2025 INSC 937

REPORTABLE

IN THE SUPREME COURT OF INDIA
ORIGINAL/CIVIL APPELLATE JURISDICTION

WRIT PETITION (C) 104 OF 2014

BSES RAJDHANI POWER LTD. & ANR. ...PETITIONER(S)

VERSUS

UNION OF INDIA AND ORS. ...RESPONDENT(S)

WITH

WRIT PETITION (C) 105 OF 2014

WITH

CIVIL APPEAL No. 4010 OF 2014

WITH

CIVIL APPEAL No. 4013 OF 2014

WITH

WRIT PETITION (C) 1005 OF 2021

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1. Introduction.

1. We are entertaining these writ petitions[1] and civil appeals[2] only for examining a limited question as to the law that governs the creation of a "regulatory asset" during the process of tariff determination by the Electricity Regulatory Commissions, its impact on the rights and liabilities of the stakeholders, the limits within which it can be operated, and finally the regulatory duties that it invokes for the Regulatory Commissions. We also clarify that through these proceedings, we are not determining the rights and liabilities of the parties, which will anyways be considered in the pending civil appeals against the orders of the Appellate Tribunal of Electricity[3].

2. In these writ petitions and civil appeals, the three distribution companies that supply electricity to consumers in the National Capital Territory of Delhi[4], namely BSES Rajdhani Power Ltd.[5], BSES Yamuna Power Ltd.[6], and Tata Power Delhi Distribution Limited[7], have challenged the manner in which the Delhi

[1] W.P. (C) No. 104/2014, W.P. (C) No. 105/2014 and W.P. (C) No. 1005/2021 under Article 32 of the Constitution.
[2] C.A. No. 4010/2014 and C.A. No. 4013/2014 against the order dated 11.03.2014 passed by the Appellate Tribunal for Electricity in I.A Nos. 364-365/2013 in Appeal Nos. 265-266/2013.
[3] Hereinafter "APTEL".
[4] Hereinafter "NCT of Delhi".
[5] Hereinafter "BRPL".
[6] Hereinafter "BYPL".
[7] Hereinafter "TPDDL".

Electricity Regulatory Commission[8] has determined the tariff for retail supply of electricity over the years, leading to the creation and continuation of a "regulatory asset". The prayers in W.P. (C) Nos. 104 and 105/2014 by BRPL and BYPL[9] are similar, which we may formulate as follows:

i. To hold and declare that the petitioners are entitled to prudently incurred cost and allowances in terms of Sections 61 and 62 of the Electricity Act, 2003[10] and Multi Year Tariff Regulations;
ii. To direct the DERC to give effect to the deferred cost creating a regulatory asset in accordance with Para 8.2.2 of the National Tariff Policy;
iii. To direct the respondent-generating companies to not disconnect or discontinue power supply or take any other coercive steps till this Court determines an appropriate mechanism for adjustment of dues owed by the distribution companies from the amounts due and owed to them; and
iv. To protect their investment and assured return from the licensed business.

3. TPDDL has also filed W.P. (C) No. 1005/2021, where it has prayed for the following reliefs:

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[8] Hereinafter "DERC".
[9] Hereinafter collectively referred to as "BSES Discoms".
[10] Hereinafter "the Electricity Act".

i. To direct DERC to recognise its regulatory asset and formulate and implement a clear roadmap for the liquidation of the regulatory asset in a time-bound manner of 3 years;
ii. In the alternative, to direct DERC to increase the Deficit Recovery Surcharge to 20% to amortise the regulatory asset as per the National Tariff Policy;
iii. To direct DERC to implement various judgments of the APTEL in appeals against tariff orders by the DERC.

4. In order to consider these prayers as well as the maintainability of the writ petitions, which has been contested by the respondents, we will have to examine the concept of a 'regulatory asset' and its creation and continuation in the context of the law that may govern it. Further, we will also examine whether the law creates any statutory duties and whether failure to fulfil the same gives rise to an enforceable legal right. For this purpose, we will commence with examining the Electricity Act, and the rules, regulations, and policies framed thereunder as well as judicial precedents and necessary practices for good governance of the electricity sector.

2. Concept of a Regulatory Asset.

5. A "regulatory asset" in the context of tariff determination for electricity utilities is an intangible asset that is created by the Regulatory Commissions in recognition of an uncovered revenue gap or revenue shortfall when a distribution licensee could not fully recover the costs reasonably incurred by it through revenue from tariff.[11] This portion of the revenue requirement is not included while determining the tariff for the particular year. Rather, the distribution company is entitled to receive or recover such revenue in the future, over a period of time.

6. There are several situations and factors leading to the creation of such a regulatory asset. It is generally created when the projected revenue based on the determined tariff is significantly lower than the revenue required by the distribution company to recover reasonably-incurred costs as well as for return on investment. When it is not feasible to recover this gap either by increasing tariffs or through other means such as government subsidy during that year, a regulatory asset equivalent to the uncovered expenses is created. Another situation requiring the

[11] See *Tamil Nadu Electricity Consumers' Association v. Tamil Nadu Electricity Board*, Appeal Nos. 192 and 206 of 2010, APTEL order dated 28.07.2011.

creation of a regulatory asset is at the time of truing up, if the actual revenue realisation from tariffs is much lesser than the Annual Revenue Requirement[12].

7. This revenue gap can be recovered through government subsidies or by increasing the tariff. However, the latter may lead to a tariff shock to consumers in a given year. Hence, to protect consumer interests, the Regulatory Commission may choose to direct recovery of only some portion of the gap while creating a regulatory asset for the remaining portion, which can be recovered in the subsequent years. At the same time, the financial health and commercial viability of the distribution company must be ensured by the Regulatory Commission. Hence, the Regulatory Commission must ensure that if a regulatory asset is created, the same is recovered in a time-bound manner.

8. The creation and continuation of a regulatory asset is neither a statutory concept nor a power granted under the Electricity Act. Rather, it is a measure adopted by the Regulatory Commissions, which are statutory bodies, in exercise of their powers and functions under the Act. It is hence guided by the legal regime of the Electricity Act and the rules, regulations, and policies framed

[12] Hereinafter "ARR".

thereunder, along with their interpretation in various judicial precedents.

3. Facts.

9. Initially, the Delhi Vidyut Board was responsible for generation, transmission and distribution of electricity in NCT of Delhi. With the Delhi Electricity Reform Act, 2000 and the Delhi Electricity Reform (Transfer Scheme) Rules, 2001, these functions were unbundled and different entities were made responsible for each function. Until 2007, the Delhi Transco Limited[13] was solely responsible for bulk procurement and bulk supply of power in Delhi, and all distribution companies were required to purchase power from it. After 31.03.2007, the responsibility for power purchase in Delhi was transferred to the distribution companies.

10. DERC adopted the Multi Year Tariff[14] framework in generation, transmission, and distribution businesses so as to bring certainty regarding tariff and its annual basis during each control period.

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13 Hereinafter "DTL".

14 Hereinafter "MYT".

11. A regulatory asset was first created by the DERC in the tariff order dated 09.06.2004 for North Delhi Power Limited[15] and orders dated 11.06.2004 for BRPL and BYPL. In these orders, the DERC introduced the regulatory asset as a mechanism to bridge the revenue gap in the tariff order for FY 2004-05, and it amounted to a total of Rs. 696 crores across BRPL, BYPL, NDPL and DTL.

12. Over the years, various orders of the DERC determining ARR for each year, MYT orders, and truing-up orders demonstrate an increase in the quantum of the regulatory asset across all three distribution companies before us. The DERC also provided for carrying costs on the regulatory asset to each distribution company, which further contributed to its ballooning. We are informed that as on 31.03.2024, the regulatory asset including carrying costs is Rs. 12,993.53 crores for BRPL, Rs. 8419.14 crores for BYPL, and Rs. 5,787.70 crores for TPDDL, totally amounting to Rs. 27,200.37 crores across all three distribution companies. During this time, the DERC has taken note of this increase and introduced various measures like increasing tariffs, Deficit Recovery Surcharge[16], fuel price adjustment charge and Power

[15] Hereinafter "NDPL", which is now TPDDL.
[16] Hereinafter "DRS".

Purchase Adjustment Charge[17]. These measures are byproducts of the regulatory asset and are intended for its liquidation.

13. After setting out the submissions of the parties as well as views of various State Commissions and State Governments, we will examine framework within which the regulatory asset is created, continued, and liquidated. We will refer to the relevant provisions of the Electricity Act, National Tariff Policies, the Electricity Rules, DERC's Tariff Determination Regulations, and introduction of various measures by the DERC, either as mitigative or alleviative to deal with the problem. Following this, we will determine the status of the regulatory asset and the consequential directions that may be passed in these writ petitions and civil appeals.

4. Submissions of Parties.

14. We have heard Mr. Kapil Sibal and Dr. Abhishek Manu Singhvi, learned senior counsels and Mr. Amit Kapur, learned counsel for the three distribution companies, who are the petitioners and appellants. On behalf of the respondents, we have heard Mr. Nikhil Nayyar, learned senior counsel for the DERC,

[17] Hereinafter "PPAC".

Mr. R. Venkataramani, learned Attorney General of India for certain generating and transmission companies, Mr. K.M. Nataraj, learned ASG for the Ministry of Power, Union of India, and Mr. Siddharth Dave and Mr. Shadan Farasat, learned senior counsels for the Government of NCT of Delhi.

15. Mr. Sibal made the following submissions:

i. Referring to the Statement of Objects and Reasons of the Electricity Act, he submitted that the statute intends to distance the government from tariff regulation and determination by establishing independent regulators, and it aims to encourage private sector participation in the electricity sector.

ii. Mr. Sibal then referred us to various provisions of the Electricity Act, including factors guiding tariff determination under Section 61, tariff determination for retail supply of electricity under Sections 62 and 64, and advance payment of government subsidies under Section 65. He also took us through the mandatory and advisory functions of the State Commission under Section 86, emphasising that the Commission must be guided by the policies and plans formulated under the Act in discharge of its functions.

iii. He then referred us to the relevant portions of the statutory advice issued by the DERC to the Government of NCT of Delhi by letters dated 15.12.2010 and 01.02.2013, which we will deal with in more detail at a later stage.

iv. Referring to Clause 8.2.2 of the National Tariff Policy, 2006, he submitted that a regulatory asset must be created only in exceptional circumstances that are clearly defined in the regulations and that only include natural causes or force majeure conditions. Further, that the regulatory asset must be recovered in a time-bound manner in 3 years, and preferably within the control period. These conditions are also incorporated in Regulation 5.42 of the DERC (Terms and Conditions for Determination of Wheeling Tariff and Retail Supply Tariff) Regulations, 2007[18] and Regulation 5.40 of the DERC (Terms and Conditions for Determination of Wheeling Tariff and Retail Supply Tariff) Regulations, 2011[19], which we will deal with at a later stage. Mr. Sibal submitted that these conditions for creation of a regulatory asset have not been complied with by the DERC.

v. He then referred us to the Electricity (Amendment) Rules, 2024 (notified on 10.01.2024) that inserts Rule 23 in the Electricity Rules, 2005, which stipulates various conditions for creation, continuation, and recovery of a revenue gap or regulatory asset.

vi. To conclude, Mr. Sibal submitted that the creation, continuation, and expansion of the regulatory asset over the years can be attributed to the following causes: (i) assumed power purchase cost for tariff determination is lower than the actual cost; (ii) assumption of inflated

[18] Hereinafter "Tariff Determination Regulations, 2007".
[19] Hereinafter "Tariff Determination Regulations, 2011".

revenue; (iii) tariffs determined by the DERC are not cost-reflective; (iv) the orders of the APTEL and this Court regarding tariff fixation are not implemented; (v) the state government has not paid the subsidy amount in advance as per Section 65; (vi) payment of Late Payment Surcharge[20] @ 18% on late payments to the generating companies; and (vii) the truing-up exercise is not carried out properly.

