

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Dated: 23rd Sept. 2013

Present: HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER
HON'BLE MR. V. J TALWAR, TECHNICAL MEMBER

APPEAL No. 52 of 2012

In the Matter of:

M/s Ferro Alloys Corporation Limited
Randia, Bhadrak
Odisha

.... Appellant

Versus

1. Odisha Electricity Regulatory Commission
Bidyut Niyamak Bhawan, Unit-VIII
Bhubaneswar -751012, Odisha

2. North Eastern Electricity Supply Company of Orissa
Plot No. N/22, IRC Village, Nayapalli
Bhubaneswar – 751 022,
Odisha

.... Respondent(s)

Appeal No. 67 of 2012

IN THE MATTER OF:

M/s Tata Steel Limited
Plot No 273, Bhouma Nagar,
Unit IV, Bhubaneshwar,
Odisha

.... Appellant

Versus

1. **Odisha Electricity Regulatory Commission
Bidyut Niyamak Bhawan, Unit-VIII
Bhubaneswar -751012,
Odisha**

2. **North Eastern Electricity Supply Company of Orissa
Plot No. N/22, IRC Village, Nayapalli
Bhubaneswar – 751 022,
Odisha**

.... Respondent(s)

Appeal No. 68 of 2012

IN THE MATTER OF:

**M/s OCL India Limited
P.S. Raigangpur, Dist Sundergarh
Odisha**

.... Appellant

Versus

1. **Odisha Electricity Regulatory Commission
Bidyut Niyamak Bhawan, Unit-VIII
Bhubaneswar -751012,
Odisha**

2. **Western Electricity Supply Company of Orissa
Plot No. N/22, IRC Village, Nayapalli
Bhubaneswar – 751 022,
Odisha**

.... Respondent(s)

Appeal No. 69 of 2012

IN THE MATTER OF:

**M/s Balasore Alloys Limited
(Formerly known as Ispat Alloys Limited)
Balgopalpur, P.O. Rasulpur
Via-Mitrapur, Balasore,
Odisha**

.... Appellant

Versus

- 1. Odisha Electricity Regulatory Commission
Bidyut Niyamak Bhawan, Unit-VIII
Bhubaneswar -751012,
Odisha**
- 2. North Eastern Electricity Supply Company of Orissa
Plot No. N/22, IRC Village, Nayapalli
Bhubaneswar – 751 022,
Odisha**

Respondent(s)

**Counsel for the Appellant(s): Mr M G Ramachandran
Ms. Swagatika Sahoo
Mr R M Patnaik
Mr P P Mohanty**

**Counsel for the Respondent(s): Mr. Amit Kapur
Ms. Deepeika Kalia
Mr. Jibran Tak, Amicus Curiae
Mr. B K Nayak
Mr. Rutwik Panda for R-1
Mr. Buddy Ranganathan
Mr. Hasan Murtaza for R-2**

J U D G M E N T

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

1. The Appellants i.e. EHT Consumers, have filed these separate Appeals as against the impugned order dated 21.1.2012 passed by the Odisha State Commission. These Appeals were heard together and disposed of through this common judgment since the impugned order in these Appeals is one and the same.
2. The short facts are as follows:
 - (a) The Appellants are the large industrial consumers (EHT Consumers) of the Distribution Licensee (2nd Respondent) in the State of Odisha.
 - (b) Earlier, on the Petitions filed by the Distribution Licensee, the Odisha State Commission determined the tariff by the order dated 20.3.2010 for the Financial year 2010-11.
 - (c) As against this order dated 20.3.2010, the EHT Consumers filed separate Appeals in Appeal No.102, 103 and 112 of 2010 before this Tribunal.
 - (d) This Tribunal after hearing the parties, by the judgment dated 30.5.2011 remanded the matter to the Odisha State Commission with directions to correctly

determine the variation of average tariff for Appellant's consumer category with respect to average cost of supply and provide consequential relief, to the Appellants in terms of the tariff policy for FY 2010-11, and also with other directions relating to determination of voltage-wise cost of supply so that in future tariff orders the cross subsidy for different categories of consumers is determined with respect to cost of supply for respective consumer categories.

(e) Similarly, in respect of the Year 2011-12, the State Commission determined the Retail Supply Tariff by passing the Tariff order dated 18.3.2011.

(f) As against this order, the EHT Consumers filed separate Appeals in Appeal No.52 and 67 to 73 of 2011.

(g) This Tribunal, after hearing the parties, rendered the judgment dated 2.9.2011 setting aside the Tariff order dated 18.3.2011 for the Financial Year 2011-12 and directing the Odisha State Commission to re-determine the tariff within the timeframe by following its directions. This judgment dated 2.9.2011 has been confirmed by the Hon'ble Supreme Court in the Appeals filed by the parties by the order dated 30.9.2011.

(h) Accordingly, in pursuance of the orders passed by this Tribunal and Hon'ble Supreme Court, the State Commission, after hearing various stake holders, passed the impugned order dated 21.1.2012 re-determining the cross subsidy in tariff in respect of the Financial Year 2010-11 and 2011-12.

(i) As against this order, the Appellants, i.e. EHT Consumers have filed these present Appeals in Appeal No.52 of 2012, 67 of 2012, 68 of 2012 and 69 of 2012 before this Tribunal.

3. The Appellants are aggrieved by the impugned order in following aspects:-

(a) The Commission has not implemented the orders of this Tribunal by re-determining and giving effect to the revised tariff applicable to Appellant's category of consumers for the tariff years 2010-11 and 2011-12 on the ground that the tariff of other category namely domestic consumers is subject matter of proceedings in the High Court of Odisha and there is stay of revised tariff applicable to domestic consumers.

(b) The Commission has exceeded the scope of remand proceedings in dealing with host of other issues and in considering extraneous aspects when the Commission was required only to re-determine the tariff

applicable to Appellant's category of consumers as per the directions contained in the orders of this Tribunal. The State Commission had no jurisdiction to deal with the correctness of the conclusions arrived at by this Tribunal.

4. Originally, these Appeals were posted before the Division Bench for final disposal. At the time of final disposal, the Division Bench of this Tribunal, after hearing the parties, felt that since the issues in these Appeals would result in large scale impact on the power sector of this country, it would be appropriate to have these to be deliberated and decided by the Full Bench of this Tribunal. Therefore, the Division Bench by the order dated 2.1.2013, framed following six issues and referred the matter for consideration by the Full Bench:

- (a) Whether the State Commission is justified in declining to implement the directions of this Tribunal in its Judgment dated 30.5.2011 in Appeal No. 102,103 & 112 of 2010 on the ground that stay on revised tariff determined by the State Commission in its Tariff Order for FY 2011-12 on LT domestic consumers was ordered by Odisha High Court even though there was no pending case before any court against the Tariff Order for FY 2010-11 and no appeal had been filed against this Tribunal's judgment dated 30.5.2011?

(b) Whether the State Commission is justified in declining to implement the directions of this Tribunal given in its Judgment dated 2.9.2011 in Appeal No. 57,67 to 73 of 2011 even when the 2nd Appeal filed by the State Commission had been dismissed by the Hon'ble Supreme Court?

(c) Whether the directions of this Tribunal in these judgments are contrary to the Tariff Policy?

(d) Whether this Tribunal was bound to consider the 'impending amendment' of the Regulation 7(c)(iii) of OERC Tariff Regulations, 2004, notified on 10.8.2011 in its Judgment dated 30.5.2011 in relation Retail Tariff Order for FY 2010-11 passed by the Commission on 20.3.2010 and Judgment dated 2.9.2011 in relation to Retail Tariff Order for FY 2011-12 passed by the State Commission on 18.3.2011?

(e) Whether the Tariff Policy issued by the Central Government in the year 2006 has over-riding effect of the Commission's own Regulations?

(f) Whether the Tariff Fixation exercise carried out by the State Commissions is **quasi-legislative** function of the Commission and if it is so this Tribunal does not

have jurisdiction over the Tariff Orders passed by the State Commissions?

5. Before adverting to these issues, it would be better to refer to the chronological events which led to the filing of these Appeals. These relevant events are as follows:

(a) The Distribution Licensees filed the Petitions for determination of Annual Revenue Requirement and Tariff before the State Commission for the Financial Year 2010-11. The State Commission, after hearing the parties, passed the Retail Supply Tariff order for the Financial Year 2010-11 in these Petitions on 20.3.2010.

(b) The Appellants (EHT Consumers) aggrieved over by this order, filed the Appeals in Appeal No.102, 103 and 112 of 2010 before this Tribunal.

(c) While these Appeals were pending before this Tribunal, the Distribution Licensees on 30.11.2010 filed the Petitions before the State Commission for determination of Annual Revenue Requirement and Tariff for the Financial Year 2011-12.

(d) In these Petitions, the State Commission, after hearing the parties, passed the Retail Supply Tariff Order by the order dated 18.3.2011 for the Financial Year 2011-12.

(e) As against this order dated 18.3.2011, the Appellants filed the Appeals in Appeal No.57, 67 to 73 of 2011 on 21.4.2011 in regard to tariff determination for the Financial Year 2011-12. These Appeals were entertained and the same were pending before this Tribunal.

(f) At this stage, the other Appeals in Appeal No.102, 103 and 112 of 2010 in respect of the Financial Year 2010-11 as against the order dated 20.3.2010 which were earlier filed, came up for final disposal.

(g) This Tribunal heard these Appeals in respect of Financial Year 2010-11, rendered judgment allowing the said Appeals by the order dated 30.5.2011 by remanding the matter to the State Commission to correctly determine the variation of average tariff of the Appellant's category with respect to average cost of supply and provide consequential relief to the Appellants in terms of the tariff policy, if any and also other directions relating to determination of voltage-wise cost of supply for use in future tariff orders within six months from the date of pronouncement of the judgement.

(h) Thereafter, the other Appeals in Appeal No.57, 67 to 73 of 2011 as against the Retail Supply Order for the Financial Year 2011-12 were taken up for final disposal. This Tribunal, after hearing the parties by the judgment dated 2.9.2011 allowed the Appeals by setting aside the Retail Supply Tariff order of the State Commission dated 18.3.2011 and remanding the matter for determination in line with the judgment earlier given on 30.5.2011 giving similar directions.

(i) In the meantime, the Utkal Chambers of Commerce filed a Writ Petition before the Orissa High Court as against the tariff order in respect of the Year 2010-11. However, in view of the Tribunal's judgment allowing the Appeals in favour of the Appellant, the Utkal Chambers of Commerce withdrew their Writ Petition and consequently, the Orissa High Court dismissed the said Writ Petition as withdrawn by the order dated 6.9.2011.

(j) Being aggrieved by the order dated 02.9.2011, passed by this Tribunal, one EHT consumer namely M/s. Adhunik Metaliks Limited filed a Civil Appeal No.8093 of 2011 before the Hon'ble Supreme Court on 30.9.2011.

(k) The Hon'ble Supreme Court disposed of the Civil Appeal No.8093 of 2011 with the following observations:

We see no reason to interfere with the Impugned Order passed by the Tribunal, save and except – we give four weeks time to the Appellant to pay the amount under Notice dated 16.9.2011. Respondent No. 2 will not take any steps for a period of four weeks.

We hope that the Regulatory Commission would be in position to dispose of the case remitted to it by November 30, 2011. If, for any reason, the matter could not be disposed of by November 30, 2011, liberty is given to parties to move this court for grant of further period.

We make it clear that, in the event of the Regulatory Commission coming to conclusion that there are parties, who are affected in the matter of fixation of tariff, on remand, it may consider giving notice to all the affected parties in it's own discretion.

The civil appeal, accordingly, stands disposed of.

(l) On 7.9.2011, The Central Electricity Supply Undertaking, one of the Distribution Licensee in Odhisha, also filed a Civil Appeal No.8135 of 2011 before the Hon'ble Supreme Court raising the following points of law:

“(i) Whether the Learned Tribunal was justified in setting aside the Annual Revenue Requirement

*and Retail Supply Tariff order dated 18th March, 2011 of the Orissa Electricity Regulatory Commission (OERC) and remanding the matter to OERC with the direction to re-determine the Tariff for Financial Year 2011-12 (01.04.2011 to 31.03.2012) after determining the Cross-subsidies in accordance with the judgment dated 30.05.2011 in Appeal No. 102 of 2010 on the basis of cost of supply of each consumer category, **without even impleading much less hearing the various categories of consumers who are likely to be affected by the re-determination of Tariff by OERC pursuant to the impugned judgment?***

(ii) Whether the directions of the Hon'ble Tribunal in judgment dated 30.05.2011 in Appeal No. 102 of 2010 run contrary to the National Tariff Policy ?

(iii) Whether the Hon'ble Tribunal was justified in directing re-determination of Cross subsidies on the basis of cost of supply of each category in spite of appreciating that the determination of cost of supply to different categories of consumers is a difficult exercise in view of non-availability of metering data and segregation of the network cost?

