



2025 INSC 838

**REPORTABLE**

**IN THE SUPREME COURT OF INDIA  
CIVIL APPELLATE JURISDICTION  
CIVIL APPEAL NO. 23514 OF 2017**

**TORRENT POWER LIMITED**

**....APPELLANT**

**VERSUS**

**U.P. ELECTRICITY REGULATORY  
COMMISSION & ORS.**

**.... RESPONDENTS**

**J U D G M E N T**

**J.B. PARDIWALA, J.**

For the convenience of exposition, this judgment is divided into the following parts:

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1. This statutory appeal filed under Section 125 of the Electricity Act, 2003 arises from the judgment and order passed by the Appellate Tribunal for Electricity, New Delhi (“**APTEL**”) dated 28.07.2016 in Appeal No. 188 of 2015. The appeal filed by the appellant herein, under Section 111 of the Electricity Act, 2003 (for short, the “**Act, 2003**”) came to be dismissed by the APTEL, thereby affirming the order dated 16.07.2015 passed by the Uttar Pradesh Electricity Regulatory Commission (“**UPERC**”).

#### **A. FACTUAL MATRIX**

2. The facts giving rise to this appeal may be summarized as under:
  - i. The respondent no. 4 had preferred Petition No. 816 of 2012 dated 25.07.2012 before the UPERC, questioning the legality, validity and propriety of the Distribution Franchisee Agreement dated 18.05.2009 and Supplementary Agreement dated 17.03.2010 respectively (together referred to as the “**DFA**”) entered and executed between the appellant (distribution franchisee) and the respondent no. 3 (distribution licensee). The respondent no. 4 prayed for investigation of the conduct of respondent nos. 2 and 3 respectively in appointing the appellant herein as a franchisee for distribution of electricity in the urban area of Agra without purportedly seeking prior approval of the UPERC for transfer of its utility to the appellant, which is violative of Section 17 of the Act, 2003.
  - ii. The appellant herein had filed the preliminary objections in the said petition *inter alia* raising the grounds of jurisdiction and maintainability of the petition, before the UPERC. The said preliminary objections of the appellant were disposed of by the UPERC *vide* its order dated 16.07.2015 on the grounds of public interest.

- iii. The appellant herein preferred an appeal bearing no. 188 of 2015 under Section 111 of the Act, 2003 before the APTEL assailing the order dated 16.07.2015 referred to above on *inter alia* twin grounds that *first*, the Electricity Regulatory Commissions (“**ERCs**”) lack the jurisdiction under the Act, 2003 to consider issues in public interest as well as contractual matters concerning the appointment of a distribution franchisee and *secondly*, the grievance of an individual person who is not even a consumer is not maintainable before the ERC under the provisions of the Act, 2003.

3. The following list of dates and events would make the picture more clear:-

06.07.1999	The Uttar Pradesh Electricity Reforms Act, 1999 came into force.
14.01.2000	<p>In pursuance of a reform-restructuring exercise, the erstwhile Uttar Pradesh State Electricity Board (“UPSEB”) was unbundled under the first reforms transfer scheme, into three separate entities:</p> <ul style="list-style-type: none"><li>• Uttar Pradesh Power Corporation Limited (“UPPCL”) was vested with the function of Transmission and Distribution within the State.</li><li>• Uttar Pradesh Rajya Vidyut Utpadan Nigam Limited [UPRVUNL] was vested with the function of Thermal Generation within the State.</li><li>• Uttar Pradesh Jal Vidyut Nigam Limited (UPJVNL) was vested with the function of Hydro Generation within the State.</li></ul>

	<p>The trifurcation of the UPSEB was accompanied by the financial restructuring of the State's Power Sector utilities. Four new distribution companies were created <i>vide</i> Uttar Pradesh Transfer of Distribution Undertaking Scheme, 2003 to undertake distribution and supply of electricity in the areas under their respective zones specified in the scheme. These four distribution companies ("DISCOM") are as follow:</p> <ul style="list-style-type: none"> <li>• Dakshinanchal Vidyut Vitaran Nigam Limited [Agra DISCOM],</li> <li>• Madhyanchal Vidyut Vitaran Nigam Limited [Lucknow DISCOM],</li> <li>• Pashchimanchal Vidyut Vitaran Nigam Limited [Meerut DISCOM] and</li> <li>• Poorvanchal Vidyut Vitaran Nigam Limited (Varanasi DISCOM),</li> </ul>
10.06.2003	The Electricity Act, 2003 came into force.
12.08.2003	<p>The State Government notified the Uttar Pradesh Transfer of Distribution Undertaking Scheme, 2003 for the purpose of providing and giving effect to the provisions for transfer of distribution undertakings of UPPCL to four DISCOMs, one of which was the respondent no. 3 namely Dakshinanchal Vidyut Vitran Nigam Ltd. (hereinafter referred to as "<b>the DVVNL</b>").</p> <p>In pursuance to the said transfer scheme. the respondent no. 3 namely DVVNL became a Distribution Licensee under the provisions of the Act, 2003.</p>
18.05.2009	Distribution Franchisee Agreement was entered into between the appellant and respondent no. 3.

	The appellant was appointed as Distribution Franchisee by the respondent nos. 2 and 3 under Section 2(27) read with the seventh proviso to Section 14 of the Act, 2003.
17.03.2010	<p>A Supplementary Agreement was executed between the appellant and respondent no. 3.</p> <p>From the date of execution of Distribution Franchisee Agreement dated 18.05.2009 and Supplementary Agreement dated 17.03.2010, the appellant has undertaken the work of distribution of electricity in the urban area of Agra in terms of the said Agreements.</p>
2012	<p>The Writ Petition No. 49774 of 2009 with the cause title <b><i>Gharelu Vidyut Upbhokta Kalyan Samiti and others v. State of U.P. and others</i></b> was filed before the Allahabad High Court, challenging the execution of Distribution Franchisee Agreement dated 18.05.2009.</p> <p>Similarly, another Writ Petition No. 30385 of 2012 with the cause title <b><i>Agra Mandal Vyapar Sangathan v. State of U.P. and others</i></b> was filed before the Allahabad High Court, challenging the Distribution Franchisee Agreement dated 18.05.2009 and Supplementary Agreement dated 17.03.2010.</p> <p>Both the aforesaid writ petitions are still pending for consideration before the Allahabad High Court.</p>
25.07.2012	Rama Shanker Awasthi, the respondent no. 4, filed a petition bearing no. 816 of 2012 before the UPERC challenging the Distribution Franchisee Agreement dated 18.05.2009 and the Supplementary Agreement dated 17.03.2010.
03.02.2014	The UPERC heard the matter wherein the respondent no. 3 and the appellant orally pointed out that the writ petitions instituted before the Allahabad High Court, are still pending. The appellant had contended therein that

	because writ petitions on the same issue were pending before the High Court, the UPERC ought not to hear the present matter.
27.03.2014	In the meantime, the High Court passed an order in another Writ Petition No. 2463 of 2014 with the cause title <b>Anoop Gupta v. Union of India and others</b> by way of which the said writ petition was dismissed and the petitioner therein was permitted to intervene in the writ petition nos. 49774 of 2009 and 30385 of 2012, already pending before the High Court.
13.06.2014	Detailed preliminary objections were filed by the appellant before the UPERC, raising the grounds of jurisdiction and maintainability of the petition filed by the respondent no. 4.
30.06.2014	In the meantime, the order passed by the Lucknow Bench of the Allahabad High Court was impugned before the Supreme Court in Special Leave Petition No. 12556 of 2014 wherein this Court was pleased to dismiss the Petition by permitting the appellant therein, Mr. Anoop Gupta to withdraw the same.
16.07.2015	The UPERC passed the order for investigation of the appellant in its role as a Distribution Franchisee under the seventh proviso of Section 14 of the Act, 2003, holding that the petition was maintainable.
31.08.2015	The appellant filed an appeal under Section 111 of the Act, 2003 before the APTEL.
28.07.2016	The impugned Judgement and Order was passed by the APTEL.

**(i) Order passed by the UPERC**

4. The UPERC *vide* the order dated 16.07.2015 held that the petition was maintainable on the grounds of public interest and the ERCs were empowered to look into the DFA to assess the benefits of such franchisee for the DISCOMs as well as for the general public. In furtherance of this finding, the UPERC ordered for the formation of an Expert Committee to give its finding on the aspects of the yearly reduction in loss levels by the appellant as well as the improvement in collection efficiency with information as to how such benefits have been passed on to the consumers.
5. Some of the observations made by the UPERC are reproduced herein below:

*“v. In view of above provisions, it is established that at the time, of signing the Agreement, DVVNL was a deemed licensee and they were authorized to sign such agreement with its franchisee TPL for the urban area of Agra. The provision of section 5 of the Act does not restrain DVVNL from entering into franchisee agreement in urban area with TPL as it only facilitates franchisee in rural area. It does not bar franchisee in urban areas which has been facilitated in section 2 (27) and seventh proviso of section 14 of the Act. DWNL was further granted license on 21.1.2010 by this Commission.*

*vi. As far as the issue of transfer of inventory by DVVNL to the Franchisee, without approval of the Commission as per section 17 of the Electricity Act, 2003, is concerned it is sufficiently evident from the above provisions that the franchisee agreement does not fall under the purview of section 17.*

*vii. The issue of lack of jurisdictional and maintainability of this petition has been raised by DWNL and TPL. Although the submissions made in this reference are primarily based*



*on certain 'v, pending PILs before the Hon'ble High Court, Allahabad but in view of Hon'ble APTEL's specific directions to pass the consequential orders and also as there is no stay order from any superior Court, the Commission concluded that the petition is maintainable and therefore, decided to proceed with the matter. The Commission's jurisdiction is further reinforced in a similar case by the Hon'ble High Court Bombay order dated 12.2.2008 [2008 (110) Bom L R 598] through which the MERC was given mandate to judge the facts and figures, discounting factor and stipulations etc., taken in ' the agreement.*

*9. Issue of investigation of conduct: The franchisee has been allowed under the provisions of the Act with the primary object of facilitating reduction of Distribution losses and improvement in Collection efficiency. There is no doubt that the concept of franchisee has been promoted in the Act to ensure better quality of supply and services to the consumer. The Agreement must have been entered into with these motives only. As now about five years have passed, which is a substantial period to show the improvements in efficiencies, the question would arise as to whether the objectives have been met and whether the trend of improvements are visible.*

*As the Commission has already concluded that the petition was maintainable and well within its jurisdiction, it becomes incumbent upon the Commission to further assess the benefits of such franchisee for the Discoms as also for general public. With this view, for preliminary examination, vide order dated 12.5.2014 reply and data on certain points were sought from DVVNL and TPL. DVVNL has not made submissions on this stating that they do not want to make any additional submission. UPPCL has seconded this. Although TPL has made submissions but insufficient. As the matter has already prolonged for more than two years and about five years have lapsed since the agreement has become effective, the Commission decides to form a*

*Committee with the specific purpose to ascertain the answers to the following questions:*

*i. What has been the yearly reduction in loss levels since 2009-10 to till date?*

*ii. What has been improvement in the collection efficiency from 2009-10 level?*

*iii. How much arrears have been recovered from the due amount of 2009-10?*

*iv. Have the benefits of such improvements, if any, have been passed on to the consumer and if yes, how?*

*Apart from above specific questions the Committee would also examine the year wise technical and commercial performance of TPL. The Committee would be at liberty to, investigate and examine any sort of data and accounts so as to assess the performance of TPL. The work shall be completed within two months of this order.*

*10. The Committee shall consists of (1) Sri Arun, Retired Ombudsman and Director, UPPCL*

*(2) Sri Sandeep Das, Chartered Accountant, Park Road, Lucknow.”*

**(ii) Impugned Order passed by the APTEL**

6. The APTEL took a diverging opinion on the aspect of maintainability and held that the Act, 2003 does not have any provision for entertaining of a public interest litigation by the ERCs. However, the APTEL was of the view that the case on hand was not a public interest litigation at all and concluded that the petition before the UPERC was maintainable. It was observed that the ERCs are empowered to exercise regulatory oversight on distribution licensees. Since the franchisees undertake distribution of electricity on behalf of the

distribution licensee then the impact of the activities of the franchisees can be considered by the UPERC.

7. Some of the observations made by the Appellate Tribunal are reproduced herein below:

*“11.12) We are fully conscious of the fact that this Appellate Tribunal does not have any power to entertain any public interest litigation under the Electricity Act, 2003 because there is no provision in the said Act to empower this Appellate Tribunal to hear and decide the public interest litigation. The matter in hand before us is, not really a public interest litigation. The only purpose of the present Petition before the State Commission is whether by giving franchisee to Torrent Power Ltd. by a distribution licensee, namely Respondent No.3, DVVNL, some benefit has accrued to the consumers in general or not. What is to be seen is whether as a result of franchisee given to Torrent Power Ltd. the consumers of the area would be benefited or not? If all the liability, responsibility of the "franchisee still remain with the distribution licensee, then its- impact is also to be considered by the State Commission.*

*11.13) We are unable to accept this contention of the appellant that this Appellate Tribunal in judgment dated 28<sup>th</sup> November, 2013 in Appeal No.239 of 2012 and batch did not remand the matter to the State Commission, hence the Impugned Order is manifestly erroneous and illegal. We have already cited the relevant part of the judgment dated 28<sup>th</sup> November, 2013, in paragraph 74, thereof this Appellate Tribunal clearly held that since any money excess paid or recovered from Rosa Power will necessarily be a pass through in tariff it becomes a tariff issue. It means that the learned State Commission is bound to decide the said issue in the light of the observations made by this Appellate Tribunal in the said judgment as the same issue becomes a tariff issue, the effect on the consumers of the State, particularly within the area of Respondent No.3, DWNL.*

*Thus the whole impact of the franchisee and its consequences, are to be considered to determine the tariff in the light as observed by this Appellate Tribunal.*

*11.14) The Petition No.816 of 2012 (Impugned Petition) was filed before the State Commission under Section 128 and 129 of the Electricity Act, 2003, read with Section 26 and 27 of the UP Electricity Reforms Act, 1999, praying, inter alia, for the following reliefs:*

*“29 That in view of the aforesaid facts and circumstances, it is expedient in the interest of justice that this Hon’ble Commission may graciously be pleased to investigate the conduct of the Respondent No.1 and 2 for acting in sheer disregard and gross violation of the statutory mandatory provisions of the Act, 2003 and declare that the utility of the Licensee has been transferred in favour of the Respondent No.3 without prior permission of the State Commission as mandated by Section 17 of the Act, 2003 and further that the Respondent No.1 and 2 acted in breach of the License, 2000 and annul the License No.3 of 2010 dated 21.01.2010 of the Respondent No.2 in respect of Urban Area of Agra and also agreement dated 18.05.2009 and supplementary agreement dated 17.3.2010”.*

