

**ODISHA ELECTRICITY REGULATORY COMMISSION
BIDYUT NIYAMAK BHAWAN,
PLOT NO. 4, CHUNUKOLI, SHAILASHREE VIHAR,
BHUBANESWAR-751021

**Present: Shri U. N. Behera, Chairperson
 Shri S. K. Parhi, Member
 Shri G. Mohapatra, Member**

Case No. 27/2020

M/s. Tata Power Company Ltd. Vrs.	Petitioner
Director (RA), OERC & Others	Respondents

In the matter of: **Application under Section 94(1)(f) read with Section 86(1)(k) of the Electricity Act, 2003 and Reg.70 of the OERC(Conduct of Business) Regulations, 2004 and all other enabling provisions of the Act for review of order dated 26.05.2020 of the Commission passed in Suo Motu proceeding in Case No. 11 of 2020 regarding vesting of Utility of CESU of Odisha to the petitioner herein in accordance with Section 21(a) of the Electricity Act, 2003.**

For Petitioner: Shri Sajjan Poovayya, Sr. Advocate, Shri Iswar Mohanty, Advocate, Ms. Anubhuti Sinha, Advocate and Shri Ajoy Kapoor.

For Respondents: Shruti Kanodia, Advocate and Shri Anand Kumar Shrivastava, Advocate of M/s. TPCODL, Shri P. K. Mohanty, Sr. Advocate on behalf of GRIDCO Ltd., Shri Bikash Jena, Advocate on behalf of Shri Dhobei Sahoo, Shri Ramesh Chandra Satpathy, Shri L.N. Mohapatra, Advocate on behalf of OPTCL, Shri Janardan Pati, President, CITU and Ms. Niharika Patanayak, ALO, DoE, Government of Odisha.

ORDER

Date of hearing: 29.09.2020

Date of order: 28.12.2020

The present petition has been filed by the Tata Power Company Limited ("TPCL" / "Petitioner") under Section 94(1)(f) of the Electricity Act, 2003 to modify/review the Commission's Order dated 26.05.2020 in Case No. 11 of 2020 ("Vesting Order/ Impugned Order") with respect to

- (i) imposition of obligation on the Petitioner to provide necessary payment security in the form of corporate guarantee, if required, for TP Central Odisha Distribution Limited ("TPCODL");
- (ii) restrictions placed on operational flexibility for designing the organization structure on the vesting of Utility;

- (iii) non-consideration of impact of Force Majeure events on the Aggregate Technical & Commercial ("AT&C") Loss trajectory as prescribed for tariff determination;
- (iv) non-consideration of impact of Force Majeure events on AT&C Loss targets for determination of performance parameters;
- (v) imposition of inequitable obligations in relation to past arrears contrary to RFP;
- (vi) transfer of the Additional Serviceable Liabilities to TPCODL;
- (vii) transfer of unfunded employee liabilities contrary to statutory framework;
- (viii) inequitable restrictions imposed on use of fixed deposits; and
- (ix) restrictions imposed on creation of charge over assets of TPCODL contrary to the existing Licence Conditions.
- (x) Also, in addition to the said issues, the Petitioner is seeking clarification on discount/ rebate/incentive to consumers being considered as legitimate expenditure and allowed as part of Average Revenue Requirement ("ARR").

The petitioner has submitted the following grounds

2. **Imposition of obligation to provide corporate guarantee on TPCL contrary to RFP documents**

The petitioner has submitted that the purpose of RFP document is to provide interested parties with information that may be useful to them in making their Bids pursuant to the RFP documents which lay down the rules of the game. TPCL submitted its Bid basing on such RFP documents.

The payment security mechanism for payment of BSP bills has been discussed under Clause 2.4.7.4 of the RFP which is reproduced below:

"One of the key objectives of this Sale is to ensure payment of the BSP bills in full to GRIDCO in terms of the Bulk Supply Agreement. In order to ensure security to GRIDCO for payment of its BSP bills in full, the Deemed Licensee would need to provide GRIDCO with a revolving letter of credit facility equivalent to two (2) months of the average BSP bill as a primary payment security mechanism. This Letter of Credit would be opened and maintained as per the provisions laid out in the Bulk Supply Agreement. In case of failure of GRIDCO to recover its dues through this letter of credit mechanism, it can approach the Commission with a request to encash the Performance Guarantee to the extent of the shortfall in the payment of BSP bills. Encashment of the Performance Guarantee would be at the sole discretion of the OERC."

Petitioner submitted that nowhere under the provision, has a liability been fastened on TPCL to provide for an additional security in the form of a corporate guarantee, if required, to ensure payment security for BSP bills.

Petitioner submitted that the RFP documents also include Shareholder's Agreement ("SHA") to be entered into between TPCL and GRIDCO and provides more categorical liabilities of TPCL towards the obligations of TPCODL. The SHA was shared with TPCL vide this Commission's letter no. OERC/RA/CESU-17/2015 (Vol. VII)/332 dated 02.03.2020. In response to the SHA, TPCL vide its letter dated 11.03.2020 shared its observations and suggestions on specific issues encompassed in the SHA and provided its acceptance to the RFP documents, subject to the addressal of issues as mentioned in the letter. It is submitted that one of the issues on which TPCL sought this Commission's clarification was with regard to Clause 5.1 of the SHA

which stated that, "Subject to other provisions of this Agreement, as the majority and controlling shareholder, TPCL shall help and assist the <<OPERATING COMPANY>> to raise the capital and other finances required for the business of <<OPERATINGCOMPANY>>including instruments for payment of payment security to be provided under any agreement." TPCL proposed the following modification to this clause – "5.1 Subject to other provisions of this Agreement, as the majority and controlling shareholder, TPCL shall help and assist the <<OPERATING COMPANY>>to raise the capital and other finances required for the business of <<OPERATING COMPANY>>".

It is clarified that the above provision of this Agreement does not create any binding and enforceable obligation upon TPCL to provide security/collateral in respect of any loans or any other financing arrangement arranged by TPCL for and entered into by Operating Company. Collateral/Security shall be provided by the Operating Company."

Petitioner submitted that as the RFP categorically did not create any such obligation of "providing instruments for payment security" on TPCL, it was imperative that TPCL seek a clarification on this issue which created a new obligation. The Commission vide its letter dated 16.03.2020 responded to the clarifications sought by TPCL with regards to clause 5.1 of SHA in its letter dated 11.03.2020 and clarified that, "The verbiage of the existing provision makes it amply clear that it shall be the responsibility of TPCL to help and assist the OPERATING COMPANY in raising finance." The intent of the proposed insertion by TPCL is adequately covered in the existing provision. Thus, the existing provision remains unchanged."

Petitioner therefore submitted that on the basis of the clarification provided by this Commission, it is evident that Clause 5.1 of the SHA does not create any binding and enforceable obligation upon TPCL to provide security/collateral in respect of any loans/any other financing arrangement/payment of bills to be arranged/carried out by TPCODL, and that the Collateral/Security shall be provided by TPCODL itself. It is further submitted that TPCL's obligation under Clause 5.1 of SHA is limited to providing only aid and assistance to TPCODL in raising finance, as required and no provision of security in the form of a corporate guarantee or otherwise by TPCL, was ever envisaged.

The stipulations in para 40 and para 41 of the Impugned Order of the Commission came as a surprise to TPCL as under the said paragraphs, TPCL has been directed by this Commission to provide necessary security such as corporate guarantee, if required. It is submitted that such direction of this Commission is in direct contradiction to the RFP as well as the consequent clarification provided by this Commission vide its letter dated 16.03.2020. Para 40 (a) and 41 (a) of the Impugned Order are being reproduced herein for ease of reference of this Commission:

"40. Payment security mechanism for payment of BSP bills

(a) In order to ensure security to GRIDCO for payment of its Bulk Supply Price (BSP) bills in full, TPCODL would need to provide GRIDCO with a revolving letter of credit facility equivalent to two (2) months of the average BSP bill as a primary payment security mechanism. This Letter of Credit would be opened and maintained as per the provisions laid out in the Bulk Supply Agreement. TPCL shall assist in opening of Letter of Credit and shall provide necessary security such as corporate guarantee, if required." (emphasis supplied)

"41. Payment security mechanism for payment of transmission and SLDC charges (a) In order to ensure security to OPTCL for payment of transmission and SLDC charges

*in full, TPCODL would need to provide OPTCL with two (2) separate revolving letters of credit as payment security for transmission charges and SLDC charges. The amount of letters of credit shall be equivalent to two (2) months of the average transmission charges and average SLDC charges respectively. These letters of credit would be opened and maintained as per the provisions laid out in the Bulk Transmission Agreement. TPCL shall assist in opening of letters of credit and **shall provide necessary security such as corporate guarantee, if required.**"* (emphasis supplied)

Petitioner submitted that the aforementioned RFP, SHA and the communications of the Commission establishes the fact that under the bid documents it was never envisaged that TPCL shall be required to provide any kind of security, such as corporate guarantee and the Impugned Order to such extent suffers from error apparent on the face of the record. The error is ostensible by mere comparison of the RFP documents read with subsequent clarification of the Commission and the relevant portion of Impugned Order. Accordingly, petitioner submitted that, the Commission may review para 40 (a) and 41 (a) of the Impugned Order and rectify the error apparent on the face of the record by deleting the direction to TPCL to provide necessary security in the form of corporate guarantees or otherwise for TPCODL.

3. **Restrictions imposed on operational flexibility with regard to the treatment of existing employees**

The petitioner has stated that Clause 2.4.5 of the RFP lays down provisions pertaining to the treatment of existing employees of CESU which are to be transferred to TPCODL upon the vesting of the Utility which is reproduced below;

"2.4.5 Treatment of existing Employees:

*2.4.5.1 All the existing staff of CESU would be transferred to the Deemed Licensee through the Vesting Order. All existing staff as on the Effective Date would form a part of the Deemed Licensee **and shall be governed by the terms of their appointment.** However, the Successful Licensee would have the operational flexibility to design the organisation structure of the Deemed Licensee to ensure efficiency in operations and staff deployment."* (emphasis supplied)

The petitioner further stated that the LOI also, makes reference to Clause 2.4.5 of the RFP which is reproduced below:

"As per clause 2.4.5 of RFP, all existing staff of CESU as on date on which CESU would be vested in the Deemed Licensee pursuant to the Vesting Order of the OERC would form a part of the Deemed Licensee and shall be governed by the terms of their appointment."

Petitioner submitted that the intent of the Petitioner for raising the present issue is to ensure the operational flexibility in resource planning & personnel placement and ability to frame efficient service policies as was promised to the Petitioner. The Petitioner by way of present issue does not intend to seek reduction in the salaries of the existing employees but ensure efficient utilisation of the personnel and organisational flexibility to make the best use of its personnel.

The Commission has therefore imposed additional conditions in the Vesting Order which is a departure from the terms under the RFP and LOI. In paragraph 49 (c) of the Impugned Order, it has held that: *"(c) All such staff shall form a part of TPCODL and shall be governed by the terms of their appointment. The terms and conditions of employment of these employees in TPCODL shall not be made inferior to their existing service conditions in any manner. TPCODL shall have the operational*

flexibility to design the organization structure to ensure efficiency in operations and staff deployment."

The petitioner submitted that addition of requirement that the terms and conditions of employment of the CESU employees transferred to TPCODL shall not be made inferior to their existing service conditions in any manner is not only contradictory but also against the doctrine of legitimate expectation.

Petitioner submitted that the Impugned Order and the RFP are also consistent on the point that the Petitioner shall have complete operational flexibility to design the organisation structure of TPCODL so as to ensure efficiency in operations as well as staff deployment. However, the new sentence in paragraph 49(c) of the Impugned Order imposes an additional obligation on TPCODL which substantially restricts TPCODL's operational flexibility to ensure efficiency in operations and staff deployment as provided in the RFP. Petitioner has therefore submitted that the terms as laid down under paragraph 49 (c) of the Impugned Order are contradictory and this is an error apparent of the face of record.

Petitioner submitted that the Hon'ble Supreme Court of India has examined the doctrine of legitimate expectation and has held that, "If a denial of legitimate expectation in a given case amounts to denial of right guaranteed or is arbitrary, discriminatory, unfair or biased, gross abuse of power or violation of principles of natural justice, the same can be questioned on the well-known grounds attracting Article 14."

It is trite law that if a public authority so conducts itself as to create a legitimate expectation that a certain course will be followed it would be unfair if the authority were permitted to follow a different course to the detriment of one who entertained the expectation, particularly if he acted on it. If in private law, a body would be in breach of contract in so acting or estopped from so acting, a public authority especially a quasi-judicial body can be in no better position. The doctrine of legitimate expectation is rooted in fairness and cannot be ignored by a quasi-judicial body such as the Hon'ble Commission.

Petitioner submitted that upon acceptance of LOI legally binding obligations arise on the parties. Moreover, the terms and conditions under the RFP were the only point of reference for TPCL basis which TPCL made its Bid. It is submitted that once the terms and conditions of vesting have been discussed and agreed upon in principle by way of the RFP and other communication exchanged between TPCL and this Hon'ble Commission, it is unreasonable on the part of this Commission to change the terms in the Impugned Order without even according an opportunity of being heard to TPCL.

Petitioner submitted that the present scenario is no different as material changes in terms as laid down in the RFP and agreed upon by both TPCL as well as this Commission in the LOA is indeed like changing the rules of the game after it has begun. The fact is that the Bid documents do not have any requirement for the Petitioner to ensure that the terms and conditions of employment of existing employees transferred to TPCODL shall not be made inferior to their existing service conditions in any manner. Now, putting such onerous additional conditions is a mistake of fact and an error apparent on face of the record.

Petitioner therefore submitted that the Commission may take note of this error apparent on the face of record and review the terms as laid down in paragraph 49(c) of the Impugned Order so as to allow TPCODL to have operational flexibility to design the organization structure to ensure efficiency in operations and staff deployment without imposing any new/ additional conditions.

4. **Non-consideration of impact of force majeure events on AT&C loss trajectory for tariff determination**

The petitioner has submitted that the commercial efficacy and planning of the distribution company is based upon managing and balancing its AT&C losses. The Commission has erred in not considering the revision of AT&C loss trajectory for the purposes of tariff determination post taking over of the Utility by the Petitioner considering the impact thereon of Force Majeure events i.e. Covid-19 pandemic and the consequent lockdown imposed by the Government of India. The non-revision of the AT&C loss trajectory for the determination of tariff in view of the impact of these Force Majeure events is an apparent error justifying review as otherwise it shall result in miscarriage of justice.

Petitioner submitted that TPCL had given assent to revising the AT&C loss trajectory which is keeping AT&C Loss Level of 23.7% for first three years instead of first five years of takeover, with additional ninth and tenth years addition at 14% and 13.5% respectively which were not provided in the RFP for determination of tariff vide its letter dated 17.10.2019. However, in view of the Covid-19 pandemic and the consequent lockdown, which were Force Majeure situations (in terms of the RFP) and the impact of which has been acknowledged by the Commission in the Impugned Order as well, any assent regarding the AT &C loss trajectory for determination of tariff prior to the advent of the pandemic should not be considered.

Petitioner submitted that given the global nature of the Covid-19 pandemic, consequent lockdowns and its implication on operations and finances of the distribution business, the extant business scenario cannot be considered as business as usual. Therefore, in case the revised trajectory is considered without accounting for the occurrence of force-majeure event, the same would be an unconscionable exercise, which shall be against the principles of equity and fairness. It is submitted that given the far reaching operational and financial consequences, even the original AT&C loss trajectory as provided in the RFP is an uphill and nearly impossible task to achieve.

The revised AT&C loss trajectory for tariff determination entails that the percentage of AT&C loss which shall be considered for tariff determination shall be reduced not only for the years which were a part of the RFP but for an additional 2 years which were never a part of the RFP.

Under the original framework, the Utility had 5 years after the effective date to balance out the AT&C loss targets and achieve 23.70% on an average. However, now the same has been reduced to 2 years and 10 months and that too, when the entire economy is suffering from its worst phase due to ongoing Force Majeure events (Covid-19 pandemic and consequent lockdown). The Force Majeure events have resulted in reduction of demand and consequent reduction in collections. In addition, the past collections also could not be realised due to lockdown and reduction in paying capacity of consumers due to economic downturn resulting from lockdown.

