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**Appellate Tribunal for Electricity**  
**(Appellate Jurisdiction)**

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**OP NO.1 OF 2011**

Dated: 11<sup>th</sup> Nov, 2011

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

Tariff Revision  
(Suo-Motu action on the letter received from  
Ministry of Power)

Counsel nominated by : 1. Mr. M.G. Ramachandran,  
the Tribunal  
Amicus Curiae  
2. Mr. R K Mehta, Amicus Curiae  
3. Mr. Amit Kapur, Amicus Curiae.  
4. Mr. Buddy A. Ranganadhan,  
Amicus Curiae

Counsel for Commissions: Mr. G. Umapathy (Tamil Nadu)  
Mr. C K Rai (Rajasthan & Tripura)

**JUDGMENT**

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

1. Since, the interesting and important issues have been raised, we have taken up this matter by treating the letter sent by the Power Ministry as the suo-moto petition.

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2. The Ministry of Power through its Secretary sent a letter to the Chairperson of this Tribunal dated 21.1.2011 complaining that most of the State distribution utilities have failed to file annual tariff revision petitions in time and as a result in a number of States, tariff revision has not taken place for a number of years and that State Commissions constituted all over India have also failed to make periodical tariff revisions suo-moto resulting in the poor financial health of the State distribution utilities. Due to this fact situation, the Power Ministry requested this Tribunal to take appropriate action by issuing necessary directions to all the State Commissions to revise the tariff periodically, if required by suo moto action, in the interest of improving the financial health and long term viability of the electricity sector in general and distribution utilities in particular.

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3. In pursuance of the said request, the matter has been posted before the Full Bench of this Tribunal for passing necessary orders. Accordingly, the Full Bench entertained the same as a suo-moto petition and issued notices to all State Commissions and to the Forum of Regulators inviting their responses through their status reports. On receipt of these notices, all the State Commissions have promptly sent their respective reports. The Secretary of the Forum of the Regulators has also sent his report on the basis of the information furnished by all the State Commissions.

4. On perusal of these reports, we found that most of the State Commissions have been complying with the provisions of the Act, 2003. However, we have come across that some of the State Commissions have not complied with the statutory requirements as provided in the Act. Those State Commissions have given some explanation as to why they were not able to make

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periodical tariff revision. Besides this, they have also raised two issues regarding jurisdiction of the State Commissions and the Tribunal to take suo-moto action for determination of Tariff.

5. Those two issues relate to the following:-

(a) The jurisdiction of the State Regulatory Commissions to suo-moto determine the tariff under the Tariff policy under section 62, 64 and 86 of the Act, 2003, in the absence of the application filed by the Utilities.

(b) The power of the Appellate Tribunal to issue directions under section 121 of the Act to the Appropriate Commissions for taking suo moto action for the determination of the tariff under the Tariff policy.

6. On these two issues, all the State Commissions in all over India have sent their respective status reports. The

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perusal of the reports indicates that most of the Commissions did not raise any question with reference to the jurisdiction of the Tribunal to issue directions under section 121 of the Act and the jurisdiction of the State Commission in taking suo-moto action for determination of tariff. On the other hand, they submitted that they have been following the provisions and comply with the directions issued by the Tribunal then and there.

7. However, 3 State Commissions namely Tamil Nadu, Tripura and Rajasthan have raised the doubts with regard to the authority of the State Commissions to take suo moto action for determination of tariff in the absence of the Tariff applications. Tamil Nadu and Tripura State Commission also raised issue relating to the jurisdiction of this Tribunal to invoke the power under section 121 of the Act to direct the State Commissions to take suo-moto action for determination of the tariff in the absence of the Tariff applications.



8. Before dealing with these issues, it would be appropriate to refer to the chronological events which led this Tribunal to take up this case as a suo-moto petition for issuing necessary directions to the State Commissions under section 121 of the Act, 2003.

9. The relevant events are as under:

Ministry of Power, Government of India, through its Secretary Mr. Uma Shankar, sent a letter to the Chairperson of this Tribunal on 21.1.2011 complaining that periodical tariff revisions by the State Commissions have not been taken place in most of the States contributing to poor financial health of the State Distribution utilities. According to the Secretary, in most of the States, the Utilities have failed to file Annual Tariff Revision Petitions in time and even then, the State Commissions have not taken suo-moto action for the revision of tariff by invoking the suo-moto powers. Under those circumstances, the Power Ministry through its Secretary, requested us to invoke our authority under section



121 of the Act, 2003 by taking suo-moto action and to issue necessary directions to all the State Commissions to take appropriate steps periodically, if required, suo-moto, for the determination of Annual Revenue Requirements/tariff in the interest of improving the financial health and long term viability of electricity sector in general and distribution utilities in particular.

10. We will now quote the contents of the letter sent by the Secretary of the Power Ministry dated 21.1.2011 addressed to the Chairperson of the Appellate Tribunal for Electricity:

*" As you are aware, most of the State distribution utilities are under financial strain due to the gap between the Average Revenue Realised (ARR) and Average Cost of Supply (ACS). On an aggregate basis, the gap between the average cost of supply and tariff is 107.32 paisa per KWH which results in financial loss for every unit of power sold. Financial losses of State distribution utilities are reported to be Rs.52,623 Cr in FY 2008-09 without subsidy. This is likely to rise to Rs.116,089 Cr by FY 2014-15 at 2008 tariff level, with no increases, according to a Mercados study for the 13<sup>th</sup> Finance*

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Commission. According to the PFC report for the year 2008-09, out of 39 utilities studied, 22 utilities have negative net worth (35 utilities are incurring losses with subsidy) and loss of Rs.32,197 Crores was incurred by the utilities (on subsidy received basis) in 2008-09. This leads to short term borrowing by distribution utilities to bridge the gap between the revenue and expenditure every year.

2. The debt trap of distribution utilities has serious implication on the financial health of the electricity sector as a whole. The distribution utilities should generate adequate internal resources to honour the Power Purchase Agreements (PPA) made with the generating companies and hence any default in payment will have repercussions on the financial institutions lending to generating companies and future investments in capacity addition. One of the most important reasons for poor financial health of DISCOMS is the inadequacy of tariff to cover the cost incurred by the utilities to procure and supply electricity to the public. In a study conducted by Forum of Regulators of ten States for assessment of tariff revision and financial viability of DISCOMS (published in November, 2010), it is estimated that additional increase to the tune of 1% to 39% is required to fully recover the cost of supply.

3. As per the information available with us tariff revision has not taken place in several States as per details given below:

Tariff Changed	Last	No. States	Name of States
2010		6	Tamil Nadu, Madhya Pradesh, Uttaranchal, Gujarat, J&K, UP
2009		9	AP, Delhi, Maharashtra, Goa, Chhattisgarh, Haryana, Assam,



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		Arunachal Pradesh, West Bengal
2008	4	Meghalaya, Karnataka, Punjab, Bihar,
2007	4	Kerala, Rajasthan, Jharkhand, Orissa
Before 2006	6	HP, Nagaland, Sikkim, Tripura, Mizoram, Manipur
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(Details in Annexure)

4. One of the reasons for the delay in tariff revisions is that the States have failed to file annual tariff revision petitions in time.

5. **As per the Para 8.1 (7) of the Tariff Policy, the State Regulatory Authorities can suo-moto take up the revision of tariffs even if the utilities are not filing the revision petitions. It is also pertinent to mention that under Section 121 of the Act directions can be issued to the State Regulatory Authorities by the Appellate Tribunal.**

6. **I request you to kindly consider issuing directions under Section 121 of the Electricity Act to the State Regulatory Authorities to revise the tariff appropriately (suo-moto, if required), in the interest of improving the financial health and long term viability of electricity sector in general and distribution utilities in particular”.**

11. On receipt of this letter, as directed, the Registry put up a note before the Chairperson to seek suitable administrative orders for taking further action on this letter.

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The Chairperson, by the administrative order dated 1.2.2011, directed the Registry to post the matter before Full Bench of this Tribunal comprising of Hon'ble Chairperson, Hon'ble Mr. Rakesh Nath, Technical Member and Hon'ble Mr. V. J. Talwar, Technical Member, for passing appropriate orders in the matter. Accordingly, the matter was numbered as O.P. No.1 of 2011 and posted before the Full bench on 4.2.2011.

12. As indicated above, the Full Bench of this Tribunal decided to take suo-moto action and entertained this letter as a suo-moto petition for consideration to issue appropriate directions to the State Commissions on those issues. As provided under Section 121 of the Act, before issuing any directions to the State Commissions, they have to be heard. So, we issued notices to all the State Commissions.

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13. Since the issues involve the interpretation of the Regulations and policy as well as the provisions of the Act, we have appointed the learned Counsel namely 1) Mr. M.G. Ramachandran, 2) Mr. R.K. Mehta, 3) Mr. Amit Kapur and 4) Mr. Buddy A Ranganathan as Amicus Curiae Counsel to assist this Tribunal in this suo-moto matter by the order dated 4.2.2011.

14. The relevant portion of the order dated 4.2.1011 issuing notices to all the State Commissions passed by the Full Bench is given below:

*"In view of the particulars given in the letter and also request made by the Power Ministry, we deem it appropriate to take up suo-moto action. Accordingly, we entertain this letter as suo-moto-petition.*

*While we issue notice to all the State Commissions, we think it fit to appoint Mr. M.G. Ramachandran, Mr. Amit Kapur, Mr. R.K. Mehta and Mr. Buddy A Ranganadhan, the learned counsel as Amicus Curiae to assist this Tribunal for passing appropriate further orders in the matter.*

*Accordingly, we issue notice to all the State Commissions/Joint Commissions to send the status report*

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*with reference to the determination of annual revenue requirement/ tariff for all the years from the date of the constitution of the Commission to enable us to find out the position and to pass suitable orders.*

*The Registry is directed to send intimation to all the State Commissions/ Joint Commissions. We think it fit to issue notice to the Secretary of the Forum of Regulators as well. Accordingly, the Registry is directed to send notice to the Secretary of the Forum of Regulators to assist this Tribunal by collecting all the particulars from the State Commissions concerned.*

*The Registry is also directed to send copy of the letter sent by the Secretary, Ministry of Power to all concerned along with the formats containing queries requiring for the relevant particulars.*

*The State Commissions are required to give necessary particulars and information in the form of status report within one month from the date of receipt of this notice. The said report must reach the Registry on or before 7<sup>th</sup> March, 2011.*

*On receipt of the report, the Registry is directed to give copies of the same to all the Amicus Curiae Advocates to enable them to assist this Tribunal for passing suitable orders.*

*Post the matter on 14.03.2011 for passing further orders".*

15. When the matter was taken up on the next hearing i.e on 14.3.2011, the Full bench noticed that most of the

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State Commissions had sent their reports. Since some of the States had not sent their response, the Full bench again directed them to send their views with reference to the contents of the letter sent by the Power Ministry. Ultimately, on 19.5.2011, we noticed that status reports from all the State Commissions had been received by the Registry. On the basis of those status reports, we framed various issues in our order dated 19.5.2011 and again issued notices to hear the State Commissions on those issues. The relevant portion of the said order is as follows:

*"On the basis of these instances we feel that the following issues have to be considered by this Tribunal. These issues are as follows:-*

- a) Several State Commissions are leaving Regulatory gaps in tariff fixation i.e. the tariff fixed for a particular year is not sufficient to cover the ARR for that year;*
- b) Such Regulatory Gaps are left as a matter of course and the gap is left to be filled up in the Truing up or in subsequent years;*
- c) Delays in the tariff determination exercise;*

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- d) *Truing up is not being carried on regularly and sometimes not even for several years at a time;*
- e) *Several Commissions have not framed regulations regarding Fuel Surcharge Adjustment Mechanism.*
- f) *Suo moto action to be taken for initiating appropriate proceedings for determination of ARR and tariff fixation in the absence of the applications to be filed by the utilities.*

*On these issues, we want to hear all the Commissions so that it would facilitate this Tribunal to pass suitable orders and to give guidelines for the future course of action on the basis of the views of the Commissions.*

*Therefore, we deem it appropriate to issue notices under Section 121 of the Electricity Act to all the State Commissions to get their views on these issues. Accordingly, the notices are issued to all the Commissions. They are directed to send their views/reports on or before 30th June, 2011 to this Tribunal. Copies of these notices be sent to the Forum of Regulators also.*

*After receipt of the copies of the reports from all the Commissions the Registry is directed to give copies of those reports/views regarding the issues referred to above to Amicus Curiae counsel. A full and complete soft copy of the information provided either on a CD or other similar electronic media must accompany the hard copy. Additionally, the full information provided must also be sent by email to [opno1of2011@gmail.com](mailto:opno1of2011@gmail.com). The Commissions if they so desire can send their representatives or the counsel to make their suggestions to assist this Tribunal.*

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*Post the matter for passing further order on 7<sup>th</sup> July, 2011 at 2.30 p.m."*

16. When the matter was taken up on 7<sup>th</sup> July, 2011, it was found out from the reply made by various State Commissions to the effect, that they have been complying with the provisions as well as the Regulations and they would comply with the directions issued by the Tribunal in future under section 121 of the Act. However, as noted above, the State Commissions of Tamil Nadu and Tripura raised the doubts regarding the jurisdiction of the State Commission to take suo-moto action for determination of tariff as well as the Tribunal to issue suo moto directions regarding the same, through their affidavit and written notes. When the jurisdictional question had been raised, we thought it fit to send notices to all the State Commissions with reference to the said issues. Accordingly, notices were again issued to all the State Commissions with reference to those issues raised by

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these State Commissions by the order dated 7<sup>th</sup> July, 2011. We quote the said order dated 7<sup>th</sup> July, 2011 which is as follows:-

*“Out of these State Commissions, the State Commissions of Tamilnadu and Tripura have raised some questions with reference to the jurisdiction. Tamilnadu State Commission in its affidavit dated 2nd March, 2011 has stated as follows:*

*“7. I submit that the Appellate Tribunal is empowered to issue orders, instructions or directions to a State Commission for the performance of its statutory functions under this Electricity Act, 2003. A relevant question is whether the power of the Appellate Tribunal extends to issue of directions to Appropriate Commissions for the performance of their functions under the Tariff Policy of the Ministry of Power.*

*12. I further submit that Section 64, thus, mandates an application from the licensee and also fixes a time limit for issue of tariff order. Section 64 apparently does not visualize suo moto revision of tariff. Suo moto revision of tariff proposed in clause 8.1.7 of the tariff policy conflicts with the requirement of an application from the licensee under Section 64 of the Electricity Act, 2003”.*

*In its additional affidavit dated June, 2011 it has stated as follows:*

*“10. I further submit that issues such as Regulatory gaps, Truing up, Fuel surcharge mechanism are quasi judicial matters which come under the purview of State Electricity Regulatory*



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Commissions. On such issues, the aggrieved parties have the right of appeal under Section 111 of the Electricity Act to this Hon'ble Tribunal. Furthermore, I submit, that the Electricity Act has to be amended suitably to make the filing of Annual Revenue Requirement/tariff petitions by the utilities on annual basis, mandatory. It may further be seen that all the issues framed by this Hon'ble Tribunal related to tariff determination exercise can be initiated only when a licensee or a generating company files a petition under Section 64 of the Electricity Act, 2003. Hence, it is stated that the scope of the petition has been broadened in the order No. OP-1/2011 dated 19.5.2011 by including various new issues which are within the domain of the SERCs".

Similarly, in Tripura Report dated 23rd June, 2011, the State Commission, Tripura has also raised some issue with regard to the question of jurisdiction in last two paragraphs with reference to the views against issue no. (f) as under:

"Views against Issue No. (f):- From the present status as seen by the Commission the utility very seriously has undertaken the process of compilation of Annual accounts for the current and previous years. It is hoped that on completion of the Annual accounts tentatively in the month of August 2011 the ARR shall be submitted along with the petition and the determination process of tariff shall be undertaken by the Commission thereafter.

The Commission i.e. TERC reserves its view on Suo Moto determination of tariff and for Suo Moto action to determination of ARR fixation for following reasons:

That if the Commission takes the responsibility for fixation of tariff at its own the public may raise objection fingering that

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*once the utility is not willing to submit the petition why Commission takes such decision which is suffering to the consumers budget.*

*Now keeping in mind the Clause 8 and Clause 9 of Section 61 and for the safeguard of the consumer interest as well considering the sustainability of the utility the Suo Moto process for determination of tariff may please be reviewed”.*

*In the light of the above issues raised by both Tamilnadu and Tripura State Commission, it would be appropriate to direct the Tamil Nadu and Tripura State Commissions to appear before this Tribunal either through their counsel or by any representative to make submission on these issues to assist this Tribunal in deciding these issues.*

*On these issues, it is open to the other Commissions also to give their suggestions and views.*

*Post the matter on 25th July, 2011 at 2.30 p.m. for hearing.”*

17. On 25.7.2011, we received the response from various State Commissions endorsing the existence of the powers with reference to the jurisdiction of the State Commissions for taking suo-moto action for tariff determination as well as the power of the Tribunal for issuing directions under section 121 of the Act to the State

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Commissions. But this time, three State Commissions namely Tamil Nadu, Tripura and Rajasthan filed Affidavits raising the very same doubt relating to the question of jurisdiction of the State Commission as well as the Tribunal. In the light of these two preliminary questions relating to jurisdiction, we requested the Amicus Curiae Counsel to enlighten us with regard to those issues as well. In the light of the doubts expressed by these three State Commissions, with reference to the jurisdiction, we framed following questions for consideration:-

- (i) Whether the State Regulatory Commissions have the jurisdiction to suo-moto initiate proceedings for determination of tariff under section 62, 64 and 86 of the Electricity Act, 2003 in the absence of the Tariff application to be filed by the Utilities under Section 64 of the Act ?

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(ii) Whether the Appellate Tribunal has got the powers to issue directions under section 121 of the Act, 2003 to appropriate Commissions for the performance of their functions under the tariff policy issued by the Ministry of Power by taking suo moto action for determination of tariff in the absence of the Tariff application?

18. On these questions, we have heard the Learned Counsel for the State Commissions of Tamil Nadu, Tripura and Rajasthan who argued at length questioning the jurisdiction of the State Commission and Tribunal for taking suo-moto action for determination of Tariff. Similarly, the Learned Amicus Curiae Counsel also made elaborate submissions, in detail, contending that the State Commissions have got the jurisdiction to take suo-moto action for initiating proceedings for determination of ARR and Tariff and the Tribunal also has got the powers under Section 121 of the Act to issue such directions to the State Commissions in this regard to ensure that

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provisions of the Act and the Regulations framed by the Commission are complied with in letter and spirit. They also filed detailed written notes along with compilation of Regulations framed by all the State Commissions and various judgements rendered by this Tribunal as well as Hon'ble Supreme Court in support of their plea.

19. Let us now deal with the **first question** as to whether the State Commissions have got the jurisdiction to suo-moto determine the tariff in the absence of tariff application filed by the Utilities. The main grounds for the objection raised by these three Commissions on this question are summarised as follows:

- (i) No suo- moto action can be initiated by the State Commissions as it is violative of section 64 of the Electricity Act.
- (ii) The tariff determination could be done by the Appropriate Commissions for the determination of

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tariff only when the tariff application is filed by the Utilities before the Commission.

- (iii) The only option available with the Regulatory Commissions concerned is to merely ask the Utilities to comply with the provisions of the Act and to file a tariff petition and nothing more.

20. The issues raised by the three Commissions involve two questions:

- (i) Whether the State Commissions can initiate suo-moto proceedings for determination of tariff ?
- (ii) If so, can the State Commissions determine the tariff without such filing of tariff application by the Utilities?

21. Before dealing with this issue, it would be proper to refer to the objects of the Act. The perusal of the statement of objects and reasons, preamble and the provisions of the Act would reveal, the following

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objectives for the enactment of the Act providing the Powers to the State Commissions to determine the Tariff.

- (a) In order to distance the State Governments from determination of tariff as the State Electricity Boards have been unable to take decisions on tariff in an independent manner and consequently tariff has virtually been determined only by State Governments which resulted in the cross-subsidies reaching unsustainable levels.
- (b) In order to take suitable measures conducive to the development of the electricity industry and rationalisation of electricity tariff.
- (c) In order to lay down justiciable statutory principles to mandatorily guide regular tariff determination requiring cost-reflective and viable tariff determination in terms of Section 61 of the Electricity Act read with the Tariff Policy.

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22. In the light of the above objectives, it becomes necessary to consider putting in place a mechanism to effectively enforce the powers of suo-moto tariff determination in the absence of application being filed by the Utility in exercise of the various powers and functions under the Act read with Regulations and conditions of licence. The tariff determination ought to be treated as a time-bound exercise. If there is any lack of diligence on the part of the utility which led to the delay, then the State Commissions have to intervene and to play a proactive role in accordance with the Regulations framed and the Statutory policy issued for the tariff determination in time.

23. In this context, it is to be pointed out that all the State Commissions have been conferred with the delegated legislative powers u/s 61 read with Section 181 of the Act, 2003 to frame Regulations. Data collected from all the State Commissions relating to the Regulations framed and approved by the legislature on this issue would clearly indicate that the relevant Regulations relating to



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the suo-moto tariff determination have been framed by all the State Commissions including these three States who raised the jurisdictional issue. These Regulations specifically empower them to initiate suo-moto proceedings for determination of tariff. As a matter of fact, almost all the State Commissions including these three State Commissions have exercised those powers on various occasions in the past. This fact is not disputed.

