IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 213 OF 2018,

APPEAL NO. 332 OF 2021,

IA NO. 1971 OF 2021 IN APPEAL NO. 334 OF 2021

AND

DFR NO. 38 OF 2022 with IA NO. 197 OF 2022 & IA NO. 195 OF 2022

Dated: **24th May 2022**

Present: **Hon'ble Mr. Justice R.K. Gauba, Officiating Chairperson**
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member

APPEAL NO. 213 OF 2018

In the matter of:

TATA POWER DELHI DISTRIBUTION LIMITED
[Through its Authorized Representative]
NDPL House, Hudson Lines,
Kingsway Camp
New Delhi – 110 009 ... Appellant(s)
Email krishan@jsalaw.com

VERSUS

DELHI ELECTRICITY REGULATORY COMMISSION
[Through Its Secretary]
Viniyamak Bhawan, Basant Kaur Marg,
Block-C, Shivalik, Malviya Nagar
New Delhi – 110 017 ... Respondent(s)
Email secyderc@nic.in

Counsel for the Appellant (s) : Mr. Amit Kapur
Mr. Anupam Verma
Mr. Rahul Kinra
Mr. Aditya Gupta
Mr. Aditya Ajay
Mr. Hemant Khera
Ms. Manu Tiwari

Counsel for the Respondent (s) : Mr. Sujit Ghosh
Mr. Mohd Munis Siddique for R-1

APPEAL NO. 332 OF 2021

In the matter of:

TATA POWER DELHI DISTRIBUTION LIMITED
[Through its Authorized Representative]
NDPL House, Hudson Lines,
Kingsway Camp
New Delhi – 110 009 ... Appellant(s)
Email krishan@jsalaw.com

VERSUS

DELHI ELECTRICITY REGULATORY COMMISSION
[Through Its Secretary]
Viniyamak Bhawan, Basant Kaur Marg,
Block-C, Shivalik, Malviya Nagar
New Delhi – 110 017 ... Respondent(s)
Email secyderc@nic.in

Counsel for the Appellant (s) : Mr. Amit Kapur
Mr. Anupam Verma
Mr. Rahul Kinra
Mr. Aditya Gupta
Mr. Aditya Ajay
Mr. Hemant Khera
Ms. Manu Tiwari

Counsel for the Respondent (s) : Mr. Sujit Ghosh
Mr. Mohd Munis Siddique for R-1

IA NO. 1971 OF 2021 IN
APPEAL NO. 334 OF 2021

In the matter of:

TATA POWER DELHI DISTRIBUTION LIMITED
[Through its Authorized Representative]
NDPL House, Hudson Lines,
Kingsway Camp
New Delhi – 110 009 ... Appellant(s)
Email krishan@jsalaw.com

VERSUS

DELHI ELECTRICITY REGULATORY COMMISSION
[Through Its Secretary]
Viniyamak Bhawan, Basant Kaur Marg,

Block-C, Shivalik, Malviya Nagar
New Delhi – 110 017 ... Respondent(s)
Email secyderc@nic.in

Counsel for the Appellant (s) : Mr. Sajan Poovayya, Sr. Adv.
Mr. S. Venkatesh
Mr. Ashutosh Kumar Srivastava
Mr. Nihal Bhardwaj
Mr. Jayant Bajaj

Counsel for the Respondent (s) : Mr. Sujit Ghosh
Mr. Mohd Munis Siddique for R-1

DFR NO. 38 OF 2022

In the matter of:

DELHI ELECTRICITY REGULATORY COMMISSION
[Through Its Secretary]
Viniyamak Bhawan, C Block,
Shivalik, Malviya Nagar
New Delhi – 110 017 ... Review Petitioner(s)
Email secyderc@nic.in

VERSUS

TATA POWER DELHI DISTRIBUTION LIMITED
[Through its Authorized Signatory]
NDPL House, Hudson Lines,
Kingsway Camp
New Delhi – 110 009 … Respondent(s)
Email krishan@jsalaw.com

Counsel for the Review Petitioner(s) : Mr. Sujit Ghosh
Mr. Mohd Munis Siddique

Counsel for the Respondent (s) : Mr. Amit Kapur
Mr. Anupam Verma
Mr. Rahul Kinra
Mr. Aditya Gupta
Mr. Aditya Ajay
Mr. Hemant Khera
Ms. Manu Tiwari for R-1

J U D G M E N T

PER HON'BLE MR. JUSTICE R.K. GAUBA, OFFICIATING CHAIRPERSON

1. The *Tata Power Delhi Distribution Limited* (for short, "TPDDL") is a licensee engaged in the business of distribution of electricity in a part of the

National Capital Territory of Delhi. The *Delhi Electricity Regulatory Commission* (hereinafter referred to variously as "DERC" or "the State Commission" or "the Commission") is the sector Regulator for the National Capital Territory of Delhi, established in terms of the Electricity Act, 2003, and has framed Regulations which include *Delhi Electricity Regulatory Commission (Terms and Conditions for Determination of Wheeling Tariff and Retail Supply Tariff) Regulations, 2011* (hereinafter referred to as "the Tariff Regulations 2011") which are germane for determination of *Aggregate Revenue Requirement* ("ARR") for the control period of *Financial Year* ("FY") 2012-2013 to FY 2014-2015. Later, on 31.01.2017, the DERC had notified *DERC (Terms and Conditions for Determination of Tariff) Regulations, 2017* (for short, "the Tariff Regulations 2017") followed by promulgation on 31.08.2017 of *DERC (Business Plan) Regulations, 2017* (for short, "Business Plan Regulations 2017"), which also have been referred.

2. The distribution licensee (TPDDL) and the State Commission have been at loggerheads over two issues which have been festering now for a number of years, the dispute having taken the turn of virtually a battle of wits, it having come to a head with the proceedings at hand, each side accusing the other of misconduct, the licensee terming certain orders and moves as reflective of breach of hierarchical discipline on the part of the Regulatory Authority, the latter (the Commission) accusing the former (the licensee) of

having played a fraud on this appellate tribunal, by suppression of facts, in certain previous proceedings relevant to the issues in question.

3. In terms of the provisions contained in the Electricity Act, 2003, it is the statutory responsibility of the State Commission, *inter-alia,* to regulate the electricity purchase and procurement process of distribution licensees including the price at which electricity may be procured from the generating companies, or from other sources, through agreements for purchase of power for distribution and supply and to determine the tariff for generation, supply, transmission, etc. within the State. While discharging such regulatory functions, it is also vested with the jurisdiction to adjudicate upon the disputes between the licensees and generating companies. Generally speaking, the orders passed by the State Commission, in exercise of some of the above functions, set out in Section 86 of the Electricity Act, 2003, are amenable to scrutiny in appeal before this tribunal at the instance of a person aggrieved by such orders, in terms of Section 111 of Electricity Act, 2003. The said legislation also confers on this tribunal, by virtue of Section 121, power to issue such orders, instructions or directions as are deemed fit to the Regulatory Commission "*for the performance of its statutory functions*".

4. The exercise of determination of tariff and regulation of the purchase or procurement of the electricity is closely connected to the responsibility of the State Commission to frame Tariff Regulations in terms of the power

conferred by Section 181, guided by the broad principles set out in Section 61, the determination of tariff for supply, transmission, wheeling or retail sale of electricity being undertaken in accordance with the procedure set out in Section 62 read with Section 64 of the Electricity Act, 2003.

5. As per the settled practices followed all over by the authorities established by the Electricity Act, the tariff determination exercise is an annual affair, carried out on the petitions taken out by the distribution licensees. The tariff orders are passed, financial year (FY) wise, before the commencement of the control period (FY), on the basis of scrutiny of material submitted in support of Annual Revenue Requirement (ARR) presented by the concerned licensee, this being subject to suitable correction after the elapse of the relevant period, on the basis of audited accounts (and thus on actuals) which is known as the exercise of truing up.

6. The controversy presently required to be resolved concerns the import and effect of the adjudicatory orders passed respecting the claims of TPDDL on the subjects of *Aggregate Technical & Commercial* (AT&C) loss trajectory and *the impact of increase in the rate of service tax* – hereinafter referred to as the two "subject-issues". To put it simplistically, for introducing the flavor of the controversy at this stage, it may be mentioned that by judgment dated 30.09.2019 passed by this tribunal in appeal no. 246 of 2014 of TPDDL against DERC, this tribunal had found substance in the contentions of the

former (TPDDL) in above respect. The directions in that regard were reiterated by a series of orders, primarily on the file of appeal no. 213 of 2018 (the first captioned matter herein) that had meanwhile come to be presented to bring a challenge to a subsequent tariff order of the State Commission. Eventually, the State Commission acquiesced in to abide and passed an Order on 04.02.2021 (hereinafter referred to as "*the Compliance Order*") acceding *in principle* to the request of the licensee for requisite relief on both the above aspects. The effective relief, however, was not seen to be forthcoming as it was not reflected in the subsequent tariff order which led to directions being reiterated by this tribunal by subsequent order dated 09.04.2021 on IA no.1615 of 2020 in appeal no. 213 of 2018. The Commission, instead of following up on the compliance order eventually opted to recant and recall, modifying its terms, by an order passed *Suo Motu* on 29.09.2021, in matter registered as F11(1619)/DERC/2018-19/914 (hereinafter referred to as "*the Suo Motu Order*"). Immediately after passing the *Suo Motu* order, modifying the *Compliance Order* dated 04.02.2021, taking back the relief earlier accorded, the Commission proceeded to pass the next tariff order, on 30.09.2021, on the Petition (no. 03 of 2021) of TPDDL on the subject of true-up of ARR for FY 2019-20 and approval of ARR and tariff for FY 2021-22, declining any relief to the licensee under various heads, including on the two subjects mentioned earlier.

7. As mentioned before, the appeal no. 213 of 2018 had been filed by the licensee assailing the tariff order passed by DERC, it being Tariff Order dated 28.03.2018 (in Petition no. 67 of 2017) for approval of ARR for FY 2018-19, revised ARR for FY 2017-18 and true up for FY 2016-17. The appeal no. 332 of 2021 was preferred by the licensee to assail the *Suo Motu* Order dated 29.09.2021. The appeal no. 334 of 2021, on the other hand, challenges the Tariff Order dated 30.09.2021, its validity *vis-à-vis* the two above mentioned subjects of claims of the licensee being dependent on the result of the challenge to the *Suo Motu* Order dated 29.09.2021. By an application (IA no. 1971 of 2021), moved in appeal no. 334 of 2021, the Licensee presses for the following:

> *"(a) Grant ex-parte ad interim stay of the operation of the Impugned Order dated 30.09.2021 passed by Ld. CERC in Petition No. 03 of 2021;*
> *(b) Issue appropriate directions to Ld. DERC to implement the Judgments/Orders passed by this Hon'ble Tribunal regarding the issue of AT&C Loss trajectory for FY 2012-13 to FY 2016-17 in absolute compliance of the Hon'ble Tribunal's judgments/orders and in a time bound manner;*
> *(c) Issue appropriate directions to Ld. DERC to withdraw its arbitrary modification and revision of O&M expenses on flawed basis and restore the O&M Expenses as determined under Order dated 29.09.2015;*
> *(d) Issue appropriate direction to Ld. DERC to allow the impact of 100% Normative entitlement of O&M Expense for the FY 2021-22 of the Applicant in terms of the Tariff Regulations 2017 and Business Plan Regulations, 2019;*
> *(e) Issue appropriate directions to Ld. DERC to submit detailed reasons for non-implementation of Judgment, Order, and directions of this Hon'ble Tribunal and initiate appropriate proceedings as deemed fit; and*

(f) Pass such order(s) as this Hon'ble Tribunal may deem fit and proper in facts and circumstances of the present case."

(Emphasis supplied)

8. While the abovementioned three appeals – appeal no. 213 of 2018, appeal no. 332 of 2021 and appeal no. 334 of 2021 – were pending consideration, the State Commission presented, on 08.02.2022, a petition for review (DFR no. 38 of 2022) in relation to the judgment dated 30.09.2019 in appeal no. 246 of 2014, *inter-alia,* pleading that the licensee (TPDDL) had been guilty of misrepresentation and playing fraud on this tribunal this vitiating the decision of the twin subjects in judgment dated 30.09.2019. It is the plea of the Commission in the review petition that the licensee had concealed the facts relating to a challenge earlier brought to the *vires* of the relevant regulations by Writ Petition (Civil) no. 2203 of 2012 which was dismissed by the High Court of Delhi by judgment dated 29.07.2016. It is stated that the licensee had instead pressed for consideration same very pleas as had been agitated before, and rejected by, the Writ Court and thereby securing a favorable order by judgment dated 30.09.2019 which cannot stand.

9. We may mention at this stage that the four captioned matters were taken up together along with another matter – Original Petition no. 3 of 2022 filed by the Licensee against the DERC. But the questions arising in the said

other matter (OP) are slightly different. Therefore, we de-tag the same, the said petition (OP no. 3 of 2022) to be heard and decided separately.

10. The review petition has admittedly been filed with a delay which is computed as of 832 days, much beyond the prescribed period of limitation for such request to be made. The appellant seeks condonation of delay by moving a formal application (IA no. 197 of 2022) but at the same time has argued that upon the plea of fraud and misrepresentation being substantiated before this tribunal, such delay or laches ought not come in the way of relief as prayed being accorded.