*11.15) The learned State Commission while passing the Impugned Order appears to have thought, on the formation of Committee, which should ascertain the loss level since 2009-10 till date, to ascertain the improvement in the collection efficiency, from 2009-10 level and to see the improvement, if any, have been passed on to consumers in its right perspective and correctness.*

*11.16) We find that the franchisee system is allowed under the Electricity Act, 2003 with the primary objective of facilitating reduction of distribution loss and improvement in. collection efficiency. Further the concept of franchisee has been permitted in the Electricity Act, 2003 .to ensure better quality of supply and services to the consumers.*

*Apparently, the agreement between the appellant. Torrent Power Ltd., franchisee and Respondent No.3, a distribution licensee had been entered with the said motives and purposes. Since five years had already elapsed since the agreement and to enable the franchisee to show the improvements the State Commission appear to be on the right path to ascertain whether the said objectives as provided under the Electricity Act, 2003 have been met or accomplished and further whether the trends of improvements are visible.*

*11.17) The learned State Commission vide order dated 12.05.2014, i.e. more than one year before passing of the Impugned Order sought reply and data from Respondent No.3, DVVNL and the appellant in that regard which they did not give. Since the said data and information as sought by the State Commission's order dated 12.05.2014 were not given, the State Commission has to pass the Impugned Order and decide to form the aforesaid Committee for the aforesaid purposes.*

*11.18) On careful consideration, we are unable to accept this contention of Mr. Pradeep Misra, learned counsel for the Respondent, UPPCL that the petitioner Mr. Rama Shapkar Awasthi has no locus standi to maintain the petition because the consumers, most of the time, remain unrepresented when such kind of decisions are taken and only a few consumers come forward to actively participate in such kind of proceedings. The present matter cannot be said to be a public interest litigation by any stretch of imagination.*

*11.19) Section 61 dealing with Tariff Regulations and Section 62 dealing with determination of tariff, of Electricity Act, 2003 clearly specify the Terms and Conditions for determination of tariff with certain guidelines like the factors which would encourage competition, efficiency, economic use of the resources, good performance and optimum investments and further safeguarding of*

consumers interest and at the same time recovery of cost of electricity in a reasonable manner and the principles regarding efficiency in performance. National Electricity Policy and Tariff Policy. A proviso to Section 62 of the Electricity Act 2003 states that in case of distribution of electricity in the same area by two or more distribution licensees, the appropriate Commission may, for promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity. Sub-section 2 further provides that the appropriate Commission may require a licensee or a generating company to furnish separate details, as may be specified in respect of generation, transmission and distribution for determination of tariff. Sub-section 6 to Section 62 of the Act says that if any licensee or a generating company recovers a price or charge exceeding the tariff determination under this Section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the Bank rate without prejudice to any other liability incurred by the licensee. From the perusal of the provisions of the Electricity Act, 2003, it is evidently clear that the tariff for a distribution licensee for its area of supply shall be determined by the respective State Commissions as per Terms and Conditions of the Act and relevant Tariff Regulations in compliance with the National Electricity Policy and Tariff Policy.

11.20) We have been informed during the arguments in this matter that in the State of Uttar Pradesh, Respondent No.2, UPPCL, procures bulk power from various sources and then supply it to the distribution licensees namely, Purvanchal Vidyut Vitran Nigam Ltd., Paschimanchal Vidyut Vitran Nigam Ltd., Madhyanchal Vidyut Vitran Nigam Ltd. and Dakshinanchal Vidyut Vitran Nigam Ltd. which are the Government Discoms besides a private Discom namely Noida Power. All the PPAs or agreements are executed between UPPCL and the relevant utility without any active role of the distribution licensee of Uttar Pradesh. A uniform

*tariff for the respective category of consumers is fixed for the whole State of Uttar Pradesh viz. for each of the Government Discoms. It means that the tariff shall remain the same for the whole State for each Discom, irrespective of the performance level of that Discom and its collection efficiency. Thus the consumers category-wise are charged the tariff at the same level. In other words, we can elucidate that the performance of the Discom of a particular area is never taken into account and all are to be treated alike.*

*-xxx-*

*11.23) This Appellate Tribunal in a separate batch of appeals, being Appeal No. 15 of 2008 & others, vide judgment dated 09.10.2009, while dealing with the determination of tariff for each distribution licensee, also observed and noted as under:*

*"Analysis and decision*

*27. The determination of tariff for each distribution licensee is based on the cost- and expenses, power availability for the particular distribution licensee, consumer base and consumer mix of the distribution licensee, their efficiency of operations, distribution losses etc. etc. In order to encourage efficient operation, it is only necessary that the different licensees have competition amongst themselves to carry out their operations in more efficient manner. In view of this, this Tribunal held that the Commission may determine differential tariff, according to the geographical location of the, consumers, different distribution licensees could have differential tariffs for their respective area of operations. The letter dated September 26, 2007 from the Government of Karnataka to Secretary, KERC relied upon by the appellant ends with the following para.*

*"In this connection, i am directed to reiterate that the Government is not in favour of differential tariffs at this stage. This may be brought to the notice of the Commission"*

28. We are inclined to agree with the contention of the Commission that the aforesaid letter dated September 26, 2007 relied upon by the appellant is not any policy direction in terms of Section 108 which has not even been quoted in the letter. This is only an innocuous suggestion. In this view of the matter, the appeal is not allowed and we uphold the decision of the Commission.”

11.24) Thus this Appellate Tribunal has reiterated the view that there should be separate determination of tariff for each distribution licensee in the State. Uniform or common retail tariff for the several distribution licensees is not proper and is wrong.

12) In view of the above discussion, we find and observe that the learned State Commission is fully competent and has jurisdiction to entertain the Petition, being Petition No.816 of 2012, because the pleadings and reliefs sought therein do not fall under the category of Public Interest Litigation. Further the grievances mentioned in the said Petition can legally be raised before a State Commission. In this view of the matter, we do not find any illegality or infirmity in the Impugned. Order and both these issues are decided against the appellant. The appeal is liable to be dismissed.

#### ORDER

The Instant Appeal, being Appeal No. 188 of 2015, is hereby dismissed and the Impugned Order is hereby affirmed. In the facts and circumstances of the matter no cost is being imposed. The Interim Order or any other Order, passed by this Appellate Tribunal, in this instant Appeal are hereby discharged.

Pronounced in the open court on this 28<sup>th</sup> day of July, 2016.”

(Emphasis supplied)



### **(iii) Report of the Expert Committee**

8. The Expert Committee constituted in compliance with the order of the UPERC dated 16.07.2015, gave its report on 09.01.2017. As regards the question of how the activities of the appellant were beneficial to the consumers, the Expert Committee gave the finding that though the consumers were not happy with the appellant's services in respect of providing new connections, yet the supply of electricity and customer service of the appellant were appreciated by the consumers. The Expert Committee, however, also pointed out that the financial benefits of appointing the appellant as the distribution franchisee could not be reaped by the retail consumers due to slow rate of reduction of distribution losses and slow growth of collection efficiency. Nevertheless, the consumers informed the Expert Committee about the satisfactory performance of the appellant in reducing the duration of power failure which has resulted in better supply of power to the consumers.
9. The findings of the Expert Committee are reproduced below:

#### *"Findings:*

*As per provision of DFA, AT & C losses should be 15 % by the end of FY 2016-17. This seems to be not achievable on the present parameters. TPL should take more effective steps to reduce the losses. TPL should also identify the high loss level area by segregating it to 33/11 KV Substation level and further to 11 KV feeder level. These steps will help in yielding better results.*

*As per DFA Para 5.8.2 "If the Distribution Franchisee fails to achieve 15% AT&C loss level based on year end ATC Losses actually achieved at the end of 7 years from the effective date then without prejudice to the other actions which DVVNL can initiate against the Distribution Franchisee under this Agreement, a penalty equivalent to*

lost due to non achievement of the target shall be recoverable by DWNL from the distribution franchisee".

As per DFA Para 5.8.3 "The penalty amount shall be computed similarly at the end or each year till the overall year end ATC Loss Level of 15% is achieved by the distribution franchisee".

As per DFA Para 5.8.4 "The Distribution Franchisee shall be liable to pay the penalty amount within 30 days of the claim made by DWNL failing which the same shall be adjusted against the performance guarantee submitted by the Distribution Franchisee in terms of Article 11."

2. What has been improvement in the collection efficiency from 2009-10 level:-

Collection Efficiency means the ratio of revenue actually realized from the consumes (including subsidy amount if any) and energy amount billed as per methodology.

$$\text{Collection Efficiency} = \frac{\text{Revenue Realised from Consumers (Rs)} \times 100}{\text{Energy Billed to Consumers (Rs)}}$$

Revenue billed and realized from consumers as reported by M/s Torrent Power Ltd. (TPL) is as below.

Year	Billed (Rs. In Cr)	Collective (Rs. In Cr.)	Collection Eff (%)
2010-11	519.91	413.47	79.50
2011-12	535.93	504.10	94.06
2012-13	634.21	597.62	94.23
2013-14	855.09	832.01	97.30
2014-15	916.35	915.78	99.94
2015-16	1131.95	1118.60	98.82

As per para 4.5 of the annual report of F.Y. 2010-11 of Franchisee Audit of Agra Urban Area under the control of TPL conducted by M/s, KPMG, validated collection

*efficiency for the base year FY 2008-09 has been 75.31%. Thus M/s Torrent Power Ltd has shown regular improvement in the collection efficiency as shown above i.e. from 79.50 in the FY 2010-11 to 98.82 in FY 2015-16.*

*There has been slight dip in the collection efficiency from 99.94 in F.Y. 2014-15 to 98.82 in FY 2015-16. According to the DFA signed between DVVNL & TPL there is no benchmark defined to be achieved by TPL. As such the action taken by TPL towards the improvement in collection efficiency seems proper.*

*However, it is to be noted here that collection reported yearwise by TPL includes non - revenue items i.e. meter damage charges, fuse charges, other SLC recoveries and other miscellaneous revenue also. Thus, actual revenue realized toward energy bills must be lower than the reported collection figures. This means that the collection efficiency mentioned in the table above shall be lower to some extent.*

*TPL has explained that the separation of nonrevenue item realization is extremely difficult activity. It is therefore necessary that realization of non – revenue items should be kept separately in books of accounts so that Actual Collection efficiency of TPL could be worked out.*

*Findings:-*

*Since there has be no Benchmark Collection Efficiency figure to be achieved in DFA and TPL has regularly improved the Collection Efficiency figure and has reached 98.82 % in FY 2015-16, the performance towards this parameter is being achieved by TPL. However, it is recommended that TPL should maintain the collection of non-revenue items separately in their books of account so that actual collection efficiency may be worked out and monitored in future reports.*

3. How much arrears have been recovered from the due amount of 2009- 10:

As per para 8.4, 8.5 and 8.8 of DFA, M/s Torrent Power Ltd has to recover the arrear of revenue pertaining to DVVN of pre take over period.

"8.4 - Distribution Franchisee shall be liable to collect the arrears from current live consumers accrued in last month prior to effective date on account of charges for usage of electricity. These arrears shall be collected and remitted to DVVNL by Distribution Franchisee(DF). The DF shall collect and remit the amount at least equivalent to the prevailing collection efficiency taking into account the collection efficiency in the corresponding month of last year including the amount already recovered."

"8.5 - Distribution Franchisee shall make best endeavor to collect arrears other than those specified in 8.4 from current live consumers."

"8.8 - Distribution Franchisee shall make best endeavor to collect arrears accrued prior to effective date from PD consumers." As per DFA signed between DVVNL & TPL revenue of pretakeover period is to be realized by TPL and remitted to DVVNL.

As per report submitted by TPL on dt 19.10.2016, the position is as below.

DVVNL Arrears Recovery: Rs. Cr

Period	Recovery of DVVNL Arrears			Recovery of pro rata payment	Total
	Live Consumers	PD Consumers	Total		
2010-11	5.89	0.81	6.71	9.23	15.93
2011-12	5.61	0.50	6.11	-	6.11
2012-13	3.27	0.30	3.57	-	3.57

2013-14	1.55	0.14	1.69	4.14	5.83
2014-2015	1.25	0.10	1.34	1.50	2.84
2015-2016	1.94	0.03	197	0.45	2.42
2016-17 (upto Aug 2016)	0.77	0.05	0.82	-	0.82
Total	20.28	1.92	22.21	15.32	37.52

*The statement submitted by TPL does not mention the actual arrear opening balance as on 01.04.2010 and actual arrear of closing 31.03.2016. TPL has only mentioned the recovery position of DVVNL arrears. This does not fulfill the requirement of review for recovery of DVVNL arrears. During site visit on dt 01.12.2016 by Expert Committee, the statement regarding arrears were put up by M/s Torrent Power Ltd (TPL) and is as below.*

*Opening (Uploaded Data) August 2010: Rs in Crores*

Service Status	Consumers	Principal	LPSC	Total
Live	188666	927.74	439.62	1367.37
PD	18501	236.28	86.12	322.40
TD	187	1.84	0.40	2.24
Total	207354	1165.85	526.15	1692.00

*Balance as on 31.10.2016*

Service Status	Consumers	Principal	LPSC	Total
Live	57818	237.09	362.43	599.52
PD	67670	780.32	656.54	1436.86
TD	7804	48.79	88.71	137.51
Total	133292	1066.21	1107.68	2178.88

*According to the statement submitted by TPL total DVVNL arrear pending for realization in Aug. 2010 is Rs. 1692.00*

*Cr. This arrear has increased to 2173.88 eras on 31.10.2016. TPL has explained that increase in arrears is due to levy of late payment surcharge on the outstanding amount of arrears. Thus the recovery of DVVNL arrears can be split into following.*

*i. What is the actual opening balance of recovery of DVVNL arrears as on 01.04.2010.*

*ii. What efforts have been made for the recovery of DVVNL arrears.*

*iii. How much arrears have been recovered & remitted to DWNL from F.Y. 2010-11 to 2015-16.*

*Actual opening balance of DVVNL arrears as on 01.04.2010.*

*M/s Torrent Power Ltd. has intimated that DVVNL has not given the opening balance as on 01.04.2010. DVVNL has intimated in August 2010 the arrears to be recovered as below:*

<i>Service Status</i>	<i>Consumers</i>	<i>Principal</i>	<i>LPSC</i>	<i>Total</i>
<i>Live</i>	<i>188666</i>	<i>927.73</i>	<i>439.62</i>	<i>1367.37</i>
<i>PD</i>	<i>18501</i>	<i>236.28</i>	<i>86.12</i>	<i>322.40</i>
<i>TD</i>	<i>187</i>	<i>1.84</i>	<i>0.40</i>	<i>2.24</i>
<i>Total</i>	<i>207354</i>	<i>1165.85</i>	<i>526.15</i>	<i>1692</i>

*Thus according to TPL, they have received the details of Rs.1692.00 Cr. As DVVNL arrears in August 2010.*

*Infrastructure Advisory Report of CRISIL for the month of September 2016 has been provided by UPPCL. According to this report Para 1.2 (v) reads as below.*

*1.2(V) Arrears : The opening status of the arrears in the Agra city was Rs.1845.0 Crores, which has now increased to Rs.2160.99 crores permanently disconnected consumers) in the month of August 2016. With respect to the above quantum of arrears in the region, TPL has been able to remit*

*only 37.39 Cr. of arrears to DVVNL till August 2016. There has been reduction in total principal amount on the account of corrections and collective efforts both from TPL & DVVNL." However Annual Audit report submitted by M/s KPMG for the F.Y. 2010-11, para 4.7 speaks as below.*

*"We have noticed In our endeavor to review the opening level of arrear that the "opening level of arrear has not been frozen till date and a final data Is not available for audit."*

*Again Annual Audit report for the F.Y. 2014-15 by KPMG regarding opening level of arrears mentions as below:*

*We have noticed in our endeavor to review the opening level of arrear that the "opening level of arrear has not been frozen till date and a final data is not available for audit."*

*From the above it is dear that TPL, CRISIL and KPMG have different views & figures regarding actual arrears opening balance as on 01.04.2010 to be recovered & remitted to DVVNL. The position is alarming arid it is to be finalisedS final figures is to be worked out and needs to be audited and accounted for.*

*(ii) What efforts has been made for recovery of DVVNL arrears:*

*From the report putup by TPL on dL 01.12.2016 as mentioned above in the table it is reported that opening (uploaded data) in August 2010 DVVNL arrears to be recovered by TPL is Rs.1165.85 Crores (Prindpal amount). This principal amount of arrears has come down to Rs.1066.21 crores. This means that in more than 06 years of operations, TPL has only recovered (Rs.1165.85 - Rs.1066.21) Rs.99.64 Crores i.e. less than 10% of opening arrears. This figure does not include late payment surcharge. This reflects that TPL is not interested in recovering DVVNL arrears.*

*It has treen observed that module for payment of bill of M/ s. Torrent Power Ltd has the following provisions.*

(i) Any payment made by consumer shall first go to arrears outstanding towards TPL.