24. Instead of quoting the Regulations framed in this regard by all the State Commissions we feel that it is enough to quote the relevant Regulations framed by these three States, indicating the existence of the said Powers of the State Commissions to take suo-moto action. The relevant tariff Regulations 2005 of **Tamil Nadu** with reference to the same are as follows:

***(Terms and Conditions for Determination of Tariff) Regulations 2005***

***"5. Filing of Aggregate Revenue Requirement***

(1) *The Distribution / Transmission licensee shall file the Aggregate Revenue Requirement (ARR) on or before 30<sup>th</sup> November of each year in the format prescribed, containing the details of the expected aggregate revenue that the licensee is permitted to recover at the prevailing tariff and the estimated expenditure.*

(2) *ARR shall be filed every year even when no application for determination of tariff is made.*

#### **6. Procedure for making application for Determination of Tariff**

(1) *The licensee may file the application for determination of tariff in Form 1 in Annexure 1 to the TNERC Conduct of Business Regulations. The tariff changes should normally be applied for to take effect from the 1<sup>st</sup> day of ensuing financial year and hence the application shall be filed before 30<sup>th</sup> November of Current Year along with Aggregate Revenue Requirement (ARR).*

**(8) *In case the licensee does not initiate tariff filings in time, the Commission shall initiate tariff determination and regulatory scrutiny on suo motu basis.***

#### **7. Decision on Application**

(4) *The Commission may conduct its proceedings in accordance with the provisions of the Tamil Nadu Electricity Regulatory Commission – Conduct of Business Regulations, 2004.*

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**Conduct of Business Regulations, 2004.**

**"16(1) The Commission may initiate any proceedings suo motu or on a petition filed by any affected or interested person.**

16 (3) While issuing the notice of inquiry the Commission may, in suo motu proceedings and other appropriate cases, designate an officer of the Commission or any other person whom the Commission considers appropriate to present the matter in the capacity of a petitioner in the case.

43(1) The Commission may on its own or on the application of any of the persons or parties concerned within 30 days of the making of any decision, direction or order, review such decision, directions or orders on the ground that such decision, direction or order was made under a mistake of fact, ignorance of any material fact or any error apparent on the face of the record.

**47 Subject to the provisions of the Act and these Regulations, the Commission may, from time to time, issue orders and directions in regard to the implementation of the Regulations and procedure to be followed and various matters which the Commission has been empowered by these Regulations to Specify or direct.**

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**48(1) Nothing in these Regulations shall be deemed to limit or otherwise affect the inherent power of the Commission to make such orders as may be necessary.**

25. Similarly, Tripura has also framed Regulations 2003 on this issue in its Terms and Conditions for determination of Tariff Regulation, 2003 which are as follows:

***(Terms and Conditions for Determination of Tariff) Regulations 2003***

**“3. Procedure for calculation of expected revenue**

*All Generating Companies and the licensee shall submit the petition to the Commission along with the details of calculation with relevant information and particular in line with Tripura Electricity Regulatory Commission (Conduct of Business) Regulations 2004.*

*The Petition should be filed at least 120 days in advance from the date of proposed effective date of revised tariff.*

*The Commission reserves the right suo-moto to ask the Generating Companies and the Licensees to file such an application for variation in tariff and other charges which should be filed as per TERC (CBR) Regulation, 2004.*

**8 (iii) Nothing in these Regulations shall be deemed to limit or otherwise affect the inherent power of the Commission to make such orders as may be necessary**



for meeting the ends of justice or to prevent the abuse of the process of the Commission.

**Conduct of Business Regulations, 2004.**

**16. The Commission shall have the authority, either on an application made by any interested party or suo-moto, to review, revoke, revise, modify, amend, alter, or otherwise change any order made or action taken by the Secretary or the Officers of the Commission.**

23(1) The Commission may from time to time hold such proceedings including consultations, meetings inquiries etc. as it may consider appropriate in the discharge of its functions. The Commission may appoint an officer or any other person whom the Commission considers appropriate to represent the matter as Commission's representative in the proceedings.

**25(1) The Commission may initiate any proceedings suo-moto or on a petition filed by any affected person. The petition so filed shall become a part of the proceedings.**

25(2) When the Commission initiate the proceedings, it shall be by a notice issued by the office of the Commission and the Commission may give such orders and directions as may be deemed necessary, for service of notice to the affected or interested parties; for the filling of replies and rejoinders in opposition or in support of the petition in such form as the Commission may direct. The Commission may, if it considers appropriate, issue orders for advertisement of the

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*petition inviting comments from the public or any class of person on the issue involved in the proceedings in such form as the Commission may direct.*

25(3) *While issuing the notice of inquiry the Commission may, in suo-moto proceedings and other appropriate cases, designate an officer of the Commission or any other person whom the Commission considers appropriate to present the matter in the capacity of a petitioner in the case.*

33(1) *The Commission may, at any time before passing order on the matter, require the parties or any one or more of them or any other person whom the commission considers appropriate, to produce such documentary or other evidence as the Commission may consider necessary for the purpose of enabling it to pass orders.*

33(2) *The Commission may direct the summoning of the witnesses, discovery and production of any document or other material objects producible in evidence, requisitioning any public record from any office, examination by an officer of the Commission or consultant, appointed by the Commission, the books, accounts or other documents or information in the custody or control of a person which the Commission considers relevant for the matter.*

33(3) *In accordance with the Section 193 of the Indian Penal Code 1860, whoever intentionally gives false evidence in any of the proceedings of the Commission or fabricate false evidence for the purpose of being used in any of the proceedings shall be punishable with imprisonment of either description for a term which may be extended to seven years and shall also be liable to be fined.*

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38(1) The Commission may make such orders or orders as it may consider appropriate for collection of information, inquire, investigation, entry, search and seizure and without prejudice to the generality of its powers in regard to the following:-

(a) The Commission may, at any time, direct the Secretary or any one or more officers or consultants or any other person as the Commission considers appropriate to study, investigate or furnish information with respect to any matter within the purview of the Commission under the Act.

(b) The Commission may, for the above purpose give such other directions as it may deem fit and specify the time within which the report is to be submitted or information furnished.

(c) The Commission may issue or authorize the Secretary or an Officer to issue directions to any person to produce before it and allow to be examined and kept by an Officer of the Commission specified in this behalf the books of accounts etc. or to furnish information.

(d) The Commission may, for the purpose of collecting any information particulars or documents which the Commission consider necessary in connection with the discharge of its functions under the Act, issue such directions and follow any one or more of the methods.

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(e) If any such report or information obtained appears to the Commission to be insufficient or inadequate, the Commission or the Secretary or an Officer authorized for the purpose may give directions for further inquire, report and furnishing of information.

(f) The Commission may direct such incidental, consequential and supplemental matters which may be considered relevant in connection with the above, be attended to.

43 (1) The Utilities shall provide to the Commission during the period between 15<sup>th</sup> December to 31<sup>st</sup> December every year details of its calculation for the ensuing financial -year of the expected aggregate revenue from charges based on currently approved tariff by the Commission.

**47. (1) The Commission may, on its motion or on the application of any of the person or parties concerned, within 90 days of the making of any decision, directions or order, review such decision, directions or orders and pass such appropriate orders as the Commission thinks fit.**

**53. (1) Nothing in these Regulations shall be deemed to limit or otherwise affect the inherent power of the Commission to make such orders as may be necessary for meeting the ends of justice or to prevent the abuse of the process of the Commission.**



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(2) Nothing in Regulations shall be the Commission from adopting a procedure, which is at variance with any of the provisions of the Regulations, if the Commission, in view of the special circumstances, on matter or class of matters and for reasons to be recorded in writing deems it necessary or expedient.

58. Failure to comply with any requirement of these Regulations shall not invalidate any proceedings merely by reasons of the failure unless the Commission is of the view that such failure has resulted in miscarriage of justice.

26. We will now refer to the Regulations framed by Rajasthan namely **Tariff Regulations 2009** which are as follows.

**(Terms and Conditions for Determination of Tariff)  
Regulations 2009**

**5. Preparation & submission of Annual Accounts, Reports etc.**

(1) Every transmission licensee and distribution licensee and generating company shall prepare annual statement of accounts and also prepare annual reports and statistics, giving an account of its activities during the current and previous year and likely to be undertaken in the remaining years of the MYT Control Period, including the ensuing year.

The report of activities also indicate targets and achievements in respect of various performance parameters. These reports shall be furnished to

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the Commission in duplicate, by 30th November every year.

(2) The Commission may also direct that, in addition to submission of the annual statements of accounts, a transmission licensee or distribution licensee or a generating company shall submit to the Commission or such other authority as it may designate in this behalf, such additional information as the Commission may require for the performance of its functions.

#### 8. Annual Review of Performance

(1) Where the aggregate revenue requirement and expected revenue from tariff and charges of a Generating Company or Licensee is covered under a multi-year tariff framework, then such Generating Company or Licensee, as the case may be, shall be subject to an annual performance review during the Control Period in accordance with this Regulation.

(2) The Licensee or Generating Company shall make an application for annual performance review by November 30th of every year:

Provided that the Licensee or Generating Company, as the case may be, submit to the Commission information in such form as may be stipulated by the Commission from time to time, together with the Accounting Statements, extracts of books of account and such other details as the Commission may require to assess the reasons for and extent of any variation in financial performance from the approved forecast of aggregate revenue requirement and expected revenue from tariff and charges:

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Provided further that the application for annual performance review shall be submitted to and dealt with by the Commission in the manner provided under the procedure for

Determination of Tariff under these Regulations for submission of and dealing with an application for determination of tariff and within the time limit specified in the Regulations for such application.

#### 11. Periodicity of tariff determination

(1) The Commission shall determine the tariff of a Generating Company, except Captive Power Plants (CPP) and Renewable Energy Power Plants, or Licensee covered under a multi-year tariff framework for each financial year during the Control Period, at the commencement of such financial year, having regard to the following:

a) The MYT principles specified under these Regulations;

b) The approved forecast of aggregate revenue requirement and expected revenue from tariff and charges for such financial year, including approved modifications to such forecast;

(c) Impact of truing up for previous financial year; and

(d) Approved gains and losses to be passed through in tariffs, following the annual performance review.

(2) The tariff for a transmission or distribution licensee or a generating company shall ordinarily be



determined not more than once in a year, except in case of fuel cost adjustment, wherever applicable.

3) The tariff for CPP shall be determined as per RERC (CPP) Regulations whereas the tariff for RE power generating stations, shall be determined as per Part VII of these Regulations.

**12. (8) In case the transmission or distribution licensee does not file petition under this regulation within one and half months (that is by 15th January) of submission of Annual Accounts, reports etc. under Regulation 5, the Commission may, on its own initiate proceedings for tariff determination: Provided that the tariff determined for a particular financial year of a Control Period shall remain applicable only till end of such financial year, unless otherwise the Commission approves the continuation of such Tariff for subsequent financial years.**

13.(2) After receipt of information or otherwise, the Commission may make appropriate orders regarding initiation of proceedings in accordance with the provisions of the Rajasthan Electricity Regulatory Commission (Transaction of Business) Regulations, 2005.