Therefore, it is submitted that the Commission while acknowledging the existence of the pandemic and consequent lockdown, which qualifies as a Force-Majeure event as per the RFP ought to have considered at least an additional year at 23.70% if not the original trajectory of allowing 5 year period after the taking over of the Utility by the Petitioner to achieve AT&C loss target for determination of tariff. Also, though this Commission in the Impugned Order acknowledged the difficulty in operations arising due to the on-going pandemic and consequent lockdown, it did not specifically adjudge the Covid-19 pandemic and the consequent lockdown as a Force Majeure. Therefore, it is respectfully submitted that this Commission may be pleased to declare the on-going pandemic and consequent lockdown as a Force Majeure event.

Petitioner submitted that this is the single most important premise for the investment which has been distorted due to no firm assurance by the Commission in allowing at least one additional year of tariff determination at 23.70% in view of the ongoing slowdown due to the pandemic/lockdowns and shorter period being available with takeover taking place with effect from 01.06.2020 and not 01.04.2020 as envisaged earlier. Thus, the time-period available to the Petitioner to bring systemic changes and endeavouring to lower the AT&C losses in order to increase economic and operational viability of the Utility has been significantly reduced. This shall adversely affect the operational and financial viability of the Utility and will also adversely affect the Utility's ability to perform its universal supply obligations.

Without Prejudice, while the Commission has specified in the Impugned Order that depending on the pandemic impact, the AT&C loss level at 23.7% for tariff determination may be extended for the fourth year with the subsequent years' loss levels remaining the same, the Commission may at the very least keep the AT &C loss trajectory constant for first 4 years after taking over the Utility and then allow the Petitioner to approach this Commission for further relaxation if so required. It is imperative for the Utility to have regulatory certainty and direction, in order to perform its functions.

It is submitted that another pertinent factual fallacy which the Impugned Order suffers from is that the Petitioner shall be taking over the Utility on 01.06.2020 i.e. only for 10 months in the Financial Year 2020-2021. Any tariff determination based on 12 month benchmark, whilst the Petitioner has taken over utility for 10 months in the present fiscal year, shall be extremely prejudicial to the Petitioner. It is also pertinent that the fact scenario of Covid-19 pandemic and consequent lock-downs is not only likely to delay capital investment plans of the Petitioner but also lead to a short - midterm increase in AT&C losses due to the nationwide shortage of manpower, supply chain issues, regulatory uncertainty and severely depressed business conditions.

Further, it is pertinent to note that while the Vesting Order provides for adjustment of AT&C loss reduction trajectory for purposes of performance review of the Petitioner based on actual audited opening AT&C loss determination, no such adjustment has been allowed for purposes of tariff determination which is inequitable and an error apparent on the face of the record.

5. Non-consideration of impact of force majeure events on AT&C loss targets for performance

The petitioner submitted that the Commission has erred in not considering the effect of the Covid-19 pandemic and consequent lockdowns whilst recognizing that the pandemic and the consequent lockdown are Force Majeure events in terms of the RFP and not revising the AT&C loss targets for determination of the performance parameters of the Utility after being taken over pursuant to the bidding process. The Commission has erred in not recognizing that the assent given by the Petitioner to the revised AT&C loss trajectory commitment was given prior to the onset of Covid-19 pandemic and consequent lockdowns and on the assumption that the Utility would be transferred with effect from 01.04.2020. AT&C losses greatly impact business viability and future growth. Accordingly, it is inequitable if the impact of the Covid-19 pandemic and consequent lockdowns, which are Force Majeure events, is not accounted for in the AT&C loss trajectory commitment which is part of the Vesting Order.

Petitioner submitted that during the bidding exercise the bidders were required to provide AT&C loss targets for first 5 years of operations post the taking over of the Utility. However, it was mandated that the AT&C loss level submitted by the bidders

for the 3rd and 5th year from takeover should not be higher than 27% and 23.70% respectively. It was also stated in Clause 2.4.3.4 of the RFP that the successful bidder shall be liable to pay a penalty of Rs. 50 crores for every 1% shortfall in meeting the committed AT & C loss targets, or proportionately for a part thereof. In accordance to the same, the Petitioner, taking the AT&C loss level of 34.07% existing at the time of the bidding, submitted an AT & C loss reduction trajectory.

Petitioner submitted that it is further pertinent that the RFP, whilst requiring the bidder to submit AT&C loss targets, also provided that the penalty for non-achievement of AT&C loss targets will be relaxed in case of occurrence of Force Majeure event. The relevant extract of the RFP is reproduced herein below:

"2.4.3.5. This penalty for non-achievement of AT&C loss targets shall be relaxed by the Commission under conditions of Force Majeure, including acts of God, acts of any Government (de jure or de facto) or regulatory body or public enemy, war, riots, embargoes, industry-wide strikes, thereby, hindering the performance by the Deemed Licensee of any of their obligations hereunder. The Commission's decision in this regard shall be final and binding on all parties. "

Considering the above and computing for a business as usual scenario, the Petitioner submitted its AT&C loss trajectory for benchmarking its performance. That without prejudice pursuant to the bid submission, the Petitioner in response to the letter dated 17.10.2019 of the Commission accepted a further revised AT&C loss trajectory as the audited AT&C loss for FY 2018-19 was determined as 30.49%.

Petitioner submitted that it is an admitted factual position that the Petitioner did not take over the Utility as was originally envisaged under the RFP and it eventually took over the Utility from 01.06.2020. Moreover, it is pertinent that the AT&C loss targets forming part of the Business Plan as submitted by the Petitioner during the bidding exercise was computed after taking into account the actual timelines and extant existing AT&C loss of the utility in a business as usual scenario.

Petitioner submitted that Commission has erred in stipulating an upper ceiling of 27% at the end of third year and 20.19% for the fifth year when no such cap was provided in the LOI or accepted by the Petitioner. Also, impact of pandemic should have been considered when fixing the AT&C loss trajectory commitment given the stringent penalty. Further, the fifth year number should also have been revised upwards as this is a cascading commitment for all years as also acknowledged by the Commission while pro-rating the loss levels downwards for all years and not only for first three years.

Petitioner submitted that the Impugned Order suffers from error apparent on the face of record and mistake of fact as the Commission has whilst, acknowledging the occurrence of Force Majeure as the extant Covid-19 situation and consequent lockdown (which as per the RFP is a Force Majeure) has failed to provide /consider any relaxation to the AT&C loss targets. Such non-consideration of relaxation is contrary to the express terms of the RFP.

Petitioner submitted that in light of the above, the Commission may review the performance benchmark levels and stipulate levels which are more reflective of the current economic/social crisis and at least provide one additional year to the Petitioner to meet the stipulated AT&C loss levels even if otherwise the same trajectory is maintained by this Commission. Allowing the Petitioner one additional year for at least meeting the third year targets is necessary in the interest of justice and equity as the ongoing Force Majeure events of Covid-19 pandemic and consequent lockdowns have severely affected the viability and paying capacity of several businesses, forcing

them to cut down on production as well as employment as well as delayed the envisaged capital investment plans of the Petitioner.

6. Imposition of inequitable obligations in relation to past arrears contrary to RFP

Petitioner submitted that the Commission in the Impugned Order has erred in holding that the dues which were to be recovered by CESU against the bills of March 2020, April 2020 and May 2020 shall not be considered as past dues/arrears ("Past Arrears") and no incentive shall be applicable for this period although the Petitioner has taken over the Utility from 01.06.2020. The relevant portion of the Impugned Order has been reproduced herein below: -

"45. Collection of revenue against bills raised in April, May and June(e) The collections against the bills of Mar-2020, April-2020 and May-2020 shall not be considered of the nature of Past Arrears for which the RFP envisaged an incentive - for the selected bidder. These collections shall not be counted towards the past arrear recovery commitment of TPCL provided in para 46 of this order. Past Arrears for the purpose of para 46 shall refer to the accumulated arrears on amount billed prior to 31.03.2020. The incentive sharing mechanism of retention of 10% of arrear collected from live consumers and retention of 20% of arrear collected from permanently disconnected consumers as mentioned in para 46 (b) of this order shall not be applicable on this amount. "

Petitioner submitted that in this regard, RFP provided that one of the primary objectives of the entire process of selling of the Utility was *"to effectively plan and effect the collection of Past Arrears from consumers, in lieu of an incentive"*. The RFP further stipulates that post taking over of the Utility, the said entity shall be entitled to receive incentive on collection of Past Arrears which shall be to the tune of 10% for the live consumers and 20% for the disconnected consumers. The RFP defines the Past Arrears in the following manner:

"Past Arrears, shall refer to the accumulated arrears from consumers of the Utility outstanding as on the Effective Date".

As per the aforementioned definition, the Petitioner is duly entitled to the incentive for all the past dues which are accumulated before the effective date i.e. 01.06.2020 ("Effective Date"). However in the Impugned Order it is held that the Past Arrears for March 2020, April 2020 and May 2020, despite being for the period prior to the Effective Date, shall not be counted for the purposes of incentive which is clearly against the provisions of the RFP, the LOI and the settled principle of legitimate expectation as elaborately discussed in paragraph 4.6 above.

Petitioner submitted that the operation and implementation of the Impugned Order shall result in grave prejudice to the Petitioner if it is not entitled to the incentive for recovery of Past Arrears for this period as well as such Past Arrears are not considered towards its commitment to collect past arrears. The Petitioner has only begun operating the Utility post the Effective Date and therefore, all the dues prior to the Effective Date should be included for the purposes of entitlement of incentive for the Petitioner as well as counted towards the Petitioner's commitment to collect past arrears. From the aforementioned, it is clear that there is apparent error with respect to the Commission not referring to the terms of RFP whilst issuing the Impugned Order.

In furtherance to the above Petitioner submitted that, the Commission has not clarified the treatment of collection pertaining to the 2 months period i.e. April 2020 and May 2020, prior to the Effective Date for purposes of determination of AT&C loss for FY2020-21. It is further submitted that due to the Force Majeure events relating to outbreak of the Covid-19 pandemic and the consequent lockdowns, the takeover of the

Utility did not occur during the beginning of the present financial year i.e. FY2020-21. However, the targets and plans, including infusion of capital expenditure in the Utility, submitted by the Petitioner were keeping in mind entire 12-month period for each year during which the Petitioner shall be operating the Utility. Grave prejudice shall be caused to the Petitioner if the AT&C loss targets for performance evaluation and tariff determination are not appropriately adjusted/ pro-rated for the no. of months of actual operations from the Effective Date for the present financial year after considering the effect of *Force Majeure* events.

Petitioner submitted that paragraph 45 (c) of the Impugned Order stipulates requirement of a minimum efficiency collection for the amounts billed in the months of April and May 2020. Paragraph 45 (c) of the Impugned Order reads as under:

"(c) TPCODL shall be liable to collect the amounts billed in the months of April and May-2020 limited by the collection efficiency for FY 20 net of amount already collected. -For the amount billed in the month of June 2020, TPCODL shall be liable to collect the entire billed amount".

Petitioner submitted that from the above mentioned portion of the Impugned Order it can be discerned that this Commission has stipulated an overt obligation of collection based on minimum efficiency which was never stipulated under the RFP or the LOI i.e. the Petitioner shall be liable to collect pending dues for the months of April and May 2020 limited by the collection efficiency net of amount already collected. It is noteworthy that such an obligation was nowhere stipulated in any of the bidding documents including the RFP.

Petitioner submitted that the stipulation as imposed by this Commission of minimum collection is extremely unfair and unjust considering the fact that the period for which the minimum collection has to be carried out is before the Effective Date for which the Petitioner has an obligation only as per the commitment made by it in its Bid, viz, Rs. 200 crores over five years from takeover. Further, without prejudice, in terms of the Clause 2.4.6.4 of the RFP and a prudent practice, the Petitioner can only be held liable for collection of the amounts billed in the month of June 2020 and that too without any imposition of minimum efficiency collection. Further, Petitioner is not even sure about the correctness of the billing being done and in the absence of that collections cannot be ensured. Therefore, the above-referred observations of this Commission are unfounded and qualify as errors apparent in order to seek revision of the Impugned Order.

Petitioner submitted that moreover, this stipulation ought to be relaxed by this Commission. It is noteworthy that this Commission has taken note of the lockdown being imposed which has impacted CESU's collection, however, the onus of residual collection of monies for the period from April-May 2020 has been passed onto TPCODL without taking into consideration that the lockdown was still in effect during passing of the Impugned Order and in these difficult times when businesses are already struggling to make payments, TPCODL will have to deal with unstable collection post its take-over for next several months until the Indian economy stabilises.

As has been already submitted by the Petitioner in the present Petition above that the outbreak of Covid-19 pandemic and consequent lockdown has resulted in adverse impact on the operations of businesses and the Petitioner herein is no exception to the same. It is also noteworthy that the afore mentioned commitment for past arrear recovery was premised on an understanding that the Utility shall be operated for entire 12 months in any given year, however, for FY2020-21, the Utility shall only be operated for 10 months. Considering the far-reaching and ongoing implications of

the Covid-19 pandemic and consequent lockdown, which still is active and wreaking havoc in full force and shall make recovery of dues an uphill task for the Petitioner in the coming months as the financial crunch is being faced by the consumers as well, this Commission ought to appropriately adjust the committed past arrear recovery as submitted by the Petitioner before the onset of the Covid-19 pandemic and consequent lockdown in order to ensure fairness and equity especially considering the fact that there is a penal consequence on the Petitioner for not meeting the committed past arrear recovery.

Accordingly, petitioner submitted that the Commission may either reduce the past arrears commitment of the Petitioner or increase the time for fulfilment of the same in the interest of justice and equity.

7. **Transfer of additional serviceable liabilities**

Petitioner submitted that in paragraph 54 of the Impugned Order, the Commission has made an apparent error when after recording that under Section 21 (a) of the Act "*the utility shall vest in the purchaser or the intending purchaser, as the case may be, free from any debt, mortgage or similar obligation of the licensee or attaching to the utility*", the Commission has in violation of this statutory fiat ordered that additional serviceable liabilities (not originally part of the RFP or allowed as per the Act) should be passed on to TPCODL "*since CESU will not have any revenue to fund the liabilities*".

Petitioner submitted that under the extant statutory framework the "Additional Serviceable Liabilities" may not be transferred to TPCODL being the purchaser of the utility. It is submitted that the proviso to Section 21 (a) categorically provides that any such debt, mortgage or similar obligation shall attach to the purchase money in substitution for the utility. Therefore, the Act already provides for a mechanism for dealing with additional liabilities that may remain with the seller after the sale of the utility under Section 20 of the Act and therefore the Commission has erred in not adopting the statutory mechanism for redressal of remaining liabilities as already provided in the Act.

Petitioner submitted that it is abundantly clear from the provisions of Section 20 (1) (c) and Section 21 (a) that the liabilities of the utility until the date of sale of the utility remain the responsibility of the licensee (i.e. CESU in this case) and cannot be passed on to the purchaser (i.e. Petitioner or TPCODL).

Petitioner submitted that as the "Additional Serviceable Liabilities" did not form part of the RFP or any amendment thereto, it is inequitable for such liabilities to be transferred to TPCODL. While the Commission has provided a mechanism for funding of such "Additional Serviceable Liabilities", the same will adversely impact Consumer Tariffs being a pass through. In fact, even such pass through may not always be possible keeping in mind the tariff shock to the consumers resulting from such pass through.

Petitioner in its written submissions in Case No. 11 of 2020 had objected to the transfer of such "Additional Serviceable Liabilities" from CESU to TPCODL including, on account of the Force Majeure situation caused by the Covid-19 pandemic and consequent lockdowns imposed by the Government of India, however, the Commission failed to consider the submission made by the Petitioner.