16. Mr. Amit Kapur, for the BSES Discoms has submitted that currently, the regulatory asset is about Rs. 26,000 crores (including the carrying cost payable to date). The continuation of the revenue gap, without liquidating it in a time-bound manner undermines the very purpose of the Electricity Act to promote private sector participation and to provide for cost-reflective tariffs. He submits that there is a creeping acquisition of private distribution companies due to this.

17. Dr. Singhvi appearing for TPDDL then addressed us and made the following submissions:

i. To liquidate the regulatory asset, certain measures may be taken such as increasing the DRS, increasing tariffs payable by consumers, and through government support. Further, there must be a fixed timeline for liquidation as

[20] Hereinafter "LPS".

the quantum of the regulatory asset only increases with the passage of time due to accumulation of carrying costs.

ii. While the DERC's roadmap for liquidation submitted before this Court estimated recovery of the entire regulatory asset by 2022, this has not fructified. In this context, he submitted that DRS of 8% is wholly inadequate as it is insufficient to even meet the carrying cost on the regulatory asset.

18. Mr. Nikhil Nayyar, learned senior counsel appearing on behalf of the DERC then addressed us. He took us through the scheme of the Electricity Act and its provisions, and also traced the history of the creation and continuation of a regulatory asset by the DERC. While doing so, he made the following submissions:

i. The DERC's tariff order dated 11.06.2004 shows that the BSES Discoms themselves suggested the creation of a regulatory asset to enable recovery of the revenue gap over a period of time through gradual increase in tariffs.

ii. Over the years, the DERC introduced various measures to liquidate the regulatory asset, including tariff hikes, 8% DRS, carrying cost, fuel purchase adjustment charge, and PPAC. Currently, TPDDL, BRPL, and BYPL levy 29.13%, 27.08%, and 31.60% PPAC respectively and between FY 2018-19 to FY 2022-23, they have earned Rs. 3,230.48 crores, Rs. 4,399.48 crores, and Rs. 2,210 crores through PPAC. The DERC also increased the tariff by 50% between

FY 2011-15 as follows - 22% by order dated 26.08.2011), 23% by order dated 13.07.2012, 5% by order dated 31.07.2013, and 8.32% by order dated 23.07.2014.

iii. However, these measures were not sufficient as between 2007 and 2012, the power purchase cost, which constitutes 80% of the ARR, increased by more than 80% from Rs. 2.86 to Rs. 5.16 per unit. The regulatory asset ballooned during this period due to this unprecedented increase in power purchase costs, which is attributable to the increase in coal and gas prices. Further, the introduction of CERC (Unscheduled Interchange charges and related matters) (Amendment) Regulations, 2010 prevented the use of UI mechanism for sale of surplus power at profitable rates.

iv. While the roadmap submitted by the DERC before this Court estimated that the regulatory asset would be liquidated by 2022, this did not materialise for several reasons such as the distribution companies not achieving the estimated 15% growth rate and carrying cost on the regulatory asset being a compound interest that itself amounts to Rs. 8,692 crores across BRPL, BYPL, and TPDDL from FY 2012-13 to FY 2019-20, while DRS @ 8% led to a collection Rs. 11,073 crores.

v. He submitted that the regulatory asset could not be liquidated as planned as the amount does not remain static. With each tariff order, some portion is recovered while other factors lead to an increase in the regulatory asset. Further, considering that the roadmap for liquidation was prepared in 2014, it needs to be revised.

vi. Mr. Nayyar also disputed the maintainability of these writ petitions as there is a statutory mechanism under the Electricity Act for tariff determination, which is a quasi-judicial exercise by an expert body and the scope of judicial review is limited. Further, the Act also provides for appealing the DERC's decision before the APTEL under Section 111. Finally, there is no allegation regarding violation of any fundamental right for this Court to exercise writ jurisdiction.

vii. Finally, Mr. Nayyar averred to tariff determination and regulatory assets created by other State Commissions. He submitted that 15 states have implemented an automatic pass-through for fuel costs, which means that the distribution companies in these states can pass on the rise in power purchase costs to the consumers. He also submitted that other than Delhi, regulatory assets have been created in Tamil Nadu, Rajasthan, Kerala, and Maharashtra.

19. We then heard the learned Attorney General for the generating and transmission companies namely Indraprastha Power Generation Company Limited[21], Pragati Power Corporation Limited[22], and DTL. He submitted that while the DERC has

[21] Hereinafter "IPGCL".
[22] Hereinafter "PPCL".

recognised a revenue gap for all three distribution companies, BRPL and BYPL are not making regular payments to IGPCL, PPCL and DTL, despite making regular payments to other power utilities. He also submitted that TPDDL has been regularly paying the bill amounts. With regard to non-payment by BRPL and BYPL, he submitted that these dues cannot be set-off/netted-off/squared off against the unrecovered tariff, which must be realised by the distribution companies from consumers in accordance with DERC orders. He also submitted that the adjustment of any payments against past dues is in accordance with the provisions of their power purchase agreements and Rule 4 of the Electricity (Late Payment Surcharge) Rules, 2022.

20. We then heard Mr. K.M. Nataraj, learned ASG appearing for the Ministry of Power, Union of India. He submitted that a regulatory asset is created when State Commission determines tariffs while ignoring the principles laid down in Section 61 of the Electricity Act, specifically in sub-sections (b), (c), and (d). In such situations, the approved tariff and revenue generated from it is lower than the actual ARR of the distribution company. Further, the regulatory asset is created without following the conditions specified in Clause 8.2.2 of the National Tariff Policy, 2006 and

without a specific time period for liquidation. In order to recover this amount, he submits that the tariffs may be increased, the state government may provide additional subsidies to reduce the burden on the consumers due to increased tariffs, and through financial support by the state government. He also submitted that liquidation must be in accordance with Rule 23 of the Electricity (Amendment) Rules, 2024.

21. Finally, Mr. Shadan Farasat and Mr. Siddharth Dave, learned senior counsels for the Government of NCT of Delhi addressed us. They submitted that the regulatory asset is not attributable to the subsidies granted by the Government and its payments under Section 65 of the Electricity Act.

22. By order dated 23.10.2024, this Court directed the Government of NCT of Delhi to respond to the subsisting regulatory asset. When the matters were listed on 20.11.2024, Mr. Shadan Farasat, learned senior counsel appeared for the Government and expressed that the Government has not yet taken its decision regarding subsidies and creation of the regulatory asset, the reasons for which we directed be placed in an affidavit before us. An affidavit dated 06.01.2025 was filed by the Government of NCT of Delhi indicating that the Department of

Power had prepared a cabinet note for circulation on 29.10.2024, which was circulated for comments. The same received concurrence from the Law Department on 01.11.2024 but the comments of the Finance and Planning Departments are awaited. It was also stated that the Government of NCT of Delhi is releasing the subsidy amounts without default, and there is no relation between the grant of electricity subsidy and accumulation of the revenue gap. The amounts payable to the BSES Discoms are directly released to IPGCL, PPCL, and DTL for adjustment against outstanding dues, in accordance with interim orders of this Court in these writ petitions and civil appeals.

5. Impleadment of the State Commissions and Governments.

23. After hearing the learned counsels for the parties, by this Court's order dated 23.10.2024 we directed the impleadment of State Governments and State Electricity Regulatory Commissions to gather their views in light of the large-scale and nation-wide implications of creation and continuation of regulatory assets on the electricity sector. Subsequently, by order dated 20.11.2024, we directed the State Governments and State Commissions to express their views through affidavits. Upon perusing these affidavits, the

position of each state vis-à-vis regulatory assets can be captured as follows:

5 (i). Affidavits by State Commissions.

24. Following is the gist of the affidavits filed by various Commissions.

i. The State Commissions of Andhra Pradesh, Assam, Haryana, Himachal Pradesh, Jharkhand, Madhya Pradesh, Odisha, Punjab, Sikkim, Telangana, and Uttar Pradesh have submitted that they have not created any regulatory asset at any point in time.

ii. The Maharashtra Electricity Regulation Commission submits that in compliance with Clause 8.2.2 of the National Tariff Policy, 2016 and Rule 23 of the Electricity (Amendment) Rules, 2024, it has not created a regulatory asset since March 2020 in respect of any distribution licensee in the state.

iii. The Joint Electricity Regulatory Commission for UT of Jammu and Kashmir and UT of Ladakh also submits that it has not created any regulatory asset since FY 2019-2020 and tariff determination is such that the ARR of the distribution companies is met from the revenue from consumers and grant-in-aid from the UT Government.

iv. The Chhattisgarh State Electricity Regulatory Commission submits that there was a revenue gap of Rs. 343 crores in FY 2011-12, even after tariff increase by 14%, but the same was fully apportioned in FY 2012-13 with carrying cost. In FY 2012-13, there was a cumulative deficit of Rs. 1752 crores that was partially apportioned by a 17% tariff increase and the remaining revenue gap of Rs. 828 crores was carried forward as a regulatory asset, which was subsequently apportioned in FY 2013-14 with carrying costs. There was no regulatory asset between FY 2013-14 and FY 2015-16. Then in FY 2016-17, the State Commission had to allow Rs. 1130.80 crores over and above the ARR to comply with an APTEL order. To prevent a tariff shock, it allowed recovery of Rs. 370 crores in that year, and created a regulatory asset for Rs. 760.80 crores that was recovered in FY 2017-18. There was no regulatory asset created or carried forward between FY 2017-18 to FY 2019-20. In FY 2020-21, considering the COVID-19 pandemic and to avoid increasing tariffs, the Commission created a regulatory asset of Rs. 213 crores that was recovered in FY 2021-22. Post-COVID, the Commission increased tariff by 6.19% and 2.31%, with no regulatory assets. However, as of FY 2023-24, there was a cumulative revenue deficit of Rs. 2924.53 crores as the tariff hikes were insufficient to meet expenditure. The Commission implemented various rationalisation measures to reduce the regulatory asset to Rs. 2528 crores, which would be recovered with carrying cost during the true-up for FY 2023-24 and tariff determination of FY 2025-26. It also submitted that no further regulatory asset has been crated in the tariff order dated 01.06.2024 for ARR of FY 2024-25.

v. Kerala State Electricity Regulatory Commission has submitted that till FY 2022-23, the regulatory asset is Rs. 7123 crores as per the Commission’s order dated 25.06.2022.