**Conduct of Business Regulations, 2005.**

**18. Initiation of proceedings- the Commission may initiate proceedings suo motu or on a petition filed by any affected person.**

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19. When the Commission initiates the proceedings in respect of any matter it shall be by a notice issued by the office of the Commission and the Commission may give such orders and directions as may be deemed necessary, for service of notice to the affected parties for the filing of replies and rejoinder in opposition or in support of the matter in issue or for other matters relating to conduct of the proceedings. The commission may, if it considers appropriate, publish a notice inviting comments on the issue involved in the proceedings in such form as the Commission may direct.

20. In proceedings and inquiries initiated by the Commission suo moto, the Commission may designate an officer of the Commission or any other person whom the Commission considers appropriate to present the matter in the capacity of a petitioner in the case.

49. (1) The Commission may decide the matter on the pleadings the parties or may call for the parties to produce evidence by way of affidavit or lead oral evidence in the matter.

50. Power of the commission to call for further information, evidence, etc.- The Commission may, at any time before passing order s on the matter, require the parties or any one or more of them or any other person whom the Commission consider appropriate, to produce such documentary or other evidence as the Commission may consider necessary for the purpose of enabling it to pass orders.

51. The Commission may direct summoning of witnesses, discovery and production of any document or other material objects producible in evidence, requisitioning of

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any public record from any office, examination by an officer of the Commission of books, accounts or other documents or information in the custody or control of any person which the Commission considers relevant for deciding the matter before it.

63. The Commission may make such order or orders as it fit in terms of Section 96 of the Act for collection of information, inquiry, investigation, entry, search, seizure and without prejudice to the generality of its powers in regard to the following:

a) The Commission may, at any time, direct the Secretary or an Officer or consultants or any other person as the Commission considers appropriate to study, investigate or furnish information with respect to any matter within the purview of the Commission under the Act. 11

b) The Commission may for the above purpose give such other directions as it may deem fit and specify the time within which the report is to be submitted or information furnished.

c) The Commission may issue or authorize the Secretary or an Officer to issue directions to any person to produce before it and allow to be examined and kept by an Officer of the Commission, specified in this behalf, the books, accounts, etc. or to furnish to an Officer information, etc. as provided in of Section 94 of the Act.

d) The Commission may, for the purpose of collecting any information, particulars or documents which the Commission consider necessary in connection with discharge of its functions under the Act, issue such

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*directions as may be considered necessary, as provided for in Section 96 of the Act.*

*e) If any such report or information obtained under these Regulations appears to the Commission to be insufficient or inadequate, the Commission or the Secretary or an Officer authorised for the purpose may give directions for further inquiry, report and furnishing of information.*

*f) The Commission may direct such incidental, consequential and supplemental matters be attended to which may be considered relevant in connection with the above*

**71. Issue of orders and directions-** Subject to the provisions of the and these Regulations, the Commission may, from time to time, issue orders and directions in regard to implementation of the Regulations and procedure to be followed and other matters in which the Commission has been empowered by these Regulations to specify or direct.

**72. Inherent powers of the Commission-** Nothing in these Regulations shall be deemed to limit or otherwise affect the inherent powers of the Commission to make such orders as may be necessary for meeting the ends of justice or to prevent the abuse of the process of the Commission.

**74.** Nothing in these Regulations shall be deemed to bar the Commission to deal with any matter or exercise any power under the Act for which no regulation has been framed, and the Commission may deal with such matters or exercise such power in such manner as it thinks fit."

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27. Thus, the above Regulations framed by these three State Commissions would indicate that these Commissions have been conferred with specific powers as well as inherent powers to initiate suo-moto proceedings for tariff determination in the absence of the Tariff applications. Further the status report of these three States show that these State Commissions have, in fact, exercised the said suo moto powers for determination of Tariff in the absence of the application by Utilities in the past. Tamil Nadu State Commission has exercised the said suo-moto powers for various tariff related issues and passed the orders including determination of tariff on the basis of the Tariff Regulations 2004 and 2005 on a number of occasion in regard to following aspects:

- (a) Tariff for generating plants based on non conventional energy sources,
- (b) Tariff for fossil fuel based captive generating and co-generation plants,



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(c) Tariff for grid interactive solar power generation plants, and

(d) Tariff for solar thermal projects

28. Similarly, the Tripura State Commission have also exercised these powers on various occasions, as admitted by them.

29. The Rajasthan Commission also passed orders in 117 cases out of which 40 orders have been issued in exercise of the suo-moto powers and over 10 orders relating to the tariff determination. These orders involve determination of :

(a) Tariff for wind power

(b) Tariff for captive power plant,

(c) Transmission charges levy for short term open access consumer, and

(d) Wheeling charges and cross subsidy surcharge dated 20.03.2008 and 22.08.2007).

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30. In view of the above admitted fact situation, we raised four questions to these 3 State Commissions seeking clarification.

(A) Is it fair on the part of these State Commissions who have actually framed the Regulation and notified delegated legislation to vest suo-motu powers in their hands and who have actually exercised such powers for determination of tariff in the past, now to make a plea that the said power does not exist or that such power through Regulations can not be exercised as it is contrary to the provisions of Electricity Act?.

(B) If that is the stand of these three Commissions, then why these Commissions exercised those powers conferred by the Regulations in the past by taking suo moto action for tariff determination?

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(C) If it is their stand, that these Regulations were not in consonance with Section 64 of the Act, then why these Commissions had framed such Regulations at all ?

(D) Whether the State Commissions are the proper authority to declare that their Regulations are wrong, so long as those Regulations are in force?

31. There is no answer to these questions either in their affidavits or in the written submissions filed by these State Commissions. We are really surprised over the conduct of these State Commissions who now plead as against their own Regulations approved by the legislature. Another surprising feature is that these Commissions, have failed to take note of the findings given by this Tribunal in the several judgments indicating the necessity to follow their Regulations, which are binding on them.

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32. We will now refer to some of the judgments of this Tribunal, which decided on the aspect of the suo moto Tariff determination, by the State Commissions. These judgements are as follows:

(a) In the judgement in Appeal No.204 of 2011 dated 11.8.2011 Faridabad Industries Association Vs Haryana State Commission and Ors, this Tribunal has decided two aspects:

(i) The State Commission can initiate suo-moto proceedings and determine the tariff in the absence of the proposal by the Utilities;

(ii) Such exercise by the State Commissions was valid in view of its power under Electricity Act read with Tariff Regulations.

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33. The relevant observations made by this Tribunal in the above judgement are as follows:

*“Whether the State Commission should have rejected the Petitions of the Distribution Licensees not containing any tariff proposal and, in the absence of any tariff proposal could the State Commission enhance the tariff suo moto?”*

*“Section 64 (3) of the 2003 Act provides for rejection of the application filed by the licensee if such application is not in accordance with the provisions of the Act and the rules and Regulation made there under. However, in terms of the Regulations and the Tariff Policy, the State Commission is empowered to start suo-moto proceedings to determine the tariff. The Regulations do not state that the suo moto proceedings should be initiated only if the tariff is to be reduced. On the other hand, the Regulations clearly state that if the expected revenue differs significantly from the revenue it is permitted to recover, the State Commission, in the absence of a proposal from the licensee for amendment of tariff, can initiate the proceedings for determination of tariff. Thus, the State Commission has correctly exercised its powers under its tariff Regulations for determination of tariff, suo-moto”*

**The State Commission has correctly exercised its powers to determine the tariff suo-moto in the absence of a tariff proposal by the Licensee, in accordance with the Tariff Regulations.[emphasis added).**

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34. The next decision is in Appeal No.106, etc of 2006 titled as Tamil Nadu Newsprint & Papers Ltd Vs Tamil Nadu State Commission reported as 2007 APTEL 157. In this judgement also, this Tribunal had the occasion to consider the suo-moto tariff determination by the Tamil Nadu State Commission for purchase of power from non-conventional energy sources and held that the impugned suo-moto tariff order was valid having been passed with a fair approach after due deliberations and deep consideration. It was also held that the determination of tariff was a mandatory obligation and duty of every Commission which cannot brook any delay.

35. The next judgement is MSEDCL Vs Maharashtra State Commission in Appeal No.70 of 2007. In this judgement, this Tribunal had the occasion to consider the interplay between Part VII of the Electricity Act read with the applicable multi-year tariff regulations vis-à-vis para 8.1 (7) of the National Tariff Policy. In this judgement, this Tribunal gave specific guidelines while discerning the underlying objective that when

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should the suo-moto tariff determination be resorted. The relevant observations are as follows:

"5. We now proceed to examine the tariff policy, paragraph 8.1.7 as extracted above. In our opinion the entire paragraph has to be read to interpret the expression given therein. The intention of the Government in this part of the tariff policy is to maintain discipline in the matter of date of commencement of every new tariff. The policy says that is desirable that MYT tariff should come to effect in the beginning of the financial year. The policy does not say that the tariff changes will come into effect at the commencement of the financial year irrespective of any prohibitive situation that may arise for various reasons. There can be no quarrel that if the tariff changes take place at the beginning of the financial year it becomes convenient for all the players in the electricity market as well as for the end consumers. In order to make this possible an advice is given to Appropriate Commissions to initiate tariff determination and regulatory scrutiny on a suo-moto basis in case the licensee does not initiate filings in time. However, suo-moto initiation of tariff determination may not be an easy process. A large amount of data is required for determination of tariff. Without a tariff petition being filed by a licensee the Appropriate Commission may find it quite difficult to collect and collate the necessary data and to fix a tariff. If the appropriate Commissions able to so determine the tariff on suo-moto scrutiny, the same may be different from the tariff which could have been framed on an ARR and tariff petition with relevant data filed by a licensee. It is in this context that the tariff policy says that if there is a gap of this nature the licensee should be made to bear the same. This provision has been made to discourage the licensee

*from delaying its tariff petition and for compelling the Appropriate Commission to go into suo-moto determination of the tariff in the next financial year.*

6. *Undoubtedly, the suo-moto tariff determination will commence only if the ARR filing is inordinately delayed. It is not expected that whenever ARR filing is delayed the Appropriate Commission would suo-moto start initiating the exercise of tariff determination. In our considered view, the last clause of Para 8.1.7 of the tariff policy comes into play only when the ARR filing is so enormously delayed that the appropriate Commission is made to issue a tariff of its own suo-moto regulatory scrutiny.*

36. In the above judgments, this Tribunal gave the following directions and guidelines:

(a) The intention of the Government in this part of the tariff policy is to maintain the discipline regarding the date of commencement of every new tariff. To make it possible an advice is given to appropriate Commissions to initiate tariff determination and **regulatory scrutiny on suo-moto basis in case a licensee does not initiate filing in time.**



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- (b) Without a tariff petition being filed by a licensee, the Appropriate Commission may find it quite difficult to collect and collate the necessary data and to fix the tariff. It is in this context, the tariff policy says that if there is a gap on account of delay in filing, the licensee should be made to bear the same. This provision has been made to discourage the licensee from delaying its tariff petition and for compelling the Appropriate commission to go into suo-moto determination of tariff for the next financial year.
- (c) The suo-moto tariff determination will commence only if the ARR filing is inordinately delayed. The last clause of para 8.1.(7 ) of the tariff policy comes into play only when the ARR filing is so enormously delayed that the appropriate Commission is made to issue a tariff on its own suo-moto regulatory scrutiny. The financial implication of the delay is nothing but the carrying cost. The consumers cannot be burdened with this resulting



carrying cost because the delay has not been caused on account of their default.