(iv) Whether the Hon'ble Tribunal was justified in directing the determination of the Average Cost of Supply as per the formula devised by it even though according to the Tribunal itself determination of voltage wise cost of supply as per the said formula will not be very accurate?

(v) Whether the Hon'ble Tribunal was justified in directing re-determination of Tariff on the basis of

cost of supply of each category even though the Forum of the Regulators constituted under Section 166 of the Electricity Act, 2003 has recommended Cross subsidization on the basis of average cost of supply for the State as a whole for the time being keeping in view the prevailing situation in the power Sector ?

(vi) Whether the Hon'ble Tribunal was justified in directing re-determination of Tariff on the basis of cost of supply of each category even though the State Advisory Committee constituted under Section 87 of the Electricity Act, 2003 has also advised the OERC to adopt a preferential lower Tariff for Low Tension (LT) Commercial Establishments and Agricultural Consumers etc., who are directly affected by increase in the Tariff, for the reason that consumers of the other categories like Industrial Consumers and Commercial Establishments who avail electricity supply at High Tension (HT) and Extra High Tension (EHT) pass on the cost of Electricity Supply as a cost of their products?

(vii) Whether the Hon'ble Tribunal was justified in directing re-determination of Tariff on the basis of cost of supply of each category relying upon Regulation VII (c) (iii) of the OERC (Terms & Conditions for Determination of Tariff) Regulations, 2004 even though the said Regulations have since been amended by the fifth amendment w.e.f. 10.8.2011?"

m) This Civil Appeal No.8135 of 2011 has also been dismissed by the Hon'ble Supreme Court by the order dated 22.4.2013 with the following observations:

“In view of earlier orders passed by this Court, it is not necessary to pass any further orders. The Appellants are at liberty to challenge the order now passed by the Orissa Electricity Regulatory Commission. The Appeals are accordingly dismissed.”

- (n) Being aggrieved by the order dated 02.9.2011, passed by this Tribunal, the State Commission also filed Civil Appeals No.9136 – 9143 of 2011 before the Hon’ble Supreme Court raising following questions of Law:

QUESTION OF LAW:

The present Appeal raises the following substantial question of law for determination of this Hon’ble Court:

(i) Whether the learned Appellate Tribunal for Electricity was justified in passing the impugned judgment dated 02.9.2011 following its judgment dated 30.5.2011 even though OERC has filed Review petitions before the learned Tribunal for review of the judgment dated 30.5.2011 ?

(ii) Whether the Learned Tribunal was justified in setting aside the Annual Revenue Requirement and Retail Supply Tariff order dated 18th March, 2011 of the Orissa Electricity Regulatory Commission (OERC) and remanding the matter to OERC with the direction to re-determine the Tariff for Financial Year 2011 – 12 (01.04.2011 to 31.03.2012) after determining the Cross-subsidies on the basis of cost of supply of each consumer

category, without even impleading much less hearing the Domestic LT consumers (forming approximately 80% of the total consumers of the State of Orissa) who are likely to be adversely affected by the re-determination by OERC in accordance with the directions of the Appellate Tribunal?

(iii) Whether the learned Tribunal was justified in directing re-determination of Tariff for FY 2011-12 after determining the Cross-subsidies on the basis of cost of supply of each consumer category relying on Regulation 7 (c) (iii) even though Regulation 7 (c) (iii) of OERC (Terms and condition for determination of Tariff) Regulations, 2004 has been amended Vide Notification dated 30.5.2011 and published in the Gazette on 10.08.2011.

(iv) Whether the learned Tribunal was justified in directing re-determination of Tariff for FY 2011-12 after determining the Cross-subsidies on the basis of cost of supply of each consumer category contrary to the Tariff Policy?

(v) Whether the learned Tribunal was justified in directing redetermination of Tariff for FY 2011-12 after determining the cross-subsidies on the basis of cost of supply of each consumer category even though the State Advisory Committee (SAC) constituted under Section 87 of the Electricity Act, 2003 has advocated before OERC to have preferential lower tariff for LT consumers considering their capacity to pay as tariff applicable to them directly affects them, whereas all other categories like HT, EHT Industrial consumers and Commercial consumer taking

power at bulk, the electricity tariff is nothing but a "Pass Through" item in their business activities. The State Commissions are duty bound to give due consideration to the advice of SAC for protection of the interest of all consumers after considering cash subventions of the State Govt., if any.

(vi) Whether the learned Tribunal was justified in directing re-determination of Tariff for FY 2011 -12 after determining the cross-subsidies on the basis of cost of supply of each consumer category even though the formulation of Bulk Supply Tariff Order and Retail Supply Tariff Order is an integrated exercise and re-determination of the Retail Supply Tariff in accordance with the directions of the learned Tribunal will necessitate the re-determination of Bulk Supply Tariff also.

(vii) Whether the learned Tribunal was justified in entertaining the Appeal filed by the Respondent HT/EHT Industries challenging the Retail Supply. Tariff order dated 18.03.2011 of OERC for FY 2011-12 even though the HT and EHT category of consumers (which includes the respondents herein) had filed Writ Petition before the Hon'ble High Court of Orissa being W.P. (C) 8451 of 2011 through their Association namely Utkal Chamber of Commerce & Industry challenging the very same Retail Supply Tariff order dated 18.03.2011 of OERC for FY 2011-12?

- (o) Along with these Civil Appeals No. 9136 -9143 of 2011, the State Commission also filed an I.A. No 2 in Civil Appeal no. 8093 before the Hon'ble Supreme Court for clarification of the order dated

30.09.2011 passed by the Hon'ble Supreme Court in the appeal no. 8093 raising almost identical grounds as were raised in these Civil Appeals.

- (p) On 8.11.2011, the Hon'ble Supreme Court dismissed the Civil Appeals No.9136-9143 of 2011 along with I.A. No.2 in Civil Appeal No.8093 of 2011 seeking clarification/modification of the Order dated 30.9.2011.
- (q) Thus, through these orders dated 30.9.2011 and 8.11.2011 the Hon'ble Supreme Court confirmed the judgment of this Tribunal dated 2.9.2011 reaffirming the judgment of this Tribunal dated 30.5.2011.
- (r) Even after the dismissal of the Appeals by the Hon'ble Supreme Court, Odisha State Commission filed the Review Petition before this Tribunal for review of the earlier judgment which was rendered on 30.5.2011. However, at the end, the learned counsel for the State Commission requested permission to withdraw the said Review Petition. Accordingly, this Tribunal dismissed the same as withdrawn by the order dated 30.11.2011. In view of the conduct of the State Commission of having filed Review Petition before

this Tribunal, even though, the Appeal filed by the State Commission was dismissed by the Hon'ble Supreme Court, this Tribunal imposed cost on the State Commission in the order dated 30.11.2011.

- (s) Thereupon, the State Commission, after hearing the parties in pursuance of the remand order passed by this Tribunal relating to the tariff of EHT consumers passed the impugned order on 21.1.2012 regarding tariff in respect of the Financial Year 2010-11 and 2011-12.
- (t) Having felt aggrieved over the said impugned order, the present Appeals have been filed by various Appellants who are EHT consumers on the main ground that the directions given by this Tribunal in the judgment dated 30.5.2011 and 2.9.2011, which have been confirmed by the Hon'ble Supreme Court have not been complied with.
- (u) After hearing the learned Counsel for the parties, the Division Bench of this Tribunal having felt that these issues which will have a large impact on the power sector, have to be deliberated by the Full Bench by the order dated 2.1.2013, referred the

matter to the Full Bench after framing the relevant issues.

(v) Accordingly, this Full Bench was constituted and the Appeals were taken up for fresh hearing.

6. In view of the importance of the issues framed by the Division Bench for consideration by this Full Bench which requires thorough analysis, we thought it fit to appoint a learned Counsel as Amicus Curiae to assist this Tribunal to enable us to determine all these issues. Accordingly, we appointed Mr. Amit Kapur by the order dated 29.1.2013 requesting him to assist this Tribunal to decide the above issues.
7. Accordingly, Mr. Amit Kapur, the Amicus curiae, after making a thorough preparation, made effective presentation analysing all these issues. He also filed written submissions.
8. Similarly, we have heard the learned Counsel for all the parties who also argued at length. They also filed the detailed Written Submissions.
9. We would now refer to the arguments made by the parties.
10. The learned Counsel for the Appellants assailing the impugned order submitted the following:-

“(a) The State Commission has, by passing the Impugned Order, acted in defiance of the principles of judicial discipline which demand that the directions of this Tribunal given in the Remand Orders should have been followed and given effect to. Failure to implement the same cannot be justified on the ground of pendency of similar proceedings before other forum, as the principles of judicial discipline demand that orders of higher authorities have to be followed unless and until the said orders of the higher authorities have been interfered with by the Appellate forum. This principle of judicial discipline is enshrined in Section 111 of the Act, by providing that the first appeal from the State Commission lies before the Tribunal. Unless an order of the Tribunal is set aside or interfered with by the Hon’ble Supreme Court of India, which is vested with the right of second appeal under Section 125 of the Act, the principles of judicial discipline demand that the State Commission abide by and give effect to the orders and directions of the Tribunal.

(b) Moreover, the stay order passed by the High Court of Odisha, pertained exclusively to the tariff of LT category of consumers only and so it could not affect the power of the State Commission to implement and give effect to the Remand Orders passed by this Tribunal. The observations of the Hon’ble High Court of Odisha on 30.3.2012 in the

Public Interest Litigation in relation to the computation of cross-subsidy in tariff may not be used to justify the decision of the Commission in the Impugned Order as the Hon'ble High Court has categorically stated itself that the correctness of fixation of tariff was not a matter on which it was inclined to exercise jurisdiction, and directed the petitioners to approach the appropriate statutory authority for the same.

(c) Therefore, the observations of the High Court in relation to the computation of cross-subsidy in tariff were *obiter dicta*, which do not have authoritative effect under the well-established doctrine of *stare decisis*. The scheme of tariff determination under the Act supports the principle of determining cross-subsidy on the basis of 'actual cost of supply' (in other words, 'voltage-wise cost of supply') and the principle of determination of cross-subsidy on the basis of 'average cost of supply' as seemingly espoused by the Commission is not in consonance with the Act, the Tariff Policy, the Electricity Policy or the applicable provisions of the Commission's Tariff Regulations."

11. Refuting the arguments made by the Appellants regarding the defiant attitude of the State Commission the Learned Counsel for the State Commission made the following submissions.

- (a) As per the directions of this Tribunal and Hon'ble Supreme Court, the State Commission initiated the remand proceeding by issuing notices to all the petitioners including all the objectors of original tariff proceeding for redetermination of cross-subsidy for FY 2010-11 and 2011-12 in Case No. 140-143/2009 and 146-149/2010 and heard all the parties present and disposed of the remand proceeding through an order on 21.01.2012 within the stipulated time as allowed by Hon'ble Supreme Court.
- (b) In obedience to the direction of this Tribunal the State Commission in its Impugned Order has fully complied with all the direction of this Tribunal. The crux of the issue of this Appeal is whether the 'cross-subsidy in tariff' is required to be determined based on 'voltage wise cost of supply' or 'Average cost of supply' to the State as a whole. In this regard the Hon'ble High Court of Odisha in WP(C) No. 8409 of 2011 dtd. 30.03.2012 in the matter of Retail Supply Tariff of FY 2011-12 in para 10 has held as under:

“10. xxxxxxxxxxxx

We may state here that a conjoint reading of Section 61 (g) of the Electricity Act and Paragraph 8.3.(2) of the National Tariff Policy makes it clear that it does not provide for any category of consumers and it is also an admitted fact that there is no methodology provided for

computing cross-subsidy. Such computation may be the average cost of supply or cost of supply voltage wise or cost of supply to various consumer categories.

At present the OERC is guided by the notion of subsidy by average cost of supply for the State as a whole, which has been recommended by the Forum of Regulators (FOR) and, in our considered opinion also, the same is a practical solution, at least in the present context of the Indian Power Sector.

11. At last, we may make it very clear that computation of surcharge is totally different from computation of tariff and Regulation 7.B (c), III. as it stood prior to amendment and as it stands at present, is only applicable to surcharge and surcharge is only levied on wheeling consumers.

*Hence, though the writ application filed by Utkal Chambers of Commerce was withdrawn, the argument advanced by Mr. Pitamber Acharya is fallacious and the **computation made by the OERC on the basis of average cost of supply to the State as a whole is not illegal but the same is in accordance with the National Tariff Policy.***

- (c) The State Commission has completely adhered to the mandate of Electricity Act, Regulation and Tariff Policy and the same has been vindicated by the Division bench of the Hon'ble High Court of Odisha in the above conclusive findings. The above findings given by the Hon'ble High Court in the public interest litigation cannot be considered as *obiter dicta*.