Against this, the average GPF balance estimated by the Kerala State Electricity Board at the end of FY 2026-27 is about Rs. 3500 crores, and the average surplus security deposit at the end of FY 2026-27 is Rs. 285 crores. Considering these funds available with the Kerala State Electricity Board, the Commission decided to amortise the balance gap of about Rs. 3350 crores during the control period while avoiding tariff shock and financial burden to the consumers, in the following manner: Rs. 850 crores each year from FY 2022-23 to FY 2024-25, Rs. 500 crores in FY 2025-26, and Rs. 300 crores in FY 2026-27.

vi. The Rajasthan Electricity Regulatory Commission has submitted that as per its orders dated 31.03.2023 and 26.07.2024, the regulatory asset across the three distribution companies in the state is Rs. 47,578 crores upto FY 2023-24 and Rs. 47,114 crores upto FY 2024-25. Various measures have been taken for recovery of the accumulated regulatory assets including financial support from the state government and introduction of monthly fuel surcharge to account for increasing power purchase costs. The Commission also noted that decision regarding regulatory surcharge, tariff increase, and adjustment of regulatory asset against revenue surplus will be taken in the successive years. It has also submitted that under the Draft RERC (Terms and Conditions for Determination of Tariff) Regulations, 2025, Regulation 91 provides for the creation of a regulatory asset only in exceptional circumstances under natural calamity conditions. Even then, it shall not be more than 3% of the approved ARR and it shall be liquidated with carrying costs in maximum 3 equal yearly instalments. Existing regulatory asset, along with the carrying costs, shall be liquidated in a maximum of 7 equal yearly instalments. In case there is surplus in any financial year, it shall be adjusted first against regulatory assets. This is exactly what is prescribed in Rule 23 of the Electricity Rules made by the Central Government, which we will refer to in further detail at a later stage.

vii. The Tamil Nadu Electricity Regulatory Commission submits that the regulatory asset in the State of Tamil Nadu till FY 2021-22, including carrying cost, is estimated at Rs. 89,375.09 crores. The Commission submits that this is more than 100% of the ARR, and hence a tariff-based liquidation would not be feasible as it would excessively burden consumers. Rather, the same must be recovered by upgrading transmission infrastructure, reducing aggregate technical and commercial (AT&C) losses, and sourcing low-cost renewable energy sources. Essentially, the cost of procurement must be lowered such that the revenue requirement of the distribution company is on par with the consumers' paying capacity. It further submits that in the true-up order for FY 2022-23, the Commission directed the Tamil Nadu Generation and Distribution Corporation to seek approval from the Government of Tamil Nadu to liquidate the revenue gap till FY 2021-22 of Rs. 83,000 crores through government resources. Based on the Government's decision, the Commission submits that it will finalise the strategy for amortisation of the regulatory asset. It also submits that it has endeavoured to not create any new regulatory asset from FY 2022-23 by proposing a tariff increase in a socially balanced manner.

5 (ii). Affidavits by State Governments.

25. Following is the gist of the affidavits filed by various State Governments.

i. The State of Nagaland has filed an affidavit stating that it is a bulk power customer and is allotted power by the Government of India from generating stations within and outside the state. The tariff for the same is determined by the Central Electricity Regulatory Commission.
ii. The State of Odisha submitted that as per its communication with the Odisha Electricity Regulatory Commission, the Commission has never created a regulatory asset.
iii. The Government of Madhya Pradesh also filed its affidavit through the Madhya Pradesh Power Management Co. Ltd., which has submitted that the State Commission has always followed a cost-reflective tariff and has not created any regulatory asset.

26. We would have expected the State Governments to take a clear stand on the social justice obligations of the State in the context of the power of the Regulatory Commissions to determine tariff. The Regulatory Commissions are required to balance the interplay of the obligations of the State to ensure access to

electricity on the one hand, and the right of the utilities to recover cost-based expenses on the other. We are aware of the autonomy that the Regulatory Commissions exercise in the context of tariff determination, as well as of applicability of the National Tariff Policy and Rules formulated by the Central Government on regulatory asset. We were conscious of this aspect and the same is reflected in our consideration.

6. Law Governing the Electricity Sector Prior to 2003.

27. The supply and use of electricity was originally governed under the Indian Electricity Act, 1910, which provided the legal framework for laying cables and other works. With independence and industrialisation, the need for electricity in urban as well as rural areas increased, leading to enactment of the Electricity (Supply) Act, 1948 that mandated State Governments to constitute separate State Electricity Boards that would be responsible for arranging supply of electricity in each state and administering the grid system. It also provided for a Central Electricity Authority[23] for planning and development of the national power system.[24]

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[23] Hereinafter "CEA".
[24] *Tata Power Co. Ltd. v. Reliance Energy Ltd.*, (2009) 16 SCC 659, paras 67-71; *BSES Rajdhani Power Ltd. v. Delhi Electricity Regulatory Commission*, (2023) 4 SCC 788, paras 11-13.

These were the regulators, but the governments exercised substantial control on policy as well as management of the sector.

28. Over time it was noticed that these State Electricity Boards were unable to respond to the rapidly growing demand of electricity due to financial losses, low tariffs, lack of budgetary support from the governments, or investments.[25] Further, various problems plagued the power sector, namely the lack of rational retail tariffs, high level of cross-subsidies, poor planning and operation, inadequate capacity, neglect of consumer interest, limited involvement of the private sector's skills and resources, and the absence of an independent regulatory authority.[26] This led to the enactment of the Electricity Regulatory Commissions Act, 1998 with the objective of reforming the electricity sector by establishing Central and State Electricity Regulatory Commissions, rationalising electricity tariffs, transparent policies regarding subsidies, and promoting efficient and environmentally benign policies.[27]

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[25] Statement of Objects and Reasons, Electricity Regulatory Commissions Act, 1998.

[26] ibid.

[27] The Preamble of this Act reads:

> "*An Act to provide for the establishment of a Central Electricity Regulatory Commission and State Electricity Regulatory Commissions, rationalization of electricity tariff, transparent policies regarding subsidies, promotion of efficient and environmentally benign policies and matters connected therewith or incidental thereto.* "

29. In the NCT of Delhi, the Delhi Electricity Reforms Act, 2000 was enacted to restructure the electricity industry by unbundling generation, transmission and distribution, to increase avenues for private sector participation, and to take measures conducive to the development and management of the electricity industry in an efficient, commercial, economic, and competitive manner.[28]

7. Electricity Act, 2003.

30. The Electricity Act, 2003 was enacted by the Parliament as a complete and comprehensive law for regulating the generation, transmission, distribution, and use of electricity in India. The Preamble of the Act reads:

> "*An Act to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalization of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto.*"

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[28] *BSES Rajdhani Power Ltd* (supra), para 15. The Preamble of the Delhi Electricity Reform Act, 2000 reads:

> "*An Act to provide for the constitution of an Electricity Regulatory Commission, restructuring of the electricity industry (rationalisation of generation, transmission, distribution and supply of electricity), increasing avenues for participation of private sector in the electricity industry and generally for taking measures conducive to the development and management of the electricity industry in an efficient, commercial, economic and competitive manner in the National Capital Territory of Delhi and for matters connected therewith or incidental thereto.*"

31. Further, the purpose of the enactment is explained in detail in its Statement of Objects and Reasons, the relevant portions of which are extracted hereinbelow:

> *"3. With the policy of encouraging private sector participation in generation, transmission and distribution and the objective of distancing the regulatory responsibilities from the Government to the Regulatory Commissions, the need for harmonising and rationalising the provisions in the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998 in a new self-contained comprehensive legislation arose. Accordingly it became necessary to enact a new legislation for regulating the electricity supply industry in the country which would replace the existing laws, preserve its core features other than those relating to the mandatory existence of the State Electricity Board and the responsibilities of the State Government and the State Electricity Board with respect to regulating licensees. There is also need to provide for newer concepts like power trading and open access. There is also need to obviate the requirement of each State Government to pass its own Reforms Act. The Bill has progressive features and endeavours to strike the right balance given the current realities of the power sector in India. It gives the State enough flexibility to develop their power sector in the manner they consider appropriate. The Electricity Bill, 2001 has been finalised after extensive discussions and consultations with the States and all other stake holders and experts."*

32. Through reading the Statement of Objects and Reasons as well as the Preamble, the salient features of the Act are:

i. The Act is a comprehensive code to regulate the generation, transmission, distribution, trading and use of electricity and replaces the erstwhile 1910 Act, 1948 Act, and 1998 Act that governed electricity supply and use;[29]

[29] *Tata Power Co Ltd* (supra), para 76.

ii. The State Electricity Boards are unbundled into separate utilities for electricity generation, transmission, and distribution,[30] and private sector participation is encouraged in these activities;[31]

iii. The Act provides for development of the electricity sector through coordinated efforts of the Central Government, State Governments, and various statutory authorities and regulators by institutionalising electricity policies and plans;

iv. While generation has been delicensed, the transmission, distribution, and trading of electricity are licensed activities;[32]

v. The Act provides for a price discovery mechanism through tariff fixation;

vi. The Act entrusts the performance of regulatory and adjudicatory functions, including licensing and tariff fixation, to permanent, independent Regulatory Commissions that act as expert and specialised bodies.[33] It also enables dispute resolution through arbitration in specified cases;

vii. The Act established the APTEL as a specialised appellate forum;[34]

viii. The Act provides for offences as well as their penalties.

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30 *PTC India Ltd. v. Central Electricity Regulatory Commission*, (2010) 4 SCC 603, para 17.

31 *Tata Power Co Ltd* (supra), para 80; *Hindustan Zinc Ltd. v. Rajasthan Electricity Regulatory Commission*, (2015) 12 SCC 611, para 29.

32 *Tata Power Co. Ltd.* (supra).

33 *Tata Power Co Ltd* (supra), para 78; *PTC India Ltd* (supra), para 17.

34 See *West Bengal Electricity Regulatory Commission v. CESC Ltd.*, (2002) 8 SCC 715, para 102.

8. Provisions of the Electricity Act relating to determination of Tariff.

33. Section 3 of the Electricity Act provides for the preparation, publication, review, and revision of the National Electricity Policy and tariff policy by the Central Government in consultation with the State Governments and the CEA for development of the power sector through optimal utilisation of resources. Sub-section (4) also provides for the CEA to prepare a National Electricity Plan as per the National Electricity Policy.

34. A distribution licensee is defined under Section 2(17) as a licensee operating and maintaining a distribution system for supplying electricity to consumers in its area of supply. Electricity distribution is a licensed activity as per Section 12, and the license is granted by the Regulatory Commission under Section 14. Part VI of the Act deals with distribution of electricity – Sections 42 and 43 set out of the duties of a distribution licensee and open access, Sections 45 and 46 provide for the power to recover charges and expenditure for supply of electricity, Section 47 provides for the power to require security, and Sections 48 and 49 empower the distribution licensee to impose restrictions and enter into agreements for supply of electricity.

35. The Electricity Act also lays down a regulatory mechanism as follows: Section 2(4) defines "Appropriate Commission" as meaning the Central, State, or Joint Electricity Regulatory Commission, as the case may be. The Central Commission is constituted under Section 76, its functions are stipulated under Section 79, and its regulation-making powers are provided under Section 178. Sections 80 and 81 deal with the Central Advisory Committee and its objects.

35.1 Similarly, the State Commissions are constituted under Section 82 and their functions are provided in Section 86, which include both mandatory and advisory functions. The relevant mandatory function for our purpose is under sub-section (1)(a), which provides for tariff determination for retail supply of electricity within the State. Sub-section (4) provides that the State Commission shall be guided by the National Electricity Policy, tariff policy, and National Electricity Plan formulated under Section 3. The State Commission can also make regulations in exercise of its powers under Section 181, including on the terms and conditions for determination of tariff under Section 61 (sub-section (2)(zd)), methodologies and procedures for calculating expected revenue from tariff and charges under Section 62(5) (sub-section (2)(zf)), the manner of making an application and fee payable under Section 64 (sub-section (2)(zg)), and modifications or conditions under Section 64(3) (sub-section (zh)). Sections 87 and 88 deal with State Advisory Committees and their objects.

35.2 The Joint Regulatory Commission is constituted under Section 83, and its functions and powers are under sub-sections (4) and (5).

35.3 Lastly, it is important to note that Section 142 empowers the Commissions to punish for non-compliance of their directions, or any provision of the Act or rules or regulations made thereunder.