37. We will now see the other judgements. The next judgement is in Appeal No.192 of 2010 dated 28.7.2011 titled Tamil Nadu Electricity Consumers Association vs Tamil Nadu Electricity Board. In this Judgement also the Tribunal has held that in case the Utilities do not file the Petition for determination of ARR and tariff in time, the State Commission should initiate the tariff determination and Regulatory scrutiny on suo-moto basis. The relevant observations made by this Tribunal is are follows:

*"7.6. While we do not want to interfere with the findings of the State Commission regarding the accumulated losses for the previous years, we are concerned with the fact that the first respondent filed a petition for determination of ARR and tariff after a gap of seven years. The first tariff petition was filed by the first respondent in September, 2002 on the basis of which the State Commission passed the tariff order dated 15.3.2003. Thereafter, the petition for determination of tariff/ARR was filed only on 18.1.2010 for the Control Period 2010-13. During the intervening period the respondent no. 1 has*

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accumulated huge financial losses, to the tune of Rs. 16700 Crores ending FY 2008-09. We fail to understand as to why the first respondent did not file the petition for ARR and tariff every year during this period and if the first respondent was failing to do so why the State Commission did not initiate suo motu proceedings in the matter. Besides the retail tariff, the State Commission has to regulate the electricity purchase and procurement process and approve capitalization of the assets of the distribution licensee for which the Annual Revenue Requirement has got to be approved by the State Commission.

7.7. In this connection let us examine the 2005 Regulations. The relevant Regulation 5 is reproduced below:

**"5. Filing of Aggregate Revenue Requirement**

(1) The Distribution / Transmission licensee shall file the Aggregate Revenue Requirement (ARR) on or before 30th November of each year in the format prescribed, containing the details of the expected aggregate revenue that the licensee is permitted to recover at the prevailing tariff and the estimated expenditure.

(2) ARR shall be filed every year even when no application for determination of tariff is made".

(6). Procedure for making application for Determination of Tariff:

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(8) In case the licensee does not initiate tariff filings in time, the Commission shall initiate tariff determination and regulatory scrutiny on suo motu basis".

Thus, according to the Regulations the licensee has to file the ARR every year even when no application for determination of tariff is made and in case the licensee does not initiate the tariff filing in time, the State Commission has to initiate the same suo motu.

7.8. In the present case the Regulations were clearly violated by the first respondent and the State Commission also remained a silent spectator.

7.9. The present situation in which the first respondent has landed itself with large accumulated financial losses, is neither in its own interest for smooth operation of the system nor in the interest of the consumers for maintaining a reliable power supply. If the first respondent is in poor financial health, then it is doubtful that it can maintain a reliable power supply to the consumers. We, therefore, direct the first respondent and its successor companies to regularly file their respective petitions for determination of Annual Revenue Requirement and Tariff every year, in time, according to the Regulations. In case the successor companies do not file the petition for determination of ARR and tariff in time, the State Commission should initiate the tariff determination and regulatory scrutiny on suo moto basis".

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38. In this decision following findings and directions have been given by this Tribunal:

(a) The first tariff order was filed by the Tamil Nadu Electricity Board before the State Commission for determination of ARR and tariff in September, 2002. The State Commission passed the tariff order on the basis of its petition on 15.3.2003. Thereafter, the Electricity Board filed a petition only on 18.1.2010 i.e after a gap of seven years. The Tribunal is not able to understand as to why the electricity board did not file its petition for ARR and tariff every year. Similarly, if the Electricity Board had not filed the said petition, there was no reason as to why the State Commission did not initiate suo-moto proceedings in the matter.

(b) The relevant regulations 5.2 of the 2005 Regulations would provide that ARR should be filed every year even when no application for determination of tariff was made.

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The Regulation 5 (8) specifically provides that the Commission should initiate tariff determination and regulatory scrutiny on suo-moto basis in case the Utilities had not initiated tariff filing in time. In the present case, the State Commission remained as a silent spectator without following the above Regulations.

(c) The Tribunal directed the Electricity Boards and its successor Companies to regularly file their petitions for determination of tariff and ARR every year according to Regulations. In case they do not file the petition in time, the State Commission should initiate the tariff determination and tariff scrutiny on suo-moto basis.

39. Thus the above issues have already been decided as the ratio and suitable directions have been issued by this Tribunal on the strength of the Regulations framed by the State Commissions in the judgments already rendered by the Tribunal. These judgements of this Tribunal have attained

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finality. There is one more aspect to be mentioned here. In the matter of Tamil Nadu Electricity Consumers Association Vs TNEB the Tribunal rendered a judgment in Appeal No.192/2010 on 28.7.2011, which we have earlier mentioned. In the present matter, Tamil Nadu State Commission filed the written submission before this Tribunal, stating that the Tamil Nadu Commission had followed Tariff Regulations which followed the National Tariff Policy which are in consonance with the provisions of the Electricity Act, 2003. We have accepted this plea by the State Commission. When such being the case, we are unable to understand as to why Tamil Nadu State Commission has now taken a different stand that they may not be able to follow the Regulations.

40. As indicated above, this present stand taken by these State Commissions is exactly opposite to the earlier stand taken as well as the ratio decided by this Tribunal in various judgements including the last judgement which was rendered on 28.7.2011 in Appeal No.192 of 2010.


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41. As a matter of fact, the Hon'ble Supreme Court has held that the Regulations framed by the Commissions are binding as a delegated legislation on the Commissions and as such the Regulatory Commissions are obliged to determine tariff in exercise of the powers in accordance with these Regulations. The relevant observations made by the Hon'ble Supreme Court in the matter of Power Trading Corporation Vs CERC is as follows:

*"40. As stated above, the 2003 Act has been enacted in furtherance of the policy envisaged under the Electricity Regulatory Commissions Act, 1998 as it mandates establishment of an independent and transparent Regulatory Commission entrusted with wide ranging responsibilities and objective, inter alia, including protection of the consumers of electricity. Accordingly, the Central Commission is set up under Section 76 (1) to exercise the powers conferred on, and in discharge of the functions assigned to, it under the Act. On reading Sections 76 (1) and 79 (1) one finds that Central Commission is empowered to take measures/steps in discharge of the functions enumerated in Section 79 (1) like to regulate the Tariff of generating companies, to regulate the inter-State transmission of electricity, to determine Tariff for inter State transmission of electricity, to issue licences, to adjudicate upon disputes, to levy*





fees, to specify the Grid Code, to fix the trading margin in inter- State trading of electricity, if considered necessary etc. These measures, which the Central Commission is empowered to take, have got to be in conformity with the Regulations under Section 178, wherever such Regulations are applicable. Measures under Section 79 (1), therefore, have got to be in conformity with the Regulations under Section 178. To regulate is an exercise which is an exercise which is different from making of the regulations. However, making of a regulation under Section 178 is not a pre-condition to the Central Commission taking any steps/measures under Section 79(1). As stated, if there is a regulation, then the measure under Section 79(1) has to be in conformity with such regulation under Section 178. This principle flows from various judgments of this Court which we have discussed hereinafter. For example, under Section 79(1)(g) the Central Commission is required to levy fees for the purpose of the 2003 Act. An Order imposing regulatory fees could be passed even in the absence of a regulation under Section 178. If the levy is unreasonable, it could be the subject matter of challenge before the Appellate Authority under Section 111 as the levy is imposed by an Order/decision making process. Making of a regulation under Section 178 is not a pre-condition to passing of an Order levying a Regulatory fee under Section 79(1)(g). However, if there is a regulation under Section 178 in that regard then the Order levying fees under Section 79(1)(g) has to be in consonance with such regulation. Similarly, while exercising the power to frame the terms and conditions for determination of tariff under Section 178, the Commission has to be guided by the factors specified in Section 61: It is open to the Central Commission to specify terms and conditions for determination of tariff even in the absence of the regulations under Section 178. However, if a regulation is made under Section 178, then, in that event, framing of

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terms and conditions for determination of tariff under Section 61 has to be in consonance with the regulation under Section 178. One must keep in mind the dichotomy between the power to make a regulation under Section 178 on one hand and the various enumerated areas in Section 79(1) in which the Central Commission is mandated to take such measures as it deems fit to fulfil the objects of the 2003 Act. Applying this test to the present controversy, it becomes clear that one such area enumerated in Section 79(1) refers to fixation of trading margin. Making of a regulation in that regard is not a pre-

condition to the Central Commission exercising its powers to fix a trading margin under Section 79(1)(j), however, if the Central Commission in an appropriate case, as is the case herein, makes a regulation fixing a cap on the trading margin under Section 178 then whatever measures a Central Commission takes under Section 79(1)(j) has to be in conformity with Section 178. One must understand the reason why a regulation has been made in the matter of capping the trading margin under Section 178 of the Act. Instead of fixing a trading margin (including capping) on a case to case basis, the Central Commission thought it fit to make a regulation which has a general application to the entire trading activity which has been recognized, for the first time, under the 2003 Act. Further, it is important to bear in mind that making of a regulation under Section 178 became necessary because a regulation made under Section 178 has the effect of interfering and overriding the existing contractual relationship between the regulated entities. A regulation under Section 178 is in the nature of a subordinate Legislation. Such subordinate Legislation can even override the existing contracts including Power Purchase Agreements which have got to be aligned with the regulations under Section 178 and which could not have

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*been done across the board by an Order of the Central Commission under Section 79(1)(j)"*

42. The above mandate issued by the Hon'ble Supreme Court would reveal the following factors.

(a) Making of a Regulation under section 178 is not a pre-condition to passing of an order levying a regulatory fee under section 79 (1) (g). However, if there is a Regulation under Section 178 in that regard, then the order levying fees under Section 79 (1) (g) has to be in consonance with the Regulation.

(b) Similarly, while exercising the power to frame the terms and conditions for determination of tariff under section 178, the Commission has to be guided by the factors specified in Section 61. It is open to the Central Commission to specify terms and conditions for

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determination of Tariff even in the absence of Regulations.

(c) If a Regulation is made under Section 178, then in that event framing of terms and condition for determination of tariff under Section 61 has to be in consonance with the Regulation under Section 178.

(d) All these observations which relate to the Central Commission, would apply to the State Commissions as well, as the State Commissions have got the powers to frame Regulations under Section 181 of the Act, 2003

43. It is strangely contended by the Tamil Nadu Commission that the Regulations would not prevail over Section 64 of the Act. It is settled position of law that the procedures as provided under section 64 of the Act are to be considered as handmaid of justice which cannot be read in a manner to frustrate the letter and spirit of the underlying statutory

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provisions and substantive rights related to regular, cost reflective tariff determination and the statements of objects and reasons read with Section 62 of the Electricity Act. Further, as held by the Hon'ble Supreme Court as well as this Tribunal in various decisions that the quasi judicial authorities (like the State Electricity Regulatory Commissions) are vested with more liberal powers to adopt more flexible processes to fulfil their statutory objectives with purposeful efficiency. This principle has been laid down in the following decisions:

(i) National Sewing Thread Co. vs. James Chadwick: AIR 1953 SC 357 at paras 8 & 9 .