- (d) The Hon'ble High Court had observed that determination of subsidy by average cost of supply as recommended by the Forum of Regulators is the correct principle for determination of cross subsidy only after hearing all the parties and after going through the relevant provision of the Act, Regulations and the Tariff policy and after analyzing the same.
- (e) Further, the Commission's orders on ARR of power utilities for various years are pending for adjudication before this Tribunal. The process of tariff determination and approval of Annual Revenue Requirement is mutually dependant. Therefore, any re-determination of the tariff for the Appellant's consumer category by the State Commission in turn would result in re-determination of ARR of utilities and in that event, it would vitiate the proceedings in the Higher forum.

12. Now, we would quote the findings of the State Commission in the impugned order which are summarized as under:

- a) From an all-India prospective, cross-subsidy in tariff should be based on average cost of supply for the State as a whole as stipulated in Tariff Policy and National Electricity Policy as well as guidelines adopted on "Model Tariff" Regulations by the Forum of Regulators, a statutory body created under the Act. Its

decisions and findings are to be taken as guiding principles for taking decisions under various matters in regard to implementations of the provisions of the Act.

b) This Tribunal has relied upon the regulation 7(c) (iii) of the Commission's Tariff Regulations, 2004. This Regulation is applicable only for the limited purpose of determination of surcharge that an open access consumer has to pay. It has no application to the tariff determination.

c) The Regulation 7(c)(iii) was inconsistent with the Tariff Policy, 2006 and has, accordingly, been amended to be in line with the provisions of Tariff Policy, 2006.

d) The State Commission while determining tariff for different categories of consumers has been working out cross subsidy based on average cost of supply in compliance with the Tariff Policy, 2006 which would prevail over Regulation 7(c)(iii) of the Tariff Regulations, 2004.

e) Electricity is a concurrent subject under Entry No. 38 of List II of the 7th Schedule to the Constitution of India. Framing of Regulation by the State Electricity Regulatory Commission is a subordinate legislative

function under the Electricity Act, 2003 which is a Central legislation. According to the provisions of the Article 254 of the Constitution of India, if any provision of law made by the Legislature of a State is repugnant to the provisions of law made by Parliament which Parliament is competent to enact law with respect to one of the matters enumerated in the Concurrent List, the law made by the Legislature of the State shall to the extent of the repugnancy be void.

f) The Commission had taken suo motu action for amendment of the aforesaid Regulation 7(c)(iii) long back through public hearing much before the Appellant category of consumers filed Appeals before this Tribunal against the Commission's tariff order in respect of the FY 2010-11 and 2011-12 and amended the Regulation as per OERC notification dated 30.05.2011 which were published in the Odisha Gazette in August, 2011,

g) Despite the requirement envisaged under para 8.3.2 of the Tariff Policy that tariffs are to be kept +/- 20% of the average cost of supply, the State Commission is required to follow the Tribunal's direction to calculate cost of supply voltage-wise in their order dated 30.5.2011 and order dated

02.09.2011. In determining tariff, the Commission has to consider the adverse impact on the LT consumers and other stake holders as stipulated by the Hon'ble Supreme Court.

h) The Commission is finding it difficult to re-determine the Tariff for FY 2010-1011 and FY 2011-12 and holds the view that Tariff can be reworked only after, and subject to, decision of the High Court.

i) There is force in the argument of some objectors that the tariff proceeding is a quasi-legislative proceedings and not a judicial proceeding for the following reasons:

i. It involves determination or adjudication of rights of specific parties before the Commission on the basis of evidence adduced by them.

ii. The quasi-legislative character of tariff-setting has been repeatedly held by the Apex Court.

iii. It is quasi-legislative because it does not emanate from sovereign legislative authority or its delegate but it is inherently legislative in character affecting a large, indeterminate population.

iv. Sections 62 and 64 of the Electricity Act, 2003 do not even provide for formal hearing of those who give objections and suggestions in response to public application of a licensee for setting tariff. Section 64(3) provides for “considering” all suggestions and objections received from the public. This is of the nature of pre-legislative consultation of interest groups, provided for in many statutes.

v. Transparent pre-legislative consultation of interest groups does not convert the proceeding into a judicial or quasi-judicial proceeding, nor does it convert regulatory body into a judicial tribunal, though the regulator in other situations (e.g. cancellation of licence) has a duty to proceed judicially.

vi. The provisions of Section 95 of the Electricity Act, 2003 to the effect that all proceedings before the Appropriate Commission shall be deemed to be a judicial proceeding are the special deeming provisions only for the purpose of empowering the State Commission for proceedings as against the offences of perjury and intentional insult, etc. The fiction created by the Act does not go beyond its

specific purpose and does not convert the regulatory body into a civil court for all purposes and does not convert what is inherently a quasi-legislative proceeding into a judicial proceeding. A fiction of law is always strictly construed and kept confined to its own purpose.

j) Tariff proceeding is a continuous process and tariff is set on the basis of periodicity (at present from year to year). It is not intended by the Act that Tariff Order should be bogged down in litigations thereby paralysing the market correction and other regulatory process set in motion by the Commission. Any error in the Order of the Commission can always be corrected in the subsequent order and a tariff setting exercise is not to be undertaken more frequently than once in a year for any reason ordinarily (Section 62 (4) of the Act) so that uncertainty which is against Multi-Year Tariff principle is avoided. Therefore, any interference at this stage by the Tribunal at the instance of only HT and EHT consumers not only throws the economy of the State out of gear but also deprive many interest groups to put forth their grievances.

13. Let us now deal with each of the issues framed by the Division Bench reproduced at para-4 above.

14. The **issue (i) and (ii) are inter-connected** and same could be discussed together.

15. Let us quote those issues (i) and (ii) which are as under:

(i) Whether the State Commission was justified in declining to implement the directions of this Tribunal in its Judgment dated 30.5.2011 in Appeal No. 102,103 & 112 of 2010 on the ground that stay on revised tariff for FY 2011-12 on LT domestic consumers was granted by Odisha High Court even though there was no pending case before any court against the Tariff Order for FY 2010-11 and there was no appeal filed against this Tribunal's judgment dated 30.5.2011?

(ii) Whether the State Commission was justified in declining to implement the directions of this Tribunal given in its Judgment dated 2.9.2011 in Appeal No. 57,67 to 73 of 2011 even when the 2nd Appeal filed by the State Commission against the said judgment had been dismissed by the Hon'ble Supreme Court ?

16. According to the Appellants, the State Commission in the impugned order declined to implement the directions of this Tribunal given in the judgment dated 30.5.2011 as well as the judgment dated 2.9.2011 and there is no justification whatsoever for the State Commission, being the Subordinate Authority, to have declined the implementation

of those directions issued by this Tribunal being the Appellate Authority while re-determining and revising the tariffs applicable to the Appellant's category of consumers for the Financial Year 2010-11 and Financial Year 2011-12.

17. Let us quote the directions given in the judgment dated 30.5.2011 and 2.9.2011 remanding the matters to the State Commission for re-determination of tariff along with directions:

(a) Judgment Dated 30.5.2011

The crux of the above directions given in the judgment dated 30.5.2011 are summarised as under:

(a) The Tribunal had noted that the Odisha Commission had erred in clubbing different consumer categories having different tariff in to one category based on voltage of supply and had determined cross subsidy payable by thus clubbed category.

(b) The Odisha Commission was directed to correctly determine the Average Tariff for each of the consumer category by dividing the total expected revenue from the category by total projected sale to that category of consumer as per ARR and redetermined the

variation tariff for different consumer categories with respect to average cost of supply to examine if the mandate of the Tariff Policy of having tariff within \pm 20% of average(overall) cost of supply has been met or not.

(c) To provide consequential relief, if any, to the Appellants' consumer category in terms of tariff policy.

(d) The Odisha Commission was directed to determine the voltage wise cost of supply for each category of consumers suggesting simplified procedure for the same.

(e) To determine the cross subsidy with respect to voltage wise cost of supply for different categories of consumers and to ensure in the future tariff orders that the cross subsidies are reduced gradually as per the provisions of the Act and to also ensure that the tariff of each category of consumer is within \pm 20% of the average (overall) cost of supply as per the Tariff Policy.

(b) Judgment Dated 2.9.2011

Similarly, the directions given in the judgment dated 30.5.2011 have been reiterated by this Tribunal in the judgment dated 2.9.2011. They are as follows:

“5. The crux of the findings given in the above paragraphs are as follows:

(a) The State Commission is required to determine voltage wise cost of supply.

(b) The cross subsidy is to be calculated on the basis of cost of supply to the consumer category.

(c) The cross subsidy is not to be increased but reduced gradually.

(d) The tariff of each of the consumer categories is to be within +20% of the average cost of supply.

(e) The State Commission is to determine cross subsidy for different categories of consumers within next six months from Financial Year 2010-11 onwards and ensure that in future tariff orders, cross subsidies for different consumer categories are determined according to the directions given in the judgment and that the cross subsidies are reduced gradually as per the

provisions of the Act.

6. In addition to above findings, this Tribunal found flaw in the methodology used for calculating cross subsidy for industrial consumers and gave another methodology to be adopted for determining the cross subsidy.

7. In view of the above directions given by this Tribunal to the Commission to determine cross subsidy for different categories of consumers within next six months from Financial year 2010-11 onwards and to ensure that in future orders for ARR and tariff of the distribution licensees, cross subsidies are reduced gradually as per the provisions of the Act, the impugned tariff order for the year 2011-12 which is a subject matter in the present Appeals is also required to be set-aside and remanded back.

8. Accordingly, the impugned order of the Commission is set-aside and remanded back for fresh consideration of the Commission in the light of the directions given by this Tribunal in Appeals No.102, 103 and 112 of 2010 dated 30th May, 2011. While remanding the matter to the State

Commission, as requested by the Counsel for the parties, we have to consider the impact of setting aside the impugned order on the revenues of distribution licensees of the State.”

- 18.** Having taken note of these directions, the State Commission referred to the scope of remand in **Para 1 to 5 of the impugned order**. They are as follows:

“1. The Commission had issued Retail Supply Tariff Order for FY 2010-11 on 20.03.2010 revising the tariff of different categories of consumers. Being aggrieved by the said order of the Commission, three EHT consumers namely, M/s. Tata Steel Ltd., M/s. Ferro Alloys Corporation Ltd. and M/s. Balasore Alloys Ltd. had moved the Hon’ble Appellate Tribunal for Electricity and Hon’ble Tribunal in their order dtd.30.05.2011 in Appeal Nos.102, 103 & 112 of 2010 relating RST Order for FY 2010-11 directed the Commission to determine the variation of tariff of the appellants category with respect to average cost of supply for that category in terms of Regulation 7(c)(iii) the OERC (Terms And Conditions For Determination of Tariff) Regulations, 2004 (before Amendment) and provide consequential relief to the appellants in terms of the tariff policy, if any, after hearing all concerned. The State Commission was also directed to take action on consumer and audit metering and determination of cross subsidy based on actual cost of supply in accordance with direction given in that judgment.

2. On the appeal of M/s. Vishal Ferro Alloys Ltd. and 23 other industries in Appeal No.57, 67-73 of 2011 on the Retail Supply Tariff order for FY 2011-12 issued

by the Commission on 18.03.2011, Hon'ble ATE in their order dtd.02.09.2011 in Para 5 had observed as follows:

The crux of the findings given in the above paragraph are as follows:

(a) The State Commission is required to determine voltage-wise cost of supply.

(b) The cross subsidy is to be calculated on the basis of cost of supply to the consumer category.

(c) The cross subsidy is not to be increased but reduced gradually.

(d) The tariff of each of the consumer categories is to be within $\pm 20\%$ of the average cost of supply.

(e) The State Commission is to determine cross subsidy for different categories of consumers within next six months from Financial Year 2010-11 onwards and ensure that in future tariff orders, cross subsidies for different consumer categories are determined according to the directions given in the judgment and that the cross subsidies are reduced gradually as per the provisions of the Act.

3. In para 10 of the aforesaid Order dated 02.09.2011 the Hon'ble ATE further directed the Commission "to re-determine the tariff on cross subsidy" and the said exercise must be completed by 30 November, 2011 positively and till then the tariff of any category is not disturbed.

4. The Hon'ble Supreme Court of India in Civil Appeal No.8093 of 2011 on the appeal filed by M/s. Adhunik Metalik Ltd. on the orders of Tribunal dtd.02.09.2011 was not inclined to interfere in the said remand order.

Hon'ble Apex Court vide their Order dtd. 30.09.2011 observed as follows:

“X X X X X

We hope that the Regulatory Commission would be in a position to dispose of the case remitted to it by November 30, 2011. If, for any reason, the matter could not be disposed of by November, 30, 2011, liberty is given to the parties to move this court for grant of further period.

We make it clear that, in the event of Regulatory Commission coming to the conclusion that there are parties, who are affected in the matter of fixation of tariff, on remand, it may consider giving notice to all the affected parties in it's own discretion.