36. The Central and State Governments are also given the power to make rules under the Act, under Sections 176 and 180 respectively. Beyond rule-making, the Central and State Governments can issue policy directions to the Central and State Commissions respectively in matters involving public interest under Sections 107 and 108. These directions "shall guide" the Regulatory Commissions, but shall not be binding on them.[35]

37. In exercise of their powers and functions, the Central and State Commissions are required to determine tariff as per Part VII of the Electricity Act. Section 61 lays down the guiding principles

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[35] *Kerala State Electricity Board Ltd. v. Jhabua Power Ltd.*, 2024 SCC OnLine SC 2819.

for the Commissions to specify the terms and conditions of tariff determination, of which the following are relevant:

> "***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:-*
> *****
> *(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;*
> *****
> *(i) the National Electricity Policy and tariff policy…*"

38. While these principles have a bearing on making the regulations for tariff determination, tariff is fixed under Section 62, inter alia, for retail supply of electricity. Sub-section (5) also provides for compliance with procedures specified for calculating expected revenues from tariff and charges that can be recovered. Section 63 deals with tariff determination through bidding, and Section 64 provides the procedure for application for tariff determination. Section 65 mandates that if the State Government requires the grant of subsidy to any class of consumers in tariff, it

shall pay the amount of such subsidy in advance to compensate the person affected by the grant of subsidy.

9. Provisions of Act, Policies, Rules, Regulations, and Orders having a bearing on creation of a Regulatory Asset.

9 (i). National Electricity Policy, 2005.

39. The Central Government notified the National Electricity Policy under Section 3 of the Electricity Act on 12.02.2005, which laid down guidelines for development of the power sector, providing electricity supply to all areas, and protecting consumer and other stakeholders' interests keeping in view availability of energy resources, technology, and energy security issues.

40. On 01.01.2006, the DERC issued a Public Awareness Bulletin setting out the major components of ARR for Delhi's distribution companies as well as the approximate ratio of each component in the tariff. Power purchase costs are 80% of the tariff, operations and maintenance expenses are 9-10% of the tariff, depreciation is 3-4%, return on capital employed is 6-7%, and income tax is 0.5-1%.

9 (ii). National Tariff Policy, 2006.

41. On 06.01.2006, the Central Government notified the National Tariff Policy, 2006 under Section 3 of the Act. Clause 8.2.2 of the Policy provides for the creation of a regulatory asset, as well as certain restrictions on time-period and circumstances. It reads:

> "*8.2.2. The facility of a regulatory asset has been adopted by some Regulatory Commissions in the past to limit tariff impact in a particular year. <u>This should be done only as exception, and subject to the following guidelines</u>:*
> *a. The <u>circumstances should be clearly defined through regulations, and should only include natural causes or force majeure conditions</u>. Under business as usual conditions, the opening balances of uncovered gap must be covered through transition financing arrangement or capital restructuring;*
> *b. <u>Carrying cost of Regulatory Asset should be allowed</u> to the utilities;*
> *c. Recovery of Regulatory Asset should be <u>time-bound and within a period not exceeding three years at the most</u> and preferably within control period;*
> *d. The use of the facility of Regulatory Asset <u>should not be repetitive</u>.*
> *e. In cases where regulatory asset is proposed to be adopted, it should be ensured that the <u>return on equity should not become unreasonably low in any year</u> so that the capability of the licensee to borrow is not adversely affected.*"
>
> (emphasis supplied)

41.1 As stated above, Section 86(4) provides that the State Commission shall be guided by the National Tariff Policy in discharging its functions, and the Policy is also a guiding principle for tariff determination as per Section 61(1)(i). This Court has held that while the Policy does not bind the State Commission, it is a material consideration that must guide tariff determination.[36]

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[36] *Tata Power Co. Ltd. v. Maharashtra Electricity Regulatory Commission*, (2023) 11 SCC 1, para 122.

41.2 Nothing can be clearer than the mandate under Clause 8.2.2 of the National Tariff Policy, 2006. The real issue is to examine the circumstances and the compelling reasons for the creation and undue extension of the regulatory asset over a period of time, which we will undertake in our Analysis.

9 (iii). DERC Tariff Determination Regulations, 2007.

42. On 30.05.2007, the DERC framed the Tariff Determination Regulations, 2007 for the first control period (FY 2007-2011), under which Regulation 5.42 deals with regulatory asset. It stipulates that at the time of truing up, if variations on account of uncontrollable items like energy sales and power purchase costs are large and it is not feasible to recover them in one year, the Commission can create a regulatory asset as per Clause 8.2.2 of the National Tariff Policy, 2006. Regulation 5.42 in fact incorporates the National Tariff Policy and makes it a part of the enforceable regime. The relevant portion is extracted below for ready reference:

> "*5.42 <u>Variations on account of uncontrollable items like energy sales and power purchase cost shall be trued up.</u> Truing-up shall be carried out for each year based on the actual/audited information and prudence check by the Commission;*
> *Provided that <u>if such variations are large, and it is not feasible to recover in one year alone, the Commission may take a view to create a regulatory asset, as per the guidelines provided in clause 8.2.2 of the National Tariff Policy</u>.*"
>
> (emphasis supplied)

9 (iv). DERC Statutory Advice dated 15.12.2010.

43. On 15.12.2010, the DERC issued a statutory advice to the Government of NCT of Delhi regarding the financial position of BRPL and BYPL and whether they are able to meet expenses from tariff revenue and return on equity. In this letter, the DERC stated that the tariffs for FY 2008-09 to FY 2010-11 are not cost-reflective and they do not account for the increase in power purchase costs during this period, which constituted more than 80% of the tariff. While generating companies recover the increase in cost from the distribution companies, the latter are unable to recover the same from consumers under the present tariff. Distribution licensees resorted to extensive borrowing to sustain operations, resulting in substantial interest costs and a precarious financial position. The DERC noted that this is against consumer interests as these costs must ultimately be recovered from consumers with carrying cost, and would burden future consumers with previously incurred costs. The relevant portions of the DERC's letter are extracted below:

> "*16. The Commission has analysed the ability of the distribution licensees to meet their expenses and has considered the revenue from retail sale of electricity at the tariffs determined by the Commission. These have been compared with various heads of expenditure i.e. power purchase cost, operating expenses including interest and*

depreciation, to determine the extent of surplus available towards the return on equity allowed by the Commission.

18. Power purchase cost should not be exceeding 80% which was in the range of 73-80% in the year 2008-09, 77-98% in the year 2009-10 and 113-135% in the first six months of 2010-11.

20. Power purchase and revenue recovered from sale of energy are not within the control of the distribution licensees. Power purchase cost is mostly dependent upon the fuel cost which is market driven. The generating company recovers the increase in the fuel cost and other variable expenses every month from the distribution licensees, who in turn are not able to recover timely from the consumers under the present dispensation. Thus, the operations of the distribution companies are dependent on borrowings over a period of 18-24 months which entails substantial interest cost. This, in any case, is detrimental to consumer Interest as all power purchase costs whether short term or long term are passed through to the consumers (and recovered from the consumers along with the carrying cost).

*****

Conclusion

The Commission is of the view that the tariff during previous years has not been cost effective. The distribution licensees have had to resort to extensive borrowing to sustain their operations.

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(3) Accumulation of Revenue gaps beyond sustainable levels

Analysis of the Audited Accounts of the distribution licensees in Tables 1-3 would indicate that there is shortfall in the years 2009-10 and 2010-11 beyond sustainable levels. Thus, it would be quite obvious that in the absence of tariff revision there is a growing revenue gap which is to be funded out of borrowings which are increasing from year to year.

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(5) Power purchase cost/ quantum

Analysis carried out for the years 2008-09 and 2009-10 in Tables 1-4 would indicate that there has been a steep increase in the power purchase cost. These issues would get addressed while taking the ground realities into consideration and estimating the quantum and the cost based upon the current data based upon the latest bills available from the generating companies, power purchase rates in the Power Exchange, Ul and bilateral contracts."

9 (v). Ministry of Power's Letter to the APTEL.

44. On 21.01.2011, the Minister of Power issued a letter to the APTEL to take suo motu cognisance and issue necessary directions under Section 121 of the Electricity Act regarding periodical tariff revisions for improving the long-term financial health and viability of the electricity sector.

9 (vi). APTEL's Order dated 11.11.2011.

45. Pursuant to this letter, the APTEL passed an order dated 11.11.2011[37] wherein it issued various directions to Regulatory Commissions regarding timely tariff determination, truing up, and creation, continuation, and recovery of the regulatory asset. The directions issued by the APTEL are as follows:

> "*65. In view of the analysis and discussion made above, we deem it fit to issue the following directions to the State Commissions:*
>
> *(i) Every State Commission has to ensure that Annual Performance Review, true-up of past expenses and Annual Revenue Requirement and tariff determination is conducted year to year basis as per the time schedule specified in the Regulations.*
>
> *(ii) It should be the endeavour of every State Commission to ensure that the tariff for the financial year is decided before 1st April of the tariff year. For example, the ARR & tariff for the financial year 2011- 12 should be decided before 1st April, 2011. The State Commission could consider making the tariff applicable only till the end of the financial year so that the licensees remain vigilant to follow the time schedule for filing of the application for determination of ARR/tariff.*
>
> *(iii) In the event of delay in filing of the ARR, truingup and Annual Performance Review, one month beyond the scheduled date of*

[37] In O.P. No. 1/2011, order dated 11.11.2011.

submission of the petition, the State Commission must initiate suo-moto proceedings for tariff determination in accordance with Section 64 of the Act read with clause 8.1 (7) of the Tariff Policy.

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

(v) Truing up should be carried out regularly and preferably every year. For example, truing up for the financial year 2009-10 should be carried out along with the ARR and tariff determination for the financial year 2011-12.

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

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

9 (vii). DERC Tariff Determination Regulations, 2011.

46. The DERC then issued the Tariff Determination Regulations, 2011 for the second control period (FY 2012-2015, later extended till 31.03.2017), under which Regulation 5.40 is relevant and deals with regulatory asset. Similar to Regulation 5.42 of the Tariff

Determination Regulations, 2007, it provides for creation of a regulatory asset when the variations at the truing up stage are large and cannot be recovered in one year. Further, the regulatory asset must be created as per the guidelines in Clause 8.2.2 of the National Tariff Policy, 2006. The Regulation reads:

> "*5.40 Truing-up shall be carried out in accordance with Regulation 4.21, for each year based on the actual/audited information and prudence check by the Commission;*
>
> *Provided that if such variations are large, and it is not feasible to recover in one year alone, the Commission may take a view to create a regulatory asset, as per the guidelines provided in clause 8.2.2 of the National Tariff Policy.*
>
> *Provided further that under business as usual conditions, the Commission, to ensure tariff stability, may include the opening balances of uncovered gap / trued-up costs in the subsequent Control Period's ARR instead of including in the year succeeding the relevant year of the control period after providing for transition financing arrangement or capital restructuring.*"

9 (viii). DERC's Tariff Order dated 26.08.2011 (FY 2011-12).

47. The DERC also passed an order dated 26.08.2011 wherein it determined the ARR for FY 2011-12 and the true-up for FY 2008-2010. In this order, it increased the tariff by 22% across the board for all consumer categories and also introduced a fuel price adjustment charge.

9 (ix). DERC's MYT Order dated 13.07.2012 (FY 2012-15).

48. In its subsequent MYT order dated 13.07.2012 determining ARR for FY 2012-2015 and true-up for FY 2010-11, the DERC approved tariff increase of 23%, introduced the DRS @ 8%, and the PPAC. The fuel price adjustment charge was absorbed into these.

9 (x). DERC's Statutory Advice dated 01.02.2013.