(ii) Balance payment shall go to current bill of the consumer.

(iii) Any extra payment done by consumer if any shall go to DVVNL arrears. Due to this reason TPL is recovering all its arrears & its current bills and almost no. payment is done by the consumer against DVVNL arrears. This matter has been examined in details and found that DVVNL arrears are increasing as TPL is recovering all its current bills & arrears. Ten sample bills of consumers have been examined & found as below (Annexure 9):

S.No .	S.C. No.	Amt. of current Bill	October 210		October 2016		
			Amt. of TPL arrears	Amt. of DVVNL arrears	Current	TPL	DVVNL
1.	5701 6	1118.6 3	1061.2 7	293711.9 7	1119.01	0.38	493522.5 7
2.	3712 2	924.44	1061.8 2	268488.0 7	925.24	0.80	461116.0 5
3.	5915	109.51	1018.3 7	241256.6 8	275.73	165.18	413813.6 4
4.	9192 5	783.9	3171.6 5	135811.1 3	784.38	0.48	216931.8 0
5.	1243 1	297.29	946.09	109335.0 7	10149.0 1	9753.22	192531.5 6
6.	9193 5	655.22	996.86	87371.07	1420.86	761.23	136142.8 4
7.	3713 6	2415.7 5	1018.3 7	72975.26	39751.0 4	37256.6 7	128691.4 4
8.	5588 3	477.13	0.52	22838.42	477.37	0.24	40580.72
9.	1785 7	1459.4 1	0.43	11897.95	1931.89	459.43	24386.62
10.	7634 0	6605.0 7	3413.9 3	709.15	6606.02	0.95	2012.30



*Further from the above table it Is clear that no effort is being made to recover DVVNL arrears by TPL.*

*(iii) How much arrears has been recovered and remitted to DVVNL from F.Y. 2010-11 to F.Y. 2015-16.*

*M/s Torrent Power Ltd. (TPL) has submitted on dt. 1.12.2016 that principal amount of DWNL arrears in August 2010 was 1165.85 Cr. This has been reduced to Rs.1066.21 Cr. as on 31.10.2016. Thus a reduction of Rs.99.64 Cr. has been done. Against this reduction Rs.22.21 Cr. has been shown as received by TPL as per annexure Point 3 of report submitted by TPL on dt. 19.10.2016. Difference of Rs.99.64 and 22.21 Cr. has not been explained by TPL in this report. These figures need verification by the competent authorities.*

*Finding:*

*(a) Opening amount of DWNL arrears as on 01.04.2010 is required to be finalised immediately and audited by competent auditors.*

*(b)Neither the opening balance of DVVNL arrears are finalised nor any effort is being made to recover these arrear by M/s. TPL.*

*(c) TFL should make more effort to recover DVVNL arrears by disconnecting live consumers and other possible means of recovery against PD consumers in consultation with DVVNL so that arrears be liquidated by the end of F.Y. 2016-17.*

*(d) Recovery made by TPL towards DWNL arrears should be verified and remitted to DVVNL account. Any adjustment done in the arrears be properly verified so that balance of arrears & payment made to DVVNL must match the figures of outstanding arrears.*

4. Have the benefits of such improvements, if any, been passed on to the Consumers.

M/s Torrent Power Ltd, (TPL) has put up the details of benefits passed onto consumers on dt. 19.10.2016 which are annexed with the report. Pointwise comments are as below:

Para-1. It was reported that higher input rates were quoted by TPL which has led to reduction in ARR and resulting into lower tariff to retail consumer. Since retail tariff rate are same all over U.P. as such it could not be said that TPL has contributed to reduction in retail tariff/rate.

Para-2. Reduction in distribution losses has reduced power requirement of the city resulting into saving cost of purchasing costly power. This point is also not correct as the power purchase by TPL is being made from DVVNL and on the fixed rate as provided in DFA. Higher rate could only be applied if the input energy level is exceeded beyond the provisions made in DFA. As seen from the record of input energy as put up by TPL (Annexure 4) and UPPCL (Annexure 8) it is almost fixed every year where as 3% increase every year has been provided in DFA.

Input energy year wise is as below:

S.No.	F.Y.	Input Energy (MUs)
1.	2010-11	2114.03
2.	2011-12	2207.57
3.	2012-13	2207.94
4.	2013-14	2206.42
5.	2014-15	2148.47
6.	2015-16	2143.86
7.	H1- 2016-17	1277.88

Para-3. Old network has been replaced by TPL as reported by them. This has been seen on site and found that improvement has been done by TPL. Following is the Capex year wise as reported.

S.No.	F.Y.	Amount (Rs. In Cr.)
1.	2010-11	94.46
2.	2011-12	125.58
3.	2012-13	203.86
4.	2013-14	122.42
5.	2014-15	72.52
6.	2015-16	76.45
	TOTAL	695.29

*Para-4 to 14: These points are for the betterment of services to the consumer. Work can not be verified by the Expert Committee and a separate agency is needed to verify the claims of TPL. However, the final outcome can be verified by the Expert Committee. For this reason DVVNL was requested to fix a public meeting of consumers. On our request DWNL has arranged meeting on dt. 02.12.2016 In the meeting hall of DVVNL at 12:30 p.m. Copy of press cutting is being annexed with the report as Annexure 10.*

*Twenty two consumers attended the meeting. Officers from DVVNL and TPL were also present. Consumer put up their views before the Expert Committee (Annexure 11). Some of them have put up their comments in writing about their satisfaction level regarding the services rendered by TPL. The list of comments are attached as annexure.*

*Feedback received by the consumers are pointing towards a satisfactory performance of TPL, As regards the improvement in the system upgradation is concerned, TPL has provided following services.*

- 1. Round the Clock Call Centre.*
- 2. Customer Care Centre.*
- 3. Distribution Transformer failure rate has been reduced.*
- 4. SCADA implementation for network management.*

*On account of the above, duration of power failure has reduced resulting into better supply to consumers.*

*Findings:*

*From the above it is evident that the consumers have appreciated the working of TPL; so far as the Supply and Customer Service is concerned. On the front of Assessment of Capital Cost in new Connections, consumers are not happy with the services of TPL. Also in cases where the consumers ask for correction of old arrears of DVVNL, the same takes a long time to settle. These areas need to be handled in a more effective manner.”*

(Emphasis supplied)

**B. SUBMISSIONS ON BEHALF OF THE APPELLANT**

10. The learned counsel appearing on behalf of the appellant vehemently submitted that all that the APTEL did was to mechanically accept the erroneous findings recorded by the UPERC. According to the learned counsel, there was no application of any mind at the end of the APTEL.
11. The APTEL failed to appreciate that the DFA entered into between the appellant and the respondent no. 3, was a contract under Section 2(27) of the Act, 2003 read with the seventh proviso to Section 14 and that the respondent no. 3 as the Distribution Licensee was the only regulated entity.
12. The APTEL failed to appreciate that the Act, 2003 ushered in a novel feature of appointment of franchisees under Section 2(27). The seventh proviso to Section 14 read with Section 2(27) and Section 13 confers power on a Distribution Licensee to appoint another person to undertake distribution of electricity for a specified area within his area of supply (Agra in the present case) and that the Distribution Licensee continues to remain responsible for the distribution of electricity in such specified area of supply. Therefore, Section 2(27) of the Act, 2003 read with the seventh proviso to Section 14 permits a Distribution Licensee to appoint an agent for a specified area. The

agent, therefore, would not fall within the jurisdiction of the UPERC in its capacity as a regulatory authority.

13. The APTEL erred in coming to the conclusion that the respondent no. 4 has the locus to approach the UPERC for fulfillment of the social obligations of the respondent no.4 as stated in the original Petition No. 816 of 2012.
14. The APTEL erred in ignoring the settled law propounded by this Court relating to individual consumers approaching the State ERC, in the case of ***Maharashtra State Electricity Distribution Co. Ltd. v. Reliance Energy Ltd.*** reported in **(2007) 8 SCC 381**. In the said, case this Court categorically held that Section 86(1)(f) of the Act, 2003 which prescribes the adjudicatory functions of the State Commission does not encompass within its domain, complaints of individual consumers and that it only provides that the Commission can adjudicate upon the disputes between the licensees and generating companies and to refer any such dispute to arbitration. This Court affirmed that Section 86(1)(f) does not include in it a grievance of an individual consumer.
15. The APTEL failed to appreciate the true purport and object of the DFA entered into between the appellant and the respondent no. 3 as well as the express provisions of the Act, 2003 namely Section 2(27) read with the seventh proviso to Section 14.
16. In such circumstances referred to above, the learned counsel prayed that there being merit in her appeal, the same may be allowed and the impugned judgment and order passed by the APTEL be set aside.

### **C. SUBMISSIONS ON BEHALF OF THE RESPONDENT NO.4**

17. The respondent no. 4 has filed submissions in writing. The same reads as under:

*1. The issues raised by the Appellant are:*

*a) Jurisdiction of the State Commission to pass directions against the Appellant, who is only a franchisee and not the licensee itself; and*

*(b) The locus standi of the Respondent No.4 to invoke the jurisdiction of the State Commission under the Electricity Act, as the Respondent No.4 is not a consumer in Agra.*

*2. It is submitted that the above issues are erroneous and are liable to be rejected.*

*3. The proceedings before the State Commission were under Sections 128 and 129 of the Electricity Act, in regard to violation of the provisions of Section 17, 43, 62 and the terms and conditions of the license issued to the distribution licensee.*

*4. One of the primary issues raised was the supply of power by the Respondent Nos.2 and 3 – distribution licensees to the Appellant at a tariff, not approved by the State Commission, and which was much lower than the cost of supply to the Respondent Nos.2 and 3.*

*5. The entire annual revenue requirements/total costs and expenses of the Respondent Nos.2 and 3 are recovered from the tariff of the consumers in Uttar Pradesh. Therefore, if there is a subsidized supply by the Respondent Nos.2 and 3 to the Appellant, it affects the tariff for the consumers of the licensee.*

*6. The tariff for such supply by Respondent Nos.2 and 3 to the Appellant is mutually decided, without the approval of*

*the State Commission. This, affecting the tariff of the consumers, is contrary to the Electricity Act.*

*7. The specific allegation of the Respondent No.4 before the State Commission was that the price of supply as mutually decided is contrary to the Electricity Act, the terms of the Franchisee Agreement are not in accordance with license terms and conditions, the input price of electricity has been decided without the audited accounts and is undervalued, the State Commission has restrained another distribution licensee in Uttar Pradesh from appointing an input based franchisee.*

*8. The Respondent No.4 herein had sought for investigation by the State Commission of the licensees, which are Respondent Nos.2 and 3 herein. The prayer was not for investigation into the affairs of the Appellant herein.*

*9. The powers of the State Commission under Sections 128, 129 are not adjudicatory in nature of a lis between two parties, but the regulatory jurisdiction of the State Commission. The role of the Respondent No.4 is to bring to the attention of the State Commission the relevant facts. It is for the State Commission to investigate in such manner and pass such orders in terms of law as a regulatory authority.*

*10. The State Commission had by order dated 16.07.2015 only directed a report to be submitted on specific aspects of the functioning of the franchisee agreement and the improvements in the distribution function in the City of Agra.*

*11. The report was submitted by the Committee on 09.01.2017. Various issues and remedial measures were also suggested.*

*12. In fact, the Appellant had itself filed a petition seeking approval of the Infrastructure Roll Out plan before the State Commission. In the said proceedings, the Commission by order dated 18.12.2017 had relied on various aspects of the*

*Expert Committee Report on the loss reduction and passed directions on the costs to be allowed.*

*13. It is submitted that the Appellant is only seeking to avoid the scrutiny of the State Commission on the terms of the Franchisee Agreement and its implementation, which has an impact on all the consumers in the State. The impact is not merely restricted to consumers in Agra, as the input price being not regulated, any loss on the input price of the Respondent Nos.2 and 3 supplying to the Appellant affects tariff of all the consumers of Respondent Nos.2 and 3.*

*14. With regard to the locus of Respondent No.4 to file a petition, it is submitted that the jurisdiction and powers of the State Commission under Section 128 and 129 of the Electricity Act are not adjudicatory, but inquisitive and regulatory in nature. The proceedings under Section 128 and 129 can be undertaken even suo moto. The role of the Respondent No.4 is only to bring to the notice of the State Commission the factual position and that there is violation. Any orders passed by the State Commission and benefits if any accruing are not only qua the Respondent No.4, but all the consumers whose tariff is affected.*

*15. With regard to the contention that the Appellant is merely an agent of the Respondent Nos.2 and 3 and there is no separate jurisdiction over the Appellant, it is submitted that the Petition filed was against both the Appellant and the Respondent Nos.2 and 3.*

*16. In fact, the petition for network roll out was filed by the Appellant and the Respondent No.3 before the State Commission, in which the Order dated 18.12.2017 was passed by the State Commission.*

*17. When the Appellant has itself invoked the jurisdiction of the State Commission on tariff issues, it is not open to the Appellant to contend that the State Commission has no jurisdiction over the affairs of the Appellant. 18. As submitted hereinabove, the issues involved impact on tariff*



*and therefore is within the jurisdiction of the State Commission.”*

D. **ANALYSIS**

18. Having heard the learned counsel appearing for the parties and having gone through materials on record, the following questions fall for our consideration:

i) Whether any individual can invoke the jurisdiction of a State ERC on the plea of public interest? In other words, whether an ERC has the jurisdiction to consider matters in public interest?

ii) Whether the Act, 2003 confers jurisdiction on the State ERCs to consider and adjudicate the efficacy of a distribution franchisee agreement entered between a distribution licensee and a distribution franchisee? In other words, whether ERCs have the jurisdiction to review the functioning of a distribution licensee to supply the electricity through a franchisee?