The civil appeal, accordingly, stands disposed of.

No order as to costs.”

5. As per above Order of the Hon'ble Supreme Court of India the Commission had issued Public Notice as well as individual notices on 15.11.2011 & 16.11.2011 to the persons/organizations/ consumer Counsels/ Stakeholders/ DISCOMs who had participated in the tariff proceedings before the Commission for FY 2010-11 & 2011-12 and also those who were parties before the Hon'ble ATE, New Delhi in Appeal Nos. 102, 103 & 112 of 2010 and in Appeal Nos. 57,67- 73 of 2011 fixing the date of hearing on 24.11.2011 and 25.11. 2011 on the issues of cross-subsidy in tariff for different categories of consumers for the FY 2010-11 & 2011-12. The above order of the Hon'ble Supreme Court requires the Commission to hear “affected parties” on all relevant matters affecting them.”

- 19.** In these Paragraphs, the State Commission referred to our directions with reference to determination of the variation of tariff of the Appellant's Category.
- 20.** The gist of the reference made by the State Commission in the impugned order is as follows:
- (a) By judgment dated 30.5.2011 relating to "RST order for FY 2010-11, this Tribunal directed the State Commission to determine the variation of tariff of the Appellant's category with respect to average cost of supply for that category in terms of Regulation 7 (c) (iii) of the OERC Tariff Regulations, 2004 (before Amendment)....."
- (b) By judgment dated 02.9.2011 on "Retail Supply Tariff Order for FY 2011-12" this Tribunal directed the State Commission to (1) determine voltage-wise cost of supply, (2) calculate cross-subsidy on the basis of cost of supply of the consumer category, (3) tariff of each of the consumer categories is to be within $\pm 20\%$ of the average cost of supply.
- 21.** So, these observations in the impugned order referring to the directions issued by this Tribunal in both the Judgment dated 30.5.2011 and 2.9.2011 confirmed by the Hon'ble Supreme Court, would clearly indicate that the State Commission was conscious of the specific directions issued

by this Tribunal. The State Commission was also in knowledge of the fact that the directions issued by this Tribunal in the judgment dated 30.5.2011 and 2.9.2011 which had been confirmed by the Hon'ble Supreme Court had attained finality and that they were binding on the State Commission.

22. Despite this, the State Commission, while analysing the issue of cross subsidy, fell into error in exceeding its jurisdiction by disregarding the same. The discussions over this issue are contained in Para 49, 53 and 59 of the impugned order. The said analysis is as follows:

“49. Based on the average tariff voltage wise, let us examine present status of cross-subsidy as per average cost of supply taken for the State as a whole which is in consonance with Tariff Policy and National Electricity Policy.

	2010-11				2011-12			
Category of Consumers	Avg. cost of Supply (P/U)	Avg. Tariff (P/U)	Cross Subsidy (P/U)	% Cross subsidy	Avg. cost of Supply (P/U)	Avg. Tariff (P/U)	Cross Subsidy (P/U)	% Cross subsidy
LT Category								
Kutir jyoti <30 Uits/ month	327.27	100.00	-227.37	-69.5	408.87	100.00	-308.87	-75.5
Domestic<=100 units/ month	327.27	160.00	-167.37	-51.1	408.87	265.00	-143.87	-35.2
Domestic>100, <=200 units/month	327.27	265.00	-62.37	-19.1	408.87	337.50	-71.37	-17.5
Domestic >200 units/ month	327.27	313.33	-14.04	-4.3	408.87	368.33	-40.54	-9.9
General Purpose<=100 Units/month	327.27	450.00	122.63	37.5	408.87	368.33	101.13	24.7

General Purpose>100,<=300 Units/month	327.27	540.00	212.63	65.0	408.87	600.00	191.13	46.7
General Purpose>300 units/month	327.27	536.37	209.30	63.9	408.87	596.67	187.80	45.9
Irrigation Pumping and Agriculture	327.27	122.18	-205.19	-62.7	408.87	122.18	-286.69	-70.1
LT Industrial (S) Supply	327.27	453.05	125.68	38.4	408.87	520.40	111.53	27.3
LT Large Industry	327.27	482.71	155.34	47.5	408.87	542.71	133.84	32.7
LT Category Avg. Tariff	327.27	219.21	-108.16	-33.0	408.87	300.34	-108.53	-26.5
HT Category								
Tariff at 80% Load Factor	327.27	383.68	56.31	17.2	408.87	482.43	73.56	18.0
Tariff at 70% Load Factor	327.27	398.49	71.12	21.7	408.87	497.77	88.90	21.7
Tariff at 60% Load Factor	327.27	418.24	90.87	27.8	408.87	518.24	109.37	26.7
Tariff at 50% Load Factor	327.27	436.88	108.51	33.1	408.87	5335.88	127.01	31.1
Avg. HT Tariff	327.27	423.59	96.22	29.4	408.87	524.92	116.05	28.4
EHT Category								
Tariff at 80% Load Factor	327.27	379.93	52.56	16.1	408.87	477.43	68.56	16.8
Tariff at 70% Load Factor	327.27	394.20	66.83	20.4	408.87	492.77	83.90	20.5
Tariff at 60% Load Factor	327.27	413.24	85.87	26.2	408.87	513.24	104.37	25.5
Tariff at 50% Load Factor	327.27	430.88	103.51	31.6	408.87	530.88	122.01	29.8
Avg. EHT Tariff	327.27	416.61	89.24	27.3	408.87	506.98	98.11	24.0

*N.B(i) Tariff for 5 KW load has been calculated for LT except Kutir Jyoti and Domestic category <100 units
(ii) % cross-subsidy means cross-subsidy as % of Average cost of supply.*

From the above table it is seen that cross-subsidy in percentage in relation to voltage-wise average tariff has decreased in 2011-12 from the level of 2010-11, though they remain above $\pm 20\%$ band stipulated in the Tariff Policy. Even in case of LT Domestic

category, General Purpose category, LT Industrial (S) category and Large Industry category etc. the cross-subsidy have been taking a declining trend. Similarly, in different load factors such as 70%, 60% and 50% and also on the average in HT and EHT cross-subsidy is reducing from the level what it was in 2010-11 in percentage term. The Learned Counsel for HT and EHT industries argued that the cross-subsidy should decrease in absolute term in relation to power purchase cost. We feel this is contrary to what has been envisaged in Tariff Policy which describes reduction in percentage term. The Learned Counsel further argued that once the $\pm 20\%$ band is reached it should not vary upward even within the prescribed $\pm 20\%$ limit. This contention of the Learned Counsel is not acceptable as policy makers have consciously prescribed the limit of $\pm 20\%$ in cross-subsidy as it would vary within that band. Had it been not so, they would have prescribed a fixed percentage instead of a

limit. It is to be further stated that as per Section 61(g) of Electricity Act, 2003 cross-subsidy is to be reduced and not eliminated. Therefore, it should vary within the prescribed limit. In this context it may be noted that Order of Hon'ble ATE states that cross-subsidies are reduced gradually as per provisions of the Act. Further, the Para 8.3.2 of Tariff Policy, 2006 stipulates that "latest by the end of 2010-11 Tariffs are within $\pm 20\%$ of the average cost of supply. The road map would also have intermediate mile stones based on the approach of a gradual reduction of cross-subsidy". The stipulation to keep the tariff within $\pm 20\%$ of the average cost of supply and gradual reduction of cross-subsidy are to be read conjointly. It means that there should be gradual reduction of cross-subsidy so as to reach the benchmark level of $\pm 20\%$ of the average cost of supply. Once that benchmark of $\pm 20\%$ is reached it should operate within that limit and should not exceed that $\pm 20\%$ limit. It is pertinent to mention

here that the FOR while prescribing guidelines for Model Tariff have stipulated that latest by end of the year 2015-16 tariffs are within $\pm 20\%$ of the average cost of supply. The tariff settings by the Commission follows the approach agreed to in the Forum of Regulators (FOR).

.....

53. We have noted the Hon'ble ATE's direction in its order dt.30.05.2011 to determine cross subsidy for different categories of consumers within next six months from FY 2010-11 onwards and ensure that in future orders for ARR and tariff of the distribution licensees, cross subsidies for different consumer categories are determined according to the directions given in that Judgment and that the cross subsidies are reduced gradually as per the provisions of the Act. Hon'ble ATE in their Order dtd. 02.09.2011 in Para 5 has directed as follows:

The crux of the findings given in the above paragraphs are as follows:

- a. The State Commission is required to determine voltage-wise cost of supply.
- b. The cross subsidy is to be calculated on the basis of cost of supply to the consumer category.
- c. The cross subsidy is not to be increased but reduced gradually.
- d. The tariff of each of the consumer categories is to be within $\pm 20\%$ of the average cost of supply.
- e. The State Commission is to determine cross subsidy for different categories of consumers within next six months from Financial Year 2010-11 onwards and ensure that in future tariff orders,

cross subsidies for different consumer categories are determined according to the directions given in the judgment and that the cross subsidies are reduced gradually as per the provisions of the Act.

As per the above order of ATE it is quite clear that they direct that the tariff for each consumer category has to be determined on the basis of 'cost of supply' for that category. The Commission has taken suo motu action for amendment of the aforesaid Regulation 7(c)(iii) long back through public hearing. Much before the Appellant category of consumers filed Appeal at the Hon'ble ATE against the Commission's tariff order for 2010-11 and 2011-12 and the amended the Regulation as per OERC notification dtd. 30.05.2011 were published in the Odisha Gazette in August, 2011, the Appellant category of consumers, i.e., EHT consumers along with other stakeholders had actively participated in the proceedings at the Commission for the amendment of the Regulation vide order dtd. 30.05.2011 in Case No. 9 of 2011 for which Public Notice was issued on 29.11.2010 and published on 30.11.2010. The Commission is of the view that future tariff orders would be governed by the amended Regulation assuming though not admitting that the said provision of Regulation 7(c)(iii) is applicable to calculation of cross-subsidy for regulatory tariff orders as distinct from compensatory cross-subsidy imposed on open access applicants in order to compensate incumbent DISCOMs – the Hon'ble ATE has not pronounced upon this distinction. However, the Commission at the present limited position, without going into these controversies, desires to calculate the voltage-wise cost of supply as per the simplified formula as given in para 31-35 of Hon'ble ATE order dtd. 30.05.2011 as far as practicable. The Commission in compliance with the Hon'ble ATE directions, hereby determines in the

subsequent paragraphs the cross-subsidy on the basis cost of supply at EHT, HT and LT voltage and ensures that the cross-subsidy for the appellant category of consumers and others for 2011-12 do not increase on that of 2010-11.

.....

59. *The Retail Supply Tariff fixed for the distribution companies consists of more than 80% of the cost of supply on account of cost of power purchase from GRIDCO, transmission charges payable to OPTCL and charges payable to SLDC. The remaining amount represents the distribution cost which includes salary and pension, interest payment, depreciation, return on equity etc. If the retail tariff for 2010-11 is to be modified on account of re-determination of cross subsidy basing on the cost of supply for the voltage wise, it will necessarily call for modification in the rate of power purchase cost (BST), transmission charges, SLDC charges etc., keeping in view the revenue gap to be addressed. Since the financial year 2010-11 is over it is not practically possible to effect retrospective revision in retail tariff, BST rate, SLDC charges etc. Further, since more than nine months have passed from the current financial year 2011-12, similar difficulties will be encountered. Moreover, GRIDCO, OPTCL, SLDC, OHPC and four distribution companies have filed their tariff application for 2012-13 on or before 30.11.2011 as per Regulation 53 (1) of OERC (Conduct of Business) Regulations, 2004 read with Regulation 5 (1) (A) of OERC (Terms and Conditions of Determination of Tariff), Regulations, 2004. Since the tariff process for the year 2012-13 has already started w.e.f. 01.12.2011, exercise for re-determination of tariff for 2011-12 will necessitate refilling of tariff applications beyond the time limit fixed by the aforesaid Regulations.”*

23. The deviation from our directions by the State Commission in the impugned order was on the following basis:

(a) The decision taken by the Forum of Regulators ought to be taken as a guiding principle for taking decision on the various matters regarding implementation of the Electricity Act, 2003. The Forum of Regulators is a statutory body constituted pursuant to Section 166 (2) of the Electricity Act, 2003.

(b) The opinion of the Attorney General that prescribing preferential tariff for renewable energy under Section 62(3) based on the National Electricity Policy and Tariff Policy does not violate average cost of supply, can be extended to tariff for LT, HT and EHT consumers.