(ii) Vasanlal Maganbhai Sanjanwada vs. State of Bombay: AIR 1961 SC 4 at paras 4,6,9,16 & 17.

(iii) B Prabhakar Rao vs. Desari Panakala Rao: (1976) 3 SCC 550 at paras 10 and 13.

(iv) AR Antulay vs. RS Nayak: (1988) 2 SCC 602 at para 83.

(v) Shree Vijay Cotton & Oil Mills Ltd., vs. State of Gujarat (1991) 1 SCC 262 at para 16.

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(vi) Dhannalal vs. Kalwatibai & Ors (2002) 6 SCC 16 at para 20-24.

(vii) Uday Shankar Triyar vs. Ram Kalewar Prasad Singh (2006) 1 SCC 75, para 17.

(viii) SIEL Ltd. Vs. Punjab SERC: 2007 ELR (APTEL)1931 at para 48 (Placed in AC Vol V at page 319-407).

44. In view of the ratio laid down in these decisions, the contention of these three State Commissions that the only option available with the Commission is merely to ask the licensee to comply with the provision of the Act and to file the tariff petition under section 64 and nothing more is wholly misconceived and misplaced. Therefore, we are to conclude that the State Commissions can initiate suo-moto proceedings and collect the data and information and give suitable directions and then to determine the tariff even in the absence of the application filed by the utilities by exercising the powers under the provisions of the Act as well as the tariff regulations. Thus, the 1<sup>st</sup> question is answered accordingly.

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45. Let us now deal with the **next Question** i.e. "Whether this Tribunal has got jurisdiction to issue directions to the State Commissions under Section 121 of the Act for suo-moto determination of tariff"?

46. According to Tamil Nadu State Commission, the jurisdiction of this Tribunal under Section 121 of the Act is limited to the issuance of directions to the Appropriate Commissions for performance of its statutory functions under the provisions of Electricity Act alone and it cannot issue directions to the State Commission for suo-moto determination of tariff under the tariff policy as the same would be beyond jurisdiction.

47. This is a preposterous proposition. As referred to in the earlier paragraphs, we have held that the suo-moto jurisdiction is vested in the hands of the State Commissions by way of Regulations. According to Hon'ble Supreme Court, these

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Regulations are statutory and binding delegated legislations which have to be mandatorily followed by the Commissions. In case of failure on the part of the Commissions to follow their own Regulations for performing their statutory duties, this Tribunal has certainly got the powers under section 121 of the Electricity Act to issue such directions to the State Commissions to perform those statutory functions in accordance with the Regulations. The relevant portions of the Supreme Court judgement in PTC India Ltd v CERC and Ors reported as (2010) 4 SCC 603/ELR (SC) 269 are as follows:

*"52. Before concluding on this topic, we still need to examine the scope of Section 121 of the 2003 Act. In this case, appellant(s) have relied on Section 121 to locate the power of judicial review in the Tribunal. For that purpose, we must notice the salient features of Section 121. Under Section 121, there must be a failure by a Commission to perform its statutory function in which event the Tribunal is given authority to issue orders, instructions or directions to the Commission to perform its statutory functions. Under Section 121 the Commission has to be heard before such orders, instructions or directions can be issued.*



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53. The main issue which we have to decide is the nature of the power under Section 121. In the case of *M/s Raman and Raman Ltd. v. State of Madras and Ors.* reported in AIR 1959 SC 694, Section 43A of Motor Vehicles Act, 1939, ("1939 Act"), as amended by Madras Act 20 of 1948, came for consideration before the Supreme Court. Section 43A conferred power on the State Government to issue "orders" and "directions", as it may consider necessary in respect of any matter relating to road transport to the State Transport Authority or a Regional Transport Authority. The meaning of the words "orders" and "directions" came for interpretation before the Supreme Court in the said case. It was held, on examination of the Scheme of the Act, that Section 43A was placed by the legislature before the sections conferring quasi-judicial powers on Tribunals which clearly indicated that the authority conferred under Section 43A was confined to administrative functions of the Government and the Tribunals rather than to their judicial functions. It was further held that the legislature had used two words in the section: (i) orders; and (ii) directions. This Court further noticed that under the 1939 Act there was a separate Chapter which dealt with making of "rules" which indicated that the words "orders" and "directions" in Section 43A were meant to clothe the Government with the authority to issue directions of administrative character. It was held that the source of power did not affect the character of acts done in exercise of that power. Whether it is a law or an administrative direction depends upon the character or nature of the orders or directions authorized to be issued in exercise of the power conferred. It was, therefore, held that the words "orders" and "directions" were not laws. They were binding only on the Authorities under the Act. Such orders and directions were not required to be published. They were not kept for scrutiny by legislature. It was further held that such orders and directions did not override the

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discretionary powers conferred on an authority under Section 60 of the 1939 Act. It was observed that non compliance of such orders, instructions and directions may result in taking disciplinary action but they cannot affect a finding given by the quasi-judicial authority nor can they impinge upon the rules enacted by the rule-making authority. It was held that such orders and directions would cover only an administrative field of the officers concerned and therefore such orders and directions do not regulate the rights of the parties. Such orders and directions cannot add to the considerations/topics prescribed under Section 47 of the 1939 Act on the basis of which an adjudicating authority is empowered to issue or refuse permits, as the case may be.

54. Applying the tests laid down in the above judgment to the present case, we are of the view that, the words "orders", "instructions" or "directions" in Section 121 do not confer power of judicial review in the Tribunal. It is not possible to lay down any exhaustive list of cases in which there is failure in performance of statutory functions by Appropriate Commission. However, by way of illustrations, we may state that, under Section 79(1)(h) CERC is required to specify Grid Code having regard to Grid Standards. Section 79 comes in Part X. Section 79 deals with functions of CERC. The word "grid" is defined in Section 2(32) to mean high voltage backbone system of interconnected transmission lines, sub-station and generating plants. Basically, a grid is a network. Section 2(33) defines "grid code" to mean a code specified by CERC under Section 79(1)(h). Section 2(34) defines "grid standards" to mean standards specified under Section 73(d) by the Authority. Grid Code is a set of rules which governs the maintenance of the network. This maintenance is vital. In summer months grids tend to trip.

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In the absence of the making of the Grid Code in accordance with the Grid Standards, it is open to the Tribunal to direct CERC to perform its statutory functions of specifying the Grid Code having regard to the Grid Standards prescribed by the Authority under Section 73. One can multiply these illustrations which exercise we do not wish to undertake. Suffice it to state that, in the light of our analysis of the 2003 Act, hereinabove, the words orders, instructions or directions in Section 121 of the 2003 Act cannot confer power of judicial review under Section 121 to the Tribunal, which, therefore, cannot go into the validity of the impugned Regulations 2006, as rightly held in the impugned judgment".

48. The above decision would make it clear that even though this Tribunal has no powers to go into the validity of the Regulations framed by the Commissions the powers are vested with this Tribunal to interpret those Regulations. If the Tribunal finds that those Regulations have not been followed by the State Commissions, then this Tribunal certainly has got the powers, to direct the Commissions to perform its statutory functions as per the Regulations. As a matter of fact, this Tribunal is duty-bound to give directions to the Commissions to strictly follow the Regulations to achieve the objective of the Act. The Tribunal can not simply keep quiet as a idle spectator.

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If the Tribunal has not given such directions through timely intervention, it would be a dereliction of duty on the part of this Tribunal.

49. Let us now see the other judgments. The next decision is in the case of Uttar Pradesh Power Corporation Ltd Vs NTPC reported as (2009) 6 SCC 235 dated 03 March, 2009 which is as under:

*"46. The Concept of regulatory jurisdiction provides for revisit of the tariff. It is now a well-settled principle of law that a subordinate legislation validly made becomes a part of the Act and should be read as such".*

50. In the above decision, the Hon'ble Supreme Court has laid down that subordinate legislation, namely Regulations, validly approved by the legislation, would become the part of the Act and should be read as such.

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51. The next decision is in the case of Cellular Operators Association of India vs Union of India reported as (2003) 3 SCC 186 which is as under:

"27. TDSAT was required to exercise its jurisdiction in terms of Section 14A of the Act. TDSAT itself is an expert body and its jurisdiction is wide having regard to sub-section (7) of Section 14A thereof. Its jurisdiction extends to examining the legality, propriety or correctness of a direction/order or decision of the authority in terms of sub-section (2) of Section 14 as also the dispute made in an application under sub-section (1) thereof. The approach of the learned TDSAT, being on the premise that its jurisdiction is limited or akin to the power of judicial review is, therefore, wholly unsustainable. The extent of jurisdiction of a court or a Tribunal depends upon the relevant statute. TDSAT is a creature of a statute. Its jurisdiction is also conferred by a statute. The purpose of creation of TDSAT has expressly been stated by the Parliament in the Amending Act of 2000. TDSAT, thus, failed to take into consideration the amplitude of its jurisdiction and thus misdirected itself in law. TDSAT was required to exercise its jurisdiction in terms of Section 14A of the Act. TDSAT itself is an expert body and its jurisdiction is wide having regard to sub-section (7) of Section 14A thereof. Its jurisdiction extends to examining the legality, propriety or correctness of a direction/order or decision of the authority in terms of sub-section (2) of Section 14 as also the dispute made in an application under sub-section (1) thereof. The approach of the learned TDSAT, being on the premise that its jurisdiction is limited or akin to the power of judicial review is, therefore, wholly unsustainable. The extent of



*jurisdiction of a court or a Tribunal depends upon the relevant statute. TDSAT is a creature of a statute. Its jurisdiction is also conferred by a statute. The purpose of creation of TDSAT has expressly been stated by the Parliament in the Amending Act of 2000. TDSAT, thus, failed to take into consideration the amplitude of its jurisdiction and thus misdirected itself in law.*

52. In this case the Hon'ble Supreme Court held that TDSAT is an expert body and its jurisdiction is wide and it was required to exercise its jurisdiction as per the provisions of the Act. This would apply to this Tribunal as well.

53. Now let us quote Section 121 of the Electricity Act. The same is reproduced below:

**"Section 121 of the Electricity Act.**

*The Appellate Tribunal may, after hearing the Appropriate Commission, or other interested party, if any, from time to time, issue such orders, instructions, or directions as it may deem fit, to any Appropriate Commission for the performance of its statutory functions under this Act."*

54. This section confers powers to Appellate Tribunal to issue such directions to any Appropriate Commission whenever it

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finds that the Commission has not performed its statutory functions. This power has been conferred on this Tribunal to ensure that the statutory functions of the Commission as prescribed under the Act and the Regulations are performed by the Commissions.