(i) **Relevant provisions of the Act, 2003**

19. Before advertng to the rival submissions canvassed on either side, we must look into few relevant provisions of law.

20. Section 2(15) of Electricity Act, 2003 reads as under:

*“(15) "consumer" means any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person, as the case may be;”*

21. Section 2(17) of Electricity Act, 2003 reads as under:

*"(17) "distribution licensee" means a licensee authorised to operate and maintain a distribution system for supplying electricity to the consumers in his area of supply;"*

22. Section 2(27) of Electricity Act, 2003 reads as under:

*"(27) "franchisee" means a persons authorised by a distribution licensee to distribute electricity on its behalf in a particular area within his area of supply;"*

23. Section 12 of Electricity Act, 2003 reads as under:

*"Section 12. (Authorised persons to transmit, supply, etc., electricity): No person shall*

*(a) transmit electricity; or*

*(b) distribute electricity; or*

*(c) undertake trading in electricity,*

*unless he is authorised to do so by a licence issued under section 14, or is exempt under section 13".*

24. The seventh proviso to Section 14 reads thus:

*"(...) Provided also that in a case where a distribution licensee proposes to undertake distribution of electricity for a specified area within his area of supply through another person, that person shall not be required to obtain any separate licence from the concerned State Commission and such distribution licensee shall be responsible for distribution of electricity in his area of supply: (...)"*

25. Part VII of the Electricity Act, 2003 reads thus:

**“TARIFF**

*Section 61. (Tariff regulations): The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-*

*(a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;*

*(b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;*

*(c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;*

*(d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;*

*(e) the principles rewarding efficiency in performance;*

*(f) multi year tariff principles;*

*(g) that the tariff progressively reflects the cost of supply of electricity and also, reduces cross-subsidies in the manner specified by the Appropriate Commission;*

*(h) the promotion of co-generation and generation of electricity from renewable sources of energy;*

*(i) the National Electricity Policy and tariff policy:*

*Provided that the terms and conditions for determination of tariff under the Electricity (Supply) Act, 1948, the Electricity Regulatory Commission Act, 1998 and the enactments specified in the Schedule as they stood immediately before the appointed date, shall continue to apply for a period of one year or until the terms and conditions for tariff are specified under this section, whichever is earlier.*

*Section 62. (Determination of tariff): --- (1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for –*

*(a) supply of electricity by a generating company to a distribution licensee:*

*Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;*

*(b) transmission of electricity ;*

*(c) wheeling of electricity;*

*(d) retail sale of electricity:*

*Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity.*

*(2) The Appropriate Commission may require a licensee or a generating company to furnish separate details, as may be specified in respect of generation, transmission and distribution for determination of tariff.*

*(3) The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required.*

*(4) No tariff or part of any tariff may ordinarily be amended, more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified.*

*(5) The Commission may require a licensee or a generating company to comply with such procedures as*

*may be specified for calculating the expected revenues from the tariff and charges which he or it is permitted to recover.*

*(6) If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee.*

*Section 63. (Determination of tariff by bidding process): Notwithstanding anything contained in section 62, the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government.*

*Section 64. (Procedure for tariff order): --- (1) An application for determination of tariff under section 62 shall be made by a generating company or licensee in such manner and accompanied by such fee, as may be determined by regulations.*

*(2) Every applicant shall publish the application, in such abridged form and manner, as may be specified by the Appropriate Commission.*

*(3) The Appropriate Commission shall, within one hundred and twenty days from receipt of an application under sub-section (1) and after considering all suggestions and objections received from the public,-*

*(a) issue a tariff order accepting the application with such modifications or such conditions as may be specified in that order;*

*(b) reject the application for reasons to be recorded in writing if such application is not in accordance with the provisions of this Act and the rules and regulations made thereunder or the provisions of any other law for the time being in force: Provided that an applicant shall be given a reasonable opportunity of being heard before rejecting his application.*

*(4) The Appropriate Commission shall, within seven days of making the order, send a copy of the order to the Appropriate Government, the Authority, and the concerned licensees and to the person concerned.*

*(5) Notwithstanding anything contained in Part X, the tariff for any inter State supply, transmission or wheeling of electricity, as the case may be, involving the territories of two States may, upon application made to it by the parties intending to undertake such supply, transmission or wheeling, be determined under this section by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefor.*

*(6) A tariff order shall, unless amended or revoked, continue to be in force for such period as may be specified in the tariff order.*

*Section 65. (Provision of subsidy by State Government): If the State Government requires the grant of any subsidy to any consumer or class of consumers in the tariff determined by the State Commission under section 62, the State Government shall, notwithstanding any direction which may be given under section 108, pay, in advance and in such manner as may be specified, the amount to compensate the person affected by the grant of subsidy in the manner the State Commission may direct, as a condition for the licence or any other person concerned to implement the subsidy provided for by the State Government:*

*Provided that no such direction of the State Government shall be operative if the payment is not made in accordance with the provisions contained in this section and the tariff fixed by State Commission shall be applicable from the date of issue of orders by the Commission in this regard.*

*Section 66. (Development of market): The Appropriate Commission shall endeavour to promote the development of a market (including trading) in power in such manner as may be specified and shall be guided*

*by the National Electricity Policy referred to in section 3 in this regard.”*

26. Section 82 of the Electricity Act, 2003 reads as under:

*“Section 82. (Constitution of State Commission): --- (1) Every State Government shall, within six months from the appointed date, by notification, constitute for the purposes of this Act, a Commission for the State to be known as the (name of the State) Electricity Regulatory Commission:*

*Provided that the State Electricity Regulatory Commission, established by a State Government under section 17 of the Electricity Regulatory Commissions Act, 1998 and the enactments specified in the Schedule, and functioning as such immediately before the appointed date, shall be the State Commission for the purposes of this Act and the Chairperson, Members, Secretary, and other officers and other employees thereof shall continue to hold office, on the same terms and conditions on which they were appointed under those Acts:*

*Provided further that the Chairperson and other Members of the State Commission appointed, before the commencement of this Act under the Electricity Regulatory Commissions Act, 1998 or under the enactments specified in the Schedule, may on the recommendations of the Selection Committee constituted under sub-section (1) of Section 85 be allowed to opt for the terms and conditions under this Act by the concerned State Government.*

*(2) The State Commission shall be a body corporate by the name aforesaid, having perpetual succession and a common seal, with power to acquire, hold and dispose of property, both movable and immovable, and to contract and shall, by the said name, sue or be sued.*

*(3) The head office of the State Commission shall be at such place as the State Government may, by notification, specify.*

*(4) The State Commission shall consist of not more than three Members, including the Chairperson.*

*(5) The Chairperson and Members of the State Commission shall be appointed by the State Government on the recommendation of a Selection Committee referred to in section 85.”*

27. Section 86 of the Electricity Act, 2003 reads thus:

*“Section 86. (Functions of State Commission): --- (1) The State Commission shall discharge the following functions, namely: -*

*(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State: Provided that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;*

*(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;*

*(c) facilitate intra-State transmission and wheeling of electricity;*

*(d) issue licences to persons seeking to act as transmission licensees, distribution licensees and electricity traders with respect to their operations within the State;*

*(e) promote co-generation and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee;*



*(f) adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration;*

*(g) levy fee for the purposes of this Act;*

*(h) specify State Grid Code consistent with the Grid Code specified under clause (h) of sub-section (1) of section 79;*

*(i) specify or enforce standards with respect to quality, continuity and reliability of service by licensees;*

*(j) fix the trading margin in the intra-State trading of electricity, if considered, necessary; and*

*(k) discharge such other functions as may be assigned to it under this Act.*

*(2) The State Commission shall advise the State Government on all or any of the following matters, namely :-*

*(i) promotion of competition, efficiency and economy in activities of the electricity industry;*

*(ii) promotion of investment in electricity industry;*

*(iii) reorganization and restructuring of electricity industry in the State;*

*(iv) matters concerning generation, transmission , distribution and trading of electricity or any other matter referred to the State Commission by that Government.*

*(3) The State Commission shall ensure transparency while exercising its powers and discharging its functions.*

*(4) In discharge of its functions, the State Commission shall be guided by the National Electricity Policy, National Electricity Plan and tariff policy published under section 3”.*

28. Section 107 of the Electricity Act, 2003 reads thus:

*“Section 107. (Directions by Central Government): --- (1) In the discharge of its functions, the Central Commission shall be guided by such directions in*

*matters of policy involving public interest as the Central Government may give to it in writing.*

*(2) If any question arises as to whether any such direction relates to a matter of policy involving public interest, the decision of the Central Government thereon shall be final.”*

29. Section 108 of the Electricity Act, 2003 reads thus:

*“Section 108. (Directions by State Government): --- (1) In the discharge of its functions, the State Commission shall be guided by such directions in matters of policy involving public interest as the State Government may give to it in writing.*

*(2) If any question arises as to whether any such direction relates to a matter of policy involving public interest, the decision of the State Government thereon shall be final”.*

30. Section 111 of the Electricity Act, 2003 reads thus:

*“Section 111. (Appeal to Appellate Tribunal): --- (1) Any person aggrieved by an order made by an adjudicating officer under this Act (except under section 127) or an order made by the Appropriate Commission under this Act may prefer an appeal to the Appellate Tribunal for Electricity:*

*Provided that any person appealing against the order of the adjudicating officer levying any penalty shall, while filing the appeal, deposit the amount of such penalty:*

*Provided further that wherein any particular case, the Appellate Tribunal is of the opinion that the deposit of such penalty would cause undue hardship to such person, it may dispense with such deposit subject to such conditions as it may deem fit to impose so as to safeguard the realisation of penalty.*

*(2) Every appeal under sub-section (1) shall be filed within a period of fortyfive days from the date on which*

*a copy of the order made by the adjudicating officer or the Appropriate Commission is received by the aggrieved person and it shall be in such form, verified in such manner and be accompanied by such fee as may be prescribed: Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.*

*(3) On receipt of an appeal under sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.*

*(4) The Appellate Tribunal shall send a copy of every order made by it to the parties to the appeal and to the concerned adjudicating officer or the Appropriate Commission, as the case may be.*

*(5) The appeal filed before the Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within one hundred and eighty days from the date of receipt of the appeal:*

*Provided that where any appeal could not be disposed of within the said period of one hundred and eighty days, the Appellate Tribunal shall record its reasons in writing for not disposing of the appeal within the said period.*

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

31. Section 128 of the Electricity Act, 2003 reads thus:

*“Section 128. (Investigation of certain matters): ---- (1)  
The Appropriate Commission may, on being satisfied*

*that a licensee has failed to comply with any of the conditions of licence or a generating company or a licensee has failed to comply with any of the provisions of this Act or rules or regulations made thereunder, at any time, by order in writing, direct any person (hereafter in this section referred to as "Investigating Authority") specified in the order to investigate the affairs of any generating company or licensee and to report to that Commission on any investigation made by such Investigating Authority:*

*Provided that the Investigating Authority may, wherever necessary, employ any auditor or any other person for the purpose of assisting him in any investigation under this section.*

*(2) Notwithstanding anything to the contrary contained in section 235 of the Companies Act, 1956, the Investigating Authority may, at any time, and shall, on being directed so to do by the Appropriate Commission, cause an inspection to be made, by one or more of his officers, of any licensee or generating company and his books of account; and the Investigating Authority shall supply to the licensee or generating company, as the case may be, a copy of his report on such inspection.*

*(3) It shall be the duty of every manager, managing director or other officer of the licensee or generating company, as the case may be, to produce before the Investigating Authority directed to make the investigation under sub-section (1), or inspection under sub-section (2), all such books of account, registers and other documents in his custody or power and to furnish him with any statement and information relating to the affairs of the licensee or generating company, as the case may be, as the said Investigating Authority may require of him within such time as the said Investigating Authority may specify.*

*(4) Any Investigating Authority, directed to make an investigation under subsection (1), or inspection under sub-section (2), may examine on oath any manager, managing director or other officer of the*

licensee or generating company, as the case may be, in relation to his business and may administer oaths accordingly.

(5) The Investigating Authority, shall, if it has been directed by the Appropriate Commission to cause an inspection to be made, and may, in any other case, report to the Appropriate Commission on any inspection made under this section.

(6) On receipt of any report under sub-section (1) or sub-section (5), the Appropriate Commission may, after giving such opportunity to the licensee or generating company, as the case may be, to make a representation in connection with the report as in the opinion of the Appropriate Commission, seems reasonable, by order in writing—

(a) require the licensee or the generating company to take such action in respect of any matter arising out of the report as the Appropriate Commission may think fit; or

(b) cancel the licence; or

(c) direct the generating company to cease to carry on the business of generation of electricity.

(7) The Appropriate Commission may, after giving reasonable notice to the licensee or the generating company, as the case may be, publish the report submitted by the Investigating Authority under sub-section (5) or such portion thereof as may appear to it to be necessary.

(8) The Appropriate Commission may specify the minimum information to be maintained by the licensee or the generating company in their books, the manner in which such information shall be maintained, the checks and other verifications to be adopted by licensee or the generating company in that connection and all other matters incidental thereto as are, in its opinion, necessary to enable the Investigating Authority to discharge satisfactorily its functions under this section.