In view of the above, petitioner submitted that the Commission may review its decision in this regard and consider parking these Liabilities with the Residual Company/GRIDCO, etc. rather than transferring them to the Operating Company, as has been contemplated by the Electricity Act 2003 as well as the RFP. The Operating

Company (TPCODL) can process all such claims and pass them on the Residual Company/GRIDCO, etc. (as may be directed by the Commission), for their settlement.

Petitioner submitted that in the event the Commission still decides to transfer such Additional Liabilities to the Operating Company in the Opening Balance Sheet, the Commission may devise a suitable mechanism to ring-fence and insulate TPCODL from any cash-flow or profitability impact of the same including allowing recovery through tariff, of any tax-impact of such Additional Liabilities. It is further submitted that the quantum of such Additional Liabilities be finalized based on verified liabilities as per audited Balance Sheet as at the Effective Date.

Petitioner submitted that the Commission has assumed that TPCODL will be able to avail finance for funding of the "Additional Serviceable Liabilities", however, in the present scenario post the Covid-19 Pandemic breakout it would be difficult for TPCODL to get such finance. Further, the Covid-19 Pandemic breakout and the consequent lockdown is likely to have an unprecedented impact on CESU's losses and reduction in CESU's billings/ collections, etc which is also likely to lead to a consequential increase in CESU's current liabilities which are in any case the liability of TPCODL. It is also worthwhile to point out that the current assets purported to be transferred to TPCODL are largely in the form of current accounts which as per the Commission cannot be utilized for any purpose other than for which the funds were made available. The balance current assets purported to be transferred are such that their quality is largely questionable in terms of recoverability. Accordingly, if such "Additional Serviceable Liabilities", are transferred to TPCODL, it will lead to an increase in Consumer Tariff as such liabilities will require financing with the principal and the interest component being a pass through (to the extent the revenue stream provided by the Commission is insufficient).

Therefore, petitioner submitted that the Commission may reconsider transferring of the "Additional Serviceable Liabilities" to TPCODL as the same is also not in line with the extant statutory framework and RFP. It is submitted that the Impugned Order to such extent suffers from error apparent on face of record and ought to be reviewed. Without prejudice, in the alternative, if the Commission feels the need to transfer such Additional Serviceable Liabilities to TPCODL, it is submitted that to ring fence TPCODL, the same should be entirely allowed as a pass through by the Commission (subject to prudence check) and the Commission may be pleased to clarify that no regulatory asset will be created in relation thereto at any point of time to give regulatory certainty to the Petitioner in these turbulent times.

8. Transfer of unfunded employee liabilities contrary to statutory framework

Petitioner submitted that the Commission has committed a serious error in paragraph 50 of the Impugned Order when it directed that all the employee liabilities of CESU towards pension, gratuity, leave encashment shall also get transferred to TPCODL along with the transfer of the employees without clarifying that this stipulation only applies to liabilities arising after the Effective Date.

Petitioner submitted that Annexure 1 to the Impugned Order titled "Note on Principles of transfer of assets and liabilities of CESU to TPCODL" states that the Long-term provisions for Pension Trust, Gratuity Trust and Leave Encashment shall remain in "full" with CESU. Further, Annexure 2 to the Impugned Order titled "Opening Balance Sheet (provisional) of Operating Company as at 01.04.2020 based on provisional financial statements as at 31.03.2020" also does not have any line item for any kind of employee liabilities other than "Long-term provisions - P.F. Trust". As such, it is evident that the Commission did not intend to transfer to TPCODL past

employee liabilities other than P.F. Trust liabilities which were categorically included by the Commission as part of the "Additional Serviceable Liabilities"

Petitioner further submitted that in any event, in view of the express provisions of Section 20 (1) (c) and Section 21 (a) the Commission, in any event, could not have transferred the employee liabilities for the period prior to the Effective Date to TPCODL, being the purchaser of the utility. Alternatively, retirement and other liabilities of employees for period not served under TPCODL should be fully funded and transferred to TPCODL, so that there is no shortfall in future, requiring funding from TPCODL or through tariff mechanism. It is submitted that the Impugned Order to such extent suffers from error apparent on face of record and ought to be reviewed.

Petitioner submitted that in the event the Commission is of the view that even the unfunded employee liabilities of the period prior to the Effective Date are to be transferred to TPCODL, then the same would not only be contrary to the RFP but also to Section 20 and Section 21 of the Act for the reasons already explained above. An actuarial valuation to determine the exact liability as on the date of transfer should be carried out and the amount so determined should be funded.

It is further submitted that, by way of WP No. 3854 of 2020 filed before the High Court of Orissa: Cuttack ("Writ Petition"), the employee unions/trusts of CESU have inter alia alleged that as per calculation made by them, as on 31.03.2019, there was a shortfall of an amount of (i) Rs. 1437 Crores in the CESCO Employees' Pension Trust; and (ii) Rs. 92.30 Crores in the CESCO Employees' Gratuity Trust.

Petitioner submitted that if the allegations made by the petitioners in the Writ Petition regarding the amount of unfunded pension and gratuity liabilities are correct and such huge past unfunded employee liabilities are transferred to TPCODL, it will not only harm the business viability of TPCODL but also the consumers as the same will have to be a pass through as part of the Tariff.

The Petitioner submitted that in such a case, given the high amount of liabilities which will likely cause a massive increase in the Tariff, the Commission may be pleased to permit the Petitioner to recover the same by way of a special surcharge over and above the Tariff so as to ensure transparency in relation to the consumers.

Petitioner therefore submitted that Delhi Electricity Regulatory Commission (DERC) has permitted recovery of future employee retirement liabilities due to shortfall in initial funding by imposing surcharge over the Tariff of Delhi distribution companies such as, vide Tariff Order dated 28.03.2018, wherein the Delhi Electricity Regulatory Commission had allowed for a surcharge of 3.80% towards recovery of Pension Trust Charges of erstwhile employees for onward payment to the Pension Trust. This surcharge is over and above the electricity tariff so that there is clear understanding among the consumers that it is not a tariff hike due to inefficiency of DISCOMs that they are paying for. The Commission is requested to follow the same approach here as well.

9. Inequitable restrictions imposed on use of fixed deposits

Petitioner submitted that as per the opening balance sheet provided in the RFP, the liabilities of CESU from the security deposits from the consumers, deposits from suppliers/ contractors and deposits for electrification/ service connection were to be transferred to TPCODL. Thus, the fixed deposits created against such liabilities were also to be transferred to TPCODL as current assets. However, the Commission while transferring the liabilities in relation to such security deposits and the related fixed deposits of CESU to TPCODL, in paragraph 51 of the Impugned Order, has erroneously (i) referred to different amounts for fixed deposits and pledged fixed

deposits at different places in the Impugned Order; (ii) has permitted the pledge of fixed deposits to raise finance for funding of Additional Serviceable Liabilities but limited the amount to the currently pledged amount with a stipulation for reduction in such pledged amounts; (iii) restricted the liquidation of fixed deposits related to security deposits except for the reasons for which it was collected without realising that it would not be possible to co-relate fixed deposits with security deposits as the fixed deposits are far short of the security deposits being transferred to TPCODL.

Petitioner submitted that the paragraph 51 (c) of the Impugned Order, the Commission has stated that the total fixed deposits with banks as per provisional balance sheet of CESU as on 31.03.2020 amounted to Rs. 696.21 Crores which shall be transferred to TPCODL, in Annexure 2 titled "Opening Balance Sheet (provisional) of Operating Company as at 01.04.2020 based on provisional financial statements as at 31.03.2020", the amount of fixed deposits with banks to be transferred to TPCODL is reflected as Rs.684.47 Crores.

Similarly, while in paragraph 54 (e) (v) of the Impugned Order, the Commission has directed that the amount of fixed deposits pledged shall, at any time, not exceed Rs.304.67 crores which is the principal amount of fixed deposits pledged as of 31.05.2020, in paragraph 7 of Annexure 1, the Commission has directed that the amount of fixed deposits pledged shall, at any time, not exceed Rs. 457.08 which is the amount of fixed deposits pledged as of 31.03.2019.

The Petitioner submitted that these are errors apparent on the face of the record and the Commission may clarify that the entire amount of fixed deposits as on the Effective Date will be transferred to TPCODL. Further, the Petitioner submits that in accordance with the mandate under Section 21(a) of the Act, the Commission may be pleased to clarify that all such fixed deposits will be transferred to TPCODL free of any pledge or other security subsisting thereon on or prior to the Effective Date. It is submitted that Section 21(a) of the Act unequivocally provides that the utility vests in the purchaser free from any debt, mortgage or similar obligation of the licensee or attaching to the utility. Thus, any existing pledge on the fixed deposits which form a part of the utility would automatically fall away upon the vesting of the utility in the purchaser by virtue of Section 21(a) of the Act and the Commission erred in not recording as part of the Impugned Order that the fixed deposits will be transferred on the Effective Date free of all existing pledges and/or other securities.

Petitioner submitted that the amount of Additional Serviceable Liabilities cannot be transferred to it under the present statutory framework of Sections 20 and 21 of the Act and that the fixed deposits should be transferred to it free of any pledge or other security, it is submitted that the Commission has erred in not permitting pledging of these Fixed Deposits for raising normal working capital financing.

Petitioner submitted that further, when the Commission permitted TPCODL to pledge the fixed deposits to raise finance for funding of Additional Serviceable Liabilities but limited the amount of such pledge to the currently pledged amount, in effect the Commission has restricted TPCODL from creating any pledge at all on the fixed deposits and thereby severely constricted the ability of TPCODL to raise any finance despite recognising the need for raising such finance. It is also submitted that by adding a further stipulation for reduction in such pledged amounts, the Commission has failed to appreciate that once a pledge is created for a financing arrangement or instrument, ordinarily the lender would not release such pledge until the financed amount is paid in full to the satisfaction of the lender. Thus, the Commission has erred in placing restrictions on the security to be created by TPCODL for raising of finance and the same may be omitted by the Commission from the Impugned Order.

Petitioner submitted that in relation to above, the Commission erred in directing that TPCODL shall not be allowed to liquidate the fixed deposits related to security deposits except for the reasons for which it was collected. It is submitted that while giving such a direction the Commission failed to realise that it would not be possible to co-relate fixed deposits with security deposits as money is fungible. Also, as per the details provided by the Commission in paragraph 51 of the Impugned Order while the amount of security deposit was Rs. 1081.32 Crores as of 31.03.2020, the corresponding fixed deposits maintained with Banks were limited to Rs. 696.21 Crores as of the same date. It is evident from this difference in the amount of security deposit and fixed deposits, that the fixed deposits do not relate to any particular security deposits. Also, the Commission failed to realise that the fixed deposits are not created for any particular purpose but are similar to cash and bank balances of a company and therefore, any restriction on the ability of TPCODL to liquidate such fixed deposits would seriously hamper its ability to run the business efficiently. Encashment and use of the monies transferred in form of fixed deposits should be at the discretion of the TPCODL and no encumbrances/ restrictions should be put on such use. It is submitted that by imposing restrictions on the use of fixed deposits which are current assets the basic principle of accounts which considers current assets as being liquid assets which are easily convertible into cash will be distorted.

Therefore, the Petitioner submitted that the Commission may remove such restrictions on liquidation and use of fixed deposits in order to enable TPCODL to ensure smooth functioning of the business of the utility which is under severe stress due to the prevailing situation on account of the Covid-19 pandemic and consequent lockdown enforced by the Central Government. It is submitted that the Impugned Order to the aforementioned extent suffers from error apparent on face of record and is required to be reviewed.

10. Restrictions imposed on creation of charge over assets of TPCODL contrary to the existing licence conditions

Petitioner submitted that this Commission committed a mistake of fact and error apparent on the face of the record in imposing restrictions on TPCODL which are contradictory with the existing License Conditions for CESU.

This Commission vide its order dated 31.03.1999 passed in Case No. 2/99, under the provisions of the Orissa Electricity Reform Act, 1995, had issued distribution licence to CESCO which later came to be vested with CESU in terms of the Central Electricity Supply Utility of Orissa (Operation and Management) Scheme, 2006 ("Scheme"). Further, this Commission vide its Order dated 27.10.2006 in Case No. 21 of 2006 determined the License Conditions for CESU. It is pertinent to note that under the Impugned Order, the said licence of CESU (together with the existing License Conditions) stands transferred to TPCODL with effect from the Effective Date in accordance with Section 21 (b) of the Act.

Further, as per Condition 12.5 of the License Conditions, CESU was free to create a charge over its assets subject to it informing the Commission about such charge and complying with certain conditions.

Petitioner submitted that the Commission has committed a mistake of fact and an apparent error in stipulating that TPCODL shall not be permitted to create charge over any of its assets or receivables without the approval of the Commission in paragraph 79 of the Impugned Order which is reproduced herein below for convenience:

“79. Without the prior approval of the Commission, TPCODL shall not create any charge over any of the assets of TPCODL including but not limited to receivables of TPCODL.”

It is humbly submitted that the stipulation in paragraph 79 is squarely against Condition 12.5 of the License Conditions and therefore contrary to Section 21 (b) of the Act which provides that all the rights and obligations of the existing licensee shall stand transferred to the purchaser of such utility. Section 21 (b) of the Act makes it clear that the existing license of CESU along with the License Conditions stands automatically transferred to TPCODL by virtue of Section 21 (b) of the Act.

In light of the above, Petitioner submitted that this Commission may delete paragraph 79 of the Impugned Order as the same may be seen as an amendment to the existing License Conditions without following the necessary procedure prescribed wider **Section 18 and Condition 15 of the License Conditions.**

Further, since the Bid submitted by the Petitioner was based on the assumption that the existing licence of CESU together with the existing License Conditions will be transferred to it upon vesting of the Utility, this is also a violation of the legitimate expectations of the Petitioner. It is submitted that this stipulation also goes against the other parts of the Impugned Order where the Commission has specifically permitted the Petitioner to create certain charges for raising finance for TPCODL.

Accordingly, the Petitioner submitted that this Commission may be pleased to delete the requirement of obtaining approval from the Commission for creation of charge over the assets including receivables of TPCODL for raising finance for TPCODL for the purposes of its business, including working capital requirements, capital expenditure funding etc. subject to compliance with the requirements of Condition 12.5 of the License by the Petitioner and TPCODL. The Petitioner confirms that in case of creation of charge for any purpose other than for raising financing (Working Capital and/ or Capex) for TPCODL, the Petitioner/TPCODL shall seek prior approval of the Commission.

11. Clarification on “discount/ rebate/ incentive to consumers' being considered as legitimate expenditure and allowed as part of ARR

In this issue petitioner submitted that the issue of allowance of discount/ rebate to consumers was highlighted by the Petitioner while raising objections with respect to the inadequacy in the present allowance of O&M cost including employees, Repair & Maintenance ("R&M") and Administrative & General ("A&G") expenses. The petitioner had also requested to allow discount given to consumers on energy bills as an expenditure for tariff determination purposes. This rebate being provided to the consumers is in accordance with the extant regulatory framework and relevant provisions of the Tariff Order(s) as issued by the Commission. It is submitted that while addressing the issues of employee costs (viz. salaries, wages, pension contribution and other employee costs), R&M and A&G costs in paragraph 55 of the Vesting Order, the Commission has inadvertently missed addressing/clarifying this issue, which is an error apparent on face of record. Accordingly, it is submitted that this Commission may clarify and allow the 'discount to consumers/ rebate' as an expense for tariff determination purposes.

Petitioner stated that it is worthwhile to point out that OERC (Terms and conditions for determination of wheeling tariff and retail supply tariff) Regulations, 2014("OERC Tariff Regulations") provides for determination of ARR of wheeling and retail supply business after duly considering the allocation of expenses incurred by the licensee,

such as rebate. The relevant Regulations of OERC Tariff Regulations are Regulation 7.1 (g) and Regulation 7.2 read with Regulation 7.17(d) are pertinent in this regard.

The petitioner therefore submitted that the rebate has to be allowed as an expense in the ARR of the distribution utility such as TPCODL in terms of the provisions in said regulation. In view of the above, the commission may clarify that any discount/ rebate/ incentive granted to consumers in accordance with directions of the Commission in its Tariff Order or otherwise shall be considered as legitimate expenditure and allowed as a pass-through cost in the Petitioner's ARR.