55. We will now refer to Section 94 of the Act. It vests extensive powers in the hands of the State Electricity Regulatory Commissions to summon, discover and enforce production of documents/records, receive evidence, etc. In furtherance of those powers various State Electricity Regulatory Commissions have notified Regulations under Section 181 and 94 of the Electricity Act. As stated above, these three State Commissions which have raised the jurisdictional issue, have framed Regulations conferring powers on the Commissions to summon and enforce production of documents, public records and evidence etc, and to direct the Utilities to follow the mandates. In the event of failure to comply with directions,

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the Commissions have got the powers to punish those Utilities for non compliance of those directions.

56. It is to be pointed out in this context, that the legislative intent in enacting the Act, 2003 is to secure effective Regulations characterised by tariff rationalisation with timely cost reflective tariff determination based on the principles set out in Section 61 read with the National Tariff Policy. The various provisions such as Section 94, 128, 129, 130, 142 and 146 empower the State Commissions to secure discovery of all relevant materials and enforce directions. Similarly, the respective tariff regulations and conduct of business Regulations notified by the State Commissions have enough provisions to call for and collect information and to enforce directions. Therefore, the hands of the State Commission cannot assumed to be tied-up to prevent them from enforcing the statutory mechanism. There are decided cases by the Hon'ble Supreme Court as well as by this Tribunal in which it is held that the State Commissions have complete powers to



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impose conditions, to frame regulations and to issue directions as also to enforce them. The relevant decisions are as under:

(a) The relevant portion of the decision rendered in the case of Maharashtra Electricity Regulatory Commissions V Reliance Energy Ltd reported as (2007) 8 SCC 381 is as under:

*"9. The question before us is: what is the power of the and to what extent the Commission can issue directions. Suffice it to say that the Regulatory Commission was constituted under the Electricity Act, 2003. The Act was a new enactment which was promulgated by superseding the Electricity Act, 1910 and the Electricity (Supply) Act, 1948. The statement of objects and Reasons of the Act which have been summarised in the Preamble reads as under:*

*"An act to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalisation of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and*

*environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto”.*

16. *A comprehensive reading of all these provisions leaves no manner of doubt that the Commission is empowered with all powers right from granting licence and laying down the conditions of licence and to frame regulations and to see that the same are properly enforced and also power to enforce the conditions of licence under sub section (6) of Section 128”.*

(b) The next decision is in the case of Central Power Distribution Co. Vs CERC reported as (2007) 8 SCC 197:

*“22.3: As already noticed, the Central Commission has the power and function to evolve commercial mechanism such as imposition of UI charges to regulate and discipline. It is well settled that a power to regulate includes within it the power to enforce”*

(c) The next decision is in the case of BSES Rajdhani Power Ltd Vs Delhi Electricity Regulatory Commission & Anr. reported as (2009) ELR (APTEL) 0352: The relevant observations are as follows:

*“18. To find out the answer for this question, it is appropriate to refer to the relevant observations made by the Supreme Court in 2007 8 SCC 381,*

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MSEDC Vs. Reliance Energy Ltd. and the same is contained in para 18, which is as follows:

“There can be no manner of doubt that the Commission has full powers to pull up any of its licensee to see that the rules and Regulations laid down by the Commission are properly complied with. After all, it is the duty of the Commission under Sections 45(5), 52, 55(2), 57, 62, 86, 128, 129, 181 and other provisions of the Act to ensure that the public is not harassed .....

The above observation would clearly indicate that the Supreme Court endorses the power of the State Commission to pull up the licensee/distribution company and punish them, whenever the Commission finds that there are violations of rules and Regulations, and licensing conditions framed by the State Commission. It is further mandated by the Supreme Court that it is the duty of the State Commission to take action against the distribution licensees who harass the consumer public, by violating the rules and conditions under the powers conferred under the Sections 45, 52, 55, 57, 62, 86, 128, 129 and 181 of the Act. In other words, the Supreme Court gives clear indication about the existence of the independent powers of the State Commission to deal with breach of licensing conditions and Regulations by the distribution licensees to protect the interest of the public.

57. This Tribunal has repeatedly held that regular and timely truing-up expenses must be done since:

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(a) No projection can be so accurate as to equal the real situation.

(b) The burden/benefits of the past years must not be passed on to the consumers of the future.

(c) Delays in timely determination of tariff and truing-up entails:

(i) Imposing an underserved carrying cost burden to the consumers, as is also recognised by para 5.3 (h) (4) of National Tariff Policy.

(ii) Cash flow problems for the licensees.

58. A similar position is reflected in the tariff Regulations framed by various State Commissions. These regulations



would stipulate that the approved gains and losses have to be passed through the tariff following the True-up.

59. Tariff determination ought to be treated as a time bound exercise. If there is any lack of diligence on the part of the Utilities which has led to the delay, the State Commission must play a pro-active role in ensuring the compliance of the provisions of the Act, Regulations and the Statutory Policies under the Electricity Act, 2003.

60. In the absence of the performance of functions and duties enjoined under the Act and Regulations by the State Commission, it is the duty of the Tribunal to intervene and wake them up from their deep slumber and to make them act to ensure that the Regulations are being followed scrupulously by the Commissions as well as the Utilities.

61. It is quite strange on the part of the State Commissions to contend that they may not follow their own Regulations as they

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would not prevail over Section 64 of the Act and therefore, they have to keep quite without taking any steps for performing their functions. This plea is made by these Commissions even though they have got the powers to take a suo-moto action for determination of tariff by virtue of the Regulations and the policies. As indicated above, Section 64 provides for procedure to ultimately achieve the purpose which is more important. It is quite surprising to notice that the State Commissions have taken up the stand to plead before this Tribunal that their own Regulations are wrong. How can they take such a stand, so long as those Regulations approved by the legislature are in force? This monstrous plea taken by the three State Commissions would indicate only one thing i.e. State Commissions have ventured to give mere lame excuses for non performance of their statutory duties. In such a surprising and shocking situation, it becomes our bounden duty to invoke the powers under section 121 of the Act, to intervene and to put the house in proper order.

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62. Let us now refer to some of the strange features that we noticed from the information furnished by the State Commissions. It is seen that some of the Commissions are leaving uncovered revenue gap in the ARR as a routine, with or without creating regulatory assets. The interest charges on the regulatory assets are also not being allowed in the ARR of the Tariff Order. This, in our view, is not in order as it may create a problem of cash flow for the distribution licensees which are already burdened with heavy debts. The cash flow problem may result in constraints in procurement of power by the distribution licensees and operation and maintenance of the distribution net work affecting the reliability of power supply to the consumers. This Tribunal in a recent Judgment in Appeal no. 192 of 2010 dated 28.07.2011 in the matter of Tamil Nadu Electricity Consumers' Association vs. Tamil Nadu Electricity Board, etc. has dealt with the issue of Regulatory Assets. The relevant extracts are reproduced below:

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"8.4. Let us first examine the provisions of the Tariff Policy in this regard. The relevant extracts are as under:

*"8.2.2. The facility of a regulatory asset has been adopted by some Regulatory Commissions in the past to limit tariff impact in a particular year. This should be done only as exception, and subject to the following guidelines:*

- a. *The circumstances should be clearly defined through regulations, and should only include natural causes or force majeure conditions. Under business as usual conditions, the opening balances of uncovered gap must be covered through transition financing arrangement or capital restructuring;*
- b. *Carrying cost of Regulatory Asset should be allowed to the utilities;*
- c. *Recovery of Regulatory Asset should be time-bound and within a period not exceeding three years at the most and preferably within control period;*
- d. *The use of the facility of Regulatory Asset should not be repetitive.*



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e. In cases where regulatory asset is proposed to be adopted, it should be ensured that the return on equity should not become unreasonably low in any year so that the capability of the licensee to borrow is not adversely affected”.

The Tariff Policy stipulates creation of the regulatory asset only as an exception subject to the guidelines specified above. According to the guidelines the circumstances under which the regulatory assets should be created are under natural causes or force majeure conditions.”

“8.8. We are of the opinion that the regulatory asset created by the State Commission is not in consonance with the Tariff Policy and its own Regulations. Moreover, the impugned order does not provide for recovery of the regulatory assets with the carrying cost as envisaged in the Regulations and the Tariff Policy.”

“8.10. Now, the question arises whether the creation of the regulatory asset is in the interest of the distribution company and the consumers. The respondent no. 1 will

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have to raise debt to meet its revenue shortfall for meeting its O&M expenses, power purchase costs and system augmentation works. It is not understood how the respondent no. 1 will service its debts when no recovery of the regulatory asset and carrying cost has been allowed in the ARR. Thus, the respondent no. 1 will suffer with cash flow problem affecting its operations and power procurement which will also have an adverse effect on maintaining a reliable power supply to the consumers. Thus, creation of the regulatory asset will neither be in the interest of the respondent no. 1 nor the consumers. "

"8.12. According to Shri Rajah, learned Senior counsel for the appellants, the regulatory assets could not be created for the anticipated shortfall in revenue. We are in agreement with the contention of the Senior counsel. The Regulations clearly state that the Regulatory Asset can be created when the licensee could not fully recover the reasonably incurred cost at tariff allowed for reasons

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*beyond his control under natural calamities and force majeure conditions. Thus, we hold that the creation of the regulatory assets on the basis of projected shortfall in revenue, that too without any directions for time bound recovery for the regulatory asset alongwith its carrying cost, is in contravention of the Tariff Policy and the 2005 Regulations".*

63. In this case the Tribunal held that the regulatory asset created by the State Commission was not in consonance with the Tariff Policy and the Tariff Regulations of the State Commission which clearly define the circumstances under which the regulatory asset can be created. Further, the creation of the regulatory asset without any directions for carrying cost and time bound recovery was neither in the interest of the distribution licensee nor the consumers.

64. We also notice that most of the State Commissions have not provided in their Regulations Fuel & Power Purchase Cost

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Adjustment Formula for allowing the increase in fuel and power purchase cost during the tariff year. The fuel and power purchase cost adjustment mechanism provided in most of the states is after completion of the financial year through a separate proceeding which takes a long time. The power purchase cost is a major expenditure in the ARR of the distribution licensee. The fuel and power purchase cost is also uncontrollable and it has to be allowed as quickly as possible according to the Tariff Policy. The Electricity Act, 2003 under Section 62(4) has specific provision for amendment of the tariff more frequently than once in any financial year in terms of Fuel Surcharge Formula specified by the Regulations. A major part of power procured by the distribution company comes from the Central Sector Generating Companies whose tariff is regulated by the Central Commission and the State owned Generation Companies whose tariff is regulated by the State Commissions. The Central Commission in its Tariff Regulations has already provided a formula for fuel price adjustment and the charges of the generation companies are increased as and when the fuel

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prices are increased. In view of the present precarious financial conditions of the distribution companies, it would be necessary that the State Commissions also to provide for Power Purchase Cost Adjustment Formula as intended in the section 62(4) of the Act to compensate the distribution companies for the increase in cost of power procurement during the financial year. In the above situation, as indicated above it has become necessary for this Tribunal to give appropriate directions, to correct this situation by invoking the powers under Section 121 of the Act which is permissible under law. So, the second question is also answered accordingly.