(c) The State Commission in the impugned order concluded that from an All India perspective, cross subsidy in tariff should be based on average cost of supply for the State as a whole. The relevant extract is as follows:

“Therefore, from the above contentions it has been concluded that, from an all India perspective cross subsidy in tariff should be based on average (overall) cost of supply for the State taken as a whole as stipulated under Para 8.3.2 of Tariff Policy, 2006 and para 5.5.2 of National Electricity Policy, 2005 as well as

*guidelines adopted on “Model Tariff” by the Forum of Regulators. **Nevertheless, the Commission is of the view that it should not defer to the direction of the Hon’ble ATE and examine the possibility to carry out the direction and effectuate the intention of Hon’ble Tribunal.”***

(d) The Regulations 7 c (iii) of the OERC Regulations, 2004 have been amended on 30.5.2011 and the same was published in Odisha Gazette on 10.8.2011. This amendment was not brought to the notice of this Tribunal which rendered these judgments. Had the amended Regulations been brought to the notice of this Tribunal, the findings of this Tribunal would have been different. Furthermore, the judgments of this Tribunal were not binding on LT consumers since they were not parties to the proceedings before this Tribunal.

(e) Though the State Commission has no intention of examining the legality of judgments of this Tribunal, the State Commission is bound to consider the adverse impact on LT consumers and others in re-determining the tariff and decide accordingly.

(f) The tariff of other categories mainly domestic consumers is the subject matter of the proceedings pending before the Orissa High Court where the revised tariff applicable to domestic consumers had

been stayed. On these basis, the State Commission has come to the following conclusions which are as follows:

“72. In view of the discussions made above, we concluded as under:

(a) As per the direction of Hon’ble ATE’s Order dtd. 30.05.2011 (as enumerated in Para 31 to 35) and order dtd. 02.09.2011 we have determined the voltage-wise cost of supply for the year 2010-11 and 2011-12 (Refer Para 54 & 55 of the Order);

(b) The cross-subsidy in tariff has been calculated on the basis of cost supply to the consumer category availing supply in three distinct voltage, i.e., EHT, HT and LT for the year 2010-11 and 2011-12 (Para 54 & 55);

(c) The cross-subsidy in Tariff for the year 2011-12 has not been increased but has been reduced in comparison with the year 2010-11 (Para 55);

(d) The tariff of each voltage-wise consumers has been calculated on the basis of the average cost of supply keeping the cross-subsidy in declining trend from year to year (Para 49); and

(e) The re-determination of tariff for the FY 2010-11 and 2011-12, as per Hon’ble ATE order is not feasible at this stage in view of the stay on revised tariff for FY 2011-12 on LT domestic consumers by Hon’ble Orissa High Court as well as pendency of the BST, Transmission Charges and Retail Supply Tariff Order both for 2010-11 and 2011-12, challenged in Hon’ble ATE by the licensee. (Para 63 and 64).”

- 24.** By these conclusions, the State Commission has observed that even though the decision taken by this Tribunal on the relevant issues are final, it is not possible or feasible for the State Commission to fix the re-determination of tariff for the Financial Year 2010-11 and 2011-12 as per the Tribunal's direction in view of the fact that these issues are pending in the High Court.
- 25.** The State Commission as referred to above, having proceeded strictly to re-determine the cross subsidy, as directed by this Tribunal as referred to in paragraph 1 to 5 of the impugned order, unfortunately has fallen into error in exceeding its jurisdiction by openly observing that the State Commission would not implement the directions issued by this Tribunal.
- 26.** In spite of the settled law that the judgments rendered by this Tribunal on 30.5.2011 and 2.9.2011 which have been confirmed by the Hon'ble Supreme Court have attained finality and were binding on the State Commission, the State Commission has the audacity to give various reasonings to indicate that the directions issued by this Tribunal in the Remand Order were not in accordance with the law and therefore, they would not follow.
- 27.** Thus, the State Commission fell into grave error in following aspects:

(a) The State Commission failed to interpret the Tariff Policy in the light of the Forum of Regulators' Guidelines for Model Tariff Regulations to defer the date for implementing $\pm 20\%$ limit on cross subsidy to FY 2015-16 when the Model Tariff Regulations do not provide for any such time frame of the year 2015-16.

(b) The State Commission in the impugned order wrongly relied upon the presentation prepared by an officer of CERC annexed to Minutes of 25th Meeting of the Forum of Regulators to state that the Forum of Regulators, while approving the Model Tariff Regulations have stipulated that latest by the year 2015-16, tariff are within $\pm 20\%$ of the average cost of supply. On the basis of these Minutes of the meeting, the State Commission observed that it would make all attempts to stick to the road map to reduce the present level of cross subsidy so that tariffs are kept within $\pm 20\%$ of the average cost of supply for all consumers taken together by the end of the year 2015-16.

(c) The State Commission wrongly understood the directions of this Tribunal that the Tariff for each consumer category has to be determined on the basis of the cost of supply for that category. For Financial Years 2010-11 and 2011-12 the relief was required to be given to the Appellants' categories in terms of the

Tariff Policy that the tariff has to be within $\pm 20\%$ of the average(overall) cost of supply by correctly determining the average tariff for the Appellants' categories as per the directions given in the judgment of the Tribunal dated 30.5.2011. The voltage wise cost of supply and cross subsidy with respect to cost of supply for 2010-11 and 2011-12 had to be determined to transparently indicate the cross subsidy and for use in the future tariff orders to ensure that in future tariff orders the cross subsidy determined on the basis of voltage wise cost of supply is reduced gradually and not increased and also the tariff of various categories of the consumers has to be within $\pm 20\%$ of the average(overall) cost of supply as per the Tariff Policy. Thus, there was no need to redetermine the tariff of other categories of consumers including the LT consumers for FY 2010-11 and 2011-12. The financial impact on the distribution licensee due to the relief to the Appellants' categories, if any, could have been neutralised by allowing the equivalent amount in the ARR of the distribution licensee for the next year.

(d) The State Commission wrongly treated the amended Regulations 7 (c) (iii) as applicable to the cross subsidy re-determination for FY 2011 and FY 2012. Admittedly, these Regulations came into force

only on 10.8.2011 upon Notification published in the official gazette and accordingly this can not be applied to cross subsidy determination for the Financial Year 2011-12. The respective tariff orders in respect of the cross subsidy determination for the Financial Year 2010-11 and 2011-12 were passed by the State Commission on 20.3.2010 and 18.3.2011 respectively which were the subject matter in the separate set of Appeals resulting the judgment rendered by this Tribunal on 30.5.2011 and 2.9.2011. Therefore, there cannot be any retrospective application of these amended Regulations to the earlier period. In fact, Section 1 (3) of the Amended Regulations specifically provided that the Regulations would come into force from the date of notification in official gazette i.e. on 10.8.2011.

(e) As a matter of fact, the Retail supply tariff order in respect of the FY 2010-11 was passed on 20.3.2010. Against this order, the Appeals of 102 of 2010 batch were filed before this Tribunal on 26.4.2010. Similarly, the Retail Supply Tariff order was passed by the State Commission in respect of FY 2011-12 on 18.3.2011. Against this order, the Appeals were filed i.e. 57 of 2011 batch on 21.4.2011.

(f) As mentioned above, the judgment was rendered in Appeal No.102 of 2010 batch on 30.5.2011 and judgment in Batch No.57 of 2011 batch was rendered on 2.9.2011. So, in both these matters, the State Commission as well as this Tribunal were concerned only with the Regulations of 2004 and not with the amended Regulations 7 (c) (iii) which came into force w.e.f. 10.8.2011 i.e. after the earlier impugned orders passed by the State Commission dated 20.3.2010 and 18.3.2011.

(g) The State Commission in the impugned order, in fact refused to implement the directions of this Tribunal in the judgment dated 30.5.2011 in Appeal No.102 of 2010 batch on the ground that the judgment of Orissa High Court prevailed over the judgment of this Tribunal. This is patently wrong. Firstly, the issue of cross subsidy had not been raised in WP No.8409. Secondly, the judgment rendered by the High Court only on 30.3.2012 long subsequent to the impugned order dated 21.1.2012 which does not exclude or rely upon any of the interpretation adopted by this Tribunal in the cases starting from SEIL vs PSERC etc., Of course, this issue of cross subsidy was raised in another WP which was withdrawn by the Writ Petitioner.

(h) In fact, the High Court had clearly held in its order that it does not wish to go into the aspects of the tariff which is within powers of the appropriate Forums. Determination of cross-subsidy is one of the aspects in tariff determination. In the order dated 30.3.2012, the High Court has held as follows:

“We are of the view that in a matter of fixation of tariff, this Court should not exercise its jurisdiction under Article 226 and 227 of the Constitution of India and, therefore, we are not inclined to entertain the writ application, so far as the correctness of the fixation of tariff is concerned and it is open to the petitioners to raise the same before the appropriate statutory forum.”

(i) When such is the order passed by the High Court, we are unable to understand as to how the State Commission could observe that the High Court of Orissa adjudicated the issue of cross subsidy and gave the finding in its favour and as such, the same would prevail over all the judgment of this Tribunal. In fact, the Tribunal had also directed for determination of cross subsidy with respect to voltage wise cost of supply as also variation in average tariff for various categories of consumers with respect to overall average cost of supply. The cross subsidy with respect to voltage-wise cost of supply had to be reduced gradually and not increased in the future tariff orders

and at the same time the tariffs of the various consumer categories have to be within \pm 20% of overall average cost of supply as per the Tariff Policy.

(j) While the matters relating to LT domestic consumers pending before the Odisha High Court are independent of the matters decided by this Tribunal, the State Commission has wrongly relied upon the same to justify the impugned order. As a matter of fact, the State Commission was required to determine the cost of supply based on the principles determined by this Tribunal. This Tribunal had not directed final adjustments of the tariff based on the cost to supply of each category of consumers. This Tribunal has directed only the following principles to be adopted by the State Commission in the determination of tariff. Those principles are as follows:

(i) The State Commission is required to determine the cost of supply of electricity category-wise and not based on the average cost of supply consistent with the requirements under Section 61 (g) of the Electricity Act, 2003. There is such a requirement to determine category wise cost to supply and record the same in the Tariff Order, though the tariff may not be adjusted to such cost to supply. It is never the contention of

any person that the State Commission is required to adjust the tariff immediately to category-wise the cost to supply.

(ii) The cost to supply determined in the manner mentioned above, namely, category wise cost to supply will lead to finding of the existence of the prevalent cross subsidy for the purposes of retail supply tariff.

iii) The tariff design should be in a manner that there is no increase in the cross subsidy determined for the retail supply tariff based on category-wise cost to supply.

iv) The tariff design should progressively reflect the category wise cost to supply and by the year 2010-11 it should reach the milestone of being within $\pm 20\%$ of the average cost of supply(overall average cost of supply).

(k) However, the State Commission has completely misunderstood the above twin applications of category wise cost to supply to be determined as per the requirements of Section 61 (g) and the milestone to be reached by the year 2010-11 with reference to the overall average cost of supply and passed the impugned order.

- 28.** The impugned order appears to be an outcome of some mis-appreciation of the implications of:
- (a) The efficacy of the decision of the Forum of Regulators and its Guidelines;
 - (b) Pending proceedings in the Odisha High Court, and;
 - (c) The amendment to Regulation 7 (c) (iii)
- 29.** We have already discussed that these issues would not exclude or rule upon any of the interpretation adopted by this Tribunal in various judgments **referred to above**.
- 30.** Furthermore, these judgments of this Tribunal on the specific issue were neither in question nor have been considered and decided by the High Court while rendering its judgment. Therefore, the plea of the State Commission that it is not possible to implement the directions of this Tribunal is completely contrary to the law established.
- 31.** It is settled position of law that a subordinate court must carry out the directions of the Superior Court. The failure of the State Commission to implement the directions issued by this Tribunal as interpreted by this Tribunal as well as the Hon'ble Supreme Court has to be held to be contumacious and destructive of judicial discipline and propriety.

- 32.** In the present case, the State Commission not only failed to implement the directions issued by this Tribunal through remand orders but also had the audacity to observe that it would not be possible for the State Commission to carry out the determination of the tariff as per the directions of this Tribunal, although the said judgments which have been confirmed by the Hon'ble Supreme Court.
- 33.** Thus, the State Commission through the impugned order, has in fact, acted contrary to the principles of judicial discipline.
- 34.** As correctly pointed out by the Appellant, the WP filed before the Orissa High Court as public interest litigation was with reference to the tariff determination for the subsequent Financial Year namely 2011-12 and not for the Financial Year 2010-11.
- 35.** Admittedly, the judgment of this Tribunal dated 30.5.2011 was not even challenged by the State Commission before the Hon'ble Supreme Court. The State Commission after the Hon'ble Supreme Court dismissing its appeal as against the judgment dated 2.9.2011, thought it fit to file the Review Petition as against the judgment dated 30.5.2011 which was ultimately withdrawn and dismissed with cost.