11. Before proceeding further, it must be noted here that the judgment dated 30.09.2019 in appeal no. 246 of 2014, on the issues which are subject matter of the present proceedings and of which review is sought at this distance in time, was rendered by a co-ordinate bench of this tribunal (presided over by Hon'ble Mrs. Justice Manjula Chellur, the then Chairperson sitting with Hon'ble Mr. S.D. Dubey, the then Technical Member-Electricity) following a ruling of this Tribunal in a previous judgment dated 10.02.2015 in appeal no. 171 of 2012. It may also be noted here that judgment dated 30.09.2019 in appeal no. 246 of 2014 is subject matter of challenge before Hon'ble Supreme Court in Civil Appeal nos. 9522-9526 of 2019 and 1762 of 2020 (preferred by TPDDL and DERC), which are pending. It must be, however, also added that Hon'ble Supreme Court has not stayed

the said judgment of this tribunal and, more particularly, that the decision rendered by this tribunal on the two issues which are subject matter of the present controversy, by judgment 30.09.2019, have concededly not been assailed by the appeal taken out by DERC.

12. In view of the fact that both the learned members of the co-ordinate bench of this tribunal, which passed the judgment dated 30.09.2019, of which review is sought, have since demitted office, the prayer for condonation of delay and review is required to be considered by this bench, which is the only bench presently functional in the tribunal, there being vacancies in the offices of Chairperson and other Technical Member (Electricity).

13. It will be appropriate to take note of the previous orders, germane to the two issues, at this stage.

14. In judgment dated 10.02.2015 in appeal no. 171 of 2012, this tribunal had ruled thus:

> "*3. The first issue is regarding non allowance of food allowance for FRSR Structure Employees in spite of their binding service conditions, for FY 2010-11.*
>
> *…*
>
> *3.2 The Appellant has pointed out that the judgment and order dated 13.8.2008 passed by the Delhi High Court disposing off the Writ Petition (C) No. 5875 of 2008 also required the Appellant to extend to all former employees of DVB the same pay benefits and perquisites which are being*

granted to those FRSR employees who became employees of DTL. Accordingly, the Appellant became liable to grant to its employees all the monitory and non-monitory benefits which were granted by DTL to its various employees by various circulars issued from time to time, hence this became an uncontrollable expenditure as the Appellant was legally bound firstly by virtue of Section 16(2) of Delhi Electricity Regulatory Commission Act read with Transfer Scheme Rules and the tripartite agreement and also the said judgment and order dated 13.8.2008 of the Delhi High court.

…

3.7 We find that the food allowance has been increased four folds w.e.f. 1.4.2010 from the base year 2006- 07 as a result of DTL following the recommendations of the Sixth Pay Commission. The Appellant is bound to enhance the food allowances as per the provisions of the Reforms Act, the statutory transfer scheme and the Tripartite Agreement. The expenditure incurred by the Appellant is uncontrollable in nature being part of the recommendations of Sixth Pay Commission which are bound to be paid to FRSR employees by the Appellant. The normal escalation of 4.66% p.a. over the base year expenses of FY 2006-07 will not be adequate to cover the enhancement of the food allowance for FR/SR employees from Rs. 125 to Rs. 500/- per employee per person. The Appellant paid Rs. 0.38 crores during 2006-07. Taking into account the escalation of 4.66%, the amount allowed in ARR for FY 2010-11 was Rs. 0.47 crores. Thus, the Appellant had to pay Rs. 0.91 crores over and above that allowed in the ARR. Even if the excess amount allowed during the FY 2007-08 to FY 2009-10 is taken into account due to escalation of 4.66% p.a. over the base year, the excess amount paid by the Appellant during FY 2010-11 would work out to be Rs. 0.8 crores. The Appellant has stated that the actual amount of Rs. 1.38 crores paid to the FR/SR employees during FY 2010-11 has only been claimed. Therefore, the impact of retirement of the employees has already been taken into account. Therefore, the Appellant is entitled to the claim of Rs. 0.8 crores on account of enhancement of food allowance for FR/SR employees. The enhancement of food allowance on the recommendations of the Sixth Pay Commission Report as adopted by DTL is binding on the Appellant as per the Statutory Transfer Scheme. As such, it is an uncontrollable expenditure. Accordingly, the State Commission shall allow

the additional expenditure of Rs.0.8 crores on this account with carrying cost."

(Emphasis supplied)

15. From the narrative of events, it is clear that appeal no. 246 of 2014 had been taken out by the licensee on 05.09.2014 questioning as erroneous and arbitrary the disallowances against Tariff Order dated 23.07.2014, on the subject matter of re-determination of AT&C losses trajectory and non-consideration of impact of increase in the rate of service tax as sub-issue under disallowance of *Operation & Maintenance* ("O&M") expenses. Prior to the filing of the said appeal against the tariff order for true up of FY 2012-13, ARR and distribution tariff for FY 2014-15, as passed by DERC on 23.07.2014, the licensee had approached the High Court of Delhi invoking its writ jurisdiction on 13.04.2012 by Writ Petition (Civil) no. 2203 of 2012 challenging the *vires* of Tariff Regulations 2011 (hereinafter referred to as "*the Writ Petition*"). The decision of the High Court on the Writ Petition came on 29.07.2016 even while appeal no. 246 of 2014 was pending before this tribunal.

16. The submissions made before, and the views formulated by, the Writ Court in judgment dated 29.07.2016, may be noted first, the relevant part having been quoted and relied upon by the review petitioner (DERC), thus:

"5. Mr C. S. Vaidyanathan, learned Senior counsel appearing for the petitioner contended that NTP, 2006 contemplated that the uncontrollable components of costs be recovered speedily to ensure that future consumers are

not burdened with past costs. He submitted that, accordingly, the uncontrollable costs were required to be trued up; but, since the impugned Regulations consider some of the uncontrollable expenses as controllable, no provision for periodical truing up of such expenses has been made. In particular, he referred to Regulation 4.7 (d) and Regulation 4.21(b)(i) of the impugned Regulations which relate to Operation and Maintenance (O&M) expenses. He submitted that although the said expenses were not controllable, the same were erroneously classified as controllable expenses. According to the petitioner, such expenses included increase on account of actual levels of inflation; costs relating to employees transferred from erstwhile DVB; costs resulting from increase in consumer base; working capital; and interest rates. Mr Vaidyanathan submitted that all such expenses and/or increase in expenses on account of the aforesaid factors, were uncontrollable and were required to be trued up on an annual basis He contended that the O&M expenses were computed by applying a normative formula and since the said formula did not provide for truing up on account of variation in the costs which were beyond the control of the petitioner, the impugned Regulations were contrary to Section 61(b), 61(c) and 61(d) of the Act read with NTP, 2006.

…

15. Regulation 4.7 of the impugned Regulations requires the Commission to set annual targets during the control period in respect of certain parameters which are deemed to be controllable. In terms of Regulation 4.7(d), O&M expenses - which include employee expenses, repairs and maintenance expenses, administration and general expenses - are deemed to be controllable. Regulation 4.21 of the impugned Regulations provides for truing up of various controllable and uncontrollable parameters as per the principles stated therein. In terms of Regulation 4.21(b)(i), any surplus or deficit on account of O&M expenses would be to the account of the licensee and would not be trued up in ARR. However, O&M expenses are to be determined using a formula – as specified in Regulation 5.5(a) - which includes a normative annual increase based on an inflation factor. Regulation 4.7, 4.21, 5.3, 5.4 and 5.5 (a) are set out below:

…

16. According to the petitioner, since the O&M expenses are required to be computed by applying a normative formula and there is no provision for truing up such expenses on account of any uncontrollable elements affecting such expenses, the impugned Regulations are violative of Section 61(b), 61(c) and 61 (d) of the Act. It is also asserted that not providing for truing up of uncontrollable costs would also be contrary to paragraph 5.3(h)(4) of NTP, 2006. According to the petitioner, the O&M expenses constitutes several uncontrollable elements including (i) change in taxes, statutory levies(ii) minimum wages (ili) inflation (iv) service terms and conditions of employees transferred from erstwhile DVB; (v) increase in consumer base; (vi) costs relating to career growth and replacement of employees and inflation in repairs and maintenance expenses.

17. Section 61 of the Act requires that the appropriate Commission be guided by various principles and factors as specified therein. Thus, indisputably, the impugned Regulations must conform to the principles as referred to in Section 61 of the Act. By virtue of Section 61 (i), the framing of the impugned Regulations are also to be guided by the National Electricity Policy and the Tariff Policy. NTP, 2006 clearly lays down that uncontrollable costs should be recovered speedily to ensure that future consumers are not burdened with past costs. Further, fuel costs, costs on account of inflation, taxes and cess, variations in power purchase unit costs are specifically stated to be uncontrollable costs.

18. In view of the above, it cannot be disputed that Regulations made under Section 181 (2) (zd) of the Act must necessarily provide for speedy recovery of uncontrollable costs. However, this does not necessarily mean that the impugned Regulations must provide for a specific determination of all uncontrolled elements of costs and provide for directly loading of those costs on the tariff for each year. NTP, 2006 only states the principles which would guide determination of tariffs. Indisputably there would be several ways to give effect to those principles. Providing an increase in costs on a normative basis taking into account the inflation factor would - if such normative basis has been arrived at after exercising due skill and after taking into account the relevant factors - also provide for a method of recovering uncontrollable costs.

19. The term 'true-up' is commonly understood to mean align/ balance/ make level. The term as used in the impugned Regulations must be read in the context of NTP, 2006, which inter alia requires that uncontrollable costs be recovered speedily. In the present context, the expression 'true-up' would be to balance and align costs. Providing for an increase in costs on normative basis is also one of the ways to balance and correct the recoveries.

20. Paragraph 5.3(h)(4) of NTP, 2006 specifically requires the uncontrollable cost to be recovered and not accumulated so as to burden future consumers. A plain reading of the impugned Regulations also indicate that they do not permit carry forward of O&M expenses or recovery of the same in the future years; all O&M expenses which may remain unrecovered are to the account of the licensee. Although O&M cost are deemed to be controllable, nonetheless, the impugned Regulations do provide for a normative increase in such costs based on a specified formula. Clearly, the intention of the Commission is to ensure that such costs are passed through but instead of bisecting the expenses' head into various cost elements and providing for truing up of the actual variation in each year, the Commission in its wisdom has framed a formula for absorbing the increased costs in the tariff on a normative basis. This is clearly to insulate the consumers from wide variation and provide for an overall uniform increase based on an inflation factor. Indisputably, the O&M expenses include both elements which are controllable as well as uncontrollable, thus admittedly, it would also not be apposite to treat all O&M expenses as uncontrollable. The Commission has adopted a broad approach and whilst all O&M expenses are treated as controllable under the impugned Regulations, it also provides for an increase in such expenses based on inflation factor. This is merely an alternate method for the pass through of increase in expenses and absorbing the effect of inflation in the tariff.

21. We are unable to accept the contention that such approach militates against the principles specified in Section 61 of the Act or falls foul of paragraph 5.3(h)(4) of NTP, 2006. It is necessary to bear in mind that Section 61 of the Act specifies certain principles/factors for guidance of the Commission in framing the Regulations. These are in nature

of broad principles to be considered while framing Regulations; and not rigid formulae as is sought to be canvassed on behalf of the petitioner. Section 61(b) of the Act, inter alia, requires the supply of electricity to be conducted on commercial principles; merely because some elements of variation in actual costs are not directly incorporated in the tariff does not necessarily mean that commercial principles have been disregarded.

…

41. Before concluding, we may also note the stand of the Commission that it has sufficient powers under the impugned Regulations to relax any of the provisions of the impugned Regulations (Regulation 12.4); amend the impugned Regulations (Regulation 12.8); and power to remove difficulty in giving effect to any of the provisions of the impugned Regulations (Regulation 12.3). It has been contended on behalf of the Commission that in the event if any serious difficulty is encountered by the petitioner on account of tariff fixation, it would be open for the petitioner to approach the Commission to invoke the above powers. Thus, in the event the petitioner finds that despite achieving the requisite efficiency norms, the tariff determined on the basis of the impugned Regulations is not sufficiently remunerative or renders the carrying on of its business unviable, it would always be open for the petitioner to approach the Commission to exercise its powers in accordance with law."

[Emphasis Supplied]

17. As mentioned earlier, the appeal no. 246 of 2014 was decided by this tribunal by judgment dated 30.09.2019. Several issues had been raised, the subject matter of impact of increase in rate of service tax as a sub-issue of disallowance under the head of O&M expenses being covered by issue no. 9. The co-ordinate bench of this tribunal which rendered the decision, recorded the submissions of TPDDL and its views on the said subject as under:

"16. ISSUE NO. 9: DISALLOWANCE OF OTHER EXPENSES:

16.1 In its written submission, on this issue, learned counsel for the Appellant submitted that: 16.1.1 The Respondent Commission has disallowed various uncontrollable expenses while truing up for FY 2012-13. The expenses sought by the Appellant under the head other expenses were uncontrollable on part of the Appellant in as much as they related to change in law and change in charges levied by the bank / financial institutions. The list of uncontrollable expenses claimed by the Appellant is given below:

Rs crores

Sl No	*Particulars*	*Petitioners Submission*
1	*Change in Service tax Rate*	*1.96*
2	*Service Tax under Reverse Charge Mechanism*	*0.31*
3	*……..*	

16.1.3 This Tribunal in its judgment dated 10.2.2015 in Appeal no. 171 of 2012 has held that enhancement in expenses due to reasons beyond the control of the utility, such as statutory obligations are uncontrollable in nature and therefore ought to be allowed.