Submission by Mr. Ramesh Chandra Satpathy

12. Shri Satpathy submitted that the Commission have categorically mentioned in para 82 of the said vesting order, the parties shall not be allowed to make any submission with regard to the matter dealt with the vesting order. TPCODL knowing fully well and accepting the vesting order, has filed a review petition on dated 16.06.2020 is totally against the order dated 26.05.2020 of the OERC. The Commission should summarily reject the review petition as because after the operation since 26.05.2020, the TOCODL have filed this review petition violating the orders of the OERC.
13. As regards payment security, the petitioner has raised the point of share holding agreement, wherein the payment of security is a point. In this connection, Shri Satpathy submitted that the Commission shall not accept the contention of TPCODL, as because the vesting order and the Share Holding Agreement are separate documents. The vesting order of the OERC and Shareholder Agreement between GRIDCO and TPCL is a bi-party settlement.
14. The Govt. of Odisha under the Chairmanship of the Chief Secretary, have directed the AT&C loss should be 15% of all the DISCOMs and that should be taken into consideration. The CESU Management introduced a franchisee operation scheme to reduce the AT&C loss, a few divisions have reduced the AT&C loss of more than 20%. The Commission may revise the order as per the direction of Govt. of Odisha, i.e. 15% AT&C loss for determination of tariff.
15. As regards treatment of employee liabilities, the TPCL have not yet considered the engagement of 62% workforce i.e. 7680 workforce working for the interest of CESU through different franchisee and outside agency. The TPCODL should be directed to increase the staff strength and prepare the yardstick to manage the LT/HT maintenance work, billing and collection work direct under the payroll of TPCL, not through the contractor.
16. As regards the fixed deposits/security deposits, the TPCL has to obtain permission from the OERC before any utilization of such funds. The workers dues like pension, EPF dues should be well protected for the greater interest of the workers.

Rejoinder to reply objections filed by Mr. Ramesh Ch. Satpathy, President, Upobhokta Mahasangha, Bhubaneshwar

17. TPCL submitted that the present rejoinder has been filed in response to the Objections dated 10.08.2020 ("Objections") filed by Mr. Ramesh Ch. Satpathy, President, Upobhokta Mahasangha, Bhubaneshwar. ("UM") and it is stated that the said Objections are without any merit and are devoid of any legal principles.
18. TPCL submitted that there is absolutely no merit in the Objections filed by Upobhokta Mahasangha and the averments and contentions made by Upobhokta Mahasangha in its Objections are based on misconstrued reading of the extant statutory framework.

19. TPCL submitted that the interpretation rendered by Upobhokta Mahasangha to the paragraph 82 of the Impugned Order is incomprehensible in terms of the extant statutory framework. In case such averments are considered, the same will result in re-writing the procedures of our justice delivery system and accordingly, may be rejected by this Commission.
20. TPCL further submitted that the instant Review Petition has been filed for the review of error apparent on the face in Order dated 26.05.2020 ("Impugned Order"). The Petitioner has a legal as well as the statutory right to seek review of the Impugned Order under Section 94 of the Electricity Act, 2003 ("Act") read with Section 114 of the Code of Civil Procedure ("CPC") and Order 47 Rule 1 of the CPC. Therefore, the Objections raised by the Upobhokta Mahasangha vide the instant averments ought to be rejected outrightly.
21. TPCL submitted that the entire argument of the Upobhokta Mahasangha is premised on incorrect understanding of law and facts. The utility of CESU was vested in terms of the RFP and associated bid documents (issued by this Commission) as per Sections 20 & 21 of the Electricity Act, 2003 and the alleged executive order (if any) has no relation to the present 'lis'.
22. TPCL submitted that without prejudice, the averments raised by the Upobhokta Mahasangha are contrary to the extant regulatory framework as the components of tariff cannot be determined by way of executive orders/circulars and are required to be determined by the Commission in the manner provided under the Electricity Act, 2003. Therefore, the Objections of the Upobhokta Mahasangha ought to be rejected at the outset.
23. TPCL therefore submitted that in light of the aforesaid submissions read with the Review Petition filed by the Petitioner, the Review Petition of the Petitioner may be allowed and the Objections raised by the Upobhokta Mahasangha be rejected outright.

Submission by the Intervenor Odisha Power Employees Association and 7 others

24. Intervenor Shri Dhobei Sahoo submitted that the Review Petition is not maintainable either on facts or in law and it is liable to be rejected. The Review Petition suffers from non-joinder of necessary parties and is hence liable to be rejected. The TPCL having acted upon pursuant to the vesting order dated 26.05.2020 cannot again seek review of the said order. If TPCL was aggrieved by the order dated 26.05.2020 it was open for the TPCL either to step back or to seek review of the order before acting upon it.
25. Shri Sahoo submitted that the order dated 26.05.2020 is like a complete package covering all aspects of the electricity distribution activity and the directions contained in the said order are not severable and as such, it is not open for the TPCL to accept the order partly and seek review of certain directions which it feels disadvantageous to their interest.
26. Shri Sahoo submitted that the review petition is otherwise liable to be dismissed in view of observation of the Commission in Para- 80 and 82 of the order dated 26.05.2020. Para 80 states that in case of any conflict between this order and the provisions of RFP or RFP documents the decision of the Commission shall be final. The para 82 states that the terms of this vesting order shall be final and binding on the parties. The parties shall not be allowed to make any further submissions with regard to the matters dealt with in this vesting order."

27. Shri Sahoo submitted that the grounds set forth by the TPCL for review of the vesting order dated 26.05.2020 do not meet the requirements of review and hence, the petition is liable to be dismissed.
28. Shri Sahoo submitted that the Order XLVII, Rule 1 (1) of the Code of Civil Procedure, 1908 provides for an application for review. Law is well settled that the power of review jurisdiction can be exercised for the correction of a mistake and not to substitute a view. In *Parsion Devi and Ors. v. Sumitri Devi and Ors.* (1997) 8 SCC 715, the Hon'ble Apex Court held as under:

"Under Order 47 Rule 1 Code of Civil Procedure a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under Order 47 Rule 1 Code of Civil Procedure. In exercise of the jurisdiction under Order 47 Rule 1 Code of Civil Procedure it is not permissible for an erroneous decision to be "reheard and corrected". A review petition, it must be remembered, has a limited purpose and cannot be allowed to be "an appeal in disguise."
29. Shri Sahoo submitted that it reveals from the order dated 26.05.2020, the Commission has elaborately dealt with the issues/objections raised by the TPCL in their correspondences, reply and written note of submissions. If TPCL feels any issue/objection has not been dealt in the order, then TPCL may avail any other remedy permissible under law, but certainly not the remedy of review in as much as non-consideration of an issue or objection is no ground for seeking review of the order within the scope and ambit of Order 47 Rule-1 of the Code of Civil Procedure. The issues/objections, if any, which have not been considered in the impugned order, must be deemed to have been rejected by the Commission.
30. Shri Sahoo submitted that It is clearly evident from the review petition that the TPCL has sought review of the order dated 26.05.2020 as a whole on the grounds that the said order is either inequitable, unjust, unreasonable, arbitrary, in violation of principles of natural justice or contrary to the Act and Regulations as well as the conditions of the License, RFP and other communications made by TPCL with this Commission.
31. Shri Sahoo submitted that the aforementioned grounds on which the petitioner(TPCL) has sought review of the order dated 26.05.2020 are not tenable in the eyes of law inasmuch as those grounds do not constitute any mistake of fact or error apparent on the face of record nor does it constitute any sufficient reasons. The grounds raised by the Petitioner are best suited for an Appellate forum or a court exercising writ jurisdiction under Article 226 and 227 of the Constitution of India, but certainly not for consideration by this Commission in exercise of its power of review.
32. As has been held by the Hon'ble Apex Court in *Parsion Devi and Ors. v. Sumitri Devi and Ors.* (1997) 8 SCC 715 that 'an error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record'. Similarly, in the case of *Sow Chandra Kante and Ors. vs. Sheikh Habib* (1975)15CC674 the Apex Court observed that a review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. In view of such clear position of law, the review petition filed by TPCL may be termed as an appeal in disguise and if it is entertained for hearing on merits, it would amount to hearing of the Case No. 11 /2020 afresh, which is not permissible under law.

33. Shri Sahoo submitted that the Review Petition has been filed by TPCL with an ulterior motive to neutralize the restrictions and safeguards contained in the impugned order, which if allowed, will not be in the interest of the public at large inasmuch as there is every chance of misuse of the huge public assets and harassment to the workforce apart from sufferings to the consumers.
34. Shri Sahoo therefore submitted that on the above backdrop of facts and law, the review petitioner is not entitled for any relief(s) as prayed for and the petition is liable to be dismissed being misconceived in fact and law and for otherwise being devoid of merits.

Rejoinder to reply/objections filed by Odisha Power Employees Assn & 7 others:

35. TPCL submitted that the present rejoinder has been filed in response to the objections dated 23.08.2020 ("Objections") filed by the Odisha Power Employees Association and Seven Others ("Objectors") and it is stated that the said Objections are without any merit and are devoid of any legal principles.
36. TPCL submitted that all the allegations/averments made by the Objectors in their Objections are denied and disputed. Any omission on the part of the Petitioner to deal with any specific averments of the Objectors in the Objections should not be construed as an admission/acceptance thereof. There is absolutely no merit in the Objections filed by the Objectors and the averments and contentions made by the Objectors in their Objections are based on misconstrued reading of the extant statutory framework.
37. Considering the submissions made by Objectors in their Objections, the Petitioner set out its Rejoinder submissions by rejecting the averments made by the Objectors on all the points.
38. In light of the submissions read with the review petition filed by the petitioner, TPCL submitted that the review petition of the petitioner may be allowed and the objections raised by the objectors shall be rejected out rightly.

Submissions by Odisha Bidyut Karmachari Mahasangh

39. Objectors submitted that the Commission after following due bidding procedure selected M/s Tata Power Company Limited (TPCL) as purchaser of the utility CESU. The Commission before vesting the utility with TPCL, allowed TPCL to conduct its own survey, scrutinize audited records, gave reply to bidders query, provided additional documents/information other than bidding and RFP to the satisfaction of purchaser company.
40. Objectors submitted that the Commission has given its best effort to protect interest of all stake holders e.g. consumers, existing employees, State Government, Bulk Power supplier GRIDCO. All terms and conditions of vesting order was well explained to TPCL before allowing it to take over management of CESU w.e.f 01.06.2020. In accordance with para 34 of the vesting order, the Commission has outlined certain serviceable liabilities for TPCODL. Being one of the prominent company in Indian Power sector, TPCL is expected to operate and manage TPCODL in accordance with its past commitment and provisions of vesting order. TPCL in this review petition has challenged the root provisions of vesting order by virtue of which it acquired ownership of CESU.
41. Objectors submitted that in the review petition TPCL is not willing to give corporate guarantee for power purchase from GRIDCO. TPCL is now reluctant to provide service protection to existing employees of CESU. The service conditions of employees are governed by provisions of OSEB/GRIDCO/State Govt. and service rules & regulations framed under Orissa Electricity Reform Act 1995. TPCL intends

to eliminate all such service conditions which it initially agreed to abide. Further provisions in vesting order related to employees' terminal benefits such as Pension, Gratuity, Rehabilitation assistance have been challenged in review petition by TPCL. This will create problem for pensioners and retiring employees. TPCL has proposed pension surcharge in electricity bill of general consumers which can create strong protest across state and defame OERC/ Government.

42. Objectors submitted that the averments made by the petitioner in clause 4.8 of its petition are not correct regarding transfer of employees. It is not clear as to how the existing employee's service condition protection outlined in Commission vesting order para 49(c) is arbitrary and unfair and expensive for TPCODL. The para 49(c) of vesting order is not a departure from the terms under RFP and LoI as challenged in para 4.4 of petition. The Commission only elaborated the term "their terms of appointment". This is not one additional clause rather explicit mention of terms of appointment which is fully consistent with transfer schemes framed under Orissa Electricity Reform Act 1995 and Section 131 of Electricity Act 2003. Therefore the Commission in no way departed from RFP and LoI. The para 49(c) is no way vague, subjective or expansive and will never invite litigation from employee side.
43. Objectors submitted that any infringement with service condition of employees and terminal benefits of pensioner and retiring persons is no way acceptable to our union and we strongly oppose this averment made in this review petition.
44. In view of the facts and submission as above, the Objectors prayed that the Commission may uphold all the provisions of impugned Vesting Order which protect interest of the state and employees and direct TPCODL that in the name of operational flexibility and organization structure the existing employees' service protection should not be weakened in any manner. The Commission may direct TPCODL that existing human resources potential at all level should be fully utilized instead of unnecessary maintenance out sourcing which will ultimately raise tariff and cause burden on general consumers of the state. The Commission may direct TPCODL that the AT&C loss reduction trajectory should be strictly fulfilled.

OPTCL's submission

45. OPTCL submitted that the petitioner M/s. Tata Power Company Limited after having participated in bidding process commencing with a Request for Proposal (RFP) dated 24.11.2017 followed by subsequent stages of the bidding process was finally vested with the CESU distribution license pursuant to provision in Sections 20 and 21 of the Electricity Act, 2003 with effect from 01.06.2020 by order dated 26.05.2020 passed in vesting proceeding initiated in Case No. 11 of 2020, transferring the rights, powers, authorisation, duties and obligations of the licensee (CESU) under its license to the purchaser M/s. Tata Power Company Ltd (TPCL) which then has become a deemed licensee of the CESU – Distribution Zone. Thus the whole process of transfer and vesting stands concluded. It is to be noted that the vesting is a public property the magnum opus of which cannot be altered at the behest of the TPCL. Thus prima facie the petition for review made in the present proceeding is liable to hit the wall.
46. OPTCL submitted that the power of review available under Section 94(1)(f) of the Act, 2003 is regulated by the provision in Section 114 read with order 47 rule 1 of CPC. The rules of review permits the party to the original proceeding to seek review in case no provision of appeal against the original order is available in law or there being scope of appeal the party has not preferred any appeal. Since appeal and review cannot be allowed to proceed simultaneously, the party seeking review is to solemnly affirm in review that it has not preferred any appeal against orders in review. The TPCL in its review petition dated 16.06.2020 has not solemnly affirmed there in that it has not

filed any appeal in ATE, New Delhi as per Section 111 of the Act, 2003. Thereby the review petition is inadmissible ab initio.

47. OPTCL submitted that the TPCL has prayed for review invoking the “inherent power” and “expansive regulatory authority” of the Commission. Be it mentioned that the Commission has no “inherent power” in the light of the position of settled by Supreme Court in AIR1978SC326 which reads as below.