*Explanation.-* For the purposes of this section, the expression “licensee or the generating company” shall include in the case of a licensee incorporated in India—

*(a) all its subsidiaries formed for the purpose of carrying on the business of generation or transmission or distribution or trading of electricity exclusively outside India; and*

*(b) all its branches whether situated in India or outside India.*

*(9) All expenses of, and incidental to, any investigation made under this section shall be defrayed by the licensee or the generating company, as the case may be, and shall have priority over that debts due from the licensee or the generating company and shall be recoverable as an arrear of land revenue.”*

32. Section 129 of the Electricity Act, 2003 reads thus:

*“Section 129. (Orders for securing compliance): --- (1) Where the Appropriate Commission, on the basis of material in its possession, is satisfied that a licensee is contravening, or is likely to contravene, any of the conditions mentioned in his licence or conditions for grant of exemption or the licensee or the generating company has contravened or is likely to contravene any of the provisions of this Act, it shall, by an order, give such directions as may be necessary for the purpose of securing compliance with that condition or provision.*

*(2) While giving direction under sub-section (1), the Appropriate Commission shall have due regard to the extent to which any person is likely to sustain loss or damage due to such contravention.”*

33. Section 130 of the Electricity Act, 2003 reads thus:

*“Section 130. (Procedure for issuing directions by Appropriate Commission): The Appropriate Commission, before issuing any direction under section 129, shall-- (a) serve notice in the manner as may be specified to the concerned licensee or the generating company; (b) publish the notice in the manner as may be specified for the purpose of bringing the matters to*

*the attention of persons, likely to be affected, or affected; (c) consider suggestions and objections from the concerned licensee or generating company and the persons, likely to be affected, or affected.”*

34. Section 181 of the Electricity Act, 2003 reads thus:

*“Section 181. (Powers of State Commissions to make regulations): --- (1) The State Commissions may, by notification, make regulations consistent with this Act and the rules generally to carry out the provisions of this Act.*

*(2) In particular and without prejudice to the generality of the power contained in sub-section (1), such regulations may provide for all or any of the following matters, namely: -*

- (a) period to be specified under the first proviso of section 14;*
- (b) the form and the manner of application under sub-section (1) of section 15;*
- (c) the manner and particulars of application for licence to be published under sub-section (2) of section 15;*
- (d) the conditions of licence section 16;*
- (e) the manner and particulars of notice under clause(a) of subsection (2) of section 18;*
- (f) publication of the alterations or amendments to be made in the licence under clause (c) of sub-section (2) of section 18;*
- (g) levy and collection of fees and charges from generating companies or licensees under sub-section (3) of section 32;*
- (h) rates, charges and the term and conditions in respect of intervening transmission facilities under proviso to section 36;*
- (i) payment of the transmission charges and a surcharge under subclause (ii) of clause(d) of sub-section (2) of section 39;*

- (j) reduction of surcharge and cross subsidies under second proviso to sub-clause (ii) of clause (d) of sub-section (2) of section 39;*
- (k) manner and utilisation of payment and surcharge under the fourth proviso to sub-clause(ii) of clause (d) of sub-section (2) of section 39;*
- (l) payment of the transmission charges and a surcharge under subclause(ii) of clause (c) of section 40;*
- (m) reduction of surcharge and cross subsidies under second proviso to sub-clause (ii) of clause (c) of section 40;*
- (n) the manner of payment of surcharge under the fourth proviso to sub-clause (ii) of clause (c) of section 40;*
- (o) proportion of revenues from other business to be utilised for reducing the transmission and wheeling charges under proviso to section 41;*
- (p) reduction of surcharge and cross-subsidies under the third proviso to sub-section (2) of section 42;*
- (q) payment of additional charges on charges of wheeling under subsection (4) of section 42;*
- (r) guidelines under sub-section (5) of section 42;*
- (s) the time and manner for settlement of grievances under sub-section (7) of section 42;*
- (t) the period to be specified by the State Commission for the purposes specified under sub-section (1) of section 43;*
- (u) methods and principles by which charges for electricity shall be fixed under sub-section (2) of section 45;*
- (v) reasonable security payable to the distribution licensee under sub-section (1) of section 47;*
- (w) payment of interest on security under sub-section (4) of section 47;*
- (x) electricity supply code under section 50;*
- (y) the proportion of revenues from other business to be utilised for reducing wheeling charges under proviso to section 51;*
- (z) duties of electricity trader under sub-section (2) of section 52;*



(za) standards of performance of a licensee or a class of licensees under sub-section (1) of section 57;  
 (zb) the period within which information to be furnished by the licensee under sub-section (1) of section 59;  
 (zc) the manner of reduction of cross-subsidies under clause (g) of section 61;  
 (zd) the terms and conditions for the determination of tariff under section 61;  
 (ze) details to be furnished by licensee or generating company under sub-section (2) of section 62;  
 (zf) the methodologies and procedures for calculating the expected revenue from tariff and charges under sub-section (5) of section 62;  
 (zg) the manner of making an application before the State Commission and the fee payable therefor under sub-section (1) of section 64;  
 (zh) issue of tariff order with modifications or conditions under subsection(3) of section 64;  
 (zi) the manner by which development of market in power including trading specified under section 66;  
 (zj) the powers and duties of the Secretary of the State Commission under sub-section (1) of section 91;  
 (zk) the terms and conditions of service of the secretary, officers and other employees of the State Commission under sub-section (2) of section 91;  
 (zl) rules of procedure for transaction of business under sub-section (1) of section 92;  
 (zm) minimum information to be maintained by a licensee or the generating company and the manner of such information to be maintained under sub-section (8) of section 128;  
 (zn) the manner of service and publication of notice under section 130;  
 (zo) the form of preferring the appeal and the manner in which such form shall be verified and the fee for preferring the appeal under sub-section (1) of section 127;  
 (zp) any other matter which is to be, or may be, specified.

*(3) All regulations made by the State Commission under this Act shall be subject to the condition of previous publication”.*

**(ii) Whether the Electricity Regulatory Commission has the jurisdiction to consider matters in public interest?**

35. Under Section 61 of the Act, 2003, the Central and State ERCs are required to specify the terms and conditions for determination of tariff, and in doing so, are required to safeguard the interests of consumers [Section 61(d)]. Pertinently, ERCs are also required to consider the principles enshrined under Section 61 of the Act, 2003 whilst adopting or determining tariff under Sections 62 and 63 respectively of the Act, 2003.
36. Similarly, Sections 18 and 19 respectively of the Act, 2003 empower the ERCs to amend/alter the terms of any license (Distribution, Transmission or Trading) issued by them or to revoke such license in public interest. Consequently, under Section 20(1), an ERC may direct the sale of a utility, in the public interest. These are a part of the regulatory functions of ERCs.
37. Furthermore, Sections 107 and 108 respectively of the Act, 2003 mandate the ERCs to be guided by directions in matters of policy involving public interest as the Central/State Government may give to it in writing. In this context, we may refer to the decision of this Court in the case of ***Paschimanchal Vidyut Vitran Nigam Ltd. v. Adarsh Textiles*** reported in **(2014) 16 SCC 212**. We may reproduce paras 21, 22 and 23 respectively as under:

*“21. The Electricity Act, 2003 was enacted by Parliament. Section 62 whereof confers the power upon the Commission to determine the tariff. Section 65 of the Electricity Act, 2003 enables the State Government*

*to grant subsidy to any consumer or class of consumers in the tariff determined by the State Commission under Section 62. Section 108 of the 2003 Act deals with the power to issue directions by the State Government. The Commission shall be guided by such directions in the matter of policy involving public interest as the State Government may give to it in writing.*

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*23. It is apparent from a bare reading of the aforesaid provisions of the Electricity Act, 2003 and the Reforms Act, 1999 that in discharge of its functions, the State Commission shall be guided by such directions in matters of policy involving public interest as the State Government may give to it in writing. Such decision/direction of the State Government in the matter of policy, subsidy and public interest shall be final. Under Section 65 it is a prerogative of the State Government to grant any subsidy to any consumer or class of consumers in the tariff determined by the Commission under Section 62. It is apparent from the provisions contained in Sections 65 and 108 of the 2003 Act that to grant subsidy to any consumer or class of consumers is the prerogative of the State Government and such other direction issued in the public interest shall be binding upon the Commission.”*

38. Electricity being a natural resource that vests in the State, the provisions of the Act, 2003 keep consumers' interest at the core of all processes that are sought to be governed under the Act, 2003 namely, generation, transmission and distribution of electricity.
39. Following the observation in ***Energy Watchdog v. CERC*** reported in **(2017) 14 SCC 80** that “*the appropriate Commission does not act as a mere post office...*” for the purpose of tariff determination but must ensure transparency in the procedure for such determination, this Court, in ***M.P. Power Management Co. Ltd. v. Sky Power Southeast Solar India (P) Ltd.***, reported in **(2023) 2 SCC 703**, has observed

that any impact on the electricity tariff, directly affects consumer interest and therefore, implicates public interest and such a concern finds statutory recognition under Sections 61 to 63 of the Act, 2003. Para 133 reads thus:

*“133. In the said case, the Court further held that the moment the electricity tariff gets affected, the consumer interest comes in and public interest gets affected and further that there is a statutory recognition for the same in Sections 61 to 63 of the Electricity Act, 2003. Therefore, this judgment, though in the context of a statutory appeal, has laid down that consumer interest in tariff is intertwined with public interest.”*

40. Similarly, in **Jaipur Vidyut Vitran Nigam Ltd. v. MB Power (M.P.) Ltd.**, reported in **(2024) 8 SCC 513**, this Court reiterated the requirement of balancing consumer interest with that of the interest of the generators. Para 127 reads thus:

*“127. It is needless to state that this Court, time and again, in various judgments including the one in GMR Warora Energy [GMR Warora Energy Ltd. v. CERC, (2023) 10 SCC 401 : 2023 INSC 398] has recognised the requirement of balancing the consumers’ interest with that of the interest of the generators. It will not be permissible to take a lopsided view only to protect the interest of the generators ignoring the consumers’ interest and public interest.”*

41. This Court, in **All India Power Engineer Federation v. Sasan Power Ltd.**, reported in **(2017) 1 SCC 487**, while rendering the judgment in the context of a statutory tariff appeal, has underscored that consumer interest in tariff is intertwined with public interest. Para 30 reads thus:

*"31. (...) This is for the reason that what is adopted by the Commission under Section 63 is only a tariff*

obtained by competitive bidding in conformity with Guidelines issued. If at any subsequent point of time such tariff is increased, which increase is outside the four corners of the PPA, even in cases covered by Section 63, the legislative intent and the language of Sections 61 and 62 make it clear that the Commission alone can accept such amended tariff as it would impact consumer interest and therefore public interest."

(Emphasis supplied)

42. What is pertinent to note is that all the judgments referred to hereinabove pertain to the adoption of tariff under Section 63 of the Act, 2003 in a manner that seeks to balance consumers' interest in the arena of procurement of electricity from generating stations. The said judgments are not in respect of the relationship between distribution licensees or franchisees. While consumer interest is an important consideration in the overall scheme of the Act, 2003, it remains to be seen whether the ERCs have jurisdiction to entertain petitions in respect of disputes between consumers and distribution licensees/franchisees.
43. The ERCs, being creatures of a statute, derive their jurisdiction and powers from the provisions of that statute i.e., the Act, 2003. Therefore, it would not be permissible for them to exercise powers not expressly vested in them. In this context, we may refer to the decision of this Court in the case of **Rajeev Hitendra Pathak v. Achyut Kashinath Karekar**, reported in **(2011) 9 SCC 541**. Para 34 reads thus:

*"34. On a careful analysis of the provisions of the Act, it is abundantly clear that the Tribunals are creatures of the statute and derive their power from the express provisions of the statute. The District Forums and the State Commissions have not been given any power to set aside ex parte orders and the power of review and*

*the powers which have not been expressly given by the statute cannot be exercised.”*

44. An authority created by a statute must act under the statute and not beyond it. In **Chiranjilal Shrilal Goenka v. Jasjit Singh**, reported in **(1993) 2 SCC 507**, this Court observed thus:

*“17. (...) In this country, jurisdiction can be exercised only when provided for either in the Constitution or in the laws made by the legislature. Jurisdiction is thus the authority or power of the court to deal with a matter and make an order carrying binding force in the facts. Oza, J. supplementing the question held that the jurisdiction to try a case could only be conferred by law enacted by the legislature. The Supreme Court could not confer jurisdiction if it does not exist in law. Ray, J. held that the Court cannot confer a jurisdiction on itself which is not provided in the law. In the dissenting opinion Venkatachaliah, J., as he then was, lay down that the expression jurisdiction or prior determination is a “verbal coat of many colours”. In the case of a tribunal, an error of law might become not merely an error in jurisdiction but might partake of the character of an error of jurisdiction. But, otherwise, jurisdiction is a ‘legal shelter’ and a power to bind despite a possible error in the decision. The existence of jurisdiction does not depend on the correctness of its exercise. The authority to decide embodies a privilege to bind despite error, a privilege which is inherent in and indispensable to every judicial function. The characteristic attribute of a judicial act is that it binds whether it be right or it be wrong. Thus this Court laid down as an authoritative proposition of law that the jurisdiction could be conferred by statute and this Court cannot confer jurisdiction or an authority on a tribunal. In that case this Court held that Constitution Bench has no power to give direction contrary to Criminal Law Amendment*

Act, 1952. The direction per majority was held to be void.”

(Emphasis supplied)

45. In **A.R. Antulay v. R.S. Nayak**, reported in **(1988) 2 SCC 602**, in para 91, this Court observed thus:

“91. (...) Instances of conferment of jurisdiction by specific law are very common. The laws of procedure both criminal and civil confer jurisdiction on different courts. Special jurisdiction is conferred by special statute. It is thus clear that jurisdiction can be exercised only when provided lower either in the Constitution or in the laws made by the legislature. Jurisdiction is thus the authority or power of the court to deal with a matter and make an order carrying binding force in the facts. In support of judicial opinion for this view reference may be made to the Permanent Edition of “Words und Phrases” Vol. 23-A at page 164. It would be appropriate to refer to two small passages occurring at pages 174 and 175 of the volume. At page 174, referring to the decision in *Carlile v. National Oil & Development Co.* it has been stated.

Jurisdiction is the authority to hear and determine, and in order that it may exist the following are essential: (1) A court created by law, organized and sitting; (2) authority given to it by law to hear and determine causes of the kind in question; (3) power given to it by law to render a judgment such as it assumes to render; (4) authority over the parties to the case if the judgment is to bind them personally as a judgment in personam, which is acquired over the plaintiff by his appearance and submission of the matter to the court, and is acquired over the defendant by his voluntary appearance, or by service of process on him; (5) authority over the thing adjudicated upon its being located within the court's territory, and by actually seizing it if liable to be carried away; (6) authority to decide the question involved, which is acquired by the

question being submitted to it by the parties for decision.”

(Emphasis supplied)

46. In **Bhadreshwar Vidyut (P) Ltd. v. Maharashtra ERC**, reported in **2024 SCC OnLine APTEL 47** in para 149, this Court observed thus:

“149. As noted hereinabove, the possibility of inconvenience or hardship would not confer jurisdiction on the CERC, since jurisdiction can be conferred only by a statutory enactment and not by judicial pronouncement. In the present case, it is evident that the jurisdiction, to adjudicate on whether or not the Appellant is a Captive Generation Plant in terms of Section 2(8) read with Section 9 of the Electricity Act and Rule 3(1) of the Electricity Rules, 2005, lies with the State Commission under Section 86(1)(f) of the Electricity Act, and not with the CERC under Section 79(1)(f).”

47. With respect to the ERCs in particular, this Court in **Gujarat Urja Vikas Nigam Ltd. v. Solar Semiconductor Power Co. (India) (P) Ltd.**, reported in **(2017) 16 SCC 498**, has held that such statutory authorities cannot act beyond the powers vested in them by their parent statute. The relevant paras are reproduced below:

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

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59. The inherent power is not a provision of law to grant any substantive relief. But it is only a procedural provision to make orders to secure the ends of justice and to prevent abuse of



process of the Court. It cannot be used to create or recognize substantive rights of the parties."