16.1.4 The Appellant in its Tariff Petition had submitted that it has incurred an additional expenditure of Rs.2.27 crores towards service tax liability due to change in service tax rate from 10.30% to 12.36% and due to introduction of reverse charge mechanism, which resulted in an increased landed cost of service in the financial year 2012-13. Such expenses incurred due to change in law brought in by the act of Parliament cannot be considered as controllable in the hands of the Appellant as has been decided by this Tribunal in Appeal No. 171 of 2012 that inflationary cost escalation can in no manner be construed as escalation due to increase in statutory levies / taxes. Therefore, these changes of statutory nature need to be allowed as waiver factored in at the time of fixation of normative expenses

…

16.4 Our findings:

16.4.1 We have carefully gone through the rival submissions of learned counsel for the Appellant and learned counsel for

the Respondent Commission and also taken note of the findings of this Tribunal in its judgment dated 10.02.2015 in Appeal No. 171 of 2012. It is not in dispute that the Appellant has actually incurred various expenses as claimed by it in the petition which the State Commission has disallowed while truing up for FY 2012-13 giving reasoning that these expenses are controllable. It is, however, seen that many of the expenses so claimed by the Appellant are in the category of uncontrollable in nature and need to be looked into by the Commission by adopting a judicious approach instead of disallowing all of them in totality. This Tribunal in its judgment dated 10.2.2015 in Appeal no 171 of 2012 has held that enhancement in expenses due to reasons beyond the control of the utility, such as statutory obligations are uncontrollable in nature and, therefore, ought to be allowed.

16.4.2 We also take note of the provisions under Tariff Regulation 5.6 which specifies that the RoCE should cover all financing cost but financing cost incurred for obtaining the loans has not at all been factored in the cost of debt.

16.4.3 It is relevant to note that change in law relating to statutory levies cannot be envisaged by the Licensee or the Respondent Commission at the time of the MYT Order and, thus, cannot be considered as part of the normative increase in expenses by the Respondent Commission. It is also noticed that apart from expenses incurred due to change in law, there are certain other expenses which have been incurred for the reasons not attributable to the Appellant but in the interest of consumers (such as credit rating fee) and if such expenses were not incurred by the Appellant, it would have burdened the consumers with higher interest, consequential higher tariff, carrying cost etc. As the judgment of this Tribunal dated 10.02.2015 has been challenged by the Respondent Commission before the Hon'ble Apex Court and no stay has been granted against the operation of the said judgment, we are of the considered view that pending decision of the Hon'ble Apex Court the various claims of the Appellant regarding statutory fee/charges should be looked into by the Respondent Commission afresh duly considering some of them as controllable and others as uncontrollable in the interest of justice and equity. Accordingly, we decide this issue in favour of the Appellant.

…

29. SUMMARY OF FINDINGS

…

29.1.4 Category – D
Total 13 issues, being issue nos. 1, 4, 5, 8, 9, 13, 22, 27, 29, 30, 31, 32 and 36, are raised as fresh issues. Out of these, 06 issues i.e. issue Nos. 1, 8, 9, 30, 31, & 32 are decided in favour of the Appellant and remaining, 07 issues i.e. Issue nos. 4, 5, 13, 22, 27, 29 & 36 are decided against the Appellant.

…

29.1.6
It is also held that <u>whichever issue is decided in favour of the Appellant, it is equitable that the Respondent Commission allows the same along with carrying cost as applicable</u>."

…

ORDER

In the light of the forgoing reasons, as stated supra, we are of the considered opinion that some of the issues raised in the instant Appeal, being Appeal No. 246 of 2014, have merit, therefore, <u>the Appeal is partly allowed</u>.
The impugned Order dated 23.07.2014 passed by Delhi Electricity Regulatory Commission in Petition No. 56 of 2013 is hereby upheld/set aside to the extent our findings set out in para 29, as stated supra.
…" *[Emphasis Supplied]*

18. After the judgment as above had been rendered on 30.09.2019 in appeal no. 246 of 2014, the issues persisted, relief having been declined by the Commission in the subsequent tariff orders as well. Thus, when Tariff Order dated 28.03.2018 (in Petition no. 67 of 2017) was challenged by the licensee by first captioned appeal (Appeal no. 213 of 2018) the grievances were reagitated. Against the said backdrop, by order dated 11.03.2020 in appeal no. 213 of 2018, this tribunal observed and directed as under:

"This Appeal is filed by the Appellant challenging the Order dated 28.03.2018 on the file of Delhi Electricity Regulatory Commission (in short "DERC") in Petition No. 67 of 2017. The Petition was filed for truing up the Aggregate Revenue Requirement and Revenue available for the Financial Year

2016-17 and approved Aggregate Revenue Requirement and Tariff for the Financial Year 2018-19.

Totally 26 issues are raised in the present Appeal under 4 (four) different categories. The following Issue Nos. 1, 9 and 16 are already covered in favour of Appellant by Judgment dated 30.09.2019 in Appeal No. 246 of 2014:

Issue No. 1: Non-allowance of Financing Charges for FY 2016-17.
Issue No. 9: Non-consideration of impact of increase in rate of Service Tax for FY 2016-17.
Issue No. 16: Revision of AT & C loss for FY 2016-17 based on pending proceedings.

So far as the following issue Nos. 12, 13 and 14, these are held against the Appellant in Appeal No. 246 of 2014. The Appellant has filed Civil Appeal challenging the same:

Issue No. 12: Non-allowance of Financing Cost on Power Banking.
Issue No. 13: Erroneous adjustment of 8% Deficit Recovery Surcharge against Revenue Deficit/Gap for the financial year.
Issue No. 14: Disallowance of additional Unscheduled Interchange Charges for FY 2016-17

…
Pertaining to the remaining issues, the same will be heard and decided on merits.

Accordingly, the Appeal is disposed of partly in respect of the above issues. In the light of the above facts and circumstances, the Respondent DERC shall take into consideration the above facts while disposing of tariff proceedings"

(Emphasis supplied)

19. On 18.08.2020, this tribunal passed the following order on the file of appeal no. 213 of 2018:

"…

In terms of our Order dated 16.04.2019 pertaining to power purchase cost of four Solar Generating Stations of the Appellant has to be complied with by the Respondent Commission, since the time granted i..e, two months was already expired. Mr. Pradeep Misra, learned counsel appearing for the Respondent-Commission fairly submits that he would advise the Commission accordingly.
List the matter for further hearing on 22.09.2020 (through video conference).”

(Emphasis supplied)

20. The above was followed by the directions through order dated 22.09.2020, again in context of appeal no. 213 of 2018, reading thus:

“…
This appeal pertains to tariff fixed by the Respondent Commission for the year 2018-19. On 11.03.2020 & 18.08.2020, this Tribunal gave certain directions and passed orders since certain issues were already under consideration of the Respondent Commission while determining the tariff for 2020-21. Since tariff schedule seems to have been issued, we request Respondent Commission advocate, Mr. Pradeep Misra to get instructions whether the issues raised/referred to in the March & August, 2020 orders by this Tribunal are complied with?
DERC, by order dated 06.12.2019 had expressed that the subject matter of merit order despatch i.e. issues 15 & 25 in the above appeal would also be considered during tariff proceedings for 2020-21.
We seek clarification even on this issue from the Respondent Commission by next date of hearing.
…”

(Emphasis supplied)

21. On 26.11.2020, this tribunal sitting in appeal no. 213 of 2018 was constrained to reiterate the directions given by afore-quoted Orders dated 11.03.2020, 18.08.2020 and 22.09.2020. The said Order, to the extent necessary, may be quoted thus:

"… In the above Appeal, certain issues were considered in the light of the said issues being covered in other Appeals. It is stated by the Respondent's counsel that the Appeals are pending before the Hon'ble Supreme Court against the same issues. However, there is no stay granted till now.

In that view of the matter, the Respondent is directed to comply with the directions granted by us. In case the Hon'ble Supreme Court holds the Appeals in favour of the Respondent herein, at that time, the Respondent is at liberty to comply with the directions of the Hon'ble Supreme Court.

List the matter on 21.12.2020 (through video conferencing)."
(Emphasis supplied)

22. On 06.01.2021, the following order was passed on the file of appeal no. 213 of 2018:

"…
It is noticed that in spite of our directions to comply with the order of this Tribunal apart from undertaking by way of an affidavit by the Commission to comply with the directions of this Tribunal, since there was no stay of the order of this Tribunal by the Hon'ble Supreme Court, the Commission has not complied with the direction except submitting that they have already commenced with the process of complying.

Learned counsel for the Appellant submits that whatever documents or data required by the Respondents was furnished much earlier and in spite of it the directions of this Tribunal are not complied with. Since the Appellant's main grievance is that if the directions are not complied with, ultimately the interest of the consumers at large would be hampered, learned counsel seeks compliance of the directions forthwith.

Mr. Pradeep Misra, learned counsel appearing for Respondent-Commission seeks four weeks me to comply

with the directions and place on record the details pertaining to compliance.

In the light of such request by Mr. Pradeep Misra, we finally grant four weeks me to place on record the compliance order complying with our direction by the Respondent-Commission."

(Emphasis supplied)

23. Finally, on 04.02.2021, the DERC issued the *Compliance Order* which prefaces the decision taken by directions of this tribunal by judgment dated 30.09.2019 in appeal no 246 of 2014 and the interlocutory orders noted above in appeal no. 213 of 2018. The Compliance Order in its initial part took note of directions of this tribunal by various orders including judgment dated 30.09.2019 and the orders dated 11.03.2020, 18.08.2020, 22.09.2020, 26.11.2020, and 06.01.2021. The relevant part of the Compliance Order dated 04.02.2021 on the issues that concern the licensee here reads thus:

"1. This order is being passed in pursuance to the direction issued by Hon'ble Tribunal (hereinafter referred to as APTEL) in Appeal NO. 213 of 2018 filed by TPDDL against the Tariff Order dated 28.03.2018 passed by DERC (hereinafter referred to as Commission) in Petition No. 67/17.

2. The said Petition No.67/17 was filed by TPDDL for truing up the Aggregate Revenue Requirement for financial year 2016-17 and Revenue available for the financial year 2017-18 and approved Aggregate Revenue Requirement and Tariff for the financial year 2018-19. Aggrieved by certain issues in the Tariff Order TPDDL preferred Appeal No. 213/2018 before APTEL.

…

8. The Commission submitted before the APTEL that the issues raised by the Appellant in Appeal No. 213 of 2018 have been challenged before the Hon'ble Supreme Court of India and in case it is implemented the Civil Appeals pending before the Hon'ble Supreme Court of India for adjudication may become infructuous. In view of the direction of the APTEL, the Commission is complying the Order.

…

11. Accordingly, issue wise compliance of the Hon'ble APTEL directions is as follows:
Issue No.1 – Non-allowance of Financing Charges for FY 2016-17 and,
Issue No.9 – Non-Consideration of impact of increase in rate of Service Tax for FY 2016-17.

…
13. From above, it is observed that Hon'ble APTEL has categorically allowed financing cost and impact of change in Service Tax due to change in law over and above the normative expenses. In order to judicially verify the said expenses, the Commission directed TPDDL vide email dated 15/01/2021 to provide details along with workings, supporting documents, references to Schedules forming part of Audited Accounts. Documentary proofs, Auditor Certificates and Base data for O&M expenses. TPDDL has not provided the complete details. Pending submission of the details, the claims made in respect of Financing Cost & Change in Service Tax is provisionally allowed as claimed in Petition filed by TPDDL for True–up of FY 2019-20, based on the directions of Hon'ble APTEL in its judgment in Appeal No. 246/2014 and subject to outcome of the Civil Appeal filed before Hon'ble Supreme Court of India. The financial impact of the same shall be provided in subsequent Tariff Order.

Issue No. 16 – Revision of AT&C Losses for FY 2016-17
…
23. As per judgement of Hon'ble APTEL in Appeal No. 246/2014, principles of MYT & Appeal No. 14/2012 have to be followed and AT&C loss trajectory beyond FY 2011- 12 is required to be revised. Accordingly, in compliance of the Hon'ble APTEL directions in its judgment in Appeal No. 246 of 2014, the AT&C Losses for the period from FY 2013-14

to FY 2016-17 is revised by considering 0.5% reduction, as per 2nd MYT Order, over the revised AT&C Loss of FY 2011-12 i.e., 15.325% (approved in Tariff Order dtd. 23/07/2014). The Petitioner has also claimed the financial impact of revision in AT&C Loss trajectory till FY 2016-17 in its True up Petition for FY 2019-20. The financial impact on account of revision in AT&C Loss trajectory shall be provided in subsequent Tariff Order which will be subject to the decision of Hon'ble Supreme Court of India in various Civil Appeals filed by the Commission.

[Emphasis Supplied]

24. The appeal no. 213 of 2018 came up for hearing on 09.04.2021 and this tribunal was constrained to pass the following order on application (IA no. 1615 of 2020) that had been moved by the licensee (appellant in the said case):

"The above Appeal is filed against the Tariff Order dated 28.03.2018 (Impugned Order) passed by Respondent No.1 - Delhi Electricity Regulatory Commission (for short "DERC / Commission") against disallowance of various claims of the applicant/Appellant by DERC while truing up the financials for FY 2016-17 and the Aggregate Revenue Requirement and Tariff for FY 2018-19.