“Review means a judicial re-examination of the case in certain specified and prescribed circumstances. The power of review is not inherent in Court or Tribunal. It is a creature of the statute. A Court or Tribunal cannot review its own decisions unless it is permitted to do so by statute. The Courts and Tribunals having limited jurisdiction have no inherent power under Sec 151 of CPC to review its own order”.
48. OPTCL submitted that in view of the above position of law the scope of review envisaged under Section 94(1) (f) of the Act, 2003 cannot be enlarged in the name of “inherent power” which the statutory authority is supposed to exercise.
49. OPTCL submitted that the next plea is “expansive regulatory authority”. But it is basically not available in the present circumstances of the matter. The Regulatory authority being limited by its power of review cannot proceed to expand its limited scope to an unlimited one to grant any relief as sought for by the petitioner.
50. OPTCL submitted that the TPCL in its response to the vesting proceeding initiated in Case no. 11 of 2020 submitted its limited issue as recorded in para 24 of the order dt. 26.05.2020 in which the TPCL requested the Commission to devise a suitable mechanism “to ring-fence the TPCODL from the impact of additional liabilities and right to use the land and land rights instead of transfer of land”. The order under review was passed after careful consideration of all aspects and the position obtainable within the walls of the CESU and the provision which permitted the vesting to be made. In para 82 of impugned order the Commission put an embargo that the vesting order shall be final and binding on the parties and shall not allowed to make any further submission with regard to matters dealt in the vesting order. Hence the scope of review being pre-limited by the above orders, it cannot be allowed to be expanded at the behest of TPCL.
51. OPTCL submitted that the TPCL in its petition for review has mainly proceeded on the basis of two elements i.e. (1) error apparent and (2) legitimate expectation. The TPCL may have expectation, mostly undue but it cannot be deemed to be a legitimate one. In the whole process of vesting commenced with RFP, there is no promise or assurance to the bidder to provide anything in the end of the exercise. The commission while acting in terms of the statute and the position obtainable in CESU could not have assured anything out of heaven. *The “Disclaimer” in RFP clearly states that RFP is not an agreement, is neither an offer nor invitation by OERC to the prospective bidders or any other person.* Its purpose is to provide interested parties with information that may be useful to them in making their bids pursuant to RFP. The OERC, its employees and Advisers/Consultants make no representation or warranty and shall have no liability to any person including any bidder under any law, statute, rules and regulations or tort etc. The RFP never assures anything to TPCL to claim any legitimate expectation.
52. OPTCL submitted that the plea of “error apparent on the face of the order” is not allowed to be dealt as an appeal in disguise. The error must be apparent on the face of the record. It must strike on mere looking at the record and would not require any long drawn process of reasoning on points where there may conceivably be two opinions. The error must be self- evident. The petitioner has not established any apparent error

in the impugned order to call for its review. Hence the basis for review as claimed by the petitioner has failed to meet the tenets of law on review.

53. OPTCL submitted that the petition has sought review on the plea of “any other sufficient reason” as provide under Order 47 Rule-1 of CPC. The reason ought to be sufficient to call for review without which the order in question has become wrong illegal and inoperative and ultimately un-enforceable. But nothing in that regard has been established by the petitioner to invoke that provision. Hence the plea of review is untenable.
54. OPTCL submitted that the petitioner has also alleged that the order has imposed an inequitable obligation in relation to collection of arrears. In the proceeding in the review “equity” or “equitable” has no place to be allowed as an element for review of the order. The review is principally based on factual elements or on law but not otherwise. Hence review is not maintainable on the alleged proposition of the petitioner.
55. OPTCL submitted that the next plea is lack of operational flexibility. Such a plea is not an element of consideration for review of the order. The scope of review does not allow any such external element to disturb the core of the impugned order. The order impugned does not restrict the operation of the utility rather it allows such operation to be within the limits of its scope and regulatory framework. Hence it is not liable to be allowed as a ground for review.
56. OPTCL submitted that the plea of “Fungible Deposit” seeking it to be allowed to TPCODL to operate it in a flexible manner does not come within the scope of review in any sense of the term and its legal tenor. This plea of petitioner is an attempt to do away with such deposits in the plea of operational flexibility. The CESU is a public utility service provider and the status quo should not be allowed to be detrimentally changed.
57. OPTCL submitted that the plea of TPCL to acquire similar licensing conditions as that of CESU is not an element to come within scope of review. Otherwise also the status of deemed licensee allowed by and under provisions of Section 21(b) of the Act, 2003 does not restrict the Commission to exercise its powers under Section 16 of the Act, 2003 to impose restrictions and conditions. Hence such plea is also untenable.
58. OPTCL submitted that the other plea TPCL that certain employees obligation attached to it is contrary to provision of Section 21(a) of the Act, 2003 is also misconceived and cannot be taken as a ground for review. The scope of review does not admit to such plea. The Section 21(a) restricts transfer of “debt”, “mortgage” or “similar obligation”. None of the employee obligation transferred to TPCL comes within the aforesaid restricted obligations. Hence such plea is also untenable.
59. OPTCL submitted that the next plea is that “Corporate Guarantee” was not covered in the RFP document. It is to be noted that RFP document never created any binding contract with OERC. Otherwise also “Corporate Guarantee” is essential to ensure adequate payment security. The TPCODL has placed a Performance Guarantee of Rs.150 Crore. As against this, the monthly BSP bills of GRIDCO comes to Rs.200 Crore and the Transmission Charge bill of OPTCL comes to Rs.15 Crore, which far exceeds the Performance Guarantee. The Corporate Guarantee of TPCL is vitally essential to ensure adequate payment security. Further Tata Power Company Limited (TPCL) being the majority stake holder of TPCODL has the responsibility of payment to OPTCL and GRIDCO and hence has the obligation of giving the Corporate Guarantee. Hence it is not liable to be reviewed.

60. OPTCL submitted that the review petition pleads to modify the terms of para 49(c) of the impugned order on Transfer of employees of CESU to TPCODL seeking it to be modified to the suitability of TPCL. However during hearing on 29.09.2020, the Ld. Sr. Counsel for TPCL resubmitted that the words “shall not be made inferior to their existing service conditions” as in para 49(c) of the order be modified to read as “less favourable” in place of “inferior to”, in terms of similar provisions enshrined in Section 133 of the Act, 2003. **This submission is not liable to be accepted. The provisions in para 49(c) of the impugned order is not contrary to the mandate in Section 133 of the Act, 2003. It calls for no review. Hence it is to be rejected.** The provision has been carefully made keeping in view the Odisha Electricity Reforms Act 1995 as well as Electricity Act 2003 and hence calls for no review.

61. OPTCL submitted that the grounds on which the review has been sought for are based on surmises and conjectures. The petitioner seeks to get it protected on its own surmises which cannot be allowed to be accepted as grounds for review.

Rejoinder to Reply / Objections Filed By Odisha Power Transmission Corporation Ltd.

62. The Rejoinder was filed by the TPCL in response to the Objections dated 25.08.2020 ("Objections") filed by the Odisha Power Transmission Corporation Ltd. ("OPTCL") and it is state that the said Objections are without any merit and are devoid of any legal principles.

63. TPCL stated that the Tata Power Company Limited (“TPCL/Petitioner”) has already provided a detailed factual background along with relevant documents and craves leave of the Commission to refer to the same and read this Rejoinder along with the instant Review Petition. It is respectfully submitted that all the allegations/averments made by the OPTCL in its Objections are denied and disputed. Any omission on the part of the Petitioner to deal with any specific averments of the OPTCL in the Objections should not be construed as an admission/ acceptance thereof. It is submitted that there is absolutely no merit in the Objections filed by OPTCL and the averments and contentions made by OPTCL in its Objections are based on misconstrued reading of the extant statutory framework.

GRIDCO’s submission

64. GRIDCO in response to the contention made by the petitioner in Para 2.10 (a) of the Review Petition regarding imposition of obligation to provide Corporate Guarantee on TPCL contrary to RFP Documents, submitted that as 51 % share capital was to be vested in favour of TPCL and TPCL was to be the majority and controlling shareholder, the Commission directed TPCL to assist TPCODL to raise the capital and other finances required for the business of TPCODL including instruments for payment security to be provided under any agreement. As TPCL was the controlling shareholder, it may be difficult in the part of the newly created DISCOM (TPCODL) to arrange the required capital and other finance on its own strength. Responding to the clarifications sought by TPCL in its letter dated 11.03.2020, the Commission vide its letter dated 16.03.2020 has already responded. The clarification of the Commission is as follows;

"The verbiage of the existing provision makes it amply clear that it shall be the responsibility of TPCL to help and assist the OPERATING COMPANY in raising finance."

65. GRIDCO submitted that thus the ultimate purpose is to ensure arranging Letter of Credit and other finance requirement of TPCODL. If with the support/assistance of

TPCL, the said security is arranged, the corporate guarantee may not be required. Hence, raising the issue in this Review Petition is not admissible.

66. GRIDCO submitted that the direction of the Commission has been included in Article 5.1 of Share Holders Agreement (SHA) and TPCL has executed the Share Holders Agreement on dated 1st June, 2020 without raising any reservation. In line with the provision of Article 5.1 of SHA, the Commission has rightly considered the same in paras 40(a) and 41 (a) of the Vesting Order dt.26.05.2020 with a direction to TPCL to assist TPCODL in opening of Letter of Credit in favour of GRIDCO and OPTCL and also to provide necessary payment security such as corporate guarantee, if required. The ultimate purpose is to ensure that TPCODL provide the L.C. in favour of GRIDCO and OPTCL throughout the tenure of the agreement.
67. GRIDCO therefore submitted that the prayer of TPCL for deletion of the direction to TPCL to provide necessary security in the form of corporate guarantees or otherwise for TPCODL in this regard is not sustainable as TPCL being the majority shareholder, has the responsibility to help and assist TPCODL to arrange Letter of Credit and other finances and only if required to provide necessary payment security in the form of corporate guarantee to ensure establishment of L.C. throughout the tenure of the agreement.
68. GRIDCO in response to the Clause 2.10(b) of the review petition regarding restriction in operational flexibility for designing organisation structure on the vesting of the Utility has stated the following:
69. The averments made by the Petitioner is unjustified and baseless as it violates the fundamental rights of the employees of the erstwhile CESU as enshrined in the Constitution of India. The Petitioner in the Review Petition has alleged that the Vesting Order has imposed additional conditions which are a departure from the terms under the RFP. The Petitioner alleges that the RFP did not incorporate the point "the terms and conditions of employment of these employees in TPCODL shall not be made inferior to their existing service conditions".
70. The RFP at Clause 2.4.5.states that "All existing staff as on the effective date would form a part of the deemed licensee and shall be governed by their terms of their appointment". The terms of appointment of the employees of CESU as incorporated in their service contract needs to be protected. This particular clause of the RFP aims at protecting not only the contractual rights of the employees of CESU under their service contracts but also their Fundamental rights guaranteed under Article 14, 19 and 21 of the Constitution. Hence, the Commission has further enunciated on the aspect of protection of the rights of the employees by adding an additional point at para 49(c) in the Vesting Order that "the terms and conditions of employment of these employees in TPCODL shall not be made inferior to their existing service conditions". This in no way is in contradiction to CI.2.4.5 of the RFP.
71. GRIDCO submitted that the Petitioner has alleged that by including para49(c) in the Vesting Order, the doctrine of legitimate expectation has been violated. It may be stated here that the doctrine of legitimate expectation means an expectation of a benefit, relief or remedy that may ordinarily flow from a promise or established practice. The term 'established practice' refers to a regular, consistent predictable and certain conduct, process or activity of the decision-making authority. The expectation should be legitimate, that is, reasonable, logical and valid. Any expectation which is based on sporadic or casual or random acts, or which is unreasonable, illogical or invalid cannot be a legitimate expectation. In this particular instance it may be stated that it is rather the legitimate expectation of the employees under their service contracts that need to be protected.

72. Moreover, the laws applicable to the Power Sector employees in Odisha also need to be taken into consideration for determining the rights and obligations of the licensee. It may be noted here that the Odisha State Electricity Board was restructured to form GRIDCO in the year 1996 and the GRIDCO was disintegrated to form four DISCOMs namely CESCO, NESCO, WESCO & SOUTHCO in the year 1998. The rights of the personnel transferred thereby have been determined by the Orissa Electricity Reform (Transfer of Undertakings, Assets, Liabilities, Proceedings and Personnel) Scheme Rules, 1996 and 1998. In no circumstances whatsoever can the obligation under these Rules be violated. The relevant paragraph of Clause 8(a) of Orissa Electricity Reform (Transfer of Undertakings, Assets, Liabilities, Proceedings and Personnel) Scheme Rules, 1996 is as below:

'The transfer of personnel shall be subject to the 'condition that the terms and conditions of the services applicable to them on the effective date shall not in any way be less favourable to them than those applicable to them immediately before such date and all benefits of their respective services rendered before the effective date shall be recognised and taken into account while fixing the condition of services under the Transferee, except as otherwise provided under these rules.'

Hence the issue of the Petitioner in respect of the para49(c) of the Vesting Order is contrary to the above Rules.

73. GRIDCO stated that the Petitioner has alleged that para49(c) of the Vesting Order hampers the Operational flexibility of TPCODL. It may be stated here that the RFP has ensured operational flexibility by including Clause 2.3.1 (iii) in the RFP which states that the very objective of the sale is to bring in effective and professional management of the Utility through hiring and deployment of efficient, experienced and seasoned senior staff and distribution experts. Hence, the allegation that para 49(c) of the Vesting Order is an error apparent on the face of record is frivolous and baseless.

74. GRIDCO stated that the Petitioner in Para 5 of the review petition has alleged non-consideration of impact of force majeure events on AT&C loss trajectory for tariff determination. It may be stated that the Commission in the RFP outlined.

"2.4.3.3. Bidders would be required to quote, as part of their Technical Bids, the year-wise AT&C losses that they commit to achieve in each of the first five (5) financial years of operations of the Deemed Licensee, starting from FY 2018-19. Each Bidder should necessarily meet the AT&C loss levels of 27.00%, latest by the end of third financial year (i.e., FY 2020-21) and AT&C loss levels of 23.70% latest by the end of the fifth financial year (i.e., FY 2022-23). The Bidders will be evaluated on their commitment to reduce losses as part of the evaluation of their Technical Bids, and the Selected Bidder would be required to achieve the yearly AT&C loss targets committed by it in its Technical Bid."

75. GRIDCO stated that the Commission while disposing Case No. 11/2020 has considered the revised 10-year AT & C loss trajectory for period FY 2021 with AT&C Loss of 23.70% to FY 2030 at AT&C loss of 13.50% respectively. It may be mentioned, that considering the delay in takeover of the utility from 01.04.2020 to 01.06.2020, delay in Capex implementation and the impact of COVID-19 pandemic, the Commission has decided that if TPCODL substantially fails to achieve the AT&C loss commitments for 3rd year i.e. FY 23 determined as per point (d) of para 43 of the order then the Commission may review the AT&C loss level for tariff determination for 4th year i.e. FY :24 and revise it subject to a maximum of 23.70%.

76. Further, the Commission, in the para 77 of the vesting order dt.26.05.2020 has considered the impact of COVID-19 and has allowed TPCODL to avail of a working capital facility at competitive rates to meet the shortfall between collection and operating expenses for first three months. **The interest expenses on such working capital loan shall be allowed by the Commission as part of the truing up of FY 21 based on prudence check. Further, in case of extended impact of Covid-19, the Commission may consider extending the period of such working capital loan subject to prudence check.**
77. GRIDCO stated that from the above decision of Commission, it transpires that the Commission has considered the impact of the Pandemic on the AT&C Loss during the four years period and the targets fixed by the Commission for the AT&C loss are quite justified and reasonable considering the overall objectives of reduction of AT&C Loss. Thus, the submission made by the Petitioner is liable to be rejected.
78. Non-consideration of impact of force majeure events on AT&C loss targets for performance is denied by GRIDCO. However in respect of allowance of one additional year for meeting the stipulated AT&C Loss for meeting the third year targets, GRIDCO maintains its stand as already offered in its reply in the Para 7 of this Reply Affidavit on the basis of the directives of the Commission in redetermination of the AT&C loss Trajectory due to COVID-19 pandemic situation prevailing in the state.
79. GRIDCO in response to the Clause No. 2.10(e) of the review petition regarding collection of past arrears for the month of March'20, April'20 and May'20 by TPCODL not being treated as Past Arrears and denial of incentive for its collection contrary to RFP provisions, submitted as follows:-
80. As per the RFP, TPCODL is liable to collect the bills made after the effective date i.e 01.04.2020. Since the billing of March'20 & April'20 consumption happens after the effective date as provided in, RFP, it is the responsibility of TPCODL to bill and collect additional two months consumption and the same shall not be considered as collection of arrear dues and shall not entitle for incentive. TPCL is entitled for incentive for collection of past arrears i.e. consumption during Feb'20 and earlier period.'
81. The Petitioner has prayed for either to reduce the past arrears commitment of the Petitioner or increase the time for fulfilment of the same in the interest of justice and equity. It was because of TPCL's inability to take over the management on 01.04.2020, the Commission directed to bill & collect the energy consumed during Mar'20 and April'20 from the consumers and settle the liability for that period relating to GRIDCO & OPTCL and others. Hence, the prayer of the Petitioner is liable to be rejected.
82. GRIDCO in response to the Clause No. 2.10(f) of the review petition regarding transfer of Additional Serviceable Liabilities of CESU to TPCODL in contravention of the provisions of Section 21 (a) of the Act, submitted as follows:-
83. The Commission while citing the provision of Section 21 (a) of the Electricity Act, 2003 noted that certain current assets & liabilities pertaining to employees, consumers, suppliers and statutory payments, etc have not been indicated in the opening balance sheet provided in the RFP. Taking into consideration the interest of the employees, consumers, suppliers of CESU and to ensure that the continuing operation of the utility is not adversely impacted, the Commission decided to pass on certain current assets & current liabilities on to TPCODL thereby ensuring that TPCODL will not be adversely impacted due to such transfer.