49. On 01.02.2013, the DERC issued another statutory advice to the Government of NCT of Delhi, wherein it noted that the revenue gap was Rs. 19,505.04 crores, including carrying costs, across BRPL, BYPL, and TPDDL since FY 2009-10. The DERC also specified various measures taken to recover the revenue gap, including the 23% tariff hike w.e.f. 01.07.2012 and the DRS of 8%, but that these were insufficient. In this light, the DERC recommended that the Government of NCT of Delhi may take steps to ensure that benefits of Central Government sponsored schemes, direct subsidies from state governments, and additional budgetary support are extended to the distribution licensees. The relevant recommendations of the DERC to the Government of NCT are extracted below:

> *"14. Recommendations:-*
>
> ***

i) …The Commission recommends that Govt. of NCT of Delhi may take urgent steps so that the benefits of various Central Government sponsored schemes are extended to the Delhi distribution utilities and, in tum, to the electricity consumers in Delhi. Unless this is done, tariffs in Delhi could become unsustainable, especially when compared to other States in the country where State owned utilities not only avail the benefits of the centrally sponsored schemes but also avail direct subsidies from the State Governments as well as additional budgetary support for lower tariff levels.

ii) In case of APDRP, R-APDRP and JNNURM schemes of the Central Govt., the view of the Govt. been that privately managed distribution entities should not be allowed to avail the benefits of these programmes. The Commission is of the view that denial of the benefits of these programmes to the distribution entities of Delhi does not affect the managements of these distribution companies but, in fact, denies the benefit of the schemes to the consumers of electricity of Delhi who are as a result required to pay higher tariffs than are paid by the electricity consumers in other States which avail of the benefits of these schemes. Thus, the Govt. of NCT of Delhi may take up with the Ministry of Power that these schemes are availed of by the Delhi distribution utilities for the benefit of the consumers in the NCT of Delhi.

iii) The financial bailout package introduced by the Central Govt. for financial restructuring of State distribution entities with certain conditions including support from the State Govt. is also being denied to the distribution entities in Delhi. Here again, this view does not impact the private managements of these companies but has a direct impact on their revenue requirements and consequently, the tariff required to be paid by electricity consumers in the city. The Govt. of NCT of Delhi may take up with the Ministry of Power to sanction the bail-out package for the DISCOMs of Delhi. This would be the single most important measure for deferring the incidence of high levels of past revenue gaps on the tariff determination process."

9 (xi). DERC's Tariff Order dated 31.07.2013 (FY 2013-14).

50. In the next tariff order dated 31.07.2013 to determine ARR for FY 2013-14 and true-up for FY 2011-12, the DERC increased

the tariff by 5% and continued the existing DRS @ 8% over and above the revised tariff. It also allowed carrying cost on the regulatory asset to all distribution companies. At this stage, the regulatory asset amounted to Rs. 8060 crores across the BSES Discoms and Rs. 3370 crores for TPDDL.

9 (xii). APTEL's Order dated 14.11.2013.

51. The APTEL also passed the order dated 14.11.2013[38], wherein it reiterated its direction to the DERC to provide for recovery of the regulatory asset in 3 years as per its order dated 11.11.2011 and to implement the judgments of the APTEL. The DERC has filed civil appeals against this order, which have been dismissed by this Court's order dated 01.12.2021 as there was no substantial question of law.[39] This Court also directed the DERC to implement the issues decided by the APTEL, if not already complied, within a period of 3 months and to file a compliance report in 2 weeks thereafter.[40] The relevant portion of the APTEL order is as follows:

> "*37. As regards recovery of the Regulatory assets/amortization schedule and fuel and power purchase adjustment mechanism, this Tribunal in OP No.1 of 2011*

[38] In O.P. Nos. 1 and 2/2012, order dated 14.11.2013.
[39] In C.A. No. 1854-1855/2014, order dated 01.12.2021.
[40] ibid.

> *dated 11.2011 has given the following directions to the State Commission…*
> *38. In view of the above, we direct the State Commission to take immediate steps for recovery of the admitted revenue gap and decide amortization schedule and also ensure that the Fuel and Power Purchase costs are passed on regularly and effectively as per the above directions of this Tribunal to avert the problems of cash flow experienced by the Petitioners which may come in the way of smooth operation of the distribution system and meeting the requirements of electricity of the consumers in the national capital in a reliable manner if not remedied in time.*
> *39. In view of the categorical stand taken by the Delhi Commission now, it is enough for us to direct the Delhi Commission to implement the directions of this Tribunal given in the decisions referred to above and pass an order in terms of those directions in future.”*

9 (xiii). APTEL’s Order dated 11.03.2014.

52. The above-referred tariff order dated 31.07.2013 was appealed before the APTEL by BRPL in Appeal No. 266/2013 and by BYPL in Appeal No. 265/2013 on the ground that the tariff order did not provide a roadmap for recovery of the regulatory asset. In these appeals, BRPL and BYPL filed IA 365/2013 and 364/2013 respectively for an order to increase the DRS to meet carrying costs upto 31.03.2014, to repay one-third of the principal component of the regulatory asset, and to provide a plan for completely recovery of the regulatory asset in 3 years as per the National Tariff Policy, 2006.

53. The APTEL rejected the prayer for liquidating the regulatory asset in 3 years by order dated 11.03.2014, which has been

appealed by BRPL and BYPL in the present civil appeals. However, the APTEL directed the DERC to prepare a roadmap for liquidation of the regulatory asset, both principal amount and carrying cost, keeping in mind the interests of consumers and the distribution licensees.

54. In the present civil appeals (C.A. No. 4010 and 4013/2014) against the APTEL's order dated 11.03.2014, as well as writ petitions by BRPL and BYPL, this Court by order dated 26.03.2014 directed the DERC to submit a roadmap for liquidation of the regulatory asset and also directed BRPL and BYPL to pay the current dues to the generating and transmission companies. In compliance with this order, the DERC submitted a liquidation schedule on 01.05.2014 before this Court, in which it proposed to liquidate the regulatory asset including carrying cost in 6-7 years (by FY 2020-21) by taking the average growth rate of distribution companies at 15%.

9 (xiv). National Tariff Policy, 2016.

55. On 28.01.2016, a revised National Tariff Policy, 2016 was notified by the Central Government, wherein Clause 8.2.2 deals with regulatory asset. While the other conditions for creation of a regulatory asset are similar to the National Tariff Policy, 2006, the

time-period for recovery was increased from 3 to 7 years. The relevant portion is extracted below:

> "*8.2.2 The facility of a regulatory asset has been adopted by some Regulatory Commissions in the past to limit tariff impact in a particular year. This should be done <u>only as a very rare exception</u> in case of <u>natural calamity or force majeure conditions</u> and subject to the following:*
> *a. Under <u>business as usual conditions, no creation of Regulatory Assets shall be allowed</u>;*
> *b. Recovery of outstanding Regulatory Assets <u>along with carrying cost</u> of Regulatory Assets <u>should be time bound and within a period not exceeding seven years</u>. <u>The State Commission may specify the trajectory for the same</u>.*"
>
> (emphasis supplied)

9 (xv). DERC Tariff Determination Regulations, 2017.

56. The DERC then framed the DERC (Terms and Conditions for Determination of Tariff) Regulations, 2017, which contains a separate section on regulatory asset. Regulation 154 provides that an accumulated revenue gap approved by the Commission in the relevant tariff order shall be treated as a regulatory asset, and that such revenue gap shall be computed on the basis of excess of ARR over revenue approved after truing up for the relevant year. Regulation 155 provides for carrying cost, and Regulation 156 deals with the how the regulatory asset must be shown in the books of accounts. On a perusal of these regulations, it is clear that Clause 8.2.2 of the National Tariff Policy, 2016 has not been

referred, nor are there any conditions on when a regulatory asset can be created, its quantum, and the time-period for its recovery.

9 (xvi). Ministry of Power's Affidavit dated 10.08.2022.

57. On 10.08.2022, the Ministry of Power, Union of India submitted an affidavit before this Court in the present writ petitions. It submitted that while the DERC created the regulatory asset as an exception, it is now being continued in a manner inconsistent with the Electricity Act and its larger objective of a healthy and economical electricity sector. The affidavit also relied on the APTEL's judgment dated 11.11.2011[41] where it was held that the regulatory asset must be recovered in a time-bound manner within 3 years, and preferably within the control period. The Ministry of Power prayed that this Court direct DERC to devise a roadmap or plan for amortisation of the regulatory asset in a time-bound manner as per the National Tariff Policies, to direct the State Commissions to determine cost-reflective tariffs, and that no new regulatory asset be created except as per the National Tariff Policy, 2016. The relevant portions of the affidavit are extracted below:

[41] In O.P. No. 1/2011 (supra).

"10. That creation of Regulatory Asset essentially requires deferment of admitted cost due to a Distribution Company to a future period in order to avoid tariff shock. This concept was adopted by the Respondent No. 2 as an exception, however, gradually the exercise of creation of Regulatory Asset seems to have become a trend and is now being done on year to year basis. Such an approach is not only inconsistent with the Act but is also irreconcilable with the larger objective to have a healthy and economical electricity sector in the country.

11. That in order to address this situation, the Answering Respondent in compliance with section 3 of the Act, notified the National Tariff Policy ("NTP, 2006") on 06.01.2006, wherein the Answering Respondent had directed that the 'Regulatory Asset' should not be created under usual business condition and the recovery of Regulatory Asset should be timebound, within a period of three years. Following are the relevant extracts of the NTP, 2006…

12. That despite the above mandate, it was observed that the SERCs have failed/or are reluctant to conduct the tariff determination exercise in consistency with the Act. In this respect, on 21.01.2011, the Answering Respondent issued a Letter to the Appellate Tribunal for Electricity ("Appellate Tribunal"), inter alia, requesting the Appellate Tribunal to issue necessary directions to the SERCs to revise the tariff periodically for improving the financial health and long-term viability of the electricity sector, particularly for distribution utilities. Basis the letter issued by the Answering Respondent, the Appellate Tribunal initiated a Suo- Moto proceeding being O.P. No. 01 of 2011 wherein, various issues with respect to power of SERCs to determine tariff were discussed…

14. That the Answering Respondent on 28.01.2016 issued the National Tariff Policy, 2016 ("NTP, 2016"). Clause 8.2.2 of NTP, 2016, provided that the SERCs cannot continue to delay the liquidation of Regulatory Assets and the recovery of outstanding Regulatory Assets along with the Carrying Cost should be done in a time bound manner not exceeding 7 years…

15. That it is evident from the above that Answering Respondent has taken steps and mandated that the SERCs (including the Respondent No.2) cannot create Regulatory Asset as a matter of routine and the Regulatory Asset and directed the SERCs to recover the outstanding Regulatory Assets in a time bound manner…

18. That in view of the above, it is submitted that the creation of a Regulatory Asset' with no mechanism for recovery is contrary to the Act's legislative intent, as it amounts to artificially keeping the tariff low while *prejudicing the efficient recovery of the tariff. Answering Respondent vide the statutory policies and various communications have directed the Commissions to refrain from creating Regulatory Asset and to amortise the Regulatory Asset within a time bound manner. However, as evident in the present case, the Respondent No. 2 has not acted in the compliance of the Act, Statutory policies issued by the Answering Respondent and the Judgments/Order of the Appellate Tribunal and deferred the recovery of recognised revenue gap for 17 years by creating the Regulatory Asset.*

19. That it is therefore submitted that this Hon'ble Court may be pleased to direct the Respondent No. 2 to devise a roadmap/plan to amortise the Regulatory Asset in a time-bound manner as mandated under the Tariff Policies notified by the Answering Respondent or any other methodology as this Hon'ble Court may deem fit in the present situation. Since such problem is also observed in other State Commissions also, Hon'ble Court may also be pleased to direct all State Commission for determination of cost reflective tariff and no new regulatory assets be created as stipulated in the Tariff Policy 2016. State Commission may also be directed to devise a roadmap/plan to amortise the Regulatory Asset in a time-bound manner as mandated under the Tariff Policies notified by the Answering Respondent."

9 (xvii). Ministry of Power's Affidavit dated 12.12.2022.