Brief facts which led to filing of this Interlocutory Application, according to the applicant/Appellant, are as under:

…

By Orders dated 11.03.2020, 18.08.2020, 22.09.2020 and 05.10.2020, this Tribunal had inter-alia directed DERC to implement the aforesaid Judgments of the Tribunal as well as its own Order in Tariff proceedings for FY 2020-21 which were underway at that time of passing these Orders. However, by not implementing the Judgments of the Tribunal, DERC proceeded to pass the Tariff Order dated 28.08.2020, and published the same on 19.10.2020 in blatant defiance of the directions of this Tribunal.

…

According to the applicant/Appellant, the conduct of the DERC by not implementing the directions and Judgments of this Tribunal robs the succeeding litigants from its entitlement as a consequence of favorable judgments secured after prolonged litigation/proceedings, which causes grave prejudice to the applicant by denying its legitimate allowances and return from the business. Having favorable judgments has legal and binding value for the succeeding party and if suitable directions are not issued, then delivery of judgments in favour of the succeeding party renders the entire litigation exercise otiose and redundant and also vitiates the hierarchy amongst courts and the Rule of Law.

Appellant/applicant further submits that despite several Judgments and Orders having been passed against DERC, DERC has casually and repeatedly shown scant regard to the authority, the statutory scheme under Section 120 and other similar provisions of the Electricity Act, 2003 providing for the powers and functions of this Tribunal. The directions of this Tribunal were unambiguous and thus, the conduct of disobeying the said directions is clearly contemptuous, destructive of the Rule of Law and administration of justice. Such conduct of the DERC being a subordinate authority tantamount to denial of justice and is against the basic principles involved in the administration of justice and majesty of courts as held by this Tribunal in the case of Delhi Transco Ltd. Vs DERC: 2013 ELR (APTEL) 498. Accordingly, the DERC has acted contrary to the principles of Rule of Law and the hierarchy of courts and has invited and rendered itself liable for suitable action against itself including contempt of court.

The applicant/Appellant further submits that this Tribunal should initiate strict consequential actions against such unlawful conduct of the DERC, which renders the principles of Rule of Law and hierarchy of courts redundant. Reliance is placed on the Order dated 25.05.2015 passed by this Tribunal in O.P. No. 01 of 2015 wherein this Tribunal had reprimanded the DERC for its inactions.

The Appellant/applicant further submits that the actions of the DERC as reflected during the course of the present

proceedings are motivated with the sole objective to cause undue loss to the Applicant and unlawfully and artificially keep in abeyance and postpone the increase and burden on Tariff so as to keep it low for the consumers in the NCT of Delhi. However, while doing so, the Commission has lost sight of mandate of Section 61 (d) of the Electricity Act, 2003 which provides for "safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;"

According to Appellant, the DERC has taken a stand that the tariff shall not be revised as per mandate of Section 62(4) of the Electricity Act (and directions of this Tribunal) and the Commission would be forced to create Regulatory Asset so as to keep the tariff of all Discoms same as per Policy Directions of the Government of NCT of Delhi dated 22.11.2001. The submission of the DERC that in order to avoid a Tariff hike or a change in tariff for various Discoms, it would need to create a Regulatory Asset is against the principles for creation of Regulatory Asset as per the Tariff Policy and also against the principles of Section 61 of the Electricity Act, 2003, since it is an established position that Regulatory Asset cannot be created to avoid a Tariff hike under business-as-usual conditions. DERC has to allow all legitimate expenses of the Discoms and not defer the same to future years. This creates an additional carrying cost burden on the consumers. Further, the Delhi High Court in the matter of WP No. 7219/2011 titled All India Hindu Mahasabha Vs. DERC & Ors. has made an observation, finding on Section 62(4) and the language employed therein including the word ordinarily. The High Court DB held that language of the said section 62(4) is not an absolute bar to amendment/ revision in Tariff more than once in a Financial Year (Para-5).

The Appellant/applicant further submits that by making such a statement opposing differential Tariff regime and being bound by regime of uniform tariffs across all Discoms in Delhi, admittedly, DERC has lost sight of - (a) its own regulatory regime and the fact that Policy Directions which were for transition period from 2002- 2007, thereafter Delhi Commission has issued Multi-year Tariff Regulations (Terms and Conditions for Determination of Wheeling Tariff and Retail Supply Tariff) Regulations,2007), which governs the tariff of Discoms. (b) Findings of this Tribunal's Judgment

in Appeal No. 29 of 2009 in the matter of WESCO vs. OERC &Ors., whereby this Tribunal has observed that while determining tariff, the State Commission has to consider factors which encourage competition, efficiency, economical use of resources, good performance and optimum investments and principles rewarding efficiency in performance and consumers interest. Further, the relative efficiencies of the distribution licensees in terms of distribution losses and other controllable expenditure is not passed on to the consumers.

The applicant/Appellant further submits that the DERC be directed to forthwith give effect to the current Tariff by suitably amending the Tariff Order in terms of its powers under Section 62(4) of the Electricity Act, 2003. The Appellant/applicant has already suffered owing to the unprecedented conditions and circumstances occasioned due to the restrictions imposed to control the spread of the COVID-19 pandemic and the Suo-moto orders passed by the DERC providing retrospective and disproportionate monetary reliefs to the consumers without accounting for the financial and revenue requirements of the applicant's business, while the applicant's finances are already under severe stress.

They further submit that any further delay in implementation of the issues that have been allowed in favour of the applicant will not only be against the extant provisions of law but will also cause grave prejudice to the applicant as this will adversely affect the cash flow and financial needs of the applicant to run the business. The Applicant believes that in case judicial notice is not taken of and appropriate Orders are not passed by this Tribunal to remedy and correct the wilful infractions committed by the Delhi Commission, the Delhi Commission will continue and repeat its unlawful actions and further delay the implementation of the Judgments passed by this Tribunal at the expense of the financial viability and survival of the Applicant.

DERC further submits that Appeal No. 246 of 2014 has been decided by this Tribunal vide judgment and order dated 30.09.2019 wherein on Issue No. 9 (disallowance of other expenses), certain directions have been issued. Also, in compliance of this Tribunal's judgment dated 16.04.2019 in

Appeal No. 82 of 2015 and other connected appeals, the Commission has passed the order dated 04.02.2021.

DERC further submits that regarding Issue Nos. 1 and 9, the Commission, as per the directions of this Tribunal has to adopt the judicial approach whether the amount spent is controllable or uncontrollable, hence email was sent to the Appellant on 15.01.2021. However, the reply to the said email was received on 01st February, 2021 at 17:36 hours when the order was almost ready. Hence, the Commission has allowed the said claim of Appellant provisionally as claimed by them in true up Petition for FY 2019-2020.

Further, regarding Issue No. 16, the Commission has implemented the directions and revised the T&C loss trajectory. Regarding issue No. 19, the Commission has allowed the differential amount claimed by the Appellant in True Up Petition of 2019-20. Issue No. 15 is not covered by the decision in Appeal No. 246 of 2014 and is yet to be adjudicated, though the same has already been decided in the tariff order for 2020-2021. Issue No. 25 is not covered by the decision in Appeal No. 246 of 2014 and is yet to be adjudicated.

…
The Commission further submits that since the retail tariff of all the categories of all the DISCOMs in Delhi is to be identical, effect to the claims of Appellant can be given in the next tariff order. Otherwise, the tariff of Appellant will be higher in comparison to other DISCOMs.

ANALYSIS & DISCUSSION:
From the stand of the parties before us, it is seen that Issue No. 1 pertaining to non-allowance of Financing Charges for FY 2016-17, issue 9 – Non-consideration of impact of increase in rate of Service Tax for FY 2016-17, and issue 16 pertaining to revision of AT and C loss for FY 2016-17 came to be decided in favour of the applicant/Appellant in Appeal No. 246 of 2014 disposed of by this Tribunal on 30.09.2019. The said Appeal was filed challenging the DERC Order dated 23.07.2014. Apparently, DERC by its order dated 06.12.2019 in Petition No. 10 of 2014 with regard to issue No. 10 – Merit Order Despatch Disallowance for FY 2013-14 and issue No. 25 pertaining to disallowance of Rs. 1.56

Crores which was disallowed for the FY 2016-17 on account of Merit Order Despatch were held in favour of the applicant/Appellant.

In the present Appeal No. 213 of 2018, by four different orders dated 11.03.2020, 18.08.2020, 22.09.2020 and 05.10.2020, directions were given to the Respondent-DERC to implement the judgments of this Tribunal as well as DERC's own order in tariff proceedings for the FY 2020-21 which were under process at the time of passing of the abovesaid four orders. Apparently, the above-said Interlocutory Application came to be filed aggrieved by the Tariff Order dated 28.08.2020, which came to be published on 19.10.2020, passed by DERC, which on prima facie seems to be in defiance of the directions of this Tribunal in the above-said four orders.

…

While trying to explain the stand of the Commission, why the directions of this Tribunal were not implemented in toto, by and large their stand seems to be that the Commission decided to keep retail tariff of all categories of all the Discoms of Delhi identical, therefore, they would give effect to the claims of the Appellant only in the next Tariff Order, since implementation of directions of this Tribunal by the abovesaid four different orders lead to higher tariff in comparison to other Discoms.

It is pertinent to note that subsequent to the four orders of this Tribunal directing the DERC to implement the judgments of the Tribunal, so also its orders in tariff proceedings for FY 2020-21, the Respondent Commission without seeking permission or modification of the abovesaid four orders, on its own wish and will has decided to implement the directions only in the next Tariff Order. We fail to understand that the action of the DERC, rather conduct of the DERC in taking this stand in blatant violation of the directions of this Tribunal. Apparently, there is no stay of the orders passed by this Tribunal dated 11.03.2020, 18.08.2020, 22.09.2020 and 05.10.2020 and there is no modification of any of the directions at the instance of the Respondent-Commission.

…

In that view of the matter, is it correct and proper on the part of the DERC to come up with this explanation of deciding to implement the directions of this Tribunal in the next Tariff Order? In the hierarchy of the authorities which deals with

these matters, definitely the orders of the Commission are appealable before this Tribunal and the directions of this Tribunal against all the Commissions in the country have to be implemented unless otherwise they are set aside or modified by higher appropriate authority. The Respondent-Commission is not an exception to the said obligation provided under the Electricity Act. It cannot treat itself as an Appellate Authority against the directions of the Tribunal and proceed to opine that it would implement all the directions of this Tribunal in the next tariff proceedings.

…

We also note that this is not the first time such instances of misconduct of the present nature on the part of the DERC. In several proceedings before this Tribunal, it has recorded the so-called conduct of DERC. In the following Judgments wherein the anguish of this Tribunal for such disobedience and attitude shown by the Respondent Commission was expressed:

…

However strong the intention of the Respondent-DERC that it would implement the directions in the next tariff proceedings, we once again remind the Respondent-DERC that in the face of directions, directing the DERC to implement, made by this Tribunal in the abovesaid four orders, it cannot choose its own time to implement such directions. The Respondent-DERC is obliged to follow the directions issued by this Tribunal in the absence of any stay order by the Hon'ble Supreme Court.

In that view of the matter, we direct the Respondent-DERC to comply with the Orders dated 11.03.2020, 18.08.2020, 22.09.2020 and 05.10.2020 forthwith, failing which there has to be appropriate action against the non-compliance.

List the matter on 23.04.2021. Pronounced through Virtual Court on this, the 9th day of April, 2021."

[Emphasis Supplied]

25. Concededly, the above-quoted order dated 09.04.2021 was not challenged by DERC by any appeal or other proceedings and, thus, attained finality binding the parties.

26. It is clear from the material placed before us that the series of Orders passed by this tribunal, directing DERC to implement issues decided in the Judgement passed in Appeal No. 246 of 2014, being Orders dated 11.03.2020, 18.08.2020, 22.09.2020, 05.10.2020, 26.11.2020, 06.01.2021 and 09.04.2021 in Appeal No. 213 of 2018 were abided by the DERC by passing the *Compliance Order* dated 04.02.2021 which consequently had merged with this tribunal's Order dated 09.04.2021, which was never challenged by the DERC and had resultantly attained finality.

27. Crucially, on 19.04.2021, the State Commission moved an Interlocutory Application (no. 736 of 2021) seeking extension of time to give effect to directions of the tribunal, including Order dated 09.04.2021 passed in appeal 213 of 2018, in the Tariff Order for FY 2021-22 pleading as under:

> *"1. Set out the relief(s)*
>
> *…*
>
> *(a) Extend the time for implementation of the directions given by this Hon'ble Tribunal vide orders dated 11.03.2020, 18.08.2020, 22.09.2020 and 05.10.2020 by two months.*
>
> *…*
>
> *2. Brief facts*
>
> *…*
>
> *(d) That the commission is bound to implement the orders passed by this Hon'ble Tribunal. However, due to vide spread of Covid and current tariff exercise for the year 2021-2022, the commission prays that it may be permitted to implement the orders passed by this Hon'ble Tribunal during current tariff exercise, to save time, resources.*

(e) That it would be in the interest of justice that the commission be permitted to implement orders dated 11.03.2020, 18.08.2020, 22.09.2020 and 05.10.2020 in current tariff exercise in order to save double exercise in this matter."