- 36.** In the light of the above circumstances, it was not open to the State Commission to sit over the judgment of the Tribunal being the Superior Appellate Authority and to hold that the State Commission would not incline to implement the directions of this Tribunal in view of the stay order passed by the Odisha High Court.
- 37.** As indicated above, the stay order passed by the High Court in the matter of the Retail Supply Tariff with reference to the domestic consumers, would not, in any manner affect the jurisdiction of the State Commission for re-determination of the tariff for the EHT and HT consumers by following the directions given by this Tribunal which were confirmed by the Hon'ble Supreme Court. There was no need for redetermining of the tariff of domestic and other subsidized consumers for the Financial Years 2010-11 and 2011-12 as per the judgements of the Tribunal. As per the directions of the Tribunal, it was only required to correctly determine the Average tariff for the Appellants' categories and re-determine the variation of the tariff of the Appellants' categories with respect to average cost of supply (overall) for Financial Years 2010-11 and 2011-12. The voltage wise cost of supply for all categories of consumers was required to be determined for Financial Years 2010-11 and 2011-12 for determination of cross subsidy transparently with respect to actual cost of supply and to ensure that in

future tariff orders the cross subsidy is not increased but reduced gradually.

- 38.** Therefore, we hold that the State Commission has not followed the principle of judicial ethics by not only not complying with the directions but also by observing that it would not be possible for the State Commission to comply with the directions issued by this Tribunal.
- 39.** As indicated above, the reasons for non compliance of the directions and non implementation of the judgment of this Tribunal are totally unwarranted and illegal. Hence, the findings on this aspect are liable to be set aside.
- 40.** Accordingly, these **issues No.(i) and Issue No.(ii) are decided** as against the State Commission.
- 41.** The **3rd Issue involves** the question as to whether the directions issued by this Tribunal in the judgment dated 30.5.2011 and 2.9.2011 are contrary to the tariff policy. The State Commission in the impugned order observed that the directions of this Tribunal in the remand order passed by this Tribunal on 30.5.2011 and 2.9.2011 are contrary to the tariff policy and therefore, they could not be complied with.
- 42.** Before going into the truth of this observation of the State Commission finding fault with our judgment, we will refer to the directions given by this Tribunal in its judgment and

remand order dated 30.5.2011 and 2.9.2011. The extract is as follows:

“41. Summary of our findings

41.1. After considering the provisions of the Act, the National Electricity Policy, Tariff Policy and the Regulations of the State Commission, we have come to the conclusion **that if the cross subsidy calculated on the basis of cost of supply to the consumer category is not increased but reduced gradually, the tariff of consumer categories is within $\pm 20\%$ of the average cost of supply** except the consumers below the poverty line, tariffs of different categories of consumers are differentiated only according to the factors given in Section 62(3) and there is no tariff shock to any category of consumer, **no prejudice would have been caused to any category of consumers with regard to the issues of cross subsidy and cost of supply raised in this appeal.**

41.2. **We do not agree with the findings of the State Commission that cost to supply a consumer category is the same as average cost of supply for the distribution system as a whole and average cost of supply can be used in calculation of cross subsidy instead of actual cost of supply. This is contrary to Regulation 7 (c)(iii) of the State Commission and findings of this Tribunal in the Judgment reported in 2007(APTEL) 931 SIEL Limited, New Delhi v/s PSERC & Ors.**

41.3. The State Commission has expressed difficulties in determining cost of supply in view of non-availability of metering data and segregation of the network costs.

*In our opinion, it will not be prudent to wait indefinitely for availability of the entire data and it would be advisable to initiate a simple formulation which could take into account the major cost elements. There is no need to make distinction between the distribution charges of identical consumers connected at different nodes in the distribution network. **It would be adequate to determine the voltage-wise cost of supply taking into account the major cost element which would be applicable to all the categories of consumers connected to the same voltage level at different locations in the distribution system.** We have given a practical formulation to determine voltage wise cost of supply to all category of consumers connected at the same voltage level in paragraphs 31 to 35 above. **Accordingly, the State Commission is directed to determine cross subsidy for different categories of consumers within next six months from FY 2010-11 onwards and ensure that in future orders for ARR and tariff of the distribution licensees, cross subsidies for different consumer categories are determined according to the directions given in this Judgment and that the cross subsidies are reduced gradually as per the provisions of the Act.***

41.4. In view of pathetic condition of consumers and distribution feeder and transformer metering, we direct the State Commission to take immediate action for preparation of a metering scheme as a project by the distribution company and its approval and implementation as per a time bound schedule to be decided by the State Commission.

41.5. According to the Tariff Policy, the tariff of all categories of consumers except those below poverty line have to be within $\pm 20\%$ of the total average cost

of supply. The variation of tariffs of different category with respect to average cost of supply has not been correctly determined by the State Commission. The State Commission has erred in clubbing different consumer categories having different tariff in one category based on voltage of supply. Also for the appellants' category average tariff per unit has been incorrectly determined at assumed load factor of 80%. The State Commission is directed to determine the average tariff for appellant's another category according to the directions given in paragraphs 39 and 40. Accordingly, **we remand the matter to the State Commission to re-determine the variation of average tariff for different consumer categories with respect to average cost of supply** and provide consequential relief to appellant's consumer category in terms of the tariff policy, if any, after hearing all concerned.

42. Conclusion

In view of above, **we remand the matter to the State Commission to correctly determine the variation of tariff of the appellant's category with respect to average cost of supply and provide consequential relief to the appellants in terms of the Tariff Policy, if any.**

The State Commission is also directed to take action on consumer and audit metering and determination of cross subsidy based on actual cost of supply in accordance with the directions given in this Judgment. No order as to cost."

43. The crux of the above directions given in the judgment dated 30.5.2011 are summarised as under:

(a) The Tribunal had noted that the Odisha Commission had erred in clubbing different consumer

categories having different tariff in to one category based on voltage of supply and had determined cross subsidy payable by thus clubbed category.

(b) The Odisha Commission was directed to correctly determine the Average Tariff for each of the consumer category by dividing the total expected revenue from the category by total projected sale to that category of consumer and re-determine the variation of average tariff with respect to average cost of supply to examine if the mandate of the Tariff Policy of having tariff within $\pm 20\%$ of average(overall) cost of supply has been met or not.

(c) To provide consequential relief, if any, to the Appellants' consumer category in terms of the Tariff Policy.

(d) The Odisha Commission was directed to determine the voltage wise cost of supply for each category of consumers suggesting simplified procedure for the same.

(e) To determine the cross subsidy with respect to voltage wise cost of supply for different categories of consumers and to ensure in the future tariff orders that the cross subsidies are reduced gradually as per the provisions of the Act and to also ensure that the tariff of

each category of consumer is within \pm 20% of the average (overall) cost of supply as per the Tariff Policy.

44. Similarly, the directions given in the judgment dated 30.5.2011 have been reiterated by this Tribunal in the judgment dated 2.9.2011. They are as follows:

“5. The crux of the findings given in the above paragraphs are as follows:

- (a) The State Commission is required to determine voltage wise cost of supply.
- (b) The cross subsidy is to be calculated on the basis of cost of supply to the consumer category.
- (c) The cross subsidy is not to be increased but reduced gradually.
- (d) The tariff of each of the consumer categories is to be within +20% of the average cost of supply.
- (e) The State Commission is to determine cross subsidy for different categories of consumers within next six months from Financial Year 2010-11 onwards and ensure that in future tariff orders, cross subsidies for different consumer categories are determined according to the directions given in the judgment and that the cross subsidies are reduced gradually as per the provisions of the

Act.

6. In addition to above findings, this Tribunal found flaw in the methodology used for calculating cross subsidy for industrial consumers and gave another methodology to be adopted for determining the cross subsidy.

7. In view of the above directions given by this Tribunal to the Commission to determine cross subsidy for different categories of consumers within next six months from Financial year 2010-11 onwards and to ensure that in future orders for ARR and tariff of the distribution licensees, cross subsidies are reduced gradually as per the provisions of the Act, the impugned tariff order for the year 2011-12 which is a subject matter in the present Appeals is also required to be set-aside and remanded back.

8. Accordingly, the impugned order of the Commission is set-aside and remanded back for fresh consideration of the Commission in the light of the directions given by this Tribunal in Appeals No.102, 103 and 112 of 2010 dated 30th May, 2011. While remanding the matter to the State Commission, as requested by the Counsel for the parties, we have to consider the impact of setting aside the impugned order on the revenues of distribution licensees of the State.”

- 45.** The above observations made by this Tribunal would show that this Tribunal by the judgment dated 2.9.2011 set aside the order dated 18.3.2011 and remanded the matter for fresh consideration of the State Commission in reiterating the directions given by this Tribunal in the earlier judgment dated 30.5.2011.
- 46.** According to the State Commission, these directions are against the tariff policy.
- 47.** Let us now examine the relevant provision of the tariff policy relating to the cross subsidy to ascertain as to whether the above directions given by this Tribunal were in conformity with the tariff policy or not. At this juncture, we have to point out that there is no mention of the definition of the term 'cross subsidy' anywhere in the tariff policy, 'National Electricity Policy' or in the Electricity Act, 2003. The tariff should progressively reflect the cost of supply of electricity and cross subsidies should be reduced in the manner specified by State Commission as per Section 61 (g) of the Electricity Act, 2003. This shows that there is a mandate that tariff should progressively reflect actual cost of supply for each consumer category and not average cost of supply.
- 48.** Let us now refer to 8.3 of the Tariff Policy which is as under:

“8.3 Tariff Design: Linkage of tariffs to cost of service

It has been widely recognised that rational and economic pricing of electricity can be one of the major tools for energy conservation and sustainable use of ground water resources.

In terms of the Section 61 (g) of the Act, the Appropriate Commission shall be guided by the objective that the tariff progressively reflects the efficient and prudent cost of supply of electricity.

.....

Accordingly, the following principles would be adopted:

1.....

2. For achieving the objective that the tariff progressively reflects the cost of supply of electricity, the SERC would notify roadmap within six months with a target that latest by the end of year 2010-11, tariffs are within $\pm 20\%$ of the average cost of supply. The road map would also have intermediate milestones, based on the approach of a gradual reduction in cross subsidy.

For example, if the average cost of service is Rs.3 per unit, at the end of the Year 2010-11, the tariff for the cross subsidised categories excluding those referred to in Para 1 above should not be lower than Rs.2.40 per unit and that for any of the cross-subsidising categories should not go beyond Rs.3.60 per unit.”

- 49.** Bare reading of the above tariff policy would reveal that the policy requires the State Commission to fix the tariffs so that it progressively reflects the cost of supply and to

ensure that latest by the year 2010-11, the tariff for each category of consumers is within $\pm 20\%$ of the average cost of supply. In fact, Section 61 (g) of the Electricity Act, 2003 mandates the Commission to ensure that the tariff progressively reflects the cost of supply and also reduces the cross subsidies. Thus, the tariff policy read with Section 61 (g) of the 2003 Act would clearly establish that the State Commission was required to ensure that the cross subsidies are to be progressively reduced and to ensure that tariff for each category is within $\pm 20\%$ of the overall average cost of supply latest by the year 2010-11.

- 50.** Thus, the Tariff Policy, 2006 recognises the fact that one of the objectives is that the tariff should reflect the cost of supply and for achieving that objective, the State Commission should notify roadmap within six months with a target that latest by 2010-11 tariff are within $\pm 20\%$ of average cost of supply(overall average cost of supply). As a matter of fact, the State Commission has referred to this provision of Tariff Policy but conveniently ignored that it had to lay down the road map for reduction in cross subsidy by July, 2006. Nowhere, the Tariff Policy suggests that the cross subsidy has to be calculated based on average cost of supply. On the other hand, it provides that the tariff progressively should reflect cost of supply. In this context,

it would be appropriate to refer to the Commission's own Tariff Regulations, 2004 as amended till May, 2011.