84. To ensure that TPCODL is not adversely impacted due to shortfall, if any, in meeting the current assets (the "Additional Serviceable Liabilities"), Commission vide para 54 (e) of the Vesting Order dated 26.05.2020 specified the manner in which the additional serviceable liability will be dealt with. To ensure TPCODL is not impacted due to transfer of certain current assets & current liabilities on to TPCODL, the Commission has allowed the required mechanism. Therefore, the concern asserted by the Petitioner is not justified as Commission has rightly issued the vesting order.
85. GRIDCO in response to the Clause No. 2.10(g) of the Review Petition regarding treatment of employee liabilities, submitted as follows:-
- As per the Orissa Electricity Reform(Transfer of Undertakings, Assets, Liabilities, Proceedings and Personnel)Scheme Rules,1996, Employees transferred from erstwhile OSEB to GRIDCO shall have the it conditions of employment not inferior to the existing terms and conditions of employment. The same terms and conditions of employment have been retained for the employees transferred from erstwhile OSEB to GRIDCO and subsequently to CESCO and thereafter to CESU over the period of time upon restructuring of the Power sector and subsequent divestment and change in management of CESCO and CESU over the period and presently vested with TPCODL. The employees transferred from erstwhile OSEB or GRIDCO are covered under OCS Pension Rules'1992 and are entitled to terminal benefits i.e., Leave, Gratuity and Pension and accordingly these liabilities are being addressed by respective Trusts of the Licensee.,
86. GRIDCO stated that as regards the submission by the Petitioner for fully funding of the terminal benefits liabilities for existing as well as the retired employees, the Commission has issued directives in para 50(e) of the Vesting Order dt.26.05.2020, which is reasonable, justified and equitable with the certain directives for allowing the actual cash outgo for TPCODL for every year on account of pension, gratuity, leave encashment and rehabilitation liabilities as part of the ARR. Thus, the submission of the Petitioner is not justified and tenable.
87. GRIDCO in response to the Clause No. 2.10(h) of the review petition regarding restrictions on liquidation and use of security deposits/fixed deposits, the Respondent No.2 submitted the following:-
- GRIDCO submitted that the averments made by the Petitioner relating to inequitable restrictions on use of Fixed Deposits seem to be untenable. Commission while disposing the Case No.11/2020 has directed that TPCODL shall not be allowed to liquidate the fixed deposit with Banks except for the reasons for which it was collected. Further, the Commission has considered the liabilities to the tune of Rs. 1081.32 Crore relating to security deposit from Consumers, deposits from suppliers/contractors and deposits for electrification / service connection with total fixed deposits of RS.696.21 Crore as per provisional Balance Sheet as on 31.03.2020,the audited figure, shall be available on or before 30.11.2020 which shall be final.
88. GRIDCO submitted that the review sought for transfer of the fixed deposits to TPCODL free of any pledge or other security subsisting thereon or prior to the effective date does not hold good as the Fixed deposit has been created out of the funds to meet the statutory liability except under the heads on which the deposit was collected towards security deposit from the consumers and deposits from Suppliers/contractors for various ongoing works. As the operations of the Utility has been vested with TPCODL with transfer of Serviceable Assets and Liabilities as on the date of transfer, it is quite illogical and irrational for TPCODL for the above submission of utilising the Fixed Deposit in the normal course of business. Thus, the

contention of utilising the fixed deposits is quite untenable and is unacceptable in the eyes of law.

89. GRIDCO submitted that the review sought to the Clause No. 2.10(h) of the review petition regarding restrictions imposed on creation of charge over assets of TPCODL contrary to the existing Licence Conditions and submitted the following:

The contention of the Petitioner for allowing creating charge over assets of TPCODL without the approval of Commission is not justified and unacceptable. The Petitioner in its submission has raised on curtailment of the power in the present vesting order which was assigned to erstwhile CESU for creating charges on the Assets of TPCODL while discharging its functions the Commission has rightly not curtailed the power of creating Charges on Assets rather the approval from the Commission would bring more accountability on the Licensee to use the charge " creation exercise on realistic basis with due prudence check by Commission. The directives of the Commission shall authenticate and would result in creating charge on assets of TPCODL more effectively and diligently. Thus, the submission by the Petitioner may be rejected.

Second Submission of GRIDCO

90. GRIDCO submitted that in view of the review petition of TPCL, it is relevant to indicate that the petition cannot be construed to be one under Section 86(1)(k) of the Electricity Act, which empowers OERC only to discharge such other functions, broadly provided under the Act but does not include any such specific power of review as provided with the parameter of provision of Section 94(1)(f) of the Electricity Act read with Regulation 70 of the OERC (Conduct of Business) Regulations.
91. GRIDCO stated that grounds upon which the review has been filed cannot be the foundation and the grounds within the scope of review power in as much as the assertions made in the Review Petition are totally based on surmise and conjecture so also in anticipation of some problems to be faced in future, in course of operation of the CESU Utility taken over by the petitioner while running it through joint venture company
92. GRIDCO stated that TPCODL, pursuant to the SHA, SAA and BSA agreements already signed on 01.06.2020, with GRIDCO, in consonance with the order dated 26.05.2020 of the OERC passed in Case No. 11/2020 read with the RFP order dated 24.11.2017 and letter of Intent dated 20.12.2019 of OERC and upon various clarifications already sought for before signing of the agreements by the petitioner, TPCL and the clarification given in this regard by OERC, hence none of the grounds ex-facie demonstrate any grounds either being an error apparent on the face of record or any discovery of new matter, as such, there is no such grounds warranting any review of the order.
93. GRIDCO stated that, in course of submissions and arguments advanced by the learned counsel for TPCL on 29.09.2020, 11 nos. of issues were canvassed and apprised to the Commission, but none of them make out any point for review and this could not satisfy the Commission. It may be more crucial and relevant for consideration that, no ground has been put forth before the Commission as regards to any error of law to have crept in the vesting order dated 26.05.2020 rather all are on factual aspects, hence it does not call for any review of the order dated 26.05.2020.
94. GRIDCO submitted that on the following grounds the Review Petition is not maintainable and liable to be dismissed.
- (I) All the grounds seeking review in the Review Petition are based on **surmise and conjecture and also in anticipation** of some problems/difficulties,

hence, the same are premature cause and also may be fresh cause of action in future.

- (II) There is no cogent grounds demonstrating **any error of law, rather tried to show only error of fact, which are not at all the grounds of review**. It may be relevant to indicate that review power is derived from Section 94 of the Electricity Act, giving the power to the Commission as vested on the Civil Court under the CPC, 1908, one of such powers is:
- a) For reviewing its decisions/directions/orders. This power is also provided under the OERC (Conduct & Business) Regulation, 70.
 - b) Section 114 Order 47 Rule 1 of CPC gives power to review judgment/decreed/order, if there are discovery of new and important matter or evidence which after exercise of due diligence was not within the knowledge of the applicant or could not be produced by him at the time while the order was passed or on' account of some mistake or error apparent on the face of record, or for any other sufficient reasons. In a similar case, Punjab State Electricity Regulatory Commission (PSERC) in its order dated 30.09.2019 in Review Petition No.4/2019 rejected the Review Petition stating that "A review under Regulation 64 of the PSERC (Conduct & Business) Regulations, 2005, can be allowed on the following grounds:
 - (i) Discovery of new and important matter of evidence which after the exercise of due diligence was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or order was made; or
 - (ii) Some mistake or error apparent on the face of the record; or
 - (iii) For any other sufficient reason PSPCL has rested its case on the second alternative i.e. error apparent on the face of record. The Commission is not convinced of the submission of PSPCL that it is a case for review of its earlier decision on this ground. Rather the Commission is of the view that PSPCL is not seeking a review but an amendment of the order. The power of review is not to be confused with powers of an Appellate Court which on an appeal filed by the aggrieved party, may re-examine and modify/reject the decision of the subordinate court. A review cannot be an appeal in disguise, whereby the decision of the subordinate court may be modified or rejected. Hence, the review petition is not admissible and dismissed.
 - c) It has been the settled position of law laid down by the High Court of Orissa in the case of M/s CESCO Ltd. and Others Vrs Pramod Kumar Swain 2018 (II) OLR 314, Manika Jena and another Vrs State of Odisha and Others, 2018 (Suppl. II) OLR 229, M/s Hindalco Industries Ltd. Vrs State of Odisha and Others, 2018 (Suppl. I) OLR 1016 that a party cannot be permitted to reopen the case and to gain a full-fledged innings for making submissions, nor review lies merely on the ground that may be possible for the court to take a view contrary to what had been taken earlier. If a case has been decided after full consideration of the arguments made by a counsel, he cannot be permitted even in the garb of doing justice or substantial justice, to engage the court again to decide the transaction already decided. The scope of review is only be

done in case of discovery of new and Important matter or evidence, which after exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when a decree was passed, the mistake or error apparent on the face of the record and for any other sufficient reason.

95. In AIR 2005 SC 592, Board of Control for Cricket in India and Another Vrs Netaji Cricket Club and Others, the Supreme Court of India has clarified upon what circumstances and grounds, the review application can be maintainable and the court can review the order but with a limited scope, while discussing the purview of Section 114 and Order 47 of Rule 1 of CPC, the Apex court has categorically held in para-88, 90 and 93 of the said judgment that if the conditions precedents laid down by such provisions are satisfied, then only discovery of new and important piece of evidence or when there exists an error apparent on the face of record but also if the same is necessitated on account of some mistake or for any other sufficient reason which includes any such erroneous undertaking is given, and if there has been misconception of facts and law by the court, or even by an Advocate while arguing the matter then within that limited boundary and ground, take a review, no doubt, can be invoked as per the doctrine "actus curiae neminemgravabit". Grounds and the submissions made on behalf of TPCL, do not constitute any such ground within such parameter, hence there is no ground for review.
- (III) The review petitioner is also estopped by the, principle of estoppel, u/s 115 of the Indian Evidence Act, 1972 which enjoins that when one person has by his declaration, act or omission caused or permitted another person to believe a thing to be true and to act upon that belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing.
96. GRIDCO stated that in the aforesaid context, it is relevant to indicate that conduct of TPCL, the petitioner, which by its own act already created confidence and belief of GRIDCO, to have entered into the transaction consciously and on that basis to proceed. Thus, from the aforesaid conduct, it is well apparent that TPCL having accepted the deal and signed all the agreements, everything, they cannot take 'U' turn and again in the garb of Review Petition ultimately make such submissions, questioning the signing of various agreements which is prohibited by the rule of estoppel, the law of evidence. The High Court of Orissa has decided in the case of Dillip Kumar Lenka Vrs State of Odisha and Others, 2018 (II) OLR 578 that "If the petitioner has signed the document with the condition stipulated in the DTCN then it has to follow the same instead of refusing to comply with the same". This decision has been rendered following the judgment of the High Court in the case of M/s Auto Oasis Dealer, Indian Oil Corporation Ltd. Vrs M/s IOCL, 2016 (Suppl. II) OLR 237, wherein it was held that "no party can say he - will be bound by only one part of the agreement not the other part, unless such other part is impossible of performance or is void being contrary to the provisions of the Act, and such part is severable from the remaining part of the agreement".
- (IV) In AIR 2003 SC 578 B.L. Sreedhar and Others Vrs K. M. Munireddy and Others, the Supreme Court held that, the doctrine of estoppel is applicable in case affects the rights though estoppel is described as a mere rule of evidence it may have the effect of substantive rights as against the person estopped. An estoppel, which enables a party as against another party to claim a right of property which in fact he does not possess is described as estoppel by negligence or by conduct or by representation or by holding out ostensible authority. Then, estoppel, may itself be the foundation of a right as against the

person estopped and indeed, if it were not so, it is difficult to see what protection the principle of estoppel can afford to the person by whom it may be invoked or what disability it can create in the person against whom it operates in cases affecting rights. Where rights are involved estoppel may with equal justification be described both as a rule of evidence and as a rule creating or defeating rights (In para 25, 26 and 27) of the said judgment.

Here in the instant case, the right of GRIDCO already created by virtue of the vesting order and signing of the agreements and thus its substantive right as against TPCL, in the counterpart, which is estopped to seek review upon various grounds and in the event any such orders are passed, the same will affect the right of GRIDCO. Thus, it is not permissible by principle of estoppel and as per settled position of law laid down by the Apex Court as well as prohibited u/s 115 of the Indian Evidence Act.

- (V) The TPCL is bound by law to take all care and to give protection to the employees taken over from CESU Utility even otherwise than the vesting order on various agreements already signed by it, as per operation of law, u/s 133 of the E. Act, that the provisions relating to officers and employees which enjoins that the State Government may by a transfer scheme provide for the transfer of officers and employees to the transferee on the vesting of the properties, rights and liabilities in such transferee as provided u/s 131. It is further provided under sub-section 2 upon such transfer under the transfer scheme, the personnel shall hold office C~ service under the transferee on such terms and conditions as may be determined in accordance with the transfer scheme and the provisions thereunder also specified that such terms and conditions on the transfer shall not in any way be less favourable than those which have been applicable to them if there had been no such transfer under the transfer scheme.
- (VI) In consonance of the aforesaid provisions, Odisha Electricity Reforms Act, 1995 also provided in the same manner and Orissa State Government has framed the scheme, namely the Odisha Electricity Reform (Transfer of Assets, Liabilities, Proceedings, Personnel of GRIDCO to Distribution Companies) Rules, 1998 and the Rule 4 thereof provides that the condition applicable to transfer of specified personnel and therein, it has been provided that "all benefits of service accrued and created while in the employment under the transferor, shall be also given all protection. This provision has been also validated as per Section 185 of Electricity Act, which categorically says that all the action, under the provisions of O.E. Reform Act and the rules and Regulation there under and provisions of the said Act and Regulation, which are not inconsistent with the provisions of the E. Act and the rules and regulations there under, stands validated.
- (VII) The TPCL, while has candidly conceded in the counter affidavit submitted before the High Court in the writ petition filed by Nikhil Odisha Bidyut Shramik Mahasangha and Others Vrs. State of Odisha and Others in WP(C) No.3854/2020 all privileges, benefits and conditions of service of the employees/personnel of CESU Utility will be well protected, now taking stand contrary to the same on a different plea, thereby creating illusion and confusion.
- (VIII) On the basis of the aforesaid factual and legal submissions as have already been submitted orally on 29.09.2020, the Review Petition bears no merit, hence liable to be dismissed.

Rejoinder to the reply of GRIDCO

97. TPCL submitted that the present review petition has been filed under Section 94 (1) (f) of the Electricity Act, 2003 read with Section 86 (1) (k) of the Act and Regulation 70 OERC (Conduct of Business) Regulations. Considering the urgency the Petitioner in the pandemic situation has managed to file the present petition within 20 days of passing of the impugned order. There is no question on the admissibility or the maintainability of the present petition. It is clearly stated in Clause 2.4.7.4 of RFP and Clause 5.1 of SHA that the Petitioner TPCL shall only be assisting and helping TPCODL in arranging letter of credit facilities as a payment security mechanism. The responsibility of arranging letter of credit cannot be fastened on TPCL. The review petition in no way infringes the fundamental rights of the employees of erstwhile CESU. The Petitioner has the distinction of being top private players in each sector of value chain and is credited with the steering the energy sector on technology, process and platform. The impugned order whilst acknowledged the ongoing pandemic has failed to provide consequent relief. The respondent is equating submission for AT&C loss targets for tariff determination with AT&C loss of target for performance. The condition 12.5 of the Licence Conditions provides that the Licensee shall be entitled to utilise the assets for raising debts and it has to merely inform the Commission. The Commission has failed to realise that the fixed deposit are not created for any particular purpose but are similar to cash and bank balances of a company and therefore, any restriction on the ability of TPCODL to liquidate such fixed deposit would seriously hamper the ability to run the business efficiently. The existing pledge on the fixed deposit which form a part of the Utility would automatically fall away upon the vesting of the Utility in the purchaser by virtue of Section 21 (a) of the Act.