[Emphasis Supplied]

28. Meanwhile, the issue of effective compliance had come up again in appeal nos. 301 of 2015 and 168 of 2018 titled 'TPDDL v. DERC' against Tariff Orders dated 29.09.2015 and 31.08.2017 respectively and by Orders dated 02.03.2021 and 25.03.2021 this tribunal again directed DERC to implement the Judgments in appeals. This was yet again reiterated by Order dated 26.07.2021 in Execution Petition (no. 05 of 2021) taken out by TPDDL, DERC having been directed to adhere to its commitment and to consider the twelve (12) issues decided in favor of the Appellant in appeal No. 246 of 2014 while issuing Tariff Order for FY 2021-22 without fail. The order dated 26.07.2021 would read thus:

"…Appeal no. 246 of 2014 came to be disposed of on 30.09.2019, subsequently in August, 2020, there was tariff determination by the Respondent Commission. Though some issues which were held in favour of the Appellant in the order dated 30.09.2019 were not modified or stayed by the Hon'ble Supreme Court in spite of Civil Appeal being filed by the Respondents, the Commission did not consider the judgment of this Tribunal pertaining to the following issues:-

Sl. No	*Issue No.*	*Particulars*	*Para No.*
1.	*Issue No. 1*	*Re-determination of AT&C loss*	*12.4.1-12.4.2*

		trajectory.	
…	…	…	…
4.	*Issue No. 9*	*Disallowance of other expenses.*	*16.4.1-16.4.3*
…		…	…

…

Definitely, it is the duty of this Tribunal and all the stakeholders concerned to see that the consumer not be put to financial burden for no fault of them on account of the delay caused by the stakeholders. Therefore, we direct the Respondent Commission to adhere to the commitment given by them that they would consider the judgment of this Tribunal pertaining to the above issues in the forthcoming tariff proceedings without fail.

Accordingly, Petition is disposed off."

[Emphasis Supplied]

29. On 25.08.2021, the licensee was constrained to present Original Petition (no. 12 of 2021) invoking the jurisdiction of this tribunal under Section 121 of Electricity Act, *inter alia*, seeking issuance of directions against the DERC to (i) issue the Tariff Order in Petition No. 03 of 2021 filed by the appellant for True Up of FY 2019-20 and ARR for FY 2021-22 forthwith; and (ii) implement the Judgments and Orders passed by the appellate tribunal in favor of the appellant. Having considered the said petition, this tribunal passed an Order on 03.09.2021, observing as under:

"There is a consensus that the State Regulatory Commission functioning under the Electricity Act, 2003 is obliged to pass and issue Tariff Order from year to year, prior to commencement of the concerned control period. The

application for Tariff Order to be passed is expected to be filed within reasonable time, the Commission being duty-bound by express terms of Section 64 to pass the necessary orders, after considering all suggestions and objections, within 120 days which obviously would coincide with last day of the previous control period.

The Respondent State Commission concededly has been consistently in default in compliance and has yet again not met the said deadline even after five months. The Tariff Order for the control period 2021-22 is still awaited. Raising grievance in this respect the present petition has been filed. The State Commission has entered appearance through learned counsel who, upon instructions, submitted that there was some delay because certain prudence check took time. She, however, also added that the Commission hopes and expect to pass the Tariff Order before the end of the current month i.e. September, 2021. She also hinted that there may be certain clarifications required to be taken from this tribunal vis-à-vis certain earlier orders. We do not express any opinion on the need for any such move intended to be made for clarifications to be sought. We would rather reserve comment if and when such matter comes up before us.

Presently we are not happy with the way the Tariff Orders are being delayed not only by the Respondent State Commission (for Delhi) but also by several other State Commissions, notwithstanding the clear command of the law and the public policy adopted with regard to the electricity sector.

While we adjourn the matter, with the consent of the parties, to 08.10.2021, we direct the Respondent State Commission to submit on oath a brief synopsis of the reasons why the timelines specified for the purpose could not be met for the control period 2021-22 and also as to how the State Commission plans the future working on this subject so that it does not face the ignominy of being called upon again to explain defaults of this kind.

The affidavit shall be filed within ten days.

Be listed for hearing on 08.10.2021, through video conferencing mode."

[Emphasis Supplied]

30. On 10.09.2021, the DERC filed an application (I.A. no. 1409 of 2021) in appeal No. 213 of 2018 seeking directions from this tribunal to modify its Compliance Order dated 04.02.2021, the same having been contested by the licensee by Preliminary Reply filed on 23.09.2021, *inter alia*, raising issues qua maintainability. On 24.09.2021, when I.A. no. 1409 of 2021 in appeal No. 213 of 2018 was listed for hearing, DERC sought time to peruse the Reply filed on behalf of the Appellant and make submissions on the same. While the matter was listed before this tribunal on 01.10.2021, an affidavit was filed by DERC, on 27.09.2021, purportedly in compliance of this tribunal's Order dated 03.09.2021 in O.P. No. 12 of 2021, *inter alia*, stating as under:

> *"7. That I state that in the meanwhile, the Appellant filed Appeal No. 249/2021 challenging the Tariff Order dated 28.8.2020 whereby the Commission had determined the distribution tariff of the Petitioner for FY 2020-21. Simultaneously, the Petitioner also filed an Interlocutory Application [being IA No.1615/2020] in Appeal No. 213/2018 alleging non-compliance of Judgment dated 30.9.2019 passed in Appeal No.246/2014 by the Commission in its aforesaid Tariff Order dated 28.8.2020. On 4.2.2021, the Commission placed on record before this Hon'ble Tribunal, the issue-wise compliance of the directions of this Hon'ble Tribunal subject to the outcome of pending Civil Appeals before the Hon'ble Supreme Court by way of an Order dated 4.2.2021. Through the said Order, the Respondent Commission in due compliance of the directions of this Hon'ble Tribunal, inter-alia, held that since certain financial data was yet to be submitted by the Petitioner to the Commission, the financial impact of various factors being considered were being provisionally allowed to the Petitioner, as claimed by it in its pending Tariff Petition for*

True up of FY 2019-20 and that the final financial impact was to be undertaken in the subsequent Tariff Order, subject to the outcome of the Civil Appeal, pending before the Hon'ble Supreme Court. Accordingly, this Hon'ble Tribunal vide its Order dated 9.4.2021 disposed off IA No.1615/2020 and directed the Commission to comply with and give effect in the forthcoming tariff Order, to the previous Judgments of this Hon'ble Tribunal particularly Judgement dated 30.9.2019 passed in Appeal No.246/2014.

8. That I state that while implementation of the above was being undertaken by the Commission, the entire country and particularly the NCT of Delhi experienced the unfortunate second wave of the COVID-19 pandemic and the Government of NCT of Delhi announced a complete curfew/lockdown in the State w.e.f 19.4.2021…

…

11. That I state that while the Commission was undertaking the above exercise of gathering information and conducting its prudence check, the Petitioner filed Execution Petition No.5/2021 seeking a direction to the Respondent Commission to give effect to the 12 issues decided by this Hon'ble Tribunal in its Judgment dated 30.9.2019 in Appeal 246/2014 in the forthcoming Tariff Order for FY 2021-22 (pending in Petition No.3/2021) along with carrying cost. While the said Execution Petition was pending, the Commission vide its letter dated 13.7.2021 informed the Ministry of Power that the delay in issuance of Tariff Orders was mainly on account of COVID-19 and consideration of Orders passed by Hon'ble Tribunal and that the Commission was trying its best to issue the Tariff Order at the earliest. Vide its Order dated 26.7.2021, this Hon'ble Tribunal disposed off Execution Petition No. 5/2021 and directed the Commission to adhere to the undertaking given by it before this Hon'ble Tribunal during proceedings in Appeal No.213/2018 that it would implement the Judgment dated 30.9.2019 passed in Appeal 246/2014 in the forthcoming Tariff Orders dated FY 2021-22.

12. … I therefore state that the Commission is hopeful that it would be issuing the forthcoming Tariff Order of the Appellant for FY 2021-22 within this month i.e before 30.9.2021, duly taking into consideration the various directions / judgements / Orders passed by this Hon'ble Tribunal from time to time and ensuring their due

compliance, the data furnished by the Petitioner and the objections / suggestions received from the stakeholders after filing of the Petition subject to prudence check."

[Emphasis Supplied]

31. Before the matter could come up on the date (01.10.2021) next fixed, DERC submitted in the registry an application (I.A. no. 1552 of 2021) in appeal No. 213 of 2018 seeking to withdraw the earlier application (I.A. No. 1409 of 2021), *inter alia*, stating that under Section 94(1)(f) of the Electricity Act, the State Commission (DERC) is vested with the power to review its own Orders and that such review will be undertaken by DERC after duly taking into consideration the applicable Regulations, the previous Orders / Directions / Judgments passed by the tribunal and the Delhi High Court. It is stated by the licensee that the advance copy of the said application was served on it in the forenoon of 29.09.2021, the same day on which the *Suo Motu* order would be passed later in the afternoon.

32. It is against the above backdrop that the Commission decided to pass the *Suo Motu* Order dated 29.09.2021, it reading thus:

"…
Issue No.9 – Non-Consideration of impact of increase in rate of Service Tax for FY 2016-17.

2. The Commission while implementing the above issue, found out that there is already a judgement dated 29/07/2016 passed by the Hon'ble High Court of Delhi in W.P. (C) No. 2203 of 2012 in the matter of TPDDL vs. DERC, on this issue. Since, as per said judgment the stand of DERC has been upheld the compliance Order dated

04/02/2021 cannot be at variance. It is a settled principle that in case of conflict between the view of a constitutional Court and statutory Tribunal, the opinion of the constitutional Court will be given preference. Accordingly, we feel duty bound to implement the direction and views given in this case by the Hon'ble High Court of Delhi.

3. In view of the above, the sentences in para 13 of the Compliance Order dated 04/02/2021 – "TPDDL has not provided the complete details. Pending submission of the details, ……. and subject to the outcome of the Civil Appeal filed before Hon'ble Supreme Court of India." be read as under:

> *"The claims made in respect of Service Tax as claimed in Petition filed by TPDDL for True–up of FY 2019-20, will be appropriately considered in the True-up of FY 2019-20, based on the judgement dated 29/07/2016 passed by the Hon'ble High Court of Delhi in W.P. (C) No. 2203 of 2012 in the matter of TPDDL vs. DERC. However, as far as Financing Charges for FY 2016-17 are concerned, the same will be implemented in line with the direction of the Hon'ble APTEL in its judgment dated 30/09/2019 in Appeal No. 246/2014, which is subject to outcome of the Civil Appeal filed before Hon'ble Supreme Court of India.*

"…

[Emphasis Supplied]

33. It is vivid that by the above-quoted *Suo Motu Order* dated 29.09.2021, the DERC retracted from its undertaking to this tribunal in terms of its Compliance Order dated 04.02.2021 and also refused to allow the impact of the issues of Service Tax and AT&C loss trajectory.

34. We are informed that after passing the Tariff Order on 30.09.2021 – subject matter of captioned appeal no. of 2021 – the State Commission published Tariff Schedule for FY 2021-22 declaring that there will be no

increase in the existing Tariff structure through a *Press Release* which is captioned thus:

"PRESS NOTE

Highlights of Tariff Order for FY 2021-22

NO TARIFF HIKE AFFORDABLE POWER GREEN POWER"

35. The Tariff Order dated 30.09.2021 passed by DERC, for FY 2021-22, also disallowed the impact on the issues of AT&C loss trajectory and Service Tax, relying on reasoning in the Suo-moto Order at Paras 3.18 and 3.49 as under:

> *"ISSUE 1: RE-DETERMINATION OF AT&C LOSS TRAJECTORY*
>
> *…*
>
> *COMMISSION ANALYSIS*
>
> *…*
>
> *3.14 The Commission had revised the AT&C Loss targets for FY 2011-12 in its tariff order dated 23.07.2014 as an outcome of the judgment of Hon'ble APTEL in Appeal no. 14 of 2012. The AT&C Loss targets were revised based on the trajectory set for the first MYT Control period as determined in the MYT Order dated 23.08.2008. Accordingly, the AT&C loss targets were revised from 13% to 15.325% as the O&M Expenses were allowed on the normative basis as followed in the first MYT Control period. The said issue is also appealed before Hon'ble Supreme Court in Civil Appeal No. 5845 of 2014 and is pending adjudication. Since the issue was sub-judice, the Commission deferred the implementation of the judgment in its tariff order dated 28.08.2020. The Petitioner proceeded with the Execution*

Petition 05 of 2021 subsequent to tariff order dated 28.08.2020.

3.15 Hon'ble APTEL vide its order dated 06.01.2021 in Appeal No. 213 of 2018, IA No. 498 of 2020 and IA No. 1615 of 2020 granted four weeks' time to place on record the compliance order complying with their directions including on the issue of re-determination of AT&C Loss Trajectory to which the Commission submitted before the Hon'ble APTEL vide its Order dated 04.02.2021 as follows:

…

3.17 Hon'ble APTEL issued its Judgement in EP 5 of 2021 on 26.07.2021 directing the Commission to consider the issues favoring the Petitioner in its judgment in Appeal 246 of 2014 by way of Execution Petition 5 of 2021 since the issues held in favour of the Petitioner have not been modified or stayed by the Hon'ble Supreme Court in spite of Civil Appeal being filed by the Commission.