- 51.** Regulation 7 (g) (i) provides that the Commission, while determining the tariff, shall see that the **tariff progressively reflects the cost of supply of electricity and also reduces and eliminates cross-subsidy within a period as stipulated by the Commission.**
- 52.** Thus, the State Commission's own Regulations require it to determine the tariff reflecting the cost of supply and cross subsidy is to be eliminated. This Tribunal has directed the State Commission to determine the tariff reflecting the cost of supply and to ensure that the cross subsidies are gradually reduced. How could then, the State Commission observe that there is a conflict between the Tariff Policy and the directions of this Tribunal?
- 53.** In fact, the full Bench of this Tribunal in the case of SIEL Limited vs Punjab State Electricity Regulatory Commission in 2007 ELR (APTEL) 931 has settled the position related to the average cost of supply and cost to supply of a particular category of consumers. Those observations are as under:

“109. According to Section 61(g) of the Act 2003, the Commission is required to specify the period within which cross subsidy would be reduced and eliminated so that the tariff progressively reflects

the cost of supply of electricity. Under Section 28(2) of the Act of 1998, the Commission while prescribing the terms and conditions of tariff was required to safeguard the interests of the consumers and at the same time, it was to ensure that the consumers paid for the use of the electricity in a manner based on average cost of supply. **The word “Average” preceding the words “cost of supply” is absent in Section 61(g) of the Act of 2003. The omission of the word “Average” is significant. It indicates that the cost of supply means the actual cost of supply,** but it is not the intent of the legislation that the Commission should determine the tariff based on cost of supply from the date of the enforcement of the Act 2003. Section 61(g) of the Act of 2003 envisages a gradual transition from the tariff loaded with cross subsidies to a tariff reflective of cost of supply to various class and categories of consumers. Till the Commission progressively reaches that stage, in the interregnum, the roadmap for achieving the objective must be notified by the Commission within six months from January 6, 2006, when the tariff Policy was issued by the Government of India i.e. by July 6, 2006. In consonance with the tariff policy, by the end of the year 2010-11, tariffs are required to be fixed within plus minus 20% of the average cost of supply (pooled cost of supply of energy received from different sources). But the policy has reached only up to average cost of supply. As per the Act, tariff must be gradually fine tuned to the cost of supply of electricity and the Commission should be able to reach the target within a reasonable period of time to be specified by it. Therefore, for the present, the approach adopted by the Commission in determining the average cost of supply cannot be faulted. **We, however, hasten to add that we disapprove the view of the Commission that the words “Cost of Supply” means “Average Cost of Supply”. The Commission**

shall gradually move from the principle of average cost of supply towards cost of supply.

110. Keeping in view the provisions of Section 61 (g), which requires tariff to ultimately reflect the cost of supply of electricity and the National Tariff Policy, which requires tariff to be within plus minus 20% of the average cost of supply, it seems to us that the Commission must determine the cost of supply, as that is the goal set by the Act. It should also determine the average cost of supply. Once the figures are known, they must be juxtaposed, with the actual tariff fixed by the Commission. This will transparently show the extent of cross subsidy added to the tariff, which will be the difference between the tariff per unit and the actual cost of supply.

111. In a given case, where an appropriate Commission comes to the conclusion that time has come when Tariff is to be fixed without providing for cross subsidies between various consumer categories, it can fix the Tariff accordingly as there is nothing in the Act which compels a regulatory Commission to formulate Tariff providing for cross subsidies between the consumer categories for all times to come.”

54. The above principles have been reiterated in the following judgments:

(a) APTEL’s Judgment dated 2.6.2006 disposing of Appeal Nos.124, 125 and 177 of 2005 and Appeal No.18 of 2006 titled Kashi Vishwanath Steel Ltd.,Vs Uttaranchal ERC & Ors.

(b) Tata Steel India vs. OERC and NEESCO: 2011 ELR (APTEL) 1022.

(c) APTEL's judgment dated 12.9.2011 disposing of Appeal Nos. 96 of 2011 titled, East Cost Railways vs OERC & Ors

55. According to the State Commission, Regulation 7 (c) (iii) is meant only for fixing surcharge for open access consumer and it has no application to the tariff fixation exercise.

56. This contention of the State Commission is totally misconceived and is liable to be rejected. Regulation 7 of the Tariff Regulations, 2004 lays down the Tariff principles. Clause (c) of Regulation 7 deals with fixation of surcharge. Sub clause (i) states that surcharge to be levied on the consumers who have opted for open access and sub-clause (ii) provides that the entire amount of cross subsidy lost by the licensee needs to be compensated. Thus, these two sub-clauses provide that the licensee has to be compensated for entire amount of cross subsidy lost by providing open access. Now, how to calculate the loss of cross subsidy is given in sub-clause (iii) of Regulation 7 (c). Conjoint reading of these three sub-clauses of Regulation 7 (c) would indicate that the cross subsidy calculated as per Sub-clause (iii) is the cross-subsidy provided by a subsidizing consumer of the licensee and the same amount is to be levied on any open access consumer. The State Commission has stated that this Regulation was inconsistent with the Tariff Policy, 2006 and accordingly

had been amended on 30th May, 2011 to make fully consistent with the Tariff Policy. This contention of the Commission is factually incorrect. According to the Commission's own submission, the Regulation 7 deals only with the surcharge payable by the open access consumers. Para 8.5 of the Tariff Policy deals with cross subsidy surcharge which **is quoted as below:**

“8.5 Cross-subsidy surcharge and additional surcharge for open access

8.5.1 National Electricity Policy lays down that the amount of cross-subsidy surcharge and the additional surcharge to be levied from consumers who are permitted open access should not be so onerous that it eliminates competition which is intended to be fostered in generation and supply of power directly to the consumers through open access.

A consumer who is permitted open access will have to make payment to the generator, the transmission licensee whose transmission systems are used, distribution utility for the wheeling charges and, in addition, the cross subsidy surcharge. The computation of cross subsidy surcharge, therefore, needs to be done in a manner that while it compensates the distribution licensee, it does not constrain introduction of competition through open access. A consumer would avail of open access only if the payment of all the charges leads to a benefit to him. While the interest of distribution licensee needs to be protected it would be essential that this provision of the Act, which requires the open access to be introduced in a time-bound manner, is used to bring about competition in the larger interest of consumers.

Accordingly, when open access is allowed the surcharge for the purpose of sections 38,39,40 and sub-section 2 of section 42 would be computed as the difference between (i) the tariff applicable to the relevant category of consumers and (ii) the cost of the distribution licensee to supply electricity to the consumers of the applicable class. In case of a consumer opting for open access, the distribution licensee could be in a position to discontinue purchase of power at the margin in the merit order. Accordingly, the cost of supply to the consumer for this purpose may be computed as the aggregate of (a) the weighted average of power purchase costs (inclusive of fixed and variable charges) of top 5% power at the margin, excluding liquid fuel based generation, in the merit order approved by the SERC adjusted for average loss compensation of the relevant voltage level and (b) the distribution charges determined on the principles as laid down for intra-state transmission charges.

Surcharge formula:

$$S = T - [C (1 + L / 100) + D]$$

Where

S is the surcharge

T is the Tariff payable by the relevant category of consumers;

C is the Weighted average cost of power purchase of top 5% at the margin excluding liquid fuel based generation and renewable power

D is the Wheeling charge

L is the system Losses for the applicable voltage level, expressed as a percentage

57. The amended Regulation 7(c)(iii) is quoted below:

“The said Regulation 7(c), extracted below, deals with the manner in which surcharge will be determined by the State Commission: “7(c) Surcharge

(i) Surcharge to be levied on wheeling consumers shall be determined by the Commission keeping in view the loss of cross-subsidy from the consumers or category of consumers who have opted for open access to take supply from a person other than the incumbent distribution licensee.

(ii) The Commission may adopt requisite principles for computing surcharge, which shall compensate for the entire loss of cross subsidy for any given consumer category for which supply is given, as the Act clearly states that such surcharges shall be utilized to meet the requirements of current level of cross-subsidy. The entire amount of cross-subsidy lost by the incumbent licensee needs to be compensated.

(iii) For the purpose of computing cross-subsidy payable by a certain category of consumer, the difference between average cost-to-serve all consumers of the State taken together and average tariff applicable to such consumers shall be considered.”

58. From the above it is clear that even the amended regulation is equally inconsistent with the Tariff Policy, 2006 in as much as there is no mention of cross subsidy surcharge formula irrespective of its applicability in the present case.

59. There is one more aspect to be noticed in this context.

60. In this context, it would be desirable to refer to Section 61 of the Act which reads as under:

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

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

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

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

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

(e) the principles rewarding efficiency in performance;

(f) multi-year tariff principles;

(g)...

(h)...

(i) the National Electricity Policy and Tariff Policy:

Provided that the terms and conditions for determination of tariff under the Electricity (Supply) Act, 1948 (54 of 1948), the Electricity Regulatory Commissions Act, 1998 (14 of 1998) and the enactments specified in the Schedule as they stood immediately before the appointed date, shall continue to apply for a period of one year or until the terms and conditions for tariff are specified under this section, whichever is earlier.

61. Bare reading of Section 61 would elucidate that the State Commissions have been mandated to frame Regulations for fixing tariff under Section 62 of the Act and while doing so i.e. while framing such regulations, State Commissions are required to be guided by the principles laid down in by the Central Commission, National Electricity Policy, Tariff Policy etc. It also provide that while framing the regulations the State Commissions shall ensure that generation, transmission and distribution are conducted on commercial principles; factors which would encourage competition and safe guard consumer's interest. Once the State Commission has framed and notified the requisite Regulations after meeting the requirement of prior publication under Section 181(3), it is bound by such Regulations while fixing Tariff under Section 62 of the Act. The issue in regard to superiority of the Regulations framed by the State Commission in discharge of its functions enumerated in Section 79 and Section 86 of the Act has been put to rest by the Hon'ble Supreme Court in PTC vs CERC; 2010 (4) SCC 603 where in the Hon'ble Supreme Court has held that the Central Commission is empowered to take steps /measures in discharge its function enumerated in Section 79(1). These measures which the Central Commission is empowered to take have got to be in conformity with the Regulations made under Section 178 of the Act.

62. The State Commission had filed an IA No.2 in Civil Appeal No. 8093 of 2011 before the Hon'ble Supreme Court for clarification of the order dated 30th September 2011 passed by the Hon'ble Supreme Court and the same had been dismissed by the Hon'ble Supreme Court on 08.11.2011. In the IA No.2 the Commission has made the following submissions:

“(ii) The Domestic LT consumers (forming approximately 80% of the total consumers of the State of Orissa) who are likely to be adversely affected by the re-determination by OERC in accordance with the directions of the Appellate Tribunal were not heard by the learned Tribunal before passing the impugned order dated 02.09.2011. Unless the order dated 02.09.2011 of the Tribunal is set aside, OERC will not be in a position to give any relief to the said Domestic LT Consumers.

(iv) Directions of the learned Tribunal for re-determination of Tariff on the basis of cost of supply of each category is contrary to Tariff Policy, 2006 which inter-alia provides as under:”

63. Two aspects would emerge from the above submissions made by the State Commission before the Hon'ble Supreme Court. Firstly, the State Commission took the plea before the Hon'ble Supreme Court on 30.9.2011 that the LT consumers had not been heard by this Tribunal. However, the State Commission, in the Impugned Order, has attributed this very contention to the LT consumers. Secondly, the State Commission has alleged that the

direction of this Tribunal in its orders dated 30.5.2011 and 30.5.2011 are contrary to tariff policy.

64. This is a very serious allegation made against this Tribunal. Before refuting this allegation, let us examine directions given by this Tribunal in its judgment and order dated 30.5.2011 and 2.9.2011. The ratio of our judgment dated 30.5.2011 is reproduced below:

“41.1. After considering the provisions of the Act, the National Electricity Policy, Tariff Policy and the Regulations of the State Commission, we have come to the conclusion that if the cross subsidy calculated on the basis of cost of supply to the consumer category is not increased but reduced gradually, the tariff of consumer categories is within $\pm 20\%$ of the average cost of supply except the consumers below the poverty line, tariffs of different categories of consumers are differentiated only according to the factors given in Section 62(3) and there is no tariff shock to any category of consumer, no prejudice would have been caused to any category of consumers with regard to the issues of cross subsidy and cost of supply raised in this appeal.

41.2. We do not agree with the findings of the State Commission that cost to supply a consumer category is the same as average cost of supply for the distribution system as a whole and average cost of supply can be used in calculation of cross subsidy instead of actual cost of supply. This is contrary to Regulation 7(c)(iii) of the State Commission and findings of this Tribunal in the Judgment reported in 2007(APTEL) 931 SIEL Limited, v/s PSERC & Ors.

41.3. *The State Commission has expressed difficulties in determining cost of supply in view of non-availability of metering data and segregation of the network costs. In our opinion, it will not be prudent to wait indefinitely for availability of the entire data and it would be advisable to initiate a simple formulation which could take into account the major cost elements. There is no need to make distinction between the distribution charges of identical consumers connected at different nodes in the distribution network. It would be adequate to determine the voltage-wise cost of supply taking into account the major cost element which would be applicable to all the categories of consumers connected to the same voltage level at different locations in the distribution system. We have given a practical formulation to determine voltage wise cost of supply to all category of consumers connected at the same voltage level in paragraphs 31 to 35 above. Accordingly, the State Commission is directed to determine cross subsidy for different categories of consumers within next six months from FY 2010-11 onwards and ensure that in future orders for ARR and tariff of the distribution licensees, cross subsidies for different consumer categories are determined according to the directions given in this Judgment and that the cross subsidies are reduced gradually as per the provisions of the Act.*

41.4. *In view of pathetic condition of consumers and distribution feeder and transformer metering, we direct the State Commission to take immediate action for preparation of a metering scheme as a project by the distribution company and its approval and implementation as per a time bound schedule to be decided by the State Commission.*

41.5. According to the Tariff Policy, the tariff of all categories of consumers except those below poverty line have to be within $\pm 20\%$ of the total average cost of supply. The variation of tariffs of different category with respect to average cost of supply has not been correctly determined by the State Commission. The State Commission has erred in clubbing different consumer categories having different tariff in one category based on voltage of supply. Also for the appellants' category average tariff per unit has been incorrectly determined at assumed load factor of 80%. The State Commission is directed to determine the average tariff for appellant's another category according to the directions given in paragraphs 39 and 40. Accordingly, we remand the matter to the State Commission to re-determine the variation of average tariff for different consumer categories with respect to average cost of supply and provide consequential relief to appellant's consumer category in terms of the tariff policy, if any, after hearing all concerned."