Reply filed by the Intervener Shri Janardan Pati

98. The intervener submitted that the Commission has categorically mentioned in para-82 of the said vesting order, the parties shall not be allowed to make any submission with regard to the matter dealt with the vesting order. That knowing full well & accepting the vesting order, the TPCL has filed a review petition on dated 16/06/2020. Hence the Commission should summarily reject the review petition as because after its operation since 26/05/2020, the TPCL have filed this review petition violating the orders of the OERC.
99. The intervener submitted that, the Commission is totally aware of the fact, the 51% share now under control of TATA Power, was earlier allotted to AES corporation, Jyoti structure Ltd. & AES Pvt. Ltd. in the year 1999. Soon after the AES Corporation & others left the management of CESCO, near about Rs.653 crs. along with Rs.175 crs provided by GRIDCO for management of CESCO, are outstanding against the said AES Corporation. As per the expert committee report headed by Soven Kanungo, Retd. IAS, all amounts have not yet been recovered. The matter of recovery of said amount, GRIDCO has filed a case before the District Judge, Khurda, Bhubaneswar vide arbitration petition no- 363 of 2007, which is now sub- judice.
100. The intervener submitted that, the Commission before hearing the review petition directed GRIDCO as well as the Govt. of Odisha to submit the status report of the said arbitration petition now pending before the district judge, Khurda, Bhubaneswar.
101. The intervener submitted that, regarding payment security, the petitioner raised the point of share holding agreement, which may not be accepted, as because the vesting order & the share holding agreement are separate documents. The vesting order of the OERC & share holding agreement between GRIDCO & TPCL is a bi party settlement.

102. The intervener submitted as regards the Aggregate Technical & Commercial loss trajectory for tariff determination post taking over of the Utility; the given loss trajectory in the vesting order is totally goes against the interest of the consumers. The Govt. of Odisha under the chairmanship of the Chief Secretary, have directed the AT&C loss should be 15% of all the DISCOMs, that should be taken into consideration.
103. The CESU management introduced a franchisee operation scheme to reduce the AT&C loss. Many divisions have reduced the AT&C loss of more than 20% within a period of 7 years. Therefore it is submitted that the Commission to revise the order as per the direction of Govt. of Odisha, i.e., 15% ATC loss for calculation of tariff determination.
104. The intervener submitted that regarding treatment of employee liabilities, the TPCL have not yet considered the engagement of 62% workforce i.e., 7680 workforce working for the interest of CESU through different franchisee & outside agency. The TPCODL should be directed to increase the staff strength & prepare the yardstick to manage the LT/ HT maintenance work, billing & collection work direct under the payroll of TPCL, not through the contractor.
105. The intervener submitted that as regards the fixed deposits and security deposits, the TPCL has to obtain permission from the OERC before any utilisation of such funds. The workers dues like pension, EPF dues should be well protected for the greater interest of the workers.
106. The intervener submitted that TPCL has accepted all the terms & conditions of the vesting order after due critical verification of CESU assets & liabilities.

Rejoinder to the reply to intervener Shri Janardan Pati

107. M/s. TPCL states that the intervener has not stated the organization which he is representing. It further states that the TPCL has already provided a detailed factual background along with relevant documents. If the argument put forth by the intervener is taken into account that would necessarily imply that no order / decree / judgement can be reviewed by the Courts. The Petitioner has legal right to seek review of impugned order. The view of the intervener that the impugned order and SHA were separate document is incorrect. It is submitted that the averments raised by the intervener are contrary to the extant regulatory framework as the component of tariff cannot be determined by way of executive orders / circulars. The intervener cannot seek direction regarding the operation of TPCODL by way of present reply. The vesting order is a judicial pronouncement and the aggrieved party can seek relief within the four corners of procedural law.

Second submission by Respondents Odisha power Employees Union and 7 Others

108. The respondent filed the case laws relied their objections in the following cases:
 1. Parsion Devi and others versus Sumitri Devi and others reported in (1997) 8 SCC 715 & Manu/SC/1360/1997
 2. Saw Chandra Kante and Others Vrs. Sheikh Habib reported in (1975)1SCC674& MANU/SC/0064/1975

In the **Parsion Devi and others versus Sumitri Devi and others** case the relevant extract of the judgment is given below:

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9. Under Order 47 Rule 1 CPC a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not

self evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under Order 47 Rule I Cpc. In exercise of the jurisdiction under Order 47 Rule 1 CPC it is not permissible for an erroneous decision to be "reheard and corrected". A review petition, it must be remembered has a limited purpose and cannot be allowed to be "an appeal in disguise".

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Commission's Order

109. The Commission heard the Petitioner, the Respondents and the Intervener in the matter, and went through all the materials on record.
110. The petitioner in this case, Tata Power Company Limited (TPCL) has filed this petition to modify/review the Commission's order passed in case No.11/2020 dt.26.5.2020 vesting the Utility of CESU into the new operating company TP Central Odisha Distribution Limited (TPCODL). The petitioner has raised various issues in the said vesting order for review and modification after taking over the TPCODL by acquiring 51% equity in the bid process undertaken by the Commission in pursuance to Section 20 & 21 of the Electricity Act, 2003 and direction of the Appellate Tribunal of Electricity (ATE) in this regard.
111. Before taking up the individual issues raised in the petition, the Commission observes that the bid process for selection of the successful bidder, in this case TPCL, was undertaken in a transparent and diligent manner. After the selection of the bidder, the LOI was issued which was accepted by TPCL. The LoI is of the nature of a contract that a party accepts. After acceptance of the LOI, wide consultations were undertaken with all the stakeholders such as GRIDCO, Government of Odisha and TPCL in order to arrive at a consensus on all the issues keeping the interest of the consumers paramount. Thereafter the RFP Documents namely Share Acquisition Agreement (SAA), Shareholders Agreement (SHA), Bulk Supply Agreement (BSA) and Bulk Power Transmission and SLDC Agreement (BPTA) were shared with the executing parties namely TPCL, GRIDCO and OPTCL. The parties were accorded the opportunity to seek clarifications. TPCL sought some clarifications which the Commission responded to. The Commission then issued the vesting order on 26.05.2020. Being fully aware of the terms of RFP, LoI, RFP Documents and more importantly the vesting order which is the subject matter of the review petition, TPCL took over the utility of CESU on 01.06.2020 by purchasing 51% equity shares in TPCODL and executing the RFP Documents on the same date. In view of this, the Commission, in the first place itself, does not find sufficient grounds for reviewing the terms of vesting after they have been accepted and the utility been taken over by TPCL. Nonetheless, now we will take up the individual issues raised by the petitioner in the petition.
112. The petitioner has stated that the imposition of obligation to provide corporate guarantee on TPCL is contrary to the RFP documents. This issue relates to the payment security mechanism for payment of BSP bills by the TPCODL to GRIDCO and transmission and SLDC charges payable to OPTCL. In this regard separate BSA and BPTA have been executed amongst TPCODL, GRIDCO and OPTCL. The payment security mechanism requires that the TPCODL shall provide to GRIDCO/OPTCL an unconditional, revolving and irrevocable Letter of Credit for an amount equivalent to two months of average monthly bill.

The Commission's order dt.26.5.2020 at para 40 and 41 deals with such payment security mechanism wherein it is mentioned that the TPCL shall assist in opening of the Letter of Credit and shall provide necessary security such as corporate guarantee, if required. From the plain reading of this para it is clear that the Commission has put the responsibility on TPCL to assist in opening of the LC and to provide necessary security such as corporate guarantee if required. It is therefore, evident that corporate guarantee is to be provided by TPCL if the circumstances necessitate.

It may be realized that the payment of bulk supply price and transmission & SLDC charges every month is a critical issue for the sustenance of the value chain of the power sector. The receipt of the power bills is vital for payment to the Generators for uninterrupted power supply into the system. Keeping this in mind the Commission has consciously attached importance to this arrangement under payment security mechanism. The provision of providing corporate Guarantee if required by TPCL will give comfort and assurance to all the stakeholders regarding the commitment and seriousness in the operation of the business. Therefore, this cannot be treated as a new obligation created by the Commission and is not an error apparent on the face of the record.

In view of such observations there is no error apparent on face of the record which is required to be reviewed.

113. One of the issues raised by the petitioner is regarding restrictions imposed on operational flexibility with regard to the treatment of existing employees. The petitioner has submitted that the intent of the petitioner for raising the present issue is to ensure the operational flexibility in resource planning and personnel placement and ability to frame efficient service policy as was promised to the petitioner. The petitioner has further submitted that raising this issue does not intend to seek reduction in the salary of the existing employees but to ensure efficient utilization of the personnel and organizational flexibility to make the best use of its personnel.
114. The petitioner has sought review of the direction that the terms and the conditions of employment of the CESU employees transferred to the TPCODL shall not be made inferior to their existing service conditions in any manner. The petitioner stated that this is not only contradictory but also against the doctrine of legitimate expectation.
115. In this regard, the Commission would like to highlight the provisions of RFP and the vesting order. The RFP conditions regarding treatment of existing Employees provides the following: *"2.4.5.1. All the existing staff of CESU would be transferred to the Deemed Licensee through the Vesting Order. All existing staff as on the Effective Date would form a part of the Deemed Licensee, and shall be governed by the terms of their appointment. However, the Successful Licensee would have the operational flexibility to design the organisation structure of the Deemed Licensee to ensure efficiency in operations and staff deployment."*
116. At para 49(c) of the vesting order the Commission has provided for the similar mechanism which is reproduced below:
All such staff shall form a part of TPCODL and shall be governed by the terms of their appointment. The terms and conditions of employment of these employees in TPCODL shall not be made inferior to their existing service conditions in any manner. TPCODL shall have the operational flexibility to design the organization structure to ensure efficiency in operations and staff deployment.
117. It can be seen from the above provisions in the RFP and the vesting order that the stipulations regarding employee service conditions are of similar nature. There is no deviation from the provision of the RFP. The Commission in the vesting order has

only reinforced the stated position by saying that the employee service conditions cannot be made inferior to their existing service conditions in any manner. By stating this, the Commission has provided an option to TPCODL to improve the service conditions. The Commission views that the terms and conditions of the employment cannot be altered to the disadvantage of the transferred employees under TPCODL. Nevertheless, Commission has also adequately allowed TPCODL the operational flexibility to design the organizational structure to ensure efficiency in operation and staff deployment as per para 49(c) of the vesting order. The stated provision that service condition on transfer to TPCODL shall not be made inferior to their existing service conditions in any manner, in no way curtails the operational flexibility provided in the vesting order or puts any constraint to design its organizational structure in its best interest.

118. Further in this regard the Commission observes that the continuity of the existing employees with their protected terms and conditions of service is important for the morale of the employees and continuity of the ongoing business. The Government of Odisha notified the Orissa Electricity Reform (Transfer of undertakings, Assets, Liabilities, Proceedings and personnel) Scheme Rules, 1996 with respect to the transfer of personnel from the erstwhile Orissa State Electricity Board (OSEB) to OHPC and GRIDCO. The said scheme also envisaged similar provision of treating the service under the transferee as continuous for the purpose of all service benefits and they shall continue to receive all the benefits on transfer.

In view of such observations there is no error apparent on face of the record which is required to be reviewed.

119. Another issue raised by the petitioner is regarding non consideration of impact of force majeure events on AT&C loss trajectory for tariff determination. The petitioner has stated that the Commission has erred in not considering the revision of AT&C loss trajectory for tariff determination purpose post taking over of the Utility by the petitioner considering the impact thereon of force majeure events i.e. Covid-19 pandemic and consequent lock down. The petitioner has made a prayer to allow one additional year of tariff determination at 23.70% due to pandemic and also since the period available is shorter by two months with takeover taking place w.e.f. 01.6.2020.
120. The petitioner has further submitted that the force majeure events have resulted in reduction of demand and consequent reduction in collections. In addition, the past collections also could not be realized due to lock down and reduction in paying capacity of consumers due to economic downturn resulting from lock down. The petitioner has, therefore, submitted allowing at least one additional year of tariff determination at 23.70% for these stated reasons. Petitioner has acknowledged that the vesting order provides for adjustment of AT&C loss reduction trajectory for the purpose of performance review, however no such adjustment has been allowed for purpose of tariff determination which is inequitable and an error apparent on the face of the record.
121. The Commission in this regard observes that the likely impact of the Covid 19 pandemic and emerging scenario thereafter have been taken into consideration in the vesting order. Para 44(d) of the vesting order addresses the impact of COVID on AT&C loss levels and provides a mechanism for dealing with the same. Further in para 77 of the Vesting order, the Commission has stated that the quantum of working capital facility availed specifically to tackle the liquidity crunch caused due to Covid 19 will be taken into account. The Commission has also observed to allow interest on such working capital facility as a part of ARR after undertaking prudence check. The Commission while assessing such impact will also take into consideration any relief

received by the operating company, collection efficiency and if loan has been availed at competitive rates.

122. In light of such relief measures granted in the Vesting order it is erroneous on the part of the petitioner to submit that Commission has not granted relief on account of the Covid 19 pandemic. The petitioner has submitted to grant further relief measures which are beyond the purview of the review. The Commission further observes that the performance of CESU/TPCODL on the parameters of billing efficiency and collection efficiency has improved appreciably during the current year after easing of the lockdown conditions. The collection efficiency has increased from 60.13% in Apr-2020 to 100.57% in Sep-2020. The AT&C loss has reduced from 60.93% in Apr-2020 to 31.62% in Sep-2020. This goes on to conclude that the performance of the DISCOM has improved which is likely to continue during the rest of the year with restoration of all the economic activities. We therefore firmly believe that the impact of the pandemic has been effectively contained. Nevertheless, the operating company may receive any relief if any, as envisaged in the Commission's vesting order dated 26.05.2020.

In view of such observations there is no error apparent on face of the record which is required to be reviewed.

123. Another issue raised by the petitioner is regarding non consideration of impact of force majeure events on AT&C loss trajectory for performance. Petitioner stated that AT&C losses greatly impact business viability and future growth. Accordingly, it is inequitable if the impact of the Covid-19 pandemic and consequent lockdowns, which are Force Majeure events, is not accounted for in the AT&C loss trajectory commitment which is part of the Vesting Order. Petitioner submitted that Commission has erred in stipulating an upper ceiling of 27% at the end of third year and 20.19% for the fifth year when no such cap was provided in the LoI or accepted by the Petitioner. Also, impact of pandemic should have been considered when fixing the AT&C loss trajectory commitment given the stringent penalty. Further, the fifth year number should also have been revised upwards as this is a cascading commitment for all years as also acknowledged by the Commission while pro-rating the loss levels downwards for all years and not only for first three years. Petitioner submitted that in light of the above, the Commission may review the performance benchmark levels and stipulate levels which are more reflective of the current economic/social crisis and at least provide one additional year to the Petitioner to meet the stipulated AT&C loss levels even if otherwise the same trajectory is maintained by this Commission.

124. The petitioner has stated that the Commission has erred in not considering the effect of the covid19 pandemic and not revising the performance parameters. The Commission has dealt with similar submission in the previous point and reiterates that the performance of the Operating Company is on a recovery path which is likely to continue in the coming months.

In view of such observations there is no error apparent on face of the record which is required to be reviewed.