3.18 The Commission modified its Compliance order dated 4/02/2021 by way of an Order dated 29.09.2021 and revised the reduction in AT&C Loss trajectory by 0.87% instead of 0.50% with reasons detailed in the said Order."

…

ISSUE 4: DISALLOWANCE OF OTHER EXPENSES (FINANCING CHARGES, LC CHARGES, COST OF AUDITOR CERTIFICATE, CREDIT RATINGS AND INCREASE IN RATE OF SERVICE TAX)

…

COMMISSION ANALYSIS

…

3.48 The Commission is of the view that claim of the Petitioner on various subheads of other expenses as claimed cannot be reviewed on a case to case basis as the O&M cost is considered as a packaged cost under the performance based regulatory regime. The Commission has exercised its prudence in reviewing the costs during the true up of respective years and has considered some of the elements to be uncontrollable and allowed the same to the DISCOM. By giving this opportunity, the Petitioner has construed it to be its right to claim the other expenses as LC Charges, Credit rating cost, Audit Costs, finance charges service tax levy etc. as uncontrollable, these costs are

routine costs of the business and not considerable as extra ordinary that be treated uncontrollable.

3.49 Further, in case of the claim of the Service Tax, the Commission observed that there is already a judgement dated 29/07/2016 passed by the Hon'ble High Court of Delhi in W.P. (C) No. 2203 of 2012 in the matter of TPDDL vs. DERC, on this issue. Since, as per said judgment the stand of DERC has been upheld the compliance Order dated 04/02/2021 cannot be at variance. It is a settled principle that in case of conflict between the view of a constitutional Court and statutory Tribunal, the opinion of the constitutional Court will be given preference. Accordingly, we feel duty bound to implement the direction and views given in this case by the Hon'ble High Court of Delhi. In view of the above the Commission modified the Compliance order in accordance with the above findings and has not considered the claims on change in service tax rate and service tax under reverse charge mechanism."

[Emphasis Supplied]

36. For completion of narration, we may note here that when the matter arising out of application (I.A. no. 1409 of 2021) in appeal No. 213 of 2018 came up along with subsequently moved application (I.A. no. 1552 of 2021) in appeal No. 213 of 2018 seeking to withdraw the former application before this tribunal, the following order was passed on 01.10.2021:

"The learned counsel, Mrs. Suparna Srivastava representing the respondent / DERC submits that she has moved an application in IA No. 1552 of 2021 seeking permission of this Tribunal to withdraw the application no. 1409 of 2021 seeking certain clarifications. Permission is granted to withdraw the application without prejudice to the contentions of the appellant on the issues raised in the appeal.

We note that with the withdrawal of this application by the Appellant, we are back to the same scenario where we were when we passed the order on 09.04.2021, wherein we directed the respondent/DERC to comply with Order dated 11.03.2020, 18.08.2020, 22.09.2020 and 05.10.2020. We

also observed that failing with the compliance, appropriate action against non-compliance will be initiated.

List the matter before Court-I for hearing on 17.12.2021 through video conferencing."

[Emphasis Supplied]

37. In the given fact-situation, it is proper that the petition of the State Commission seeking review of the view expressed on the two contentious subjects in judgment dated 30.09.2019 in appeal no. 246 of 2014 be taken up first.

38. The Commission concedes that a substantive appeal on merits being Civil Appeal No. 1762 of 2020 has been filed by it before the Hon'ble Supreme Court of India assailing the Judgment dated 30.09.2019, the grounds raised in the Review Petition having not been agitated therein. It has been submitted that DERC has filed the captioned Review Petition seeking recall of select findings which were obtained by the licensee by practicing suppression of facts, indulgence sought of this tribunal being to exercise its power under Section 151 of Code of Civil Procedure, 1908 ("CPC") and not the power of Review under Order 47 Rule 1 of CPC. Primarily on these submissions, it has been argued that neither the pendency of the Civil appeal before the Supreme Court nor the inordinate delay in seeking review should come in the way of examining the contentions urged.

39. The gravamen of the case of DERC is that the judgment of which Review is sought was obtained by the licensee by suppressing a vital material in the form of a decision of the jurisdictional Writ Court pertaining to the very same contesting parties and touching upon the very precise issue which fell for consideration before the tribunal. It is submitted that it is possible that if the aforementioned decision of the jurisdictional High Court was brought to the knowledge of this tribunal, then the resultant outcome may not have been as was ultimately held by Judgment dated 30.09.2019. It is contended that by failing to bring the judgment of the writ court to the notice of the tribunal, the licensee indulged in suppression, robbed off an opportunity from this tribunal to apply its mind while rendering justice. On such basis, it is argued that the case at hand is one where there has been a miscarriage of justice owing to abuse of process of law meriting the prayer for this tribunal to exercise its inherent power as may be necessary for ends of justice or to prevent the abuse of process of the Court.

40. The provision contained in section 151 CPC reads thus:

> *'Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.'*

41. We do not have the least doubt that by virtue of the provision contained in Section 120 of the Electricity Act, 2003 this tribunal possesses not only the power of review but also the inherent power under Section 151 of CPC

to make such orders as may be necessary for the ends of justice or to prevent abuse of the judicial process. We also accept that it is an established principle of law that if any judgment or order is obtained by suppression, it cannot be said to be a judgment or Order in Law, such decision being consequently rendered a nullity and *non-est* in the eyes of Law. Such decision can be challenged at any Court at any time, in appeal, revision, writ or even in collateral proceeding [see *in re Dadu Dayal* 1990 (1) SCC 189; *Indian Bank versus Satyam Fibers (India) Private Limited* (1996) 5 SCC 550; *Roshan Deen v. Preeti Lal* 2002 (1) CLT (SC) 1; *A.B Papayya Sastry v. Government of A.P* [(2007) 4 SCC 221; and *in re Ram Prakash Agarwal* 2013 (11) SCC 296].

42. It has been argued that the pendency of the Civil appeal before Hon'ble Supreme Court is no ground to hold that the review petition is barred since the present is not a review petition under Section 114 or Order 47 Rule 1 CPC. Reliance is placed on rulings in *A.B Papayya Sastry* (supra) and *Abbai Maligai Partnership firm v K Santhakumaran* 1998 (7) SCC 386. On the strength of the decisions reported as *Ram Chandra Singh v. Savitri Devi* (2003) 8 SCC 319; *Ram Preeti Yadav v. U.P Board of High School and Intermediate Education and Others.'* (2003) 8 SCC 311; *Sutlej Jal Vidyut Nigam v. Raj Kumar* [(2019) 14 SCC 449; *Union of India v. Murugesan* 2021 SCC Online SC 895; and *Pooranchand Mulchand Jain v Komalchand Beniprasad Jain* AIR 1962 MP 64**, i**t is also submitted that the principle of delay and laches should not inhibit revisit by this tribunal in case of fraud

having been played on the adjudicatory authority. It is the argument of DERC that non-mentioning of vital documents tantamount to fraud, even if the same was the result of innocent misrepresentation [*S.P Chengalvaraya Naidu v. Jagannath*, AIR 1994 SC 853; *Smt. Pushpalata Raut v. Damodar* AIR 1987 Orrisa 1; *Peary Choudhary v. Sonoodas* (1914) 19 Cal WN 419; *Anita v. R. Ram Bilas* 2002 (3) APLJ 8 (HC); and *Deepak v. Dr. Shri Ram* (2018) SCC Online BOM 2199].

43. It is not in dispute that DERC also did not place the decision of the writ court before the tribunal at the hearing leading to the judgment dated 30.09.2019. It is argued that such omission on the part of the Commission cannot exonerate the licensee, the contention being that while drawing affidavits, all material facts are required to be laid bare which is the primary responsibility of one who seeks indulgence of the court. The thrust of the submission of DERC is that notwithstanding categorical finding of the High Court that providing an increase in cost on a normative basis taking into account the inflation factor would if such normative basis has been arrived at after exercising due skill and after taking in account the relevant factors also provide a method for recovering uncontrollable cost and that such a provision cannot be said to be unreasonable, the licensee continued to maintain a contrarian position, suppressing the decision on the writ petition, this constituting a case of withholding of facts and fraud.

44. It is conceded by the learned Counsel for DERC that this tribunal is vested with the power of review by virtue of provision contained in section 120(2)(f) of the Electricity Act, the contours of which limited jurisdiction have been settled, *inter* alia, by rulings in *Gujarat Urja Vikas Nigam Ltd. & Ors. v. Renew Wind Energy (Rajkot) Private Ltd. & Ors.*, *2020 SCC OnLine APTEL 64* and *M.P. Electricity Regulatory Commission and Ors. v. Universal Cables Ltd. and Ors., (2008) APTEL 12.* The DERC, however, has expressly stated that it does not seek to invoke Order 47 of the CPC knowing that in terms of Section 120(2)(f) of the Electricity Act this tribunal exercises power of review under said provision of law i.e. Order 47 Rule 1 of the CPC. The Commission seeks to justify filing of the Review Petition under Section 151 CPC placing reliance on judgement of Hon'ble Supreme Court *Indian Bank v. Satyam Fibres (India) Private Limited,* (1996) 5 SCC 550 ("*Indian Bank Judgment*") in context of the Consumer Protection Act, 1986 side-stepping the fact that the provisions for review in Electricity Act are not *pari materia* with the Consumer Protection Act. The *Indian Bank Judgment* is premised on Section 13 of the Consumer Protection Act, 1986 whereunder, unlike the Electricity Act, there was no power to review.

45. It is trite law that where there is a specific provision available, no proceeding can be initiated under a general provision [*Gujarat Urja Vikas Nigam Limited v. Solar Semiconductor Power Company (India) Pvt. Ltd. & Anr*., (2017) 16 SCC 498]. In *Gujarat Urja* (supra), it was held thus:

"37. This Court should be specially careful in dealing with matters of exercise of inherent powers when the interest of consumers is at stake. The interest of consumers, as an objective, can be clearly ascertained from the Act. The Preamble of the Act mentions "protecting interest of consumers" and Section 61(d) requires that the interests of the consumers are to be safeguarded when the Appropriate Commission specifies the terms and conditions for determination of tariff. Under Section 64 read with Section 62, determination of tariff is to be made only after considering all suggestions and objections received from the public. Hence, the generic tariff once determined under the statute with notice to the public can be amended only by following the same procedure. Therefore, the approach of this Court ought to be cautious and guarded when the decision has its bearing on the consumers.

…

39. The Commission being a creature of statute cannot assume to itself any powers which are not otherwise conferred on it. In other words, under the guise of exercising its inherent power, as we have already noticed above, the Commission cannot take recourse to exercise of a power, procedure for which is otherwise specifically provided under the Act."

[Emphasis Supplied]

46. In *Union of India v. Paras Laminates (P) Ltd.,* (1990) 4 SCC 453, the Supreme Court held as under:

"8. There is no doubt that the Tribunal functions as a court within the limits of its jurisdiction. It has all the powers conferred expressly by the statute. Furthermore, being a judicial body, it has all those incidental and ancillary powers which are necessary to make fully effective the express grant of statutory powers. Certain powers are recognised as incidental and ancillary, not because they are inherent in the Tribunal, nor because its jurisdiction is plenary, but because it is the legislative intent that the power which is expressly

> *granted in the assigned field of jurisdiction is efficaciously and meaningfully exercised, the powers of the Tribunal are no doubt Ltd. Its area of jurisdiction is clearly defined, but within the bounds of its jurisdiction, it has all the powers expressly and impliedly granted. The implied grant is, of course, Ltd. by the express grant and, therefore, it can only be such powers as are truly incidental and ancillary for doing all such acts or employing all such means as are reasonably necessary to make the grant effective. As stated in Maxwell on Interpretation of Statutes, (eleventh edition) "where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution."*
>
> [Emphasis Supplied]

47. In terms of the ruling in *Ram Chand and Sons Sugar Mills Private Ltd, Barbanki (U.P) v. Kanhayalal Bhargava & Ors*., (1966) 3 SCR 856, it is settled law that inherent powers of a Court cannot override the express provisions of the law and that if there are specific provisions of the CPC (e.g., Order 47 Rule 1) dealing with a particular topic, and the same expressly or by necessary implication exhausts the scope of the powers of the Court or the jurisdiction that may be exercised in relation to a matter, the inherent power of the Court (i.e., under Section 151) cannot be invoked to cut across the powers conferred by the CPC. To quote from the decision:

> *"5. ...*
> *This Court again in Arjun Singh v. Mahindra Kumar (2) considered the scope of s. 151 of the Code. One of the questions raised was whether an order made by a court under a situation to which O. IX, r. 7, of the Code did not apply, could be treated as one made under s. 151 of the Code. Rajagopala Ayyangar, J., made the following observations:*

> *'It is common ground that the inherent power of the Court cannot override the express provisions of the law. in other words, if there are specific provisions of the Code dealing with a particular topic and they expressly or by necessary implication exhaust the scope of the powers of the Court or the jurisdiction that may be exercised in relation to a matter the inherent power of the Court cannot be invoked in order to cut across the powers conferred by the Code. The prohibition contained in the Code need not be expressed but may be implied or be implicit from the very nature of the provisions that it makes for covering the contingencies to which it relates."*
>
> *[Emphasis Supplied]*
>
> 9. Accordingly, it is submitted that when Section 120 of the Electricity Act read with specific provisions of the CPC under Order 47 Rule 1 expressly exhaust the scope of the powers of review of the Hon'ble Tribunal, the inherent powers under Section 151 cannot be invoked to cut across the express powers conferred by the Electricity Act and the CPC.