65. In view of the analysis and discussion made above, we deem it fit to issue the following directions to the State Commissions:

- (i) Every State Commission has to ensure that Annual Performance Review, true-up of past expenses and Annual Revenue Requirement and tariff**

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determination is conducted year to year basis as per the time schedule specified in the Regulations.

(ii) It should be the endeavour of every State Commission to ensure that the tariff for the financial year is decided before 1<sup>st</sup> April of the tariff year. For example, the ARR & tariff for the financial year 2011-12 should be decided before 1<sup>st</sup> April, 2011. The State Commission could consider making the tariff applicable only till the end of the financial year so that the licensees remain vigilant to follow the time schedule for filing of the application for determination of ARR/tariff.

(iii) In the event of delay in filing of the ARR, truing-up and Annual Performance Review, one month beyond the scheduled date of submission of the petition, the State Commission must initiate suo-moto proceedings for tariff determination in accordance

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with Section 64 of the Act read with clause 8.1 (7) of the Tariff Policy.

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

(v) Truing up should be carried out regularly and preferably every year. For example, truing up for the

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financial year 2009-10 should be carried out along with the ARR and tariff determination for the financial year 2011-12.

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



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66. We direct all the State Commissions to follow these directions scrupulously, and send the periodical reports by 1<sup>st</sup> June of the relevant financial year about the compliance of these directions to the Secretary, Forum of Regulators, who in turn will send the status report to this Tribunal and also place it on its website.

67. Before parting with this case, we are duty bound to record our heartfelt appreciation for the services rendered by all the learned Amicus Curiae Counsel namely **Mr. M G Ramachandran, Mr. R K Mehta , Mr. Amit Kapur, and Mr. Buddy A Ranganadhan** who made thorough preparation and filed their written submissions to enable this Tribunal to have a clarity over the core of the issues and to give suitable directions to all the State Commissions on a proper conclusion.

68. In particular, we shall make a special mention about **Mr. Amit Kapur**, the learned Amicus Curiae Counsel who argued the matter elaborately and effectively in a lucid language for a

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number of days on behalf of all the Amicus Curiae Counsel which made our task easy. We express our gratitude to all the Amicus Curiae Counsel, who have rendered valuable services by taking enormous pain for preparation and presentation of the matter on all the hearings which were held on several days.

69. In view of their contribution, we feel that they are to be suitably remunerated. In fact they have not only spent time during several hearings but also they would have incurred expenditure in preparing the documents and copies of Regulations of all the State Commissions in all over India and filing the same in the spiral bound form in several volumes. Therefore, we deem it appropriate to fix their legal fees at Rs.1 lac each for all the 4 Amicus Curiae Counsel. Accordingly, the Registry is directed to pay the amount of Rs.1 lac each to the learned Amicus Curiae Counsel.

70. It is also our duty to record our appreciation for the prompt services rendered by the **Secretary of Forum of**

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**Regulators** who collected all data and information from all the State Commissions and placed it before the Tribunal.

71. Similarly, the initiative taken by **Mr. P. Uma Shankar, the Secretary of the Power Ministry** to send a letter to this Tribunal giving the details about the snail-speed functioning of the various State Commissions and requesting us to intervene and to give suitable directions to all the State Commissions, which gave opportunity for us to deal with these legal as well as the technical issues in depth, and to give appropriate directions to make the statutory authorities functional, is quite commendable. Accordingly, we record our appreciation over the anxiety shown by the Power Ministry to take steps to make the Power Sector in whole of India more effective and energetic.

72. Similarly, we have to appreciate the learned Counsel appearing for the three State Commissions for having

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presented the case well, even though we did not accept their plea made on behalf of these Commissions.

73. The Registry is directed to send copies of this judgment to all the State Commissions and the Secretary of the Forum of Regulators as well as to the Secretary of the Power Ministry and to the learned Amicus Curiae Counsel.

74. With these observations, this suo-moto petition is disposed of.

(V J Talwar)  
Technical Member

(Rakesh Nath)  
Technical Member

(Justice M. Karpaga Vinayagam)  
Chairperson

Dated: 11<sup>th</sup> Nov, 2011

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## GUJARAT ELECTRICITY REGULATORY COMMISSION (GERC)

### Procurement of Energy from Renewable Sources

Notification No. 3 of 2010

In exercise of the powers conferred under sections 61, 66, 86 (1)(e) and 181 of the Electricity Act 2003 (36 of 2003) and all powers enabling it in that behalf, Gujarat Electricity Regulatory Commission hereby makes the following Regulations for promoting the sale of power from renewable energy sources to any person and for procurement of energy from renewable sources by distribution licensee within the State of Gujarat.

#### 1. Short Title, Extent and Commencement

- i. These Regulations shall be called the Gujarat Electricity Regulatory Commission (Procurement of Energy from Renewable Sources) Regulations, 2010.
- ii. These Regulations extend to the whole of the State of Gujarat.
- iii. These Regulations, excluding clause 8 shall come into force on the date of their publication in the Gazette.
- iv. Clause 8 of these Regulations shall come into force from a date to be notified by the Commission separately.

#### 2. Definitions and Interpretation

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**2.1** In these Regulations, unless the context otherwise requires -

- (a) 'Act' means the Electricity Act, 2003 (Act 36 of 2003);
- (b) 'Area of Supply' means the area within which a distribution licensee is authorized to supply electricity;
- (c) 'Central Agency' means the agency operating the National Load Dispatch Centre or such other agency as the Central Commission may designate from time to time;
- (d) 'Central Commission' means the Central Electricity Regulatory Commission referred to in sub - section (1) of section 76 of the Act;
- (e) 'Certificate' means the renewable energy certificate issued by the Central Agency in accordance with the procedures laid down by it and under the provisions specified in the Central Electricity Regulatory Commission (Terms and Conditions for recognition and issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010;
- (f) 'Commission' means Gujarat Electricity Regulatory Commission;



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- (g) 'Distribution Licensee' means a licensee authorized to operate and maintain a distribution system for supplying electricity to the consumers in his area of supply;
- (h) 'Floor price' means the minimum price as determined by the Central Electricity Regulatory Commission in accordance with its (Terms and Conditions for recognition and issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010 at and above which the certificate can be dealt in the power exchange;
- (i) 'Forbearance price' means the ceiling price as determined by the Central Electricity Regulatory Commission in accordance with its (Terms and Conditions for recognition and issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010 within which only the certificates can be dealt in the power exchange;
- (j) 'MNRE' means the Ministry of New and Renewable Energy;
- (k) 'Obligated entity' means the entity mandated under clause (e) of subsection (1) of section 86 of the Act to fulfil the renewable purchase obligation and identified under clause 3 of these Regulations;



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- (l) 'Person' shall include any company or body corporate or association or body of individuals, whether incorporated or not, or artificial juridical person;
- (m) 'Power Exchange' means any exchange operating as the power exchange for electricity in terms of the orders issued by the Central Commission;
- (n) 'Preferential tariff' means the tariff fixed by the Commission for sale of energy from a generating station based on renewable energy sources to a distribution licensee;
- (o) 'Quantum of purchase' means percentage share of total purchase of electricity from renewable energy sources as specified in these Regulations. The quantum would be the sum of all direct purchases from generating stations based on renewable energy sources and purchase from any other licensee, which would arise from renewable energy sources;
- (p) 'Renewable energy sources' in this context means non-conventional, renewable electricity generating sources such as mini/ micro hydel, wind, solar, biomass and bagasse based co-generation, urban/municipal waste, or such other sources, (which are generally inexhaustible and can be replenished in a short period





of time) as approved by the Ministry of New and Renewable Energy, Government of India or by the State of Gujarat;

- (q) 'State' means the state of Gujarat;
- (r) 'State agency' means the agency in the State of Gujarat to be designated by the Commission to act as the agency for accreditation and recommending the renewable energy projects for registration and to undertake functions under these Regulations;
- (s) 'Supply', in relation to electricity, means the sale of electricity to a licensee or consumer;
- (t) 'Year' means a financial year.

Words and expressions used and not defined in these Regulations but defined in the Act shall have the meanings assigned to them in the Act. Expressions used herein but not specifically defined in these Regulations or in the Act but defined under any law passed by a competent legislature and applicable to the electricity industry in the state shall have the meaning assigned to them by such law. Expressions used herein but not specifically defined in the Regulations or in the Acts or any law passed by a competent legislature shall have the meaning as is generally assigned in the electricity industry.



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## 2.2 Interpretation

For the interpretation of these Regulations, unless the context otherwise requires:

- a. words in the singular or plural term, as the case may be, shall also be deemed to include the plural or the singular term, respectively;
- b. the terms "include" or "including" shall be deemed to be followed by "without limitation" or "but not limited to" regardless of whether such terms are followed by such phrases or words of like import;
- c. references herein to the "Regulations" shall be construed as a reference to these Regulations as amended or modified by the Commission from time to time in accordance with the applicable laws in force;
- d. the headings are inserted for convenience and may not be taken into account for the purpose of interpretation of these Regulations;
- e. references to the statutes, Regulations or guidelines shall be construed as including all statutory provisions consolidating, amending or replacing such statutes, Regulations or guidelines, as the case may be, referred to.

## 3. Applicability of Renewable Purchase Obligation

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These Regulations shall apply to:

- (1) Distribution licensee
- (2) Any other person consuming electricity (i) generated from conventional Captive Generating Plant having capacity of 5 MW and above for his own use and / or (ii) procured from conventional generation through open access and third party sale.

#### 4. Quantum of Renewable Purchase Obligation (RPO)

- 4.1 Each distribution licensee shall purchase electricity (in kWh) from renewable energy sources, at a defined minimum percentage of the total consumption of its consumers including T&D losses during a year.

Similarly, Captive and Open Access user(s) / consumer(s) shall purchase electricity (in kWh) from renewable energy sources, at a defined minimum percentage of his/her total consumption during a year.

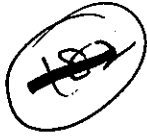
The defined minimum percentages are given below in the Table 1.

Table 1

Year (1)	Minimum Quantum of purchase (in %) from renewable energy sources (in terms of energy in kWh)			
	Total (2)	Wind (3)	Solar (4)	Biomass, bagasse and



185



				others (5)
2010-11	5%	4.5%	0.25%	0.25%
2011-12	6%	5.0%	0.5%	0.5%
2012-13	7%	5.5%	1.0%	0.5%

If the above mentioned minimum quantum of power purchase from solar and other renewable energy sources is not available in a particular year, then in such cases, additional wind or other energy, over and above that shown in column 3 and 5, shall be utilized for fulfillment of the RPO in accordance with column 2.

Provided further that such obligation to purchase renewable energy shall be inclusive of the purchases, if any, from renewable energy sources already being made by the obligated entity concerned:

Provided also that the power purchases under the power purchase agreements for the purchase of renewable energy sources already entered into by the distribution licensees shall continue to be made till their present validity, even if the total purchases under such agreements exceed the percentage as specified hereinabove.

- 4.2 The Commission may, *suo-motu* or at the request of a licensee, revise the percentage targets for a year as per clause 4.1 of these Regulations