58. In another affidavit dated 12.12.2022, the Ministry of Power submitted that the LPS fixed by the State Commissions was 18%, which is "usurious" as bank lending rates are 6-7%. This higher LPS means that distribution companies bear a heavy burden in case of delayed payments, which is subsequently passed on to consumers. Hence, LPS must be linked to the Bank Lending Rate to make it reasonable. Though this issue does not directly arise for our consideration, we are aware that it has a bearing on the tariff,

if not for the present but in future. Eventually, the burden is shifted on the consumer. The Ministry also submits that taking into account these concerns, it has notified the Electricity (LPS) Rules, 2022. The relevant portions of the affidavit are extracted below:

> "*In the absence of any Rules or directions with regard to the specific rates for Late Payment Surcharge (LPS), the CERC and SERCS notified their respective Tariff Regulations from time to time wherein different rates of the LPS were specified and which were exorbitant- as high as 18 percent- whereas Banks are charging an interest of only 6 to 7 percent on their loans. The extortionate rate of LPS lead to higher cost of electricity for the common man; and a heavy burden on the distribution companies putting them virtually into a debt trap.*"

9 (xviii). Electricity (Amendment) Rules, 2024 introducing Rule 23.

59. On 10.01.2024, the Central Government notified the Electricity (Amendment) Rules, 2024 by which it inserted Rule 23, which deals with regulatory asset, in the Electricity Rules, 2005. This was in exercise of its rule-making powers under Section 176 of the Electricity Act. Rule 23 prescribes as a first principle that tariff shall be cost-reflective and that there shall not be any gap between the ARR and the estimated revenue from approved tariff. The only exception to this rule is natural calamity conditions. Four conditions are formulated for the creation, management, and

liquidation of a regulatory asset under Rule 23: First, the regulatory asset shall not be more than 3% of the ARR. Second, the revenue gap shall be liquidated within 3 years. Third, the existing regulatory assets shall be liquidated within 7 years. Fourth, the regulatory asset will have carrying cost as prescribed under the Rules. We will deal with Rule 23 in more detail at a later stage.

9 (xix). DERC's Order dated 19.07.2024 (true-up till FY 2020-21).

60. Finally, in its orders dated 19.07.2024 for truing-up till FY 2020-21, the DERC implemented various decisions of the APTEL and this Court. Pursuant to this, the regulatory asset including carrying costs is as follows: Rs. 12,993.53 crores for BRPL, Rs. 8419.14 crores for BYPL, and Rs. 5,787.70 crores for TPDDL. This amounts to Rs. 27,200.37 crores across all three distribution companies until the end of FY 2020-21.

10. Analysis.

61. We are considering the legal position and status of a regulatory asset, the rights and liabilities of stakeholders, consequences of regulatory failure to manage the regulatory asset

as a reasonable measure, and the appellate and review powers of the APTEL and this Court to ensure accountability and restitution.

10 (i). Electricity is a public good and is regulated under the Act.

62. Since electricity is a material resource, the State has a public interest in ensuring that its ownership and control is so distributed as best to subserve the common good. Therefore, the public policy that governs purchase, sale and distribution of electricity is not based on market forces of demand and supply but by regulation through statute. The Electricity Act 2003, the policies and plan(s) formulated under Section 3 of the Act, rules made by the Central and State Governments, and more importantly, the regulations formulated by the Regulatory Commissions, followed by the precedents laid down by the APTEL and this Court form the legal regime, by which tariff is determined, restructured, and reviewed from time to time.

10 (ii). Tariff determination is governed by the Act, which entrusts this function to independent Regulatory Commissions.

63. The Electricity Act unbundled generation, distribution and transmission of electricity, and at the same time, institutionalised

important functions such as grant of licenses and determination of tariff through the establishment of Regulatory Commissions. These Regulatory Commissions have autonomy as provided in the statute, expertise through human resource, continuation through seal and succession, plurality by composition, and accountability by transparency. With the powers that they are granted, coupled with autonomy that they enjoy, these Commissions are the primary duty bearers to implement the provisions of the Act.

63.1 Tariff determination is the exclusive province of the Regulatory Commissions. In performance of their functions, the Central and State Electricity Regulatory Commissions determine tariff for supply of electricity by generating companies to distribution licensees, for transmission, wheeling, and also for retail sale of electricity.[42] Section 61 provides the guiding

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[42] Section 62 of the Electricity Act, which reads:

> "***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.*"

principles for good governance for development, sale, and distribution of power and also emphasises the overarching principle of subserving the interests of consumers. The journey as well as the destination of tariff determination indicates that the Commissions shall adopt commercial principles, encourage competition, promote efficiency, use resources economically, perform efficiently and optimise investments. The purpose of adopting such measures is to "*safeguard and protect the interest of the consumers*". Section 61 also recognises the vulnerability of the electricity sector to undue political posturing, and therefore emphasises that the Commission shall ensure that "*the tariff progressively reflects the cost of supply of electricity and also,*

Sections 79 sets out the functions of the Central Commission. The relevant portion is as follows:

> "***Section 79. (Functions of Central Commission): ---***
> *(1) The Central Commission shall discharge the following functions, namely:-*
> *(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;*
> *****
> *(d) to determine tariff for inter-State transmission of electricity;...*"

Section 86 sets out the functions of the State Commission. The relevant portion is as follows:

> "***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:*
> *(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;...*"

reduce cross-subsidies".[43] In this endeavour the National Electricity Policy and the National Tariff Policy shall also be guiding factors.[44]

10 (iii). Collaborative effort of the Regulatory Commissions to balance social justice obligations with efficiency.

64. The Electricity Act contemplates multiple stakeholders, in other words, a plurality of collaborators – the Central Government, the State Governments, Regulatory Commissions, the Appellate Tribunal, statutory policy makers, and the utilities. These authorities collaborate to ensure that the purpose of the Act is subserved and, in this endeavour, the Regulatory Commissions share the social justice obligations of the State. Since electricity is a public good,[45] Regulatory Commissions must undertake joint and collaborative efforts with the other authorities to enable access to electricity across urban and rural areas[46] and affordability through rationalisation of tariffs[47]. The statutory authorities must work in cohesion towards a common goal of ensuring supply of electricity across regions and terrains, and cheaper and affordable

[43] Section 61(1)(g) of the Electricity Act.
[44] Section 61(1)(i) of the Electricity Act.
[45] See *K.C. Ninan v. Kerala State Electricity Board*, (2023) 14 SCC 431, para 93.
[46] See Preamble of the Electricity Act; Section 6 of the Electricity Act that places the responsibility of rural electrification jointly on the Central and State Governments.
[47] See Preamble of the Electricity Act.

supply of electricity to those sections of society who cannot afford it.[48] At the same time the Regulatory Commissions maintain their independence and autonomy and ensure that the final decision with respect to fixation of tariff will be that of the Regulatory Commissions alone.

10 (iv). Tariff fixation takes into account multiple variables and requires flexibility. Regulatory asset is a measure adopted during tariff fixation that recognises right of recovery.

65. A regulatory asset is adopted as a measure by the Regulatory Commissions when the gap between the revenue required by the distribution company to meet its costs and expenditure and the actual revenue realised through immediate tariff is so high that it would not only prejudice the consumer but lead to what is called a tariff shock. By adopting such a measure, the Commission liquidates the revenue required by the utility through future tariff

[48] Paul Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (Cambridge University Press, 2015), 305-306. The relevant portion is extracted hereinbelow:

> "*Regulation as an enterprise conceives regulators as governments in miniature, in which efficiency and distributive goals are both legitimate regulatory concerns, and anyway are inseparable'. The regulatory goals may include social cohesion, and this function may be shared with government Regulatory independence is not regarded as central, because regulation is conceived as a collaborative project between agencies and other organs of government. Regulation in this mould is seen as delegation by government of its inherent powers to act in the public interest. The emphasis is on different actors working towards a common enterprise, with accountability conceived primarily in terms of public law mechanisms such as proceduralization, judicial review and parliamentary scrutiny. For Prosser this model has the virtue of rendering it easier to understand in areas where regulation has a social rationale, and is not driven by considerations of economic efficiency.*"

determinations. 'Revenue assets' are costs incurred by power distribution companies that are recognised as recoverable from consumers in future tariffs but are not immediately recovered in the current bills.

65.1 The measure adopted by the Commissions in creating a 'regulatory asset' can also be seen as an accounting treatment. Regulatory assets are treated as assets in the balance sheet and are liquidated over a defined period of time through tariff adjustments or government subsidies. The regulatory asset is a cost incurred by the utility that the Regulatory Commission allows to be deferred on the balance sheet instead of being immediately expensed. It enables the distribution company to utilise the 'recognition' of a regulatory asset to obtain bridge funds from bankers and the financial institutions as they have the confirmation that the said amount will be recovered in the ensuing financial years.

10 (v). Factors leading to an unmanageable regulatory asset, and consequent 'regulatory failure'.

66. While determining tariff, Regulatory Commissions have to deal with situations where there could be a sudden increase in the fuel cost, infrastructure investments, or some extraordinary

expenditure. Further, lack of discipline followed by delays in filing the ARR leads to uncertainties. Equally, not conducting quick and effective truing up multiplies the problem of ascertaining the actual cost incurred. The failure to file ARR in time and the Regulatory Commissions not invoking their suo motu powers to rectify the same are not addressed. There is a lack of accountability here. Further, even though Section 65 provisions that State Governments shall pay in advance the subsidy to subserve social justice obligations, it is alleged that such payments are not made in time. The decisions taken by the Regulatory Commissions, which were considered in appeal by the APTEL and this Court, give a clear impression that the Regulatory Commission is not able to take firm decisions. Instead of taking strong decisions on the basis of the statutory mandate, we see instances where the Regulatory Commissions manage and manoeuvre to arrive at a tariff by creating regulatory assets over and above all permissible limits. This is where the problem lies. Though the Electricity Act envisages functional autonomy for Regulatory Commissions[49] and the statutory scheme is complete in all respects, the decisions taken by the Commissions, many a time, have not inspired confidence of

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[49] See *Transmission Corporation of Andhra Pradesh Ltd. v. Sai Renewable Power (P) Ltd.*, (2011) 11 SCC 34, para 59; *Kerala SEB Ltd.* (supra), paras 16 and 17.

independence and autonomy. The reasons are not difficult to conceive as there is an issue about the appointment process. The assertion of independence, however, comes through individual volition and that is where the mandate of transparency leads to accountability. The decisions taken by the Commission, rather the Regulatory Commissioners, are subject to scrutiny in the appellate and the review jurisdiction of the APTEL and thereafter by the Supreme Court. We have dealt with this issue in more detail while considering accountability of the Regulatory Commissions and powers of the APTEL. All these factors give rise to a situation where the tariff for the subsequent years has to be substantially increased to meet the ARR of the previous years.

66.1 A Regulatory Commission's power to create a regulatory asset is part of the tariff fixation process, as long as it is in reasonable measure. However, in an egregious situation where the regulatory asset has grown beyond proportion and is also extended from time-to-time inefficiently, there is a compelling need to deal with it. In this context, the Regulatory Commissions have twin obligations: *first*, the Commission must enable an efficient and effective recovery of the regulatory asset by the utility, and *second*, more importantly, it must manage the regulatory asset in a manner that does not transgress the principles that inform and govern tariff determination. The regulatory asset cannot be permitted to balloon into such proportions or continued for such periods, year after year, that the governance of the sector is set in peril, affecting the rights of the utilities and at the same time jeopardising the consumer interest, who eventually end up bearing the burden. Creation, management and dissolution of regulatory assets are subject to law and regulation. In performance of these duties, the orders of the Regulatory Commissions are subject to the orders, instructions, and directions of the APTEL issued in exercise of its statutory powers. When they fail to comply with these statutory and other requirements, one can infer regulatory failure.