48. *Albeit* expressed in context of the plenary powers under Article 142 of the Constitution of India, since they apply with even greater force here, we can borrow words from the decision of the Supreme Court in *Supreme Court Bar Assn. v. Union of India*, (1998) 4 SCC 409 to say that the inherent power under Section 151 CPC also cannot be used *to "supplant substantive law applicable to the case or cause under consideration of the Court*", it being impermissible "*even with the width of its amplitude*" to avail of the same "*to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby to achieve something indirectly which cannot be achieved directly*".

49. We find the allegations of fraud and suppression of facts levelled against the licensee a bogey created by the State Commission in an attempt to cover up for certain acts of omission and commission on its own part, particularly the manner in which *Compliance Order* was sought to be taken back by the *Suo Motu* order in brazen breach of hierarchical discipline and in gross violation of principles of natural justice, which aspects would need elaboration, but a little later.

50. The judgment on writ petition was rendered by the High Court dealing with the challenge to the *vires* of the Regulations governing the subject. The writ court was not dealing with the claims of the licensee nor subjecting the disallowances to appellate scrutiny. In contrast, the tribunal was called upon to adjudicate on the grievances raised by appeal No. 246 of 2014 of TPDDL vis-à-vis the disallowances in the Tariff Order dated 23.07.2014 passed by DERC. It is not the case of DERC that upon filing of the Writ Petition, the Appeal No. 246 of 2014 could not have been filed or the plea of Service Tax liability to be treated as an uncontrollable expense could not have been considered by DERC or this tribunal.

51. In *PTC India Ltd. v. CERC*, (2010) 4 SCC 603, it was held as under:

> *"Summary of our Findings*
> *92. (i) In the hierarchy of regulatory powers and functions under the 2003 Act, Section 178, 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).
(ii) A regulation under Section 178, as a part of regulatory framework, intervenes and even overrides the existing contracts between the regulated entities inasmuch as it casts a statutory obligation on the regulated entities to align their existing and future contracts with the said regulation.
(iii) 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.
(iv) Section 121 of the 2003 Act does not confer power of judicial review on the Appellate Tribunal. The words "orders", "instructions" or "directions" in Section 121 do not confer power of judicial review in the Appellate Tribunal for Electricity. In this judgment, we do not wish to analyse the English authorities as we find from those authorities that in certain cases in England the power of judicial review is expressly conferred on the tribunals constituted under the Act. In the present 2003 Act, the power of judicial review of the validity of the regulations made under Section 178 is not conferred on the Appellate Tribunal for Electricity.
(v) If a dispute arises in adjudication on interpretation of a regulation made under Section 178, an appeal would certainly lie before the Appellate Tribunal under Section 111, however, no appeal to the Appellate Tribunal shall lie on the validity of a regulation made under Section 178. …"

[Emphasis Supplied]

52. The challenge to the *vires* of Regulations was rightly taken to the High Court while the contentions vis-à-vis the unfair result of strict application of the Tariff Regulations properly agitated before the Commission and this tribunal in appeal.

53. There has been no suppression of any *material fact* by TPDDL. The Commission cannot plead that there is any discovery of a new and important matter or evidence which, after the exercise of due diligence was not within its knowledge when judgment dated 30.09.2019 was rendered. The expression *'Material Fact'* connotes a fact upon which a party's claim or defence is based. As held in *Arunima Baruah v. Union of India*, (2007) 6 SCC 120, "(m)*aterial fact would mean material for the purpose of determination of the lis, the logical corollary whereof would be that whether the same was material for grant or denial of the relief*".

54. The decision of the jurisdictional writ court was on the challenge to the *vires* of the prevalent Regulations. This fact was known to both the parties, including the State Commission (DERC). The licensee had made a prayer in the tariff petitions for reliefs on the twin issues but was unable to persuade the DERC to accept its contentions about the undue and unfair adverse financial impact of strict application of the extant regulations. By the time the appeal against the disallowances could come up for consideration before this tribunal, the challenge to *vires* had failed before writ court. The judgment of High Court expressing opinion on the validity of the provisions contrary to the case set up by the licensee was relevant as authoritative pronouncement of the jurisdictional court on the validity of the regulatory regime which bound everyone. It cannot, however, be treated as a *fact* the pleading of which was crucial to the decision-making process so as to make out a case of fraud.

55. The judgment dated 30.09.2019 of this tribunal did not decide that the regulations are invalid. It only found merit in the claims of the licensee as to the unfair impact since the additional liability created by the service tax regime introduced later could not have been anticipated. In this view, all that the tribunal in appeal did was to hold that various claims of the licensee regarding statutory fee/charges "*should be looked into by the Respondent Commission afresh*" duly considering some of them as controllable and others as uncontrollable in the interest of justice and equity [*see* para 16.4.3 of the judgment dated 30.09.2019, quoted earlier]. Pertinent to add that this is also how the Commission had contested the writ petition, not taking a position that the Regulations are inflexible. On the contrary, it showed inclination to address the concerns of TPDDL pointing out, *inter alia*, the possibility of examining the matter in exercise of its "*sufficient powers under the impugned Regulations to relax any of the provisions of the impugned Regulations (Regulation 12.4); amend the impugned Regulations (Regulation 12.8); and power to remove difficulty in giving effect to any of the provisions of the impugned Regulations (Regulation 12.3)*". Again, this is also the spirit with which the High Court parted with the case holding that "*it would always be open … to approach the Commission to exercise its powers in accordance with law*" in the event the licensee herein "*finds that despite achieving the requisite efficiency norms, the tariff determined on the basis of the impugned Regulations is not sufficiently remunerative or renders the*

carrying on of its business unviable" [*see* Para 41 of the judgment dated 29.07.2016, quoted earlier].

56. If the judgment on writ petition was a "material fact", it was one also within the knowledge of the Commission. There is no explanation offered as to why the Commission itself failed to bring it to the attention of the bench of this tribunal which was in *seisin* of appeal no. 246 of 2014 decided on 30.09.2019. We cannot allow luxury to the Commission to adopt a *holier than thou* posture in a scenario wherein it would be equally guilty (if there is any such misdemeanour on the part of the licensee) of suppression or fraud.

57. The judgment of High Court was not a decision on the merits of disallowances and claims of TPDDL, and there is no inconsistency in the said decision and the judgment dated 30.09.2019 of this tribunal. The former upheld the *vires* of the Tariff Regulations, 2011 but noted the powers of DERC to *(i)* relax *(ii)* amend and *(iii)* remove difficulty arising out of the Regulations in case, in spite of achieving efficiency norms, the tariff is not sufficiently remunerative for the Licensee or renders the carrying on of its business unviable. This tribunal, by the later judgment, only directed the DERC to *look into* various claims for considering some of them as controllable and others as uncontrollable in the interest of justice and equity. In both cases, the power of the regulatory Commission to reconsider stands duly recognized.

58. With inordinate time gap, and omission (conscious as it must have been) in agitating such grievances in the appeal brought against the judgment dated 30.09.2019, knowing full well that such conduct would not be approved within the scope and ambit of review jurisdiction under Order 47 Rule 1, DERC has sought to set up a case under Section 151 of the CPC quite apparently with intent to by-pass the objection of delay and laches and cover up own defaults in not implementing the judgments or orders of this tribunal. We are not impressed with the theory of suppression of facts and fraud. In these circumstances, we find the prayer for review, brought on 08.02.2022 (two years and five months after the judgment dated 30.09.2019) badly time-barred as also suffering from laches.

59. It is vivid from the various orders passed, seen in their chronology, that the State Commission has been guilty of consistent default in compliance. As noted earlier, the direction by judgment dated 30.09.2019 on the relevant issue was for a revisit ("*should be looked into … afresh*"), bearing in mind the principles of "*justice and equity*". Given the position taken by the Commission on the subject, in light of prevalent regulations, such revisit clearly would be by availing the "*sufficient powers under the impugned Regulations to relax any of the provisions of the impugned Regulations (Regulation 12.4); amend the impugned Regulations (Regulation 12.8); and power to remove difficulty in giving effect to any of the provisions of the*

impugned Regulations (Regulation 12.3)", as assured before the High Court. Given the fact that this tribunal is a forum with limited jurisdiction, the decision rendered on 30.09.2019 cannot be construed as a *direction* to DERC to *amend* the Regulations or to proceed under the power of removal of difficulties which entails adherence to the existing regime ("*not being inconsistent with the provisions of these Regulations or the Act"*). Thus, the focus would be on the power "*to relax*" (Regulation 12.4) the rigor of the relevant Regulations, in the event the licensee was able to demonstrate before the regulator that the tariff determined on the basis of the Regulations is not "*sufficiently remunerative or renders the carrying on of its business unviable*", as was the word given before writ court. The power to relax is available to be used by applying the muster of "public interest". The State Commission scrupulously avoided and delayed the revisit in terms of the directions on the subject in judgment dated 30.09.2019 till it passed the Compliance Order dated 04.02.2021, giving *in-principle* approval, only after much cajoling, prodding and goading, including by exercise of powers vested in this tribunal for execution of its orders. The *Compliance Order* in such sequence of events was, therefore, an acknowledgement by the DERC that there was a case made out *to relax.* The *Suo Motu* order passed on 29.09.2021 was an about turn on the said compliance. Since the said *Suo Motu* order was immediately followed by Tariff Order for next control period issued on 30.09.2021 and when brought in question, the review petition was

filed, an ulterior retrograde intent is at play, the objective being to justify taking back what had been granted.

60. For the foregoing reasons, the review petition (DFR no. 38 of 2022) filed by the State Commission (DERC), along with applications (IA nos. 197 and 195 of 2022), do not deserve to be allowed.

61. This brings us to the challenge brought by the licensee through appeal no. 332 of 2021 to the *Suo Motu* Order dated 29.09.2021 passed by DERC. The relevant part of the Order has already been extracted earlier.

62. Having bestowed our anxious consideration to the submissions advanced before us, we are of the view that the *Suo Motu* Order is an egregious violation of judicial propriety and hierarchy of adjudicatory authorities. As observed earlier, the said order attempts to render ineffectual the judgments and orders of this tribunal which have neither been stayed nor recalled nor set aside. This is particularly so since Compliance order dated 04.02.2021 was a solemn undertaking of a subordinate quasi-judicial authority (the State Commission) to its appellate authority (this tribunal) which could not be withdrawn without modification or setting aside of the orders and judgements passed by this tribunal, not the least without leave for such adventure to be undertaken. What stands out as the foremost reason for finding the *Suo Motu* order bad in law is the fact that in passing it

the DERC has flouted all principles of natural justice, there being not even an attempt to afford opportunity to the affected party to be heard in such respect. By such order, DERC has tried to avoid its obligation to implement directions and judgements of its appellate authority by ingeniously claiming that there is a conflict between the Judgment dated 29.07.2016 passed by the High Court of Delhi in W.P. (C) No. 2203 of 2012 and Judgment dated 30.09.2019 in Appeal No. 246 of 2014 which argument has already been rejected earlier. The recall of its own Compliance Order dated 04.02.2021 is an abuse of process and a travesty of justice – beyond the scope of Order 47, Rule 1 of CPC read with Section 94 of the Electricity Act.

63. The licensee may be right in submitting that the endeavor to avoid compliance with the judgements and orders of appellate authority seems to be part of a pattern which has been frowned upon in the past by previous decisions of this tribunal including *Delhi Transco Ltd. v. DERC,* 2013 ELR (APTEL) 498*; DTL v. DERC*, Judgment dated 29.09.2010 in Appeal No. 28 of 2008*; NDPL v. DERC,* Judgment dated 28.11.2013 in Appeal 14 of 2012*; BSES Discoms v. DERC,* Judgment dated 14.11.2013 in O.P. No. 1 and 2 of 2012*; BSES Discoms v. DERC,* Judgment dated 28.11.2014 in Appeal No. 61 of 2012*; BSES Discoms v. DERC,* Judgment dated 02.03.2015 in Appeal No. 177 of 2012*; DERC v. BSES,* IA No. 320 of 2015 in Appeal No. 177 of 2012*;* and *TPDDL v. DERC*, judgment dated 28.02.2020 in E.P. No. 09 of 2016, and, therefore, very disturbing.