125. An issue raised by the petitioner is regarding imposition of inequitable obligations in relation to past arrears contrary to RFP. The petitioner has stated that the Commission has erred in holding that the dues which were to be recovered by CESU against the bills of March, 2020, April, 2020 and May, 2020 shall not be considered as past dues/arrears and no incentive shall be applicable for this period although the petitioner has taken over the Utility from 01.6.2020. The petitioner has further agitated that as per the definition of the past arrear in RFP, the past arrears shall refer to the accumulated arrears from the consumers of the Utility outstanding as on the effective

date. The petitioner states that the Commission has stipulated that TPCODL shall be liable to collect the amount billed in the months of April and May, 2020 limited by the collection efficiency for FY 2020 net of amount already collected. The Commission has therefore stipulated an overt obligation of collection based on minimum efficiency which was not stipulated in the RFP or the LoI. Petitioner further stated that due to Covid 19 pandemic and consequent lockdown there has been adverse impact on the operations of the business and Commission therefore ought to appropriately adjust the committed past arrear recovery as submitted by the petitioner in order to ensure fairness and equity as there is penal consequence on the petitioner for not meeting the committed past arrear recovery. The petitioner has therefore, submitted to either reduce past arrear commitment on the petitioner or increase the time for fulfilment of the same in the interest of justice and equity.

126. The Commission has already dealt the issue of Covid 19 in the preceding paragraphs and there is no such review which is required on this aspect. As regards the treatment of the collection for the month of April & May, 2020 these are the uncollected current amount due to restrictions of Covid 19. Also, provisional bills were raised in this period, the actual bills being raised in the subsequent months. These bills are of the nature of running bills which will be paid off by the consumers in due course of time. Therefore, these uncollected amounts can in no case be considered as arrears as per the spirit of the RFP and vesting order which envisages incentives for collection of past arrears from live and permanently disconnected consumers which would require efforts from TPCODL. After the easing of the Covid 19 restrictions the uncollected amounts are required to be collected on the priority basis and in no case can be treated as arrears as contended by the petitioner. It is observed here that the collection fell short of the target when Covid 19 restrictions were the strictest in the months of March, April and May 2020. However after subsequent easing of the lockdown conditions the collection has picked up appreciably. The collection efficiency has increased from 60.13% to 100.57% from Apr-2020 to Sep-2020.

In view of such observations there is no error apparent on face of the record which is required to be reviewed.

127. One of the issues raised by the petitioner is regarding transfer of additional service liabilities to the operating company. The petitioner has submitted that the Commission has made an apparent error by passing on the additional service liabilities to the TPCODL which is contrary to the Section 21(a) of the Electricity Act, 2003. The petitioner further submitted that the additional service liabilities did not form part of RFP or any amendment thereto and it is therefore inequitable for such liabilities to be transferred to TPCODL. The petitioner has further stated that though the Commission has provided the mechanism for funding of such liabilities, the same will adversely impact tariff as the cost of servicing these liabilities is allowed as a pass through in tariff.
128. The petitioner has submitted that the Commission may review its decision in this regard and consider retaining these liabilities with the residual company/GRIDCO. The TPCODL can process all such claims and pass them on residual company/GRIDCO for settlement. The petitioner has therefore submitted that such provision in the order is an error apparent on the face of the record and ought to be reviewed. The petitioner has further submitted that if the Commission feels the need to transfer such additional service liabilities then TPCODL may be ring fenced and the same should be entirely allowed as pass through by the Commission after prudent check and no regulatory assets be created in this relation to give regulatory certainty to the petitioner.

129. The Commission with regard to this issue observes that Section 21(a) of the Electricity Act does not envisage passing on the past liabilities to the successor entity, however, the assets and liabilities of current nature need to be handled by the new operating company as a going concern. Further, the Commission has already “ring fenced” TPCL by providing a mechanism under which additional assets have been transferred for servicing the liabilities and in the event of any shortfall in meeting the liabilities, TPCODL has been allowed to avail of appropriate funding instruments, the cost of which shall be allowed in the ARR. The Commission again emphasizes that as the utility is being transferred as a going concern, in the interest of consumers and suppliers it is imperative that these liabilities be serviced by TPCODL. Moreover, the mechanism provided does not cause any adverse impact on TPCODL.

In view of such observations there is no error apparent on face of the record which is required to be reviewed.

130. Another issue raised by the petitioner is regarding transfer of unfunded employees' liabilities contrary to statutory framework. The petitioner has stated that the Commission has erred in directing that all the employees' liabilities of CESU towards pension, gratuity, leave encashment shall also get transferred to TPCL along with transfer of employees without clarifying that this stipulation only applies to liabilities arising after the Effective Date. The petitioner stated that the Commission did not intend to transfer to TPCODL past employees' liabilities other than PF liabilities which are included as a part of additional serviceable liabilities. Petitioner has stated that the retirement and other liabilities of employees not served under TPCODL should be fully funded and transferred so that there is no short fall in future, requiring funding from TPCODL or through tariff mechanism. The order therefore to such extent suffers from error apparent on face of record and ought to be reviewed. Petitioner stated that in case the Commission passes on such unfunded liabilities to the operating company the Commission may permit the petitioner to recover the same by way of a special surcharge over and above the tariff so as to ensure transparency in relation to the consumers. A similar mechanism of imposing surcharge over the tariff has been followed by the DERC to recover future employee's retirement liabilities due to short fall in initial funding.

131. The Commission in the vesting order at para 50 dealt with the issue of Treatment of Employee Liabilities. The CESU has four existing trusts each relating to Pension, Gratuity, Provident Fund and Rehabilitation trusts. The quantum of funds available in all the trusts as on 31.03.2019 is indicated in the Vesting Order. The Pension and Gratuity Trusts assess their annual requirement after considering interest earned on the investments and thereafter make requisition to the Utility. The Utility submits a projection of the disbursement to Trusts in their ARR for approval of the Commission. The Utility remits the same to the Trusts after such approval. As regards the Provident Fund Trust, the Utility is also allowed employer's contribution in the ARR. The Commission has provided clear mechanism as to how these Trusts will be dealt in future. The para 50 (e) is relevant in this regard and is reproduced below :

“(e) The Trusts, their investments as well as Employees' Liabilities shall be dealt with in the manner specified below:

- i. All the Trusts shall continue to exist, and investments made by the Trusts shall not be liquidated without prior approval of the Commission.*
- ii. TPCODL shall disburse the Employees' Liabilities to Trusts as per the mechanism specified in point (c) above.*

- iii. *Of the total Employees' Liabilities disbursed by TPCODL as per point ii above, the Commission shall allow as part of the Aggregate Revenue Requirement the actual cash out go for TPCODL for every year on account of pension, gratuity, leave encashment and rehabilitation liabilities.*
 - iv. *For provident fund liabilities, the Commission shall allow as part of the Aggregate Revenue Requirement, only the Employer's contribution towards provident fund made to CESCO Provident Fund Trust.*
 - v. *Except as provided in (iii) and (iv) above, no amount shall be allowed in Aggregate Revenue Requirement of TPCODL for contribution to the Trusts for increasing their corpus fund or investments.*
 - vi. *Investments made by the Trust shall be appropriately disclosed in the accounts of TPCODL as per the applicable accounting standards."*
132. The Commission in this regard observes that in the vesting order it has been clearly mentioned that all the Trusts shall continue to exist. The Commission has further directed that TPCODL shall disburse the employee's liabilities to the Trusts as per the prevalent mechanism for disbursement to the beneficiaries covered under the trusts. The same mechanism shall continue from the effective date and TPCODL shall be responsible to remit such amount to the trusts towards employee's liabilities. The Commission has further stated that the Commission shall allow as part of ARR the actual cash outgo for TPCODL for every year on account of pension, gratuity, leave encashment and rehabilitation liabilities. For provident fund, the employer's contribution shall be allowed in the ARR. In no case the TPCODL is impacted on account of payment of retirement benefits to the existing and past employees.
- In view of such observations there is no error apparent on face of the record which is required to be reviewed.
133. One of the issues raised by the petitioner is regarding the restrictions imposed on the use of fixed deposits terming it inequitable. The petitioner has submitted that the security deposits from consumers, suppliers, contractors, electrification, service connection, etc., have been kept in fixed deposits created against such liabilities. The Commission however, while transferring the liabilities and related fixed deposits has restricted the liquidation of the fixed deposits related to security deposits except for the reasons for which it was collected. The petitioner has submitted that it would not be possible to correlate fixed deposits with security deposits as the fixed deposits are far short of the security deposits in transfer to the TPCODL. The petitioner has therefore submitted that these are errors apparent on the face of the record and the Commission may clarify that all such fixed deposits transferred to TPCODL be made free of any pledge or other security subsisting there on or prior to the effective date. Any restriction on the ability of TPCODL to liquidate such fixed deposit would seriously hamper its ability to run the business efficiently. Encashment and use of monies transferred in form of fixed deposits should be at the discretion of TPCODL and no encumbrances/restrictions should be put on such use. The petitioner has therefore requested to remove such restriction on liquidation and use of fixed deposits.
134. The Commission in this issue observes that the fixed deposits which are created against the security provided by the consumers and various service providers are required to be specifically maintained for the purpose those have been created. In the erstwhile CESU as on 31.03.2020 the fixed deposits maintained with the banks are of Rs.696.21 crore. The fixed deposits are essential to be maintained and liquidated as and when required to pay back the security provided by the users. Therefore, the

Commission is of the firm opinion that in public interest, the restriction on liquidation of fixed deposits needs to be in place.

In view of such observations there is no error apparent on face of the record which is required to be reviewed.

135. One of the issues raised by the petitioner is regarding the restrictions imposed on creation of charge over assets of TPCODL. The petitioner in this issue has submitted that the Commission has committed a mistake of fact and error apparent on the face of record in imposing restrictions on TPCODL which are contradictory with existing licence conditions of CESU. The petitioner has further submitted that the Commission has erred in stipulating that TPCODL shall not be permitted to create charge over any of its assets or receivables without the approval of the Commission in para 79 of the vesting order. This stipulation is against the existing licence condition of CESU and also contrary to Section 21(b) of the Act which provides that all the rights and obligations of the existing licences shall stand transferred to the purchaser of such utility. The petitioner, therefore, submitted that the para 79 of the vesting order may be deleted which is seen as an amendment to the existing licence condition. The petitioner has also submitted that the Commission may delete the condition in the vesting order which requires approval of the Commission for creation of charge over the assets including receivable, for raising finance for TPCODL.

136. The Commission in this issue observes that the vesting order does not restrict TPCODL from creating charge over the assets. The vesting order only requires TPCODL to seek approval of the Commission before creation of charge over the assets. The Commission has also accordingly incorporated such condition in the amended new licence conditions of TPCODL. The Commission is aware of the fact that TPCODL is required to raise capital for its CAPEX investments and working capital. In this regard the TPCODL may accordingly seek approval of the Commission for creation of charge on the future assets for raising capital as and when required.

In view of such observations there is no error apparent on face of the record which is required to be reviewed.

137. An issue raised by the petitioner is regarding clarifying and allowing the discount to consumers/rebate as an expense for tariff determination purpose. The petitioner has stated that the Commission may clarify that any discount/rebate/incentive granted to consumers in accordance with directions of the Commission in its tariff order or otherwise shall be considered as legitimate expenditure and allowed as pass through cost in the petitioner's ARR. The petitioner has, therefore, stated that while addressing the issue of employees cost, R&M and A&G cost in paragraph 55 of the vesting order, the Commission has inadvertently missed addressing/clarifying this issue which is an error apparent on face of record.

138. The Commission in this regard observes that the issue of discount/rebate/incentive allowed to consumers will be dealt with in the ARR of TPCODL in accordance to the OERC (Terms and Conditions for Determination of Wheeling Tariff and Retail Supply Tariff) Regulations, 2014.

In view of such observations there is no error apparent on face of the record which is required to be reviewed.

139. The Electricity Act, 2003 at Section 94(1)(f) confers power on the Commission to review its order which is similar to Section 114 read with Order 47 Rule 1 of the Code of Civil Procedure on the following grounds:

- (a) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the applicant and could not be produced by him at the time when the decree or order was passed.
- (b) Some mistake or error apparent on the face of record,
- (c) For any other sufficient reason

The scope and ambit of review has been delineated by Hon'ble Supreme Court in the following judgments.

In *Sow. Chandra Kanta and Anr. v. Sheik Habib* AIR 1975 SC 1500 the Hon'ble Apex Court dismissed a review application observing as under:

“..... Once an order has been passed a review thereof must be subject to the rules of the game and cannot be lightly entertained. A review of a judgment is a serious subject and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility.”

Similar view has been reiterated by the Hon'ble Supreme Court in *Sajjan Singh and Ors. V. The State of Rajasthan and Ors.*, AIR 1965 SC 845, *Girdhan Lal Gupta v. D.N. Mehta and Anr.* AIR 1971 SC 2162, *Northern India Caterers' (India) Ltd. v. Lt. Governor of Delhi*, AIR 1980 SC 674, *Aribam Tuleswar Sharma v. Aribam Pishak Sharma and Ors.* AIR 1979 SC 1047 and *Green View Tea and Industries v. Collector Gollaghat and Anr.* (2002)1 SCC 109.

In *Subhash vrs. State of Maharastra and Anr.* AIR 2002 SC 2537, the Hon'ble Apex Court emphasized that the Court should not be misguided and should not lightly entertain the review application unless there are circumstances falling within the prescribed limits for that as the Courts and Tribunal should not proceed to re-examine the matter as if it was an original application before it for the reason that it cannot be a scope of review.

In Civil Appeal No. 5217 of 2010 the Hon'ble Supreme Court vide their recent judgement dated 01.02.2019 between *Asharfi Devi THR. LRs Vrs. State of UP and Others* reiterating the settled position of Law on review held that every error whether factual or legal cannot be made subject matter of review under Order 47 Rule 1 of the Code of Civil Procedure, though it can be made subject matter of appeal arising out of such order. In other words, in order to attract the provisions of Order 47 Rule 1 of the Code, the error/mistake must be apparent on the face of the record of the case.

140. The party must satisfy the Court that the matter or evidence discovered by it at a subsequent stage could not be discovered or produced at the initial stage though it had acted with due diligence. A party filing a review application on the ground of any other “sufficient reason” must satisfy that the said reason is analogous to the conditions mentioned in Order 47 Rule 1 CPC. Under the garb of review, a party cannot be permitted to re-open the case and to gain a full-fledged innings for making submissions, nor review lies merely on the ground that it may be possible for the Court to take a view contrary to what had been taken earlier. Even the judgment given subsequent to the decision in a case can be no ground for entertaining the review. Review lies only when there is error apparent on the face of the record and that fallibility is by the over-sight of the Court. If a Counsel has argued a case to his satisfaction and he had not raised the particular point for any reason whatsoever, it cannot be a ground of review for the reason that he was the master of his case and might not have considered it proper to press the same or could have thought that arguing that point would not serve any purpose. If a case has been decided after full consideration of arguments made by a Counsel, he cannot be permitted even under the garb of doing justice or substantial justice, to engage the court again to decide the

controversy already decided. If a party is aggrieved of a judgment, it must approach the Higher Court but entertaining a review to re-consider the case would amount to exceeding its jurisdiction, conferred under the limited jurisdiction for the purpose of review. Justice connotes different meaning to different persons in different contexts, therefore, Courts cannot be persuaded to entertain review application to do justice unless it lies only on the grounds mentioned in the statutory provisions.

141. In view of aforesaid statutory provisions and position of law settled by Hon'bel Apex Court, we observe that the TPCL has sought review of the order mainly on the grounds which are based on assumptions, surmises and conjectures. The petition mainly relies on his perceived grounds that the vesting order is inequitable, unjust, unreasonable, arbitrary, in violation of principles of natural justice or contrary to the Act and Regulations as well as the conditions of the License, RFP and other communications made by TPCL with this Commission. The petitioner seeks to get it protected on its own surmises which cannot be allowed to be accepted as grounds for review.
142. In the light of the above, we are of the considered view that there is no merit in the Review Petition and the same is accordingly dismissed as devoid of merit.

Sd/-
(G. Mohapatra)
Member

Sd/-
(S.K. Parhi)
Member

Sd/-
(U.N. Behera)
Chairperson