10 (vi). Law that governs creation, continuation and liquidation of regulatory asset.

67. In the context of creation, management and liquidation of a regulatory asset, the Regulatory Commissions are bound by the mandate of the Electricity Act, the National Electricity Policy, the National Tariff Policy, the Electricity Rules, the Tariff Determination Regulations applicable at the relevant period, and the precedents of the APTEL. We have already indicated that the Central Government recently notified the Electricity (Amendment)

Rules, 2024 by which it inserted Rule 23 that deals with regulatory asset. Prior to the notification, the Central Government elicited comments from various statutory authorities, including the CEA, the Central and State Commissions, the State Governments, generating and distribution utilities, etc. The reason for introduction of this rule is evident from the circulation of the Draft Rules for stakeholder comments, wherein the Central Government has expressed the need for a statutory rule on the conditions for creation and management of a regulatory asset as follows:

> "*3. In order to remove difficulties/challenges faced by various entities and to facilitate development of the power sector some more reforms are proposed. The issues and the reforms proposed to resolve them are mentioned below:*
> *****
> *iii) To ensure financial sustainability of the power sector, it is necessary that the tariff is cost reflective and all the prudent cost is pass through. However, it has been observed that in many States there is large gap in approved ARR and estimated revenue on approved tariff. To discourage such practice there is need to make statutory provisions to avoid such gap. It is also imperative that liquidation of any such gaps in revenue required and estimated approved tariff is done in a time bound manner. New rules are proposed to ensure that revenue gap/regulatory assets is not created except in extraordinary circumstances and to provide for time bound liquidation of the same.*"

67.1 In furtherance of this object and purpose, Rule 23 provides as follows:

> "***Rule 23. Gap between approved Annual Revenue Requirement and estimated annual revenue from approved tariff.–*** *The tariff shall be cost reflective and there shall not be any gap between approved Annual Revenue Requirement and estimated annual revenue from approved tariff except under natural calamity conditions:*

Provided that such gap, created if any, shall not be more than three percent of the approved Annual Revenue Requirement:

Provided further that such gap along with the carrying costs at the base rate of Late Payment Surcharge as specified in the Electricity (Late Payment Surcharge and Related Matters) Rules, 2022, as amended from time to time shall be liquidated in maximum three numbers of equal yearly installments from the next financial year:

Provided also that any gap between approved Annual Revenue Requirement and estimated annual revenue from approved tariff existing on the date of notification of these rules, along with the carrying costs at the base rate of Late Payment Surcharge as specified in the Electricity (Late Payment Surcharge and Related Matters) Rules, 2022, as amended from time to time shall be liquidated in maximum seven numbers of equal yearly installments starting from the next financial year."

67.2 The rule has come into existence after detailed consultation with all the stakeholders. It subserves a salutary purpose and sets a normative principle in motion. Rule 23 is issued in exercise of powers under Section 176, which enables the Central Government to make rules to carry out the provisions of the Act.[50] Sub-section (2)(z) of the Section 176 provides that without prejudice to the generality of the rule-making power, the Central Government may also provide for, by way of a rule, "*any other matter which is required to be, or may be, prescribed*". The expression "prescribed" is defined in Section 2(52) to mean "*prescribed by rules made by the Appropriate Government under this Act*". It may sound

[50] The relevant portion of Section 176 of the Electricity Act reads:

"***Section 176. (Power of Central Government to make rules): ---***

(1) The Central Government may, by notification, make rules for carrying out the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely: -

***

(z) any other matter which is required to be, or may be, prescribed."

tautological, but the correct way to examine the legal position is to look at the provisions with respect to which the Central Government or the State Governments may make rules for carrying out the provisions of the Act. The province or domain with respect to which rules can be made is based on the functions that have been assigned to the Government(s) and the Regulatory Commissions. Tariff determination is provisioned in Sections 61 and 62 of the Act, and this must be read with the functions of the Regulatory Commissions under Sections 79 and 86 and the power of the Central and State Commissions to make regulations under Sections 178 and 181.

67.3 The creation of a regulatory asset, being a measure undertaken by the Regulatory Commissions as part of tariff determination, such exercise is informed by Section 61 read with Sections 79 and 86. It is also important to note that Rules made by the Central Government under Section 176 are binding on the Regulatory Commissions when they make regulations because Sections 178 and 181 provide that the "*Commission may make regulations consistent with the Act and the rules*". In any event of the matter, the principle that one must adopt is that the adverse effect of an overbearing regulatory asset extended beyond proportion is an anathema to good governance of the Electricity Act. It affects every stakeholder, the worst of all being the consumer who is burdened, rather over-burdened, from time to time because of the lapses of the regulators or the manipulation of the utilities or the indifference of the government. Therefore, the principle formulated in Rule 23, consistent with Clause 8.2.2 of the National Tariff Policy, 2016 and the scheme of the Act, must be the normative principle which must invariably be followed. Wherever Rule 23 is incorporated into the Tariff Determination Regulations of the State Commission, it shall be complied with.

67.4 We have dealt with the legal regime in detail and have also extracted the relevant provisions, rules, regulations, policies, instructions and precedents. A combined effect of these can be restated as follows: (i) As a first principle, tariff shall be cost-reflective; (ii) The revenue gap between the approved ARR and the estimated annual revenue from approved tariff must be only in exceptional circumstances; (iii) The regulatory asset should not exceed a reasonable percentage, which can be arrived on the basis of Rule 23 of the Electricity Rules that prescribes 3% of the ARR as the guiding principle; (iv) If a regulatory asset is created, it must be liquidated within a period of 3 years from 01.04.2024, taking

Rule 23 as the guiding principle; (v) The existing regulatory asset must be liquidated in a maximum of 7 years starting from 01.04.2024, taking Rule 23 as the guiding principle; and (vi) Regulatory Commissions must provide the trajectory and roadmap for liquidation of the regulatory asset, which will include a provision for dealing with carrying costs. Regulatory Commissions must also undertake strict and intensive audit of the circumstances in which the distribution companies have continued without recovery of the regulatory asset.

10 (vii). Accountability of the Regulatory Commissions.

68. A Regulatory Commission must perform its functions as per the provisions of the Electricity Act, the National Electricity Policy, the National Tariff Policy, the relevant rules and regulations made under the Act, and the APTEL's directions[51]. In performance of its functions, the Regulatory Commission's decisions are subject to appeal before the APTEL as well as the Supreme Court.[52] The APTEL has also issued directions under Section 121 from time to time for timely determination of tariff, regular truing up, and

[51] Section 121 of the Electricity Act.
[52] Sections 111 and 125 of the Electricity Act.

management of a regulatory asset, as indicated hereinabove[53]. The Regulatory Commissions must abide by and implement the directions of the APTEL. That is how accountability can be ensured. The need for accountability and its dimensions have been explained by this Court in *Vijay Rajmohan v. CBI*[54] as follows:

> "*34. Accountability in itself is an essential principle of administrative law. Judicial review of administrative action will be effective and meaningful by ensuring accountability of the officer or authority in charge.*
> *35. The principle of accountability is considered as a cornerstone of the human rights framework. It is a crucial feature that must govern the relationship between "duty bearers" in authority and "right holders" affected by their actions. Accountability of institutions is also one of the development goals adopted by the United Nations in 2015 and is also recognised as one of the six principles of the Citizens Charter Movement.*
> *36. Accountability has three essential constituent dimensions: (i) responsibility, (ii) answerability, and (iii) enforceability. Responsibility requires the identification of duties and performance obligations of individuals in authority and with authorities. Answerability requires reasoned decision-making so that those affected by their decisions, including the public, are aware of the same. Enforceability requires appropriate corrective and remedial action against lack of responsibility and accountability to be taken. Accountability has a corrective function, making it possible to address individual or collective grievances. It enables action against officials or institutions for dereliction of duty. It also has a preventive function that helps to identify the procedure or policy which has become non-functional and to improve upon it.*"

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[53] In O.P No. 1/2011 (supra) and O.P. Nos. 1 and 2/2012 (supra).
[54] (2023) 1 SCC 329.

10 (viii). Powers of the APTEL.

69. Under Section 110 of the Act, the Central Government establishes the Appellate Tribunal for Electricity to hear appeals against orders of the Adjudicating Officer or the Appropriate Commission. Section 111 is the statutory remedy for any person aggrieved against an order made by the Adjudicating Officer or that of the Appropriate Commission as it provides for the appellate power of the Tribunal, which reads as follows:

> "***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…*"

69.1 While exercising appellate jurisdiction, the APTEL routinely interprets the Act and the rules and regulations framed thereunder, by which process it systematically evolves legal principles. These very principles are applied consistently for a structural evolution of sectoral laws. This freedom to evolve and interpret laws must belong to the APTEL to subserve the regulatory regime for clarity and consistency. In a similar context, while interpreting the scope of appellate jurisdiction of the Securities

Appellate Tribunal against orders of the regulator, the SEBI, this Court in *SEBI* v. *Mega Corporation*[55] held as under;

> "*20. … Being a permanent body, apart from acting as an appellate Tribunal on fact, the Tribunal routinely interprets the Act, Rules and Regulations made thereunder and evolves a legal regime, systematically developed over a period of time. The advantage and benefit of this process is consistency and structural evolution of the sectorial laws.*
> *21. … This freedom to evolve and interpret laws must belong to the Tribunals to subserve the regulatory regime for clarity and consistency and it is with this perspective that the Supreme Court will consider appeals against judgment of the Tribunals on questions of law arising from its orders.*
> *****
> *23.2 … The Tribunal while exercising jurisdiction under Section 15-T, apart from acting as an appellate authority on fact, also interprets the Act, Rules and Regulations made thereunder and systematically evolves a legal regime. These very principles are applied consistently for structural evolution of the sectorial laws.…*"

69.2 The power under Section 111 is that of an appeal and as such the decision of the APTEL shall be after re-appreciation of facts and by applying the law on the subject. The APTEL will also examine the legality, propriety or correctness of the orders made by the Regulatory Commissions, and it may also on its own motion make such orders as are appropriate for adjudication and determination of the case.

69.3 Apart from Section 111 under which the APTEL is granted appellate jurisdiction, it is significant to note that the Parliament has also empowered the APTEL with important jurisdiction and

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[55] (2023) 12 SCC 802.

powers under Section 121, which is reproduced hereinunder for ready reference.

> *"**Section 121. (Power of Appellate Tribunal): ---***
> *The Appellate Tribunal may, after hearing the Appropriate Commission or other interested party, if any, from time to time, issue such orders, instructions or directions as it may deem fit, to any Appropriate Commission for the performance of its statutory functions under this Act."*

69.4 We can explain the significance of Section 121 in the context of the facts of these very writ petitions and civil appeals. The facts relating to the performance of DERC present a classic case of 'regulatory failure'. Typically, 'regulatory failure' does not come under scrutiny when the APTEL considers appeals from orders of the Regulatory Commissions as the focus at that time is on the merits of the decision made by the Commission. The institutional failures or the shortcomings of the regulatory bodies are often ignored and an appellate forum or even constitutional courts proceed to resolve the issue by addressing the merits of the case. In *Lifecare Innovations Pvt. Ltd. v. Union of India*[56] this Court had an occasion to reflect on this problem and held as follows;

> *"21. Having considered the provisions of the Act and the MSE Procurement Preference Policy, 2012, we are of the opinion that there is no mandatory minimum procurement 'right' of an individual MSE. However, there is certainly a statutory foundation for the Procurement Preference Policy, 2012, having force of law as it 'encapsulates a mandate*

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[56] 2025 INSC 269.

and discloses a specific purpose'.[57] *Clause 3 of the policy mandating procurement of 25 per cent of supply from MSEs is simply the statutory duty of the bodies constituted under the Act and the Policy. The significance of creation and establishment of these statutory and administrative bodies is not difficult to conceive. If these institutions and bodies work effectively and efficiently, it is but natural that the purpose and object of the legislation will be achieved in a substantial measure. It is, therefore, necessary to ensure that in the functioning of these bodies, there is efficiency in administration, expertise through composition, integrity through human resources, transparency and accountability, and response-ability through regular review, audits and assessments.*

22. While exercising judicial review of administrative action in the context of Statutes, laws, rules or policies establishing statutory or administrative bodies to implement the provisions of the Act or its policy, the first duty of constitutional courts is to ensure that these bodies are in a position to effectively and efficiently perform their obligations. This approach towards judicial review has multiple advantages. In the first place, while continually operating in the field with domain experts, these bodies acquire domain expertise, the consequence of which would also be informed decision-making and consistency. Further, the critical mass of institutional memory acquired by these bodies will have a direct bearing on the systematic development of the sector and this will also help handling polycentric issues. Thirdly, while continuously being on the field, and having acquired the capability of making real-time assessments about the working of the policies, these bodies will be in a position to visualize course correction for future policymaking."