(Emphasis supplied)

48. Under the scheme of the Act, 2003, the Central and State ERCs are vested with regulatory functions, tariff determination functions, and adjudicatory functions, in particular under Sections 79 and 86 respectively. Whilst in the exercise of regulatory functions, the ERCs are also required to comply with the various Regulations made by the respective Central and State Commissions under Sections 178 and 181 respectively of the Act, 2003. A close reading of most of the Regulations framed by the ERCs i.e., Regulations pertaining to Open Access, Connectivity Regulations, Regulations on Renewable Power Purchase Obligations etc., indicate that regulatory powers and functions of the ERCs must be exercised in public or consumer interest alongside commercial principles. The function of tariff adoption or determination is also mandated to be carried by ERCs in accordance with public interest and to safeguard consumer needs. It is noteworthy that Section 61 of the Act, 2003 also requires ERCs to consider commercial principles in matters of tariff and therefore ERCs are expected to undertake a balancing act between commercial prudence and consumer interest.
49. The adjudicatory functions of ERCs are specifically governed by Sections 79 and 86 respectively of the Act, 2003. The ERCs also have the discretion to refer disputes to arbitration. Adjudicatory jurisdiction of the Central Commission is specified under Section 79(1)(f) and is limited to adjudication of disputes involving generating companies or transmission licensee, in regard to matters connected with clauses (a) to (d), which are extracted below:
- a) to regulate the tariff of generating companies owned or controlled by the Central Government;

- b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;
- c) to regulate the inter-State transmission of electricity;
- d) to determine tariff for inter-State transmission of electricity.

50. The State ERCs have a comparatively broader jurisdiction under Section 86, to adjudicate upon all disputes between the licensees and generating companies, without being limited to categories specified in (a) to (d) of Section 79. However, even this enlarged jurisdiction of the State ERCs, more particularly the UPERC, does not include within its fold the power to adjudicate disputes involving consumers and by extension their grievances, irrespective of whether such issue is raised in furtherance of public interest. However, a perusal of the petition filed by the respondent no. 4 shows that there is no occasion for application of Section 86, as the said petition was filed praying for an investigation under Section 128 of the Act, 2003 against the respondent nos. 2 and 3 as well as the appellant. To this extent, we agree with the impugned order of the APTEL.

51. To contest the jurisdiction of the UPERC to decide the petition of the respondent no. 4, the appellant has relied on this Court's dictum in ***Maharashtra Electricity Regulatory Commission v. Reliance Energy Ltd.***, reported in (2007) 8 SCC 381 wherein it was held that in view of the mechanism for redressal of consumers' grievance provided under Section 42(5) of the Act, 2003, there is no occasion for the State ERC to exercise jurisdiction over such matters in place of the forum created under the Act, 2003 for this very purpose. It was further held that the ERCs are empowered to adjudicate upon disputes under Section 86(1)(f) but the said provision does not appertain to the individual consumers' disputes. The relevant observations from the said decision are reproduced below:

“31. The basic question which arises for our consideration in this appeal is whether the individual consumer can approach the Commission under the Act or not.

32. For deciding this question, the relevant provision is Section 42(5) of the Act, which reads as under:

“42. Duties of distribution licensee and open access.—(1)-(4) \* \* \*

(5) Every distribution licensee shall, within six months from the appointed date or date of grant of licence, whichever is earlier, establish a forum for redressal of grievances of the consumers in accordance with the guidelines as may be specified by the State Commission.”

33. As per the aforesaid provision, if any grievance is made by a consumer, then they have a remedy under Section 42(5) of the Act and according to sub-section (5) every distribution licensee has to appoint a forum for redressal of grievances of the consumers. In exercise of this power the State has already framed the Maharashtra Electricity Regulatory Commission (Consumer Grievance Redressal Forum and Ombudsman) Regulations, 2003 (hereinafter referred to as “the 2003 Regulations”) and created Consumer Grievance Redressal Forum and Ombudsman. Under these 2003 Regulations a proper forum for redressal of the grievances of individual consumers has been created by the Commission. Therefore, now by virtue of sub-section (5) of Section 42 of the Act, all the individual grievances of consumers have to be raised before this forum only. In the face of this statutory provision we fail to understand how could the Commission acquire jurisdiction to decide the matter when a forum has been created under the Act for this purpose. The matter should have been left to the said forum. This question has already been considered and decided by a Division Bench of the Delhi High Court in Suresh Jindal v. BSES

Rajdhani Power Ltd. [(2006) 132 DLT 339 (DB)] and Dheeraj Singh v. BSES Yamuna Power Ltd. [Ed. : (2006) 127 DLT 525 (DB)] and we approve of these decisions. It has been held in these decisions that the forum and ombudsman have power to grant interim orders. Thus a complete machinery has been provided in Sections 42(5) and 42(6) for redressal of grievances of individual consumers. Hence wherever a forum/ombudsman have been created the consumers can only resort to these bodies for redressal of their grievances. Therefore, not much is required to be discussed on this issue. As the aforesaid two decisions correctly lay down the law when an individual consumer has a grievance he can approach the forum created under sub-section (5) of Section 42 of the Act.

34. In this connection, we may also refer to Section 86 of the Act which lays down the functions of the State Commission. Sub-section (1)(f) of the said section lays down the adjudicatory function of the State Commission which does not encompass within its domain complaints of individual consumers. It only provides that the Commission can adjudicate upon the disputes between the licensees and generating companies and to refer any such dispute for arbitration. This does not include in it an individual consumer. The proper forum for that is Section 42(5) and thereafter Section 42(6) read with the Regulations of 2003 as referred to hereinabove.

35. Therefore, in the facts and circumstances of the present case, we are of the opinion that the views taken by the Commission as well as the appellate authority are unsustainable and they have erred in coming to the conclusion that the Commission has jurisdiction. Consequently, we set aside the order dated 18-10-2005 passed by the Commission and the orders dated 5-4-2006 and 2-6-2006 passed by the appellate authority and remit the matter to the proper forum created under Section 42(5) of the Act to decide the

*grievance of the respondent herein in accordance with law. We make it clear that we have not made any observation with regard to the merits of the demand raised by the appellant upon the respondent Company and it will be open for the proper forum to adjudicate the same. The payment, if any, made by the Company will not operate as an estoppel against the respondent Company. We hope that the forum will decide the matter expeditiously.”*

(Emphasis supplied)

52. Although we are in respectful agreement with the principles enunciated in the decision in **Reliance Energy** (*supra*) to the extent that it observes that a State ERC cannot usurp the jurisdiction of the consumer grievance redressal forum established under Section 42(5), yet we are of the view that in the specific case on hand, the said judgment is not applicable. The present matter pertains to the State of Uttar Pradesh where the UPERC had enacted the Uttar Pradesh Electricity Regulatory Commission (Consumer Grievance Redressal Forum & Electricity Ombudsman) Regulations, 2007 dated 04.10.2007 (hereinafter referred to as “**UPERC Consumer Grievance Regulations**”) under Section 181 of the Act, 2003. Regulation 5 thereof relates to the jurisdiction of the consumer grievance redressal forum wherein it has been specified that the forum is not empowered to entertain a complaint pertaining to matters under Section 128 of the Act, 2003. The relevant regulations are extracted below:

*“5.0 Jurisdiction of the Forum-*

*5.1 The Forum shall not entertain a complaint, if it pertains to matters mentioned in Section 126, 127, 128, 135 to 139, 143, 152 and 161 of the Electricity Act, 03.*

*5.2 The Forum shall have the jurisdiction to take up complaints, except those under Regulation 5.1, on an application before it or suo-moto if it considers appropriate in the interest of justice.*

*5.3 The Forum shall not entertain a complaint if it pertains to the same subject matter for which any proceedings before any court, authority or any other Forum is pending or a decree, award or a final order has already been passed by any competent court, authority or Forum.”*

(Emphasis supplied)

53. We now examine the provision of law under Section 128 of the Act, 2003. Sub-section (1) of the provision reads thus:

*“(1) The Appropriate Commission may, on being satisfied that a licensee has failed to comply with any of the conditions of licence or a generating company or a licensee has failed to comply with any of the provisions of this Act or rules or regulations made thereunder, at any time, by order in writing, direct any person (hereafter in this section referred to as “Investigating Authority”) specified in the order to investigate the affairs of any generating company or licensee and to report to that Commission on any investigation made by such Investigating Authority”*

54. The language of the Section is clear inasmuch as it places the onus of initiating an investigation on the appropriate commission, which is either the Central ERC or the State ERCs. Read with Regulation 5.1 of the UPERC Consumer Grievance Regulations, it is clear that a request for investigation under Section 128 cannot be made by an individual before the consumer forum for the simple reason that directing such investigation is out of the scope of the said body as it does not exercise regulatory powers under the Act, 2003. Therefore, this Court’s observations in **Reliance Energy** (*supra*) are of no avail to the appellant.

55. Having dealt with the said submission, we now proceed to ascertain whether the ERCs have *suo motu* power to initiate a proceeding under Section 128. For this purpose, we may refer to the Uttar Pradesh Electricity Regulatory Commission (Conduct of Business) Rules, 2004 (the “**Conduct of Business Rules, 2004**”), more particularly, Regulation 14 thereof, which deals with initiation of proceedings. The Regulation is extracted below:

*“14. Initiation of Proceedings:*

*a. The Commission may initiate any proceeding suo moto or on a Petition filed by any affected person.*

*b. When the Commission initiates the Proceedings, it shall be by a notice issued by the Office of the Commission through Secretary and the Commission may give such orders and directions as may be deemed necessary, for service of notices to the affected parties, for the filing of replies and rejoinder 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 Petition inviting comments on the issue involved in the Proceedings in such form as the Commission may direct.*

*c. While issuing the notice of inquiry the Commission may, in 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 the Party, which cannot afford to engage its representative”*

(Emphasis supplied)

56. A perusal of the Regulation compels us to conclude that the UPERC had jurisdiction to entertain a petition praying for investigation under Section 128. Therefore, in our considered view, the first issue must be

answered against the appellant. In the same breath, we also clarify that as a principle of law, the ERCs are not competent to entertain a matter on the singular ground of public interest. Accordingly, we answer this issue in negative.

**(iii) Whether the petition filed by the respondent no. 4 under Section 128 of the Act, 2003 was maintainable in law?**

57. We may now look into the “satisfaction” required under Section 128. Such satisfaction must be on either of the two grounds: (1) that a licensee has contravened the conditions of its license; or (2) that a licensee has failed to act in accordance with the provisions of the Act, 2003 and/or the regulations made thereunder. In the case at hand, the respondent no. 4 had approached the UPERC under Section 128 to investigate the respondent no. 3 along with the appellant on the following grounds:

- (i) *First*, the entire assets of the respondent no. 3 (i.e., the distribution licensee) deployed in the urban area of Agra were transferred to the appellant without the prior approval of the UPERC under Section 17.
- (ii) *Secondly*, the grant of franchisee for an urban area by a distribution licensee is not permissible under Section 13.
- (iii) *Lastly*, the appellant and respondent no. 3 were in violation of the tariff orders passed by the UPERC under Section 62, by adopting their own fixed schedule of annualized input rates.

58. As regards the first objection, we are of the view that the same does not afford any ground for investigation under Section 128 in the present case. Section 17 places the requirement of a prior approval on a licensee in respect of transactions with other licensees and not with a franchisee. In terms of the seventh proviso to Section 14 read with Sections 2(27) and 2(49), a franchisee is not required to obtain a separate license and therefore, is not considered to be a licensee under



Section 2(38) and Section 14. The Uttar Pradesh Electricity Regulatory Commission (General Conditions of Distribution License) Regulations, 2004 (the “**Conditions of Distribution License Regulations, 2004**”) reiterate the aforesaid explanation of Section 17. Regulation 5.8 of the said Regulations permits a distribution licensee to undertake distribution in a particular area through a franchisee, and Regulation 5.11 thereof clarifies that a distribution licensee is not restricted from transferring or assigning its functions under its license to a franchisee. As such, the facts of the case on hand fall outside the scope of an enquiry under Section 17 and no request for investigation under Section 128 can be made on this count. The relevant Regulations are extracted hereinbelow:

**“5. ACTIVITIES OF THE DISTRIBUTION LICENSEE**

5.8 The Licensee may undertake distribution of electricity for a specified area (franchise) within his Area of Supply through another Person. Such Person shall not be required to obtain any separate Licence from the Commission. The Licensee shall continue to be responsible for distribution of electricity in its Area of Supply and –

(a) Such Person shall operate under the overall supervision and control of the Licensee and upon the terms and conditions of the Licence and comply with all Regulations, guidelines or orders of the Commission;

(b) Establishment of such arrangements shall not alter the Licensee’s duties and obligations pursuant to general or specific conditions of Licence;

(c) The cost of providing service shall not be higher than if the Licensee performed such tasks itself; and

(d) For any act or omission of such Person, the Licensee shall be responsible.

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5.10 The Distribution Licensee may establish Subsidiaries or associated companies or grant a

*Franchisee or enter into management contracts including appointment of billing agent to conduct or carry out any of the functions, which the Distribution Licensee is authorised to conduct or carry under the Licence Provided that the Licensee shall be responsible for all actions of the Subsidiaries or associated companies or Franchisees or agents or contractors.*

5.11 Except as provided in clause 5.8 above the Distribution Licensee shall not transfer or assign the Licence or any of the functions under the Licence to any other Person without the prior approval of the Commission.”

59. The second objection, in our view, does not serve as a ground for initiating an investigation under Section 128. The respondent no. 4 may argue that appointment of the appellant as a distribution franchisee in the urban area is inconsistent with Section 5 of the Act, 2003, however, in our considered opinion, the said argument is devoid of substance. Section 5 lays down the “National policy on electrification and local distribution in rural areas” wherein franchisees have been identified as important stakeholders to achieve this policy but such provision cannot be taken to mean that the Act, 2003 restricts the role of franchisees to rural areas. A conjoint reading of Sections 2(27), 2(49), 13 and seventh proviso of Section 14 indicates that distribution franchisees may be appointed for urban areas as well and the Act, 2003 places no limitation on the area of operation of such franchisees. [See: **Citizen Forum, Maharashtra v. State of Maharashtra**, reported in **2008 SCC OnLine Bom 165**]
60. As regards the last objection, we understand such objection to be one that challenges the very concept of “input-rate model of distribution of franchisee”. The crux of the objection raised by the respondent no. 4 is that the appellant herein is benefiting from the fixation of lower rates as annualized input rates in the DFA between it and the

respondent no. 3. According to the respondent no. 4, such input rates are lower than the bulk supply rate of the respondent no. 2 and therefore, the difference between such rates has to be subsidized by public money, that is, by consumers who consume electricity supplied by the respondent no. 2 in areas other than the urban area of Agra.