64. We elaborate our reasons hereinafter.

65. Reliance has been placed, and rightly so, on rulings in *Kunhayammed and Ors. v. State of Kerala, (2000) 6 SCC 359; Dy. Director, Land Acquisition v. Malla Atchinaidu, (2006) 12 SCC 87; and UPSRTC v. Imtiaz Hussain, (2006) 1 SCC 380* to argue that doctrine of merger applies. In *Kunhayammed and Ors. v. State of Kerala* (supra), the Supreme Court held as under:

> *"12. The logic underlying the doctrine of merger is that there cannot be more than one decree or operative orders governing the same subject-matter at a given point of time. When a decree or order passed by an inferior court, tribunal or authority was subjected to a remedy available under the law before a superior forum then, though the decree or order under challenge continues to be effective and binding, nevertheless its finality is put in jeopardy. Once the superior court has disposed of the lis before it either way — whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior court, tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the court, tribunal or the authority below. However, the doctrine is not of universal or unlimited application. The nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or which could have been laid shall have to be kept in view."*
>
> [Emphasis Supplied]

66. In *Dy. Director, Land Acquisition v. Malla Atchinaidu* (supra), the Supreme Court ruled thus:

> *"48. The general rule is clear that once an order is passed and entered or otherwise perfected in accordance with the*

practice of the court, the court which passed the order is functus officio and cannot set aside or alter the order however wrong it may appear to be. That can only be done on appeal. Section 189 of the Civil Procedure Code of Ceylon, which embodies the provisions of Order 28 Rule 11 of the English Rules of the Supreme Court to ensure that its order carries into effect the decision at which it arrived, provides an exception to the general rule, but it is an exception within a narrow compass. …"

[Emphasis Supplied]

67. In *UPSRTC v. Imtiaz Hussain* (supra)**,** the principle was reiterated as under:

"7. Section 152 provides for correction of clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission. The exercise of this power contemplates the correction of mistakes by the court of its ministerial actions and does not contemplate passing effective judicial orders after the judgment, decree or order. The settled position of law is that after the passing of the judgment, decree or order, the same becomes final subject to any further avenues of remedies provided in respect of the same and the very court or the tribunal cannot (sic), on mere change of view, is not entitled to vary the terms of the judgments, decrees and orders earlier passed except by means of review, if statutorily provided specifically therefor and subject to the conditions or limitations provided therein. The powers under Section 152 of the Code are neither to be equated with the power of review nor can be said to be akin to review or even said to clothe the court concerned under the guise of invoking after the result of the judgment earlier rendered, (sic modify it) in its entirety or any portion or part of it.

…

No court can, under the cover of the aforesaid sections, modify, alter or add to the terms of its original judgment, decree or order. Similar view was expressed by this Court in Dwaraka Das v. State of M.P. [(1999) 3 SCC 500] and

Jayalakshmi Coelho v. Oswald Joseph Coelho [(2001) 4 SCC 181]."

[Emphasis Supplied]

68. The State Commission was rendered *functus officio* on the two issues (of increase in Service Tax and AT&C loss trajectory) after the Compliance Order had been issued. It, thus, could not have passed the *Suo Motu* order. It cannot be wished away that the two disallowances have been subject matter of binding directions issued by this tribunal including in appeal No. 213 of 2018 titled as *'TPDDL v. DERC'* against Tariff Order dated 28.03.2018. As already noted, pursuant to the judgment dated 30.09.2019 in appeal No. 246 of 2014, this tribunal by Order dated 11.03.2020 had partly disposed of appeal No. 213 of 2018, *inter alia* directing the DERC to implement the issues which had been decided in favor of the appellant in the ongoing tariff proceedings for FY 2020-21. The Commission had given assurances on 11.03.2020 and 18.08.2020 to this tribunal that it shall implement the judgement. Yet, the Tariff Order for FY 2020-21 was passed on 28.08.2020 denying the relief. This led to Orders being issued in Appeal No. 213 of 2018 on 18.08.2020, 22.09.2020, 26.11.2020 and 06.01.2021, which have already been taken note of.

69. In the wake of above-mentioned orders, the DERC issued the Compliance Order dated 04.02.2021, placing it before this tribunal under an affidavit, undertaking to implement the judgments of this tribunal. The

Compliance Order dated 04.02.2021 was considered by this tribunal at the hearing on 15.02.2021 and culminated in the Order dated 09.04.2021 on IA no. 1615 of 2020 in appeal No. 213 of 2018, which has been earlier quoted. Against this backdrop, there cannot be two views about the fact that the State Commission was left with no powers to pass the *Suo Motu* Order to withdraw the compliance, its Compliance Order dated 04.02.2021 having merged with this tribunal's Order dated 09.04.2021 in Appeal No. 213 of 2018.

70. In the above view, the *Suo Motu* Order is not only in the teeth of judgments or orders passed by this tribunal as well as undertakings given by DERC itself but also destructive of the Constitutional scheme of rule of law, judicial propriety, and discipline of hierarchy of adjudicatory authorities. Under the garb of exercising *Suo Motu* powers of Review, the commission has sought to re-open the issues which have already been decided by it through the Compliance Order which was the revisit undertaken pursuant to the judgment dated 30.09.2019, equipped as it was with the *power to relax*. It is trite that not only the Compliance Oder of DERC had merged with the subsequent order of this tribunal but also that there is no provision for review of an order passed in review jurisdiction, rendering the matter beyond its power of review.

71. The *Suo Motu* order passed in purported exercise of review jurisdiction (which, as observed above, was no longer available in the chronology of

events) is even otherwise bad in law because there is no discovery shown of any new or important matter or evidence, which after the exercise of due diligence, was not within the knowledge of DERC at the time of Compliance Order. Other than change of guard, there was no new development which could have prompted such fresh re-visit.

72. One of the cardinal principles of natural justice is *audi alteram partem* (*'to hear the other side'*). In judicial or quasi-judicial proceedings where rights are likely to be affected, principles of natural justice mandate that the adjudicatory authority gives a hearing to the party against whom an adverse or unfavorable order may be passed [see *BALCO Employees' Union (Regd.) v. Union of India*, (2002) 2 SCC 333]. What must stand out as a clinching factor that vitiates the entire exercise leading to the *Suo Motu* order being issued is the blatant violation of the above-said principle of natural justice.

73. The *Suo Motu* Order has been passed by DERC without giving any hearing to the licensee. Neither any notice was given nor opportunity afforded to submit representation against the proposed *Suo Motu* Order which was sprung more as a surprise.

74. In the reply to the appeal challenging the *Suo Motu* order, DERC has contended that the said order was passed under an administrative process

and not in adjudicatory role. This plea is specious. It is settled law that tariff orders being amenable to appellate scrutiny by this tribunal resemble a judicial decision by a court of law. Such orders are passed in exercise of its powers as a quasi-judicial authority. The orders passed are then subject matter of the appellate jurisdiction of this tribunal as per the provisions of the Electricity Act. As said before, the Compliance Order was passed pursuant to directions given by the appellate forum in adjudicatory process. It could not have been tinkered with under an administrative process.

75. It is well settled that if pursuant to an earlier order, a person acquires a right enforceable in law, the same cannot be taken away by a subsequent order under general power of rescindment available under the General Clauses Act. The power of rescindment has to be determined in the light of the subject matter, context, and the effect of the relevant provisions of the statute [see *State of Kerala v. K.G. Madhavan Pillai (*1988) 4 SCC 669 as reiterated in *HC Suman & Anr. v. Rehabilitation Ministry Employees' CHBS & Ors*., (1991) 4 SCC 485]. As was held in *Indian National Congress (I) v. Institute of Social Welfare and Ors*., (2002) 5 SCC 685, "*Section 21 of the General Clauses Act has no application where a statutory authority is required to act quasi-judicially*". This renders the *Suo Motu* order, if passed under administrative process bad in law.

76. In the above facts and circumstances, we must set aside and vacate the *Suo Motu* order passed by DERC on 29.09.2021. It must be added that, as a natural corollary, the *Compliance Order* dated 04.02.2021 passed by the State Commission will continue to hold the field and prevail, binding the parties. In the sequitur, it is the bounden duty of the Commission to pass the consequential orders vis-à-vis the claims of the licensee on the two subject-issues for regulating the tariff for the relevant period. The necessary orders for giving effect to the *in-principle* approval accorded by the Compliance Order must now be issued by DERC without further demur or delay.

77. As observed earlier, the tariff determination exercise is an annual feature. The grievances of the licensee as to disallowances on the twin issues mentioned earlier continue to rankle vis-à-vis subsequent tariff orders as well, particularly the Order dated 30.09.2021 which is assailed by the third captioned matter, i.e. appeal no. 334 of 2021. Requisite directions have been sought by the licensee in the course of the said appeal by interlocutory application (I.A. no. 1971 of 2021).

78. Given the fact that denial came for the licensee in the tariff order close on the heels of the *Suo Motu* order, found bad in law, the caption of the press release (quoted earlier) issued by the State Commission on 30.09.2021 comes across as populist. Having heard the learned Counsel for the parties, we find that DERC while passing the Tariff Order dated 30.09.2021, assailed

by appeal no. 334 of 2021, has arbitrarily re-determined the O&M expenses for FY 2012-13 to FY 2016-17 thereby resulting in an adverse financial impact upon the licensee, statedly to the tune of Rs. 285 Crores along with applicable carrying cost. It is apparent that the decisions taken by Order dated 30.09.2021 on the subjects of re-determination of AT&C loss trajectory and impact of increase in rate of Service Tax were influenced by the *Suo Motu* order dated 29.09.2019 which had illegally attempted to dislodge the *Compliance Order* dated 04.02.2021. Since the *Suo Motu* order has been found to be improper, unjust, and bad in law and is being vacated, consequently rendering the Compliance Order operative and in force, the decisions on the above-mentioned subject by the Tariff Order dated 30.09.2021 cannot be allowed to stand. We order accordingly. It would be the obligation of the State Commission to revisit the same and pass fresh orders in accordance with law on such issues, also for the period covered by the Tariff Order dated 30.09.2021. The Interlocutory application (IA no. 1971 of 2021) in appeal no. 334 of 2021 deserves to be allowed to this extent.

79. Before concluding we must give vent to the deep anguish that we have felt in dealing with the controversy at hand. The State Regulatory Commission, as indeed this appellate tribunal, are creatures of the same legislation, i.e. Electricity Act, 2003. Both are important institutions, conceived as high-powered bodies expected to possess acute domain knowledge, vision and expertise, duty-bound to steer the power sector

towards optimum development and growth, bearing in mind the legislative objectives and goals as indeed the State Policy reflected in national electricity and tariff plan documents. These bodies are placed in a hierarchy wherein the appellate tribunal gains by the intense knowledge, study and research reflected in the reasoned orders of the Regulatory Commissions that are brought in challenge for appellate scrutiny. While this appellate forum respects the views expressed in orders of the Commissions, it is obliged to step in and intervene, at times by setting at naught the impugned directions or modifying the same, as and when it is satisfied that the action on the part of the regulator was remiss or not in accord with law. In all such cases, where the appellate authority interferes, the forum of first instance is expected to show the same deference and abide by the modified directives subject, of course, to intervention, if any, by the superior authority i.e. Supreme Court before which a second appeal lies under the Electricity Act. The order of the appellate forum stands and is required to be abided by scrupulously, whatever be the views of the forum of first instance, subject to remedy of second appeal. That is the requirement of hierarchical judicial discipline.

80. The State Commission being an authority, subordinate in hierarchy to this tribunal, in matters requiring adjudication, does not possess prerogative to render otiose the entire regulatory-adjudicatory mechanism under the Electricity Act by refusing to implement the judgments or orders passed in

appellate jurisdiction or in exercise of power of execution, or by passing such orders as take away the reliefs already granted after appellate scrutiny, particularly without any leave being taken from the superior forum. Such conduct in flagrant violation of hierarchical discipline is tantamount to overreach, an affront, and cannot be countenanced since the same threatens the rule of law, inviting anarchy. We hope these mores will be borne in mind by the regulatory commissions.

81. For the foregoing reasons, we hold and direct as under:

(i) The petition seeking review of the judgment dated 30.09.2019 in appeal no. 246 of 2014 on grounds of suppression of facts or playing of fraud is unmerited and so liable to be rejected.

(ii) The *Suo Motu* Order dated 29.09.2021 passed by DERC in case file no. F11(1619)/DERC/2018-19/914, being bad in law, is liable to be vacated and so set aside.

(iii) The *Compliance Order* dated 04.02.2021 of DERC continues to hold good, prevail and binds the parties, including DERC.

(iv) The DERC is duty-bound to pass the necessary orders giving effect to the decisions taken by the *Compliance Order* dated 04.02.2021 in relation to the determination of the tariff for the relevant control periods including the period covered by the Tariff Order dated 30.09.2021 in case no. 03 of 2021, which it must now do without

further delay or demur, at the earliest, not later than two months of this judgment.

(v) As a sequitur to the above, the orders on the two subject-issues passed in appeal no. 213 of 2018 continue to be in force, there being no occasion for their recall or modification.

(vi) The Interlocutory Application (IA no. 1971 of 2021) in appeal no. 334 of 2021 is allowed to the extent and effect of setting aside the Tariff order dated 30.09.2021, presently limited to the two subject issues, remitting the same for reconsideration and fresh orders by DERC in accordance with law within the period specified above, the contentions on other subjects raised in the main appeal (no. 334 of 2021) to be considered in due course.

82. The appeal no. 332 of 2021 and DFR no. 38 of 2022 as indeed applications filed therewith, along with IA no. 1971 of 2021 in appeal no. 334 of 2021, are disposed of in above terms.

83. Subject to the above, for purposes of consideration of grievances other than the two subject-issues, the appeal nos. 213 of 2018 and 334 of 2022 stand included in *list of finals* and shall be taken up in due course.

PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO CONFERENCING ON THIS 24TH DAY OF MAY, 2022.

(Sandesh Kumar Sharma)
Technical Member

(Justice R.K. Gauba)
Officiating Chairperson

vt