69.5 In the above referred matter, this Court was considering the duty to ensure institutional integrity and efficiency of the

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[57] Gulf Goans Hotels Co. Ltd v. Union of India, (2014) 10 SCC 673 *"…a government policy may acquire the 'force of 'law' if it conforms to a certain form possessed by other laws in force and encapsulates a mandate and discloses a specific purpose"*; Bennett Coleman & Co. v. Union of India (1972) 2 SCC 788 *"What is termed 'policy' can become justiciable when it exhibits itself in the shape of even purported 'law'. According to Article 13(3)(a) of the Constitution, 'law' includes 'any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law'. So long as policy remains in the realm of even rules framed for the guidance of executive and administrative authorities it may bind those authorities as declarations of what they are expected to do under it."*

regulators under the MSME Act. A similar approach was adopted by this Court in *T.N. Godavarman Thirumulpad*[58] for reviving and effectuating the environment regulators, rather than taking over or routinely reviewing their decision making.

69.6 'Regulatory failure' occurs due to ineffective functioning of the Regulatory Commissions, excessive governmental interference, or 'regulatory capture'. We cannot wish away these real and imminent dangers that affect effective functioning of the Regulatory Commissions. These issues could have the effect of completely eclipsing regulatory functions, thereby losing the very purpose and object of restructuring the electricity sector by unbundling the functions of generation, distribution, and transmission and more importantly, establishing independent regulatory institutions and granting them the exclusive jurisdiction over grant of licenses and tariff determination. Section 121 is intended to ensure that in the functioning of the Regulatory Commissions, there is efficiency in administration, expertise through human resource, integrity through transparency, and accountability and responsibility through review audit and assessment. For enforcing these values, Section 121 empowers the

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[58] *In Re: T.N. Godavarman Thirumulpad v. Union of India*, 2024 INSC 78, paras 27-30.

APTEL to issue such orders, instructions or directions as it deems fit, to the Commission for performance of its statutory functions under the Act.

69.7 The power of the APTEL to issue such orders and directions takes within its sweep the power to enforce such orders, as provided in Section 120(3) of the Act.[59] The power under Section 121 is extremely important as it is intended by the Parliament that the APTEL must be the guiding force to ensure that Regulatory Commissions across the length and breadth of the nation perform their statutory functions with efficiency and integrity.

69.8 This position is already recognized by the APTEL, as is evident from its order in O.P. No. 1 of 2011, relevant portion of which has already been reproduced in this judgment. It is necessary to restate the directions issued by the Appellate Tribunal in its orders dated 11.11.2011 and 14.11.2013, as it is relevant for the present purpose:

i. The APTEL has the power and the duty to issue directions to Regulatory Commissions when they fail to comply with the Act, rules or regulations, fail to perform their

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[59] Section 120(3) of the Electricity Act reads:

"***Section 120. (Procedure and powers of Appellate Tribunal): ---***

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(3) An order made by the Appellate Tribunal under this Act shall be executable by the Appellate Tribunal as a decree of civil court and, for this purpose, the Appellate Tribunal shall have all the powers of a civil court."

statutory functions and duties, or perform the same negligently, improperly or poorly.[60] Such directions are intended to secure compliance with the letter and spirit of the Electricity Act, and the APTEL can monitor the same through periodical status reports and by setting timelines for the Regulatory Commissions.[61]

ii. Tariff determination is a statutory function entrusted to the Regulatory Commissions, and it must be undertaken on a regular, timely, and annual basis.[62]

iii. Regulatory Commissions must undertake truing up on a regular basis, immediately at the end of the financial year so that any discrepancies between the ARR and the revenue realised through tariffs is brought to notice and can be rectified in a timely manner.[63] This is necessary so that the burden or benefit of present years is not carried forward to future consumers, and delay in truing up could lead to imposition of carrying costs and cash-flow problems for the utility.[64]

iv. The tariff determined by the Regulatory Commissions must be cost-reflective as per Section 61 of the Electricity Act.[65]

v. Regulatory Commissions must not ordinarily leave revenue gaps or create regulatory assets, and when it does so in exceptional circumstances, it must comply

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[60] O.P. No. 1/2011 (supra), para 47-48; O.P. Nos. 1 and 2/2012 (supra), para 15.
[61] O.P. No. 1/2011 (supra), para 66.
[62] O.P. No. 1/2011 (supra), paras 59, 65(i) and (ii); O.P Nos. 1 and 2/2012 (supra), para 15.
[63] O.P. No. 1/2011 (supra), para 65(i) and (iii).
[64] ibid, para 57.
[65] ibid, para 65(iv).

with the provisions of the Act, rules and regulations on the issue;[66]

vi. In case a Regulatory Commission creates a regulatory asset, it must allow carrying costs to the distribution utility, time-bound recovery and a liquidation schedule, and ensure that neither the financial position and liquidity of the distribution company nor consumer interests are jeopardised.[67]

69.9 We reiterate that the Regulatory Commissions must call for ARR, ensure that tariffs are determined, and that truing up is conducted in a timely manner, by exercising suo motu powers if necessary. In case of non-compliance with these directions, the APTEL has the power and duty to call for an explanation, ensure accountability, and monitor compliance by the Regulatory Commissions. Similarly, the APTEL must exercise its powers under Section 121 to ensure that the legal principles on regulatory asset laid down by us in paragraph 67.3 hereinabove are complied with by the Regulatory Commissions, and it must monitor the same. In case of non-compliance, the APTEL must issue such orders, directions, or instructions to the Commissions as may be necessary to hold them accountable.

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[66] ibid, paras 62, 65(iv).

[67] ibid, para 62(iv); O.P. Nos. 1 and 2/2012, para 38.

11. Conclusions.

70. In the following ten *sutras*, we have examined the issue relating to *regulatory asset*, its position in the regulatory regime for determination of tariff, the duties and accountability of the regulators - the Regulatory Commissions and then powers of the Appellate Tribunal for Electricity to avert a regulatory failure.

I. Electricity is a public good. Its generation, transmission, and distribution are statutorily regulated to ensure access to supply, on a non-rival and non-exclusive basis.

II. Being a material resource within Article 39 of the Constitution of India, Part-IV of the Constitution must inform the generation, transmission, and distribution of electricity.

III. The statutory regulators, i.e. the Central and State Regulatory Commissions alongwith Union and State Governments and other stakeholders are equally bound by the mandate under Part-IV of the Constitution for its equitable distribution. This duty is predicated on the independent, efficient, objective functioning of the electricity commissions. They must guard themselves against 'regulatory failure' and in particular 'regulatory capture'. The interpretation of the powers and function of the Regulatory Commissions have to be *such that there is no regulatory vacuum, in that there is no unallocated residue of power of regulation.*

IV. Tariff determination is a regulatory function and it is the exclusive province of the Regulatory Commissions. Tariff determination involves multiple variables requiring the regulators to act with expertise and also with certain amount of flexibility. Creation of regulatory asset is a 'measure' that the Commission adopts for good governance of tariff. It is also a recognition of revenue recoverable by distribution companies, and as such, it is an enforceable right, though only through tariff determination for later years. This 'measure' gives rise to correlative obligations of the Regulatory Commissions to manage it efficiently and allow easy liquidation.

V. Disproportionate increase and long pending regulatory asset depict a 'regulatory failure'. It has serious consequences on all stakeholders and the ultimate burden is only on the consumer.

VI. Laws encompassing the creation, continuation, and liquidation of a 'regulatory asset' are located in the Act, National Tariff Plan and Policy, Rules, and Regulations made under the Act, as interpreted *by the APTEL. The combined effect of this legal regime is the statutory obligation on the regulator(s).*

VII. Ineffective and inefficient functioning of the Regulatory Commissions, coupled with acting under dictation can lead to regulatory failure. The commissions are accountable for their decisions, and they are subject to judicial review.

VIII. Apart from examining the legality and propriety of the orders of the Commissions in appeal, the APTEL has extraordinary powers under Section 121 to issue orders, instructions or directions for effective enforcement of the regulatory regime. This is one of the most important powers allocated to APTEL by the Parliament.

IX. We have affirmed the limits of creation, continuation and liquidation of the regulatory asset, recognised the obligations of the Regulatory Commissions, and directed that they will be accountable and subject to such orders, instructions or directions as the APTEL may issue in this regard under Section 121.

X. The regulatory regime under the Act is a complete code enunciating rights, prescribing obligations, and laying down the mechanism for course correction. The effectiveness of these laws will be reflected in the will to enforce them.

12. Directions.

71. For the reasons state above, we issue the following directions:

(i) As a first principle, tariff shall be cost-reflective;

(ii) The revenue gap between the approved ARR and the estimated annual revenue from approved tariff may be in exceptional circumstances;

(iii) The regulatory asset should not exceed a reasonable percentage, which percentage can be arrived on the basis of Rule 23 of the Electricity Rules that prescribes 3% of the ARR as the guiding principle;

(iv) If a regulatory asset is created, it must be liquidated within a period of 3 years, taking Rule 23 as the guiding principle;

(v) The existing regulatory asset must be liquidated in a maximum of 4 years starting from 01.04.2024, taking Rule 23 as the guiding principle;

(vi) Regulatory Commissions must provide the trajectory and roadmap for liquidation of the existing regulatory asset, which will include a provision for dealing with carrying costs. Regulatory Commissions must also undertake strict and intensive audit of the circumstances in which the distribution companies have continued without recovery of the regulatory asset;

(vii) Regulatory Commissions shall in general follow the principles governing creation, continuation and liquidation of the regulatory asset, as laid down in paragraph 70, and also abide by the directions of the APTEL summarised in paragraph 69.8;

(viii) The APTEL shall invoke its powers under Section 121 and issue such orders, instructions or directions as it may deem fit to the Regulatory Commissions for performance of their duties with respect to regulatory asset as enunciated by us in this judgment and as per the orders of the APTEL in O.P. No. 1/2011 dated 11.11.2011 and O.P. Nos. 1 and 2/2012 dated 14.11.2013.

(ix) The APTEL shall register a suo moto petition under Section 121 of the Act to monitor implementation of above directions (v) and (vi) till the conclusion of the period mentioned therein.

72. With these directions, the present writ petitions in W.P. (C) No. 104/2014, W.P. (C) No. 105/2014 and W.P. (C) No. 1005/2021 and the present civil appeals in C.A. No. 4010/2014 and

C.A. No. 4013/2014 against the APTEL's order dated 11.03.2014 stand disposed of.

..J.
[PAMIDIGHANTAM SRI NARASIMHA]

..J.
[SANDEEP MEHTA]

NEW DELHI;
AUGUST 06, 2025