61. For the purpose of discussing this objection, we find it apposite to first explain the “input-rate model of distribution franchisee”. In this model, a franchisee buys electricity from a distribution licensee at defined input point(s) at a pre-determined rate which is annualized for consistency on a yearly basis. This pre-determined rate that has to be paid by the franchisee to the distribution licensee for purchase of electricity, is usually fixed by way of bids received from private players interested in assuming the role of a franchisee. The private party that quotes the highest rate is awarded the bid subject to other terms and conditions of the bidding process. It is for this reason that quoting of such annualized rates is required even by the Ministry of Power’s “Standard Bidding Document for Appointment of Input based Distribution Franchisee, June 2012”
62. Once a franchisee signs an input-based franchisee agreement, it has to pay the distribution licensee or any utility it is purchasing electricity from, the agreed input rate for all the energy received by it. However, it is pertinent to note that the franchisee collects revenue from the consumers by raising bills at the tariff decided by the appropriate ERC. Therefore, after collecting the revenue from the consumers, the surplus left with it after paying the input rate to the distribution licensee or utility is its profit. This profit margin can be increased by the franchisee by reducing the aggregate technical and commercial losses (“**AT&C losses**”) and increasing efficiency in improving collection of revenue for the same specified quantity of power or energy purchased by it from the distribution licensee or utility. In the same breath, we must also clarify that generally, the level of investments and expenses anticipated by the franchisee for

increasing efficiency is incorporated in the input rates quoted by it in the bid. The higher the level of investment is required, the lower the input rate is likely to be. In other words, the input price that a private player proposes in its bid is inversely proportional to the capital expenditure that a private player believes it will have to make to ensure that the distribution exercise is profitable.

63. It is because there is no fixed incentive for the franchisee envisaged in such a model that the franchisees are motivated to reduce all kinds of losses to earn more revenue to increase their profit margin. Even though the model is advantageous for the purpose of reducing losses through theft and non-payment, yet it is also considered to be prone to misuse and not without its demerits. A bidding franchisee may over-project the investments and expenses required to distribute electricity efficiently, which in turn would lead to a reduction in the input rate fixed between the distribution licensee and the franchisee, as operation in the particular area that the franchisee is bidding for will be considered to be a loss-making venture. Lack of data about baseline loss levels puts the distribution licensee in a weaker position vis-à-vis the distribution franchisee. One could argue that this is a demerit of the input-rate model. However, it does not seem to be a plausible criticism of the model considering that most distribution licensees would ideally have the knowledge of AT&C loss levels prevailing in an area that they used to service before the franchisee came into picture.
64. The objection raised by the respondent no. 4 is two-pronged: (1) that the Average Tariff Rate (ATR) for the base year 2008-09 derived by the respondent nos. 2 and 3 is based on fabricated data without any authentication thereof; and (2) that the input rate fixed between the appellant and respondent no. 3 is undervalued with the ulterior motive to enable the appellant to profit at the cost of public money. The respondent no. 4 assailed such action on part of the respondent

no. 2 and the appellant to be a willful and deliberate violation of the tariff order passed by the UPERC.

65. To get a better background of the operations of the appellant in the urban city of Agra, we may refer to the APTEL's decision in ***Amausi Industries Association v. Uttar Pradesh Electricity Regulatory Commission*** reported in **2013 SCC OnLine APTEL 138**, with profit. The APTEL was faced with *inter alia*, the question whether Torrent Power (the appellant herein) could be supplied power at a price below the bulk power purchase price. The appellants therein argued that despite the bulk supply price fixed by the State ERC for purchase of power by the distribution licensees being Rs. 2.64 per unit for the FY 2011-12 and Rs. 3.75 per unit for FY 2012-13, such power was supplied to Torrent Power at Rs. 1.54 per unit for FY 2010-11, Rs. 1.55 per unit for FY 2011-12 and Rs. 1.71 per unit for FY 2012-13. The supply of electricity to Torrent Power at rates lower than the bulk supply price fixed by the UPERC meant that the consumers of other areas were cross subsidizing the supply of power by DVVNL to Torrent Power. The appellants therein took strong exception to the consumers of other areas bearing the tariff burden on account of cheaper supply of power in Agra by DVVNL to Torrent Power. The APTEL succinctly pointed out that due to high AT&C losses in the urban area of Agra, the distribution licensee, DVVNL was unable to recover the bulk supply rate of Rs. 2.64 per unit and was able to collect revenue to the extent of Rs. 1.27 per unit by bearing a loss of Rs. 1.37 per unit. Such loss of Rs. 1.37 per unit was being subsidized by consumers of other areas. Therefore, to alleviate the situation, DVVNL called for bids on the basis of input-rate model of distribution franchisee in which the highest bidder was the appellant herein, Torrent Power. Accordingly, an input rate of Rs. 1.54 per unit was decided among the distribution licensee and franchise. DVVNL, which was initially recovering Rs. 1.27 initially started recovering Rs. 1.54. The APTEL observed that after the introduction of the franchisee, the cross subsidization by

consumers of other areas was mitigated by 27 paise. The relevant portion of the judgment is reproduced below:

*“56. The fifth issue is regarding the Power Purchase cost and other cost in excess of the legitimate claims and allowing supply of bulk power to Torrent Power - a franchisee at a price below the bulk power purchase price.*

*57. The learned Counsel for the Appellant has made the following submissions on this issue:*

*(a) The State Commission has allowed exaggerated power purchase costs to the Distribution Licensees. The Distribution Licensees are purchasing high cost power on short term basis without proper planning and without entering into long term PPAs at competitive rates. The State Commission ought to have initiated an enquiry into such power purchase by the Distribution Licensees and held against them for excess power purchase cost.*

*(b) One of the Distribution Licensees - Dakshin anchal Vidyut Vitran Nigam Limited has given a franchisee in the Agra area which has been given to Torrent Power Limited. The bulk supply price fixed by the State Commission for purchase of power by the distribution licensees is Rs. 2.64 per unit for FY 2011-12 and Rs. 3.75 per unit of FY 2012-13 and the same is being supplied to Torrent Power Limited at Rs. 1.54 per unit for FY 2010-11, Rs. 1.55 per unit for FY 2011-12 and Rs. 1.71 per unit 2012-13. Therefore, the consumers in all other areas are cross subsidizing the supply of power by Dakshinanchal Vidyut Vitran Nigam Limited to Torrent Power Limited.*

- (c) The issue is not with regard to the power of the Distribution Licensee to appoint a franchisee but that if a franchisee is given by a Distribution Licensee in its area of operation, why should the consumers of the other Distribution Licensees bear the tariff burden on account of supply of cheaper power by one of the Distribution Licensees to the franchisee.
- (d) The Rosa Power Plant was commissioned on 12/13.3.2010. However, the necessary transmission evacuation facility (220 KV line) was not available due to the mistakes of the distribution licensee/transmission licensee/Rosa Power Supply Co. Ltd and the power could not be evacuated from the COD of Rosa Power Plant on 13.3.2010 for a period of 6 months till the transmission facility came. The power generated by Rosa in these 6 months was supplied to nearby rural areas. The licensees received fix amount per month from such consumers. The balance amount (i.e. the difference between the tariff paid to Rosa and fix charges recovered from rural consumers) cannot be passed on to the consumers.
- (e) Rosa Power is one of the generating companies having entered into a PPA with the Holding Company for supply of power to the consumers in the State of Uttar Pradesh. Any money excess paid to or recovered from Rosa Power will necessarily be a pass through in tariff and therefore, becomes a tariff issue.

58. In reply to above submissions, the learned counsel for the State Commission has made the following submission:

- a) *The aforesaid argument is irrelevant and immaterial since in determining the ARR of the distribution licensee the cost of power purchased by the licensee is the same. The revenue realized by the licensee is calculated at the rate at which energy is sold to the consumer, whether by the licensee directly or through its franchisee. Hence, the rate at which the franchisee draws power from the licensee is immaterial for the purpose of ARR determination of the licensee.*
- b) *In calculating the revenue of the licensee it is only the rate which the consumer ultimately pays which would be taken into account for determining the revenue in the ARR. Hence, whatever may be the transaction between the distribution licensee and the franchisee will not alter in any way the ARR of the licensee as a whole.*
- c) *The Appellant has also been unable to establish as to how the ARR has in any way been impacted by the so called difference in rates as mentioned above.*

59. *The learned Counsel for the Distribution Licensees has made the following submissions:*

- a) *The bulk supply price of Rs. 2.64 per unit has been fixed for the distribution licensee. The Discoms are unable to recover the bulk supply price of Rs. 2.64 per unit and are incurring heavy losses. The distribution in Agra was recovering only Rs. 1.27 per unit.*
- b) *In order to mitigate the situation, DVVNL initiated bidding process for identifying the Franchisee on the Input based Model, i.e., the franchisee will buy*



the electricity from the utility and shall pay the energy charges to the utility at a pre-determined rate. The franchisee will have to collect revenues from the consumers through raising bills so as to have sustainable commercial operation. The Torrent Power among all the bidders quoted the highest rate of Rs. 1.54 per unit for the first year and consequent increase every year. Accordingly, DVVNL entered into agreement with Torrent to operate as their franchisee.

- c) The payment made by Torrent Power Ltd a franchise of DVVNL is based on Input unit on the basis of agreement entered into between Torrent Power Ltd and DVVNL.
- d) The Hon'ble High Court of Bombay, Nagpur Bench in its judgment dated 12.02.2008 in W.P. No. 3701 of 2007; Citizen Forum Maharashtra v. state of Maharashtra (Paras 45-51) has upheld the power of distribution licensee to appoint distribution franchisee for the benefit of consumers.
- e) The delay in commissioning of Transmission lines relates FY 2009–10 and UP Transmission Licensee and the said issue cannot be raised in the present Appeal relating to Discoms.

60. We have carefully considered the submissions made by both the parties. The crux of the submissions made by the Appellant is that the Franchisee is being supplied power at rate lower than the bulk supply rate of the Distribution Licensee itself. The shortfall in the revenue of the licensee is to be recovered from the consumers of the Licensee in the remaining area to meet its ARR.

61. According to the Appellant, the State Commission has allowed higher power purchase cost to the Distribution Licensees. It is further stated that the distribution licensees are purchasing high cost power on short term basis without proper planning and without entering into long term PPAs at competitive rates. But the State Commission has failed to initiate an enquiry into such power purchase by the distribution licensees.

62. According to the State Commission the ground urged by the Appellant is irrelevant and immaterial since in determining the ARR of the distribution licensee, the cost of power purchased by the licensee is the same and hence, the rate at which franchise draws power from the licensee is immaterial for the purpose of ARR determination of the licensee.

63. The reply statements of the Respondent including the State Commission are not only evasive but also not to the core of the issue raised by the Appellant.

64. On going through the impugned order it is clear that the State Commission has allowed the power purchase cost as claimed by the distribution licensee without considering the following salient aspects.

“i) One of the Distribution Licensees - Dakshin anchal Vidyut Vitran Nigam Limited has given a franchisee in the Agra area which has been given to Torrent Power Limited. The bulk supply price fixed by the State Commission for purchase of power by the distribution licensees is Rs. 2.64 per unit for FY 2011-12 and Rs. 3.75 per unit of FY 2012-13 and Rs. and the same is being supplied to Torrent Power Limited at Rs. 1.54 per

unit for FY 2010–11, Rs. 1.55 per unit for FY 2011–12 and Rs. 1.71 per unit 2012–13, Therefore, the consumers in all other areas are subsidizing the supply of power by Dakshin anchal Vidyut Vitran Nigam Limited to Torrent Power Limited.

ii) The Rosa Power Plant was commissioned on 12/13.3.2010. However, the necessary transmission evacuation facility (220KV line) was not available due to the mistakes of the distribution licensee/transmission licensee/Rosa Power Supply Co. Ltd and the power could not be evacuated from the COD of Rosa Power Plant on 12/13.3.2010 for a period of 6 months, when the transmission facility came and maximum power generated by Rosa supply to nearby rural area in 6 months were licensees received fix amount per month from such consumers. This amount can not be passed on to the consumers. This aspect was raised by the Appellants but no finding has been given by the State Commission.

65. The finding of the State Commission is only this:—  
“C) The Commission's view:— 3.8.6 The Commission notes that M/s Torrent Power Ltd has been appointed input based franchisee by the licensee.”

66. According to the distribution licensee, since the Torrent Power was chose as a input based franchisee which was improving recovery of the prices in a particular franchisee area and the franchise arrangement has been approved by the High Court of Bombay in W.P. No. 3701 of 2007 and therefore there is nothing wrong in appoint Torrent Power as a franchisee. This contention by the Distribution Licensee

*is not relevant. The issue raised by the Appellants is not with reference to the power of the distribution licensee to appoint a franchisee. The real question arises is this - "When a franchisee has been given by the distribution license in its area of operation, who should the consumers of the other distribution licensees bear the tariff burden on account of supply of cheaper power by one of the Distribution Licensees to the franchisee?"*

*67. The contention of the Appellant appears to be attractive at first rush of blood. But there is something deeper. The issue in the present case can be addressed simply by saying that the Commission did not allow the Licensee to recover its full ARR. The approved average revenue recovery rate through tariff is only 77% of the average cost of supply. Thus, the Commission has left huge gap including the loss suffered due to lesser tariff to the franchisee.*

*68. Let us tackle the issue from the root to settle it for once and all.*

*69. The Licensee gathers power to distribute electricity in its area of supply through another person (Franchisee) from 7<sup>th</sup> Proviso to section 14 of the Act reproduced below:*

*Provided also that in a case where a distribution licensee proposes to undertake distribution of electricity for a specified area within his area of supply through another person, that person shall not be required to obtain any separate licence from the concerned State Commission and such distribution*

licensee shall be responsible for distribution of electricity in his area of supply:

70. The question arises as to why a licensee should appoint a franchise for a particular area. The licensee control large area of supply. Some areas within its area of supply have higher losses than the average loss. The licensee may deem it fit to hand over such an area, where system losses are higher than the average losses in his area of supply to some franchise. It is to be noted that when losses are higher, the average revenue recovery rate would have to be lesser than average revenue recovery rate of the licensee. The franchise is expected to purchase power from the licensee and supply to the consumers at the same tariff fixed for other areas of the licensee. The franchise has to incur capital expenditure to reduce the losses to make the franchise business workable. If the franchise purchase power at average power purchase cost of the licensee and supply at tariff applicable to other areas, the franchise business will never become viable.

71. There are many models of appointing the Franchisee and one of such model is 'on the basis of Input costs'. Under this model the Franchisee is sold electricity by the licensee at certain predetermined rate and the franchisee distributes the electricity in its area and recovers the costs at price not more than retail tariff of the Licensee. The Franchisee is responsible for the reduction of losses. The areas given to it for distribution is high loss area. The franchisee would earn profit only if he is able to reduce the losses to a certain level else he would suffer loss.

