtful debts.		Withdrawn by Appellant
6.	Disallowance in Contingency Reserve.		Withdrawn by Appellant
7.	Tariff Philosophy.		Withdrawn by Appellant
8..	Non-recovery of Wheeling Charges from		Withdrawn by Appellant

	Open Access customer availing supply directly through State Transmission Network.		
9.	Additional Surcharge.		Withdrawn by Appellant
10	Revenue-Gap/Surplus		Withdrawn by Appellant
Section – 3 (Power Purchase Issue)			
1.	Medium Term Power Purchase		Withdrawn by Appellant
2.	RE Power to meet RPO		Withdrawn by Appellant
3.	Long Term Power Purchase From M/s DIL		Withdrawn by Appellant
4.	Intra-State Transmission Charges and Losses		Withdrawn by Appellant
Section – 4 (Capital Expenditure)			
1.	Capital Expenditure Disallowance on Vehicles		Issue is not adjudicated in the present Appeal. Liberty, as prayed for by the Appellant is granted. The Appellant shall be at liberty to raise and pursue this issue in Appeal No. 398 of 2022.

The State Commission is further directed to examine the Appellant's claim for carrying cost on the claims upheld by this Tribunal as well as while deciding the claims of the issues remanded for reconsideration in this judgement, in accordance with the extant Regulations. The subject appeal and associated IAs, if any, are hereby disposed of in the above mentioned terms.

Appeal No 465 of 2023:

In view of above deliberations, review / amendment of earlier year tariff order can only be undertaken in terms of section 94(1)(f) of the Electricity Act 2003 read with Section 114 and Order 47 of the Civil Procedure Code. State Commission without adhering to the procedure stipulated in the Electricity Act, amend or revoke the tariff Orders passed by it for earlier years, more so after the financial year for which the earlier tariff orders were passed have elapsed or the said orders have attained finality. The Appellant cannot, through a side-wind, to have tariff orders for earlier years reversed by the State Commission, that too while passing a tariff/true-up order in the proceedings relating to a subsequent year/period. Accordingly Impugned Order needs no interference and is upheld on this account.

The subject appeal and associated IAs, if any, are hereby disposed of in the above mentioned terms.

Pronounced in open court on this 28th Day of November, 2025

(Seema Gupta)	**(Justice Ramesh Ranganathan)**
Technical Member (Electricity)	**Chairperson**

Reportable/~~Non-Reportable~~

Pr/dk/ag

COURT-1

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APL No. 98 OF 2021 & IA No. 2004 OF 2024
APL No. 465 OF 2023

Dated: 28th November, 2025

Present : Hon`ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon`ble Ms. Seema Gupta, Technical Member (Electricity)

In the matter of:

APL No. 98 OF 2021 & IA No. 2004 OF 2024

Noida Power Company Limited .... Appellant(s)

Versus

Uttar Pradesh Electricity Regulatory Commission & Anr. .... Respondent(s)

Counsel on record for the Appellant(s) : Vishal Gupta
Sumeet Sharma
Divyanshu Gupta
Paras Choudhary
Tenzen Tashi Negi
Anil Dutt
for App. 1

Counsel on record for the Respondent(s) : C.K. Rai
for Res. 1

Anand K. Ganesan
Swapna Seshadri
Divyanshu Bhatt
Amal Nair
Shashwat Singh
Savyasachi Saumitra
for Res. 2

APL No. 465 OF 2023

Rama Shanker Awasthi .... Appellant(s)

Versus

Uttar Pradesh Electricity Regulatory Commission & Anr. .... Respondent(s)

Counsel on record for the Appellant(s) : Anand K. Ganesan
Swapna Seshadri
Divyanshu Bhatt
Amal Nair
Shashwat Singh
for App. 1

Counsel on record for the Respondent(s) : C.K. Rai
Sumit Panwar
Anuradha Roy
for Res. 1

Vishal Gupta
Anil Dutt
Sumeet Sharma
Paras Choudhary
Tenzen Tashi Negi
Debolina Roy
for Res. 2

ORDER

After judgment was pronounced, Mr. B.P. Patil, Learned Senior Counsel appearing on behalf of the Appellant, requested for a time frame to be fixed by this Tribunal within which Commission should pass orders afresh consequent on remand.

Mr. C.K. Rai, Learned Counsel, for the 1st Respondent-Commission, would state that it may not be necessary for a time-frame to be fixed since the Commission is conscious of its obligations under the Electricity Act, and would dispose of the matter with utmost expeditiously.

In these circumstances, we request the Commission after hearing the Appellant, to pass orders afresh, consequent on remand, with utmost expedition preferably within four months from the date of receipt of a copy of this order.

(Seema Gupta)
Technical Member (Electricity)

(Justice Ramesh Ranganathan)
Chairperson

sk/dk