72. The average revenue recovery rate of Agra was only Rs. 1.27 per unit. The bulk supply rate for the licensee was Rs. 2.64 per unit. Thus, the licensee was suffering a loss of Rs. 1.37 per unit to supply power in this area. Accordingly, the consumers of other areas would have been subsidizing this amount. With the appointment of a Franchisee at Bulk supply rate of Rs. 1.54 per unit, the cross subsidisation by the consumers of other areas gets mitigated by 27 paise per unit.

73. Accordingly, the issue is decided against the Appellants.”

(Emphasis supplied)

66. What is worth noting is that the concept of cross subsidization is not alien to the electricity distribution sector. It aims to balance social objectives with the financial health of the electricity sector and is done on the basis of population mix of an area or in some circumstances even when there are high losses in an area. It is a well settled position of law that the courts refrain from encroaching into the powers of the Government or the legislature. Therefore, the courts cannot question the rationale and wisdom behind cross subsidies. However, there is not an iota of doubt in our minds that cross subsidization as a standalone cause for challenging the fixation of an annualized input rate lower than the bulk supply rate of the distribution licensee, cannot be accepted. What can also be discerned from the aforesaid exposition is that the input-rate model of distribution franchisee may not always be successful in attracting bids that will entirely mitigate the cost of cross subsidization. Bids for input rates lower than bulk supply rate may be received for areas experiencing very high AT&C losses as the investment required would be manifold. This is because, the higher the anticipation of capital expenditure will be, the lower will be the input rate quoted by a franchisee. Such low input rates

cannot be taken to mean that they are deliberately or mischievously undervalued, without any substantial evidence that there has been misrepresentation of the required investment and expenses.

67. We are dismayed to find that the respondent no. 4, though, has levelled serious allegations against the respondent no. 2 and the appellant, yet has not provided any reasons or documentation in respect of how the appellant and respondent no. 2 are in violation of tariff orders. Further, even the Expert Committee Report dated 09.01.2017 does not shed any light on how tariff orders are being contravened by the appellant. The remit of the said Committee was to study the levels of loss reductions, collection efficiency and extension of benefit to the consumers. Even though the Expert Committee made some suggestions in respect of all the points of study, yet it did not make an adverse remark against the appellant that would translate to blatant illegality.
68. What is discernible from the aforesaid is that unless some satisfactory grounds are given for initiating an investigation, a petition or an application under Section 128 cannot be held to be maintainable. The ERCs are required to consider matters in public interest wherever mandated by the Act, 2003, i.e., in matters relating to tariff determination, procurement of power processes, and utility/licensee management which requires safeguarding of consumer interest alongside the commercial principles. We are, therefore, of the considered view that in the present case, the petition of the respondent no. 4 filed under Section 128 does not fulfill the parameters of satisfaction required under the said Section.

**(iv) Whether the ERCs have the jurisdiction to review the functioning of a distribution licensee to supply electricity through a franchisee?**

69. Though we have held the petition under Section 128 to be not maintainable in the case on hand, yet in our opinion, such observation cannot have blanket application over distribution licensees and franchisees.
70. Under the Act, 2003, the business of distribution/supply of electricity can be undertaken by a Distribution Licensee licensed by the ERCs under Section 12. However, according to the seventh proviso to Section 14, the supply of electricity can be undertaken either by the distribution licensee or through another person authorised by the distribution licensee. It is pertinent to note herein that ERCs under Section 181 of the Act, 2003 frame regulations to carry out the provisions of the Act including the conditions of license as mandated in Section 16. Under the Conditions of Distribution License Regulations, 2004, the following are forthcoming:

**"4. COMPLIANCE OF LAWS, RULES AND REGULATIONS**

*4.1 The Distribution Licensee shall comply with the provisions of the Applicable Legal Framework, Rules, Regulations, Orders, and Directions issued by the Commission from time to time and the provisions of all other applicable laws.*

*4.2 The Distribution Licensee shall act in accordance with these General Conditions except where the Distribution Licensee is exempted from any provisions of these General Conditions at the time of the grant of Licence or otherwise specifically by an approval of the Commission to any deviation there from.*



*4.3 The Distribution Licensee shall duly comply with the order and directions of the National Load Despatch Centre, Regional Load Despatch Centre and the State Load Despatch Centre and other statutory authorities issued in the discharge of their functions under the Applicable Legal Framework.*

*4.4 The Licensee shall comply with the Orders or Directions issued by the Forum and Electricity Ombudsman.*

*4.5 Licensee shall give consultancies / assignment to its group companies /sister concerns/ subsidiary companies only after prior approval of Commission*

## **5. ACTIVITIES OF THE DISTRIBUTION LICENSEE**

*5.8 The Licensee may undertake distribution of electricity for a specified area (franchise) within his Area of Supply through another Person. Such Person shall not be required to obtain any separate Licence from the Commission. The Licensee shall continue to be responsible for distribution of electricity in its Area of Supply and –*

*(a) Such Person shall operate under the overall supervision and control of the Licensee and upon the terms and conditions of the Licence and comply with all Regulations, guidelines or orders of the Commission;*

*(b) Establishment of such arrangements shall not alter the Licensee's duties and obligations pursuant to general or specific conditions of Licence;*

*(c) The cost of providing service shall not be higher than if the Licensee performed such tasks itself; and*

*(d) For any act or omission of such Person, the Licensee shall be responsible.*

*5.10 The Distribution Licensee may establish Subsidiaries or associated companies or grant a Franchisee or enter into management contracts including appointment of billing agent to conduct or*

*carry out any of the functions, which the Distribution Licensee is authorised to conduct or carry under the Licence Provided that the Licensee shall be responsible for all actions of the Subsidiaries or associated companies or Franchisees or agents or contractors.*

*5.11 Except as provided in clause 5.8 above the Distribution Licensee shall not transfer or assign the Licence or any of the functions under the Licence to any other Person without the prior approval of the Commission.*

## **7. PROVISION OF INFORMATION TO THE COMMISSION**

*7.1 The Distribution Licensee shall furnish to the Commission without delay such information, documents and details related to the Licensed Business or any Other Business of the Distribution Licensee, as the Commission may require from time to time for its own purposes or for the purposes of the Government of India, State Government, the Central Commission, the Central Electricity Authority, the State Transmission Utility and State Load Dispatch Centre.*

*7.2 The Distribution Licensee shall duly maintain the information as the Commission may directed under Section 128 of the Act.”*

71. Therefore, whilst an ERC may not directly regulate a franchisee, it exercises regulatory oversight over the distribution licensee's functions and duties, including the process of a distribution licensee delegating some of its functions and activities to a franchisee. Further, Sections 16, 18, 19 and 20 of the Act, 2003 respectively, prescribe that the ERC can stipulate/review the terms and conditions under which a distribution licensee may delegate its electricity distribution

responsibilities to a franchisee. Such stipulation/review occurs as a part of ERC's regulatory functions.

72. It is apposite to observe that the Act, 2003 does not provide for a direct regulatory oversight by the ERCs in respect of the distribution franchisees. Part IV of the Act, 2003, from Sections 12 to 24 deals with licensing which *inter-alia* includes the procedure for grant of licence, conditions of licence, actions that a licensee may not undertake, amendment of licence, revocation of licence, sale of utilities of licensees, directions to licensees, and suspension of distribution licence and sale of utility. All these stipulations are to regulate the distribution licensee. There is no such stipulation provided to control or regulate the relationship between a licensee and franchisee. Thus, the contractual terms and conditions of the authorization by the distribution licensee provided to the franchisee are privy to the said parties. [See: **Global Feeds Feedback Energy Distribution Company Private Ltd. v. Govt. of Odisha**, reported in **2019 SCC OnLine Ori 205**]
73. It is well settled that the relationship between the distribution licensee and franchisee is one of agency. As a natural corollary, the franchisee is accountable only to the distribution licensee, who in turn is accountable to the consumers. We refer to the APTEL's decision in **City Corporation Limited v. Maharashtra Electricity Regulatory Commission and Anr.** reported in **2024 SCC OnLine APTEL 103** to fortify this point. The relevant observations therein read thus:

*“40. Consequently, since Section 86(1)(f) of the Electricity Act does not specifically provide for the franchisee to file a petition questioning prescription of a very low percentage towards distribution losses or reimbursement charges, the MERC must be held to lack jurisdiction, to entertain and adjudicate a petition filed by them, under the said provision. The MERC can*

exercise jurisdiction to determine tariff of a distribution licensee under Section 62(1)(d) of the Electricity Act in the exercise of its regulatory functions under Section 86(1)(b) on a petition filed by a Distribution licensee. It lacks jurisdiction to entertain and adjudicate a petition filed by anyone else, such as a franchisee, nor can a tariff order, passed with respect to a distribution licensee, be held to apply to a franchisee.

41. In considering the question whether MERC has jurisdiction to adjudicate a dispute between a distribution licensee and its franchisee, it is useful to examine the provisions of the Electricity Act relating to a franchisee. Section 2(27) of the Electricity Act, 2003 stipulates that in the Electricity Act, unless the context otherwise requires, “franchisee” shall mean a person authorised by a distribution licensee to distribute electricity on its behalf in a particular area within his area of supply. Section 14 relates to grant of license and, under Section 14(b), the Appropriate Commission may, on an application made to it under Section 15, grant a licence to any person to distribute electricity as a distribution licensee. Under the seventh proviso to Section 14, in case where a distribution licensee proposes to undertake distribution of electricity for a specified area within his area of supply through another person, that person shall not be required to obtain a separate licence from the concerned State Commission, and such distribution licensee shall be responsible for distribution of electricity in his area of supply.

42. The person, referred to in the seventh proviso to Section 14, is the franchisee as defined in Section 2(27) of the Electricity Act. It is clear, from a conjoint reading of Section 2(27) and the seventh proviso to Section 14 of the Electricity Act, that (i) the franchisee is a person authorised by a distribution licensee to distribute electricity on its behalf, and (ii) such distribution of electricity by a franchisee is confined to a particular area within the area of supply of the distribution licensee. In other words, a distribution licensee can authorise another person as its franchisee to distribute electricity on its behalf within an area as may be specified by it, provided such a specified area forms part of the area of supply of the distribution licensee. Such a franchisee, in view of the seventh proviso to Section 14, does not require a separate licence since the responsibility to ensure distribution of electricity in its area of supply (including the specified area in which the franchisee supplies electricity on behalf of the distribution licensee) is that of the distribution licensee. In short, a distribution licensee is the principal and the franchisee is its agent. While the franchisee is, no doubt, accountable to the distribution licensee in the discharge of its obligations under the distribution franchise agreement (entered into between the distribution licensee and the franchisee), it is the distribution licensee which is accountable to its consumers including those consumers to whom electricity is supplied, on its' behalf, by the franchisee. Except Section 2(27) and the Seventh Proviso to Section 14, which make it clear that the franchisee is merely the agent of the distribution licensee, and it is the distribution licensee which is eventually responsible, for distribution of electricity, to the consumers in its

area of supply, there is no other provision in the Electricity Act which specifically relates to a franchisee.

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90. Unlike the tariff of a distribution licensee (including the distribution losses it is permitted to incur) which is statutorily required to be determined by the Regulatory Commission under Section 62(1)(d) of the Electricity Act, the distribution losses which a franchisee is entitled to incur, and the reimbursement compensation it is entitled to receive, are not governed by any provision of the Electricity Act, but are those stipulated in the contractual provisions of the Distribution Franchisee Agreement which it enters into as an agent with the Distribution licensee, its principal. It is clear, therefore, that the tariff orders passed by MERC, for retail sale of electricity by the second Respondent-MSEDCL to the consumers in its area of supply, cannot be said to be an order passed by the Commission with respect to the Appellant franchisee, violation of which would require the MERC to adjudicate the dispute on its jurisdiction being invoked under Section 86(1)(k) read with Section 142 of the Electricity Act.

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95. The challenge to the other conditions stipulated in the DFA are also matters which fall outside the jurisdiction of the MERC. Since an appeal under Section 111 of the Electricity Act lies only against orders passed by Regulatory Commissions, the Appellant cannot agitate its grievance, relating to the validity of, or the terms and conditions imposed under, the DFA in

appellate proceedings before this Tribunal, as the State Commission lacked jurisdiction to examine these aspects. The issue of open access has been dealt with earlier in this order, and is therefore not being dealt with under this head.”

(Emphasis supplied)

74. Further, the Conditions of Distribution License Regulations, 2004, more particularly Regulation 7.2 thereof, unequivocally places an obligation on the distribution licensee to furnish any information that the UPERC may ask for. Following the approach of decentralization of electricity distribution adopted by the Act, 2003, the said Regulations do not require furnishing of any information from the franchisee directly.
75. The aforesaid exposition of law leaves no manner of doubt in our minds that the Act, 2003 does not envisage direct regulatory oversight as regards distribution franchisees and by virtue of their relationship of agency, such franchisees can only be indirectly regulated through the distribution licensee. Therefore, even an investigation under Section 128 can only happen in respect of a distribution licensee and not its franchisee. This is in consonance with the principle of agency. Any action of the franchisee is equivalent to such action having been committed by a distribution licensee. Therefore, only the distribution licensee can be questioned for any action that its agent commits.
76. Although the Tribunal, in para 11.7 of its impugned order, upholds the right of DVVNL as a distribution licensee, to appoint the appellant as a franchisee for Agra, yet it seeks to review the progress of the appellant without there being any specific provision in the Act, 2003 allowing for such review. The UPERC as well as the APTEL should have been mindful of the fact that it cannot micromanage a distribution franchisee transaction obliquely and question various aspects of the functioning of such franchisee including its collection,

efficiency and the manner or quantum of reduction of distribution losses.

77. Even otherwise, if we were to limit our observations on the issue whether an investigation under Section 128 could be ordered against DVVNL or respondent no. 2, we will be compelled to answer in the negative. It goes without saying that the investigation to be conducted by an authority under Section 128 is to be limited to only two eventualities: (i) if the licensee fails to abide by the terms of its license, and (ii) if the licensee acts in contravention to the provisions of the Act, 2003 and the regulations thereunder. The exposition in the aforesaid clarifies that the threshold of “satisfaction” required to order an investigation under Section 128 was not met by the respondent no. 4 and even the Expert Committee did not present any findings as regards these two considerations.

#### **E. CONCLUSION**

78. In the overall view of the matter, we have reached the conclusion that the UPERC fell in serious error in entertaining the petition filed by the respondent no. 4 and passing the order constituting an expert committee. The APTEL also failed to look into the error committed by the UPERC and dismissed the appeal filed by the appellant-herein.
79. In the result, the appeal succeeds and is hereby allowed. The impugned order passed by the APTEL is hereby set aside. As a consequence, the report of the Expert Committee also pales into insignificance.
80. Pending application(s), if any, are disposed of.



81. No orders as to cost.

.....J.  
(J.B. PARDIWALA)

.....J.  
(R. MAHADEVAN)

**14<sup>th</sup> July 2025,**  
**New Delhi.**