- 65.** Thus, in para 41.1 above we have held that cross subsidy calculated on the basis of cost of supply has to be reduced gradually and the tariff for all category of consumers should be within +/- 20% of average cost of supply. This is exactly in confirmation with the Tariff Policy, 2006. It would be desirable again quote para 8.3 of the Tariff Policy to understand the true import of this policy:

"8.3 Tariff design : Linkage of tariffs to cost of service

It has been widely recognised that rational and economic pricing of electricity can be one of the major tools for energy conservation and sustainable use of ground water resources.

In terms of the Section 61 (g) of the Act, the Appropriate Commission shall be guided by the objective that the tariff progressively reflects the efficient and prudent cost of supply of electricity.

...

Accordingly, the following principles would be adopted:

1. In accordance with the National Electricity Policy, consumers below poverty line who consume below a specified level, say 30 units per month, may receive a special support through cross subsidy. Tariffs for such designated group of consumers will be at least 50% of the average cost of supply. This provision will be re-examined after five years.

2. For achieving the objective that the tariff progressively reflects the cost of supply of electricity, the SERC would notify roadmap within six months with a target that latest by the end of year 2010-2011 tariffs are within ± 20 % of the average cost of supply. The road map would also have intermediate milestones, based on the approach of a gradual reduction in cross subsidy. For example if the average cost of service is Rs 3 per unit, at the end of year 2010-2011 the tariff for the cross subsidised categories excluding those referred to in para 1 above should not be lower than Rs 2.40 per unit and that for any of the cross-subsidising categories should not go beyond Rs 3.60 per unit.

...

- 66.** Thus, the Tariff Policy 2006 recognizes the fact that one of the objectives is that the tariff should reflect the cost of supply and for achieving that objective, the State Commission should notify roadmap within six months with a

target that latest by 2010-11 tariff are within +/- 20% of average cost of supply. The State Commission has referred to this provision of Tariff Policy but conveniently ignored that it had to lay down the road map for reduction in cross subsidy by July 2006. Nowhere, the Tariff Policy suggests that the cross subsidy has to be calculated based on average cost of supply. On the other hand it provides that the tariff progressively should reflect cost of supply. In this context, it would be appropriate to refer to the State Commission's own Tariff Regulations 2004 as amended till May 2011. Regulation 7 (g)(i) provides that the Commission, while determining the tariff, shall see that the **tariff progressively, reflects the cost of supply of electricity and also reduces and eliminates cross-subsidy within a period as stipulated by the Commission.**

67. Thus, the State Commission's own regulations require it to determine the tariff reflecting the cost of supply and cross subsidy is to be eliminated. This Tribunal has directed the State Commission to determine the tariff reflecting the cost of supply and to ensure that cross subsidies are gradually reduced. Then, where is the conflict between the Tariff Policy and directions of this Tribunal ?
68. Interestingly, while the Commission has amended the Regulation 7(c)(iii) for calculations of surcharge, as per

State Commission's own submission, this Regulation 7(g)(i) has not been amended so far and accordingly the State Commission is required to eliminate the cross subsidy within the stipulated time. It is to be noted that the provision regarding elimination of cross subsidy was there in Electricity Act 2003 when it was enacted on 10th June 2003. The Act was amended in the year 2005 and all the provisions regarding elimination of cross subsidy were removed from the Act. Although the State Commission has carried out five amendments to its Tariff Regulations 2004, the State Commission must have consciously decided to ensure that cross subsidies are to be eliminated and therefore did not amend this provision in accordance with the Act. On the other hand, the finding of the Tribunal in judgment dated 30.5.2011 was that the cross subsidy with respect to voltage wise cost of supply has to be reduced but the tariff may not be the mirror image of the cost of supply i.e. the cross subsidy may not be eliminated.

- 69.** The term cross subsidy has not been defined in the Act or the policy. Also the methodology to calculate the cross subsidy has not been given in the Act or the policy. Let us understand the actual meaning of the term "cross subsidy". Let us now take an example of a company which has to cross subsidize the price of one product by another product. One unit of product A costs, the Company Rs.65

and the Company sells it at Rs.50 only. A Unit of another product B costs, the Company Rs.60 and it sells the product B at Rs.75 per unit so as to fully compensate the loss. In that case, we can say on account of sale of product A that product B is cross subsidizing product A. Now, the question would arise as to by how much amount B is subsidizing the A. The answer would be $Rs.75 - Rs.60 = Rs.15/Unit$. Thus cross subsidy for subsidizing commodity would be sale price – cost of production and cross subsidy to subsidized commodity would be cost of its production – sale price.

- 70.** Let us now put this principle in Electricity sector. Cross subsidy for subsidizing category of consumers would be effective tariff for that category of consumers minus cost of supply to that category of consumers. Similarly, cross subsidy to a subsidized consumers would be cost to supply such category of consumers minus cost of service to that category of consumers. Where is the concept of average cost of supply in calculating cross subsidy?
- 71.** In Para 41.2 of this Tribunal Judgment dated 30.5.2011, has held that the contention of the State Commission that the cost to supply a consumer category is same as average cost of supply for the distribution system as a whole and average cost of supply can be used in calculation of cross subsidy is misconceived. As explained above, the very term

cross subsidy suggests that it is a differential between sale price and cost to serve.

72. In Para 41.5 of this Tribunal's Judgment dated 30.5.2011, the State Commission was directed to calculate the variation of tariffs with respect to average cost of supply(overall average). From the Retail Tariff order for the year 2010-11, passed by the Commission, it appears that the State Commission has lumped the consumption of all the categories at particular voltage level both the subsidized and subsidizing categories, to show that cross subsidies had been brought within +20% for subsidizing category as shown in Table 42 reproduced below:

Year	Level of Voltage	Average Cost of supply for the State as a whole (P/U)	Tariff (P/U)	Cross Subsidy (P/U)	Percentage of Cross Subsidy above/below or cost of supply
(1)	(2)	(3)	(4)	5=(4)-(3)	(6)
2009-10	EHT	263	295.05	32.05	(+)12.18
	HT		308.68	45.68	(+)17.36
	LT		179.99	(-)83.01	(-)31.56
2010-11	EHT	327.37	379.93	52.00	(+)15.88
	HT		383.68	56.31	(+)17.20
	LT		219.21	(-)108.16	(-)33.03

73. This approach of calculating cross subsidy with respect to average cost of supply is not correct. Categories of consumers are those categories that the State Commission

created in accordance with the Section 62(3) of the Act such as Domestic, non-domestic, LT Industrial, HT Industrial, agricultural etc. and then sub-categories which have different tariffs. The State Commission was directed to determine the effective Average tariff of consumer's category by dividing total expected revenue from a category by projected sale to that category of consumers. The State Commission had considered load factor of industrial consumers at 80% for the State as whole without any basis. The Tribunal in its order dated 30.5.2011 had given specific directions to calculate the variation with respect to average(overall) cost of supply. The State Commission was also directed to give relief to the Appellants' category in terms of the tariff policy i.e. in case their average tariff was not within $\pm 20\%$ of the overall average cost of supply.

- 74.** It is evident that the State Commission did not understand the basic aspects of the tariff fixation and also did not understand the Tribunal's directions given in the Judgment dated 30.5.0211. Perusal of the Impugned Order would indicate that the State Commission has again erred and calculated the variation of average tariff with respect to average cost of supply lumping all the consumers together in three voltage class. The State Commission has violated

this Tribunal's Judgment and order dated 30.5.2011 on this count also.

- 75.** The State Commission has relied upon the Model Tariff Regulations recommended for adoption by the Forum of Regulators in its 25th Meeting. According to the State Commission these Model Tariff Regulations provided that latest by the end of the year 2015-16, it must be ensured that tariffs are within $\pm 20\%$ of the average cost of supply. This observation is factually incorrect. What has been referred to by the State Commission as the recommendation of the Forum of Regulators was in fact, the portion of the presentation made by one of the Officers of the Central Electricity Regulatory Commission. This was not the recommendation of the Forum of Regulators.
- 76.** Let us refer to the relevant extract of the presentation given by the said Officer of the Central Commission in its 25th Meeting. They are produced as under:

“Cross Subsidy

**SERC would notify revised roadmap within six months from the notification of these Regulations with a target that latest by the end of year 2015-16, tariffs are within $\pm 20\%$ of the average cost of supply.*

**The road map would also have intermediate milestone, based on the approach of a gradual reduction in cross subsidy.”*

77. On the other hand, the Forum of Regulators recommended the Regulations 36 of the Model Tariff Regulations. The same are as follows:

“(a) The Commission shall notify a roadmap for reduction of cross subsidies within six months from the notification of these Regulations. The road map shall have intermediate milestone, based on the approach of a gradual reduction in cross subsidies.

(b) The Distribution Licensee shall compute the consumer category-wise cost of supply as per the methodology elaborated below.”

78. Unfortunately, the State Commission has wrongly proceeded on the basis that the Forum of Regulators while prescribing the guidelines for the Model Tariff have chosen to incorporate the time frame of the year 2015-16 to ensure that the tariff is within $\pm 20\%$ of the average cost of supply as referred to in the impugned order.

79. The above observation is erroneous both in fact as well as in law particularly when the guidelines of the Forum of Regulators being a consultative body cannot override the parent statutes and delegated legislation and policy there under.

80. In view of the above, the State Commission’s assertion in the impugned order that the directions given by this Tribunal are against the tariff policy is totally wrong and

quite unwarranted. In fact, as explained above, they are in full conformity with the tariff policy read with Section 61 (g) of the Electricity Act, 2003.

- 81.** So, this issue is decided accordingly as against the finding of the State Commission.
- 82.** The **4th Issue involves** the following question: Whether this Tribunal was bound to consider the “impending amendment” of the Regulations 7 (c) (iii) of OERC Tariff Regulations, 2004 notified on 10.8.2011 in its judgment dated 30.5.2011 in relation to the Retail Tariff Order for the Year 2010-11 passed by the State Commission on 20.3.2010 and the judgment dated 2.9.2011 in relation to the Retail Supply Tariff year for the year 2011-12 passed by the State Commission on 18.3.2011?.
- 83.** Here, we are concerned with the directions issued by this Tribunal in the judgment dated 30.5.2011 in relation to the Financial Year 2010-11 and judgment dated 2.9.2011 in relation to the Financial Year 2011-12 to re-determine the tariff of the Appellants’ category in terms of the Tariff Policy and to determine the voltage wise cost of supply to transparently determine the cross subsidy with respect of cost of supply in terms of Regulation 7(c)(iii) of the OERC Tariff Regulations,2004. The Regulations 7(c) (iii) has been amended only through the Notification dated

10.8.2011. The question is whether this Tribunal has to give a direction on 30.5.2011 in line with the impending amendment which came to be introduced on 10.8.2011. In order to examine this issue, it is necessary to take note of the following facts:

(a) The first judgment which was rendered by this Tribunal on 30.5.2011 dealt with Retail Tariff order for the Financial Year 2010-11 passed by the State Commission on 20.3.2010. The 2nd judgment was rendered on 2.9.2011 which dealt with the Retail Supply Tariff Order for FY 2011-12 passed by the Commission on 18.3.2011. In both the judgments, the matter was remanded to the State Commission with a direction to re-determine the tariff of the Appellants category in the light of the principles laid down by this Tribunal and also to determine the voltage wise cost of supply. In both the impugned orders passed by the State Commission dated 20.3.2010 and 18.3.2011, the State Commission relied upon the then prevalent Regulations 7 (c) (iii), 2004.

(b) While adjudicating these issues in the two set of Appeals as against both these orders, this Tribunal considered Regulations 7 (c) (iii), 2004 as existed on the date of orders namely 20.3.2010 as well as on

18.3.2011. The said Regulations are extracted hereunder:

“(iii) For the purpose of computing cross-subsidy, the difference between cost to serve of that category and average tariff realisation of that category shall be considered.”

(c) The Amendment to Regulation 7 (c) (iii) came into force and published on 10.8.2011. This amendment is prospective and not retrospective. The said amended Regulations is as follows:

“2. Amendment to Regulation 7 (c) (iii)

The Regulation 7 (c) (iii) shall be substituted as below:

*“For the purpose of computing **cross-subsidy payable by a certain category of consumer**, the difference between average cost to serve **all consumers of the State taken together** and average tariff **applicable to such consumers** shall be considered.”*

(d) These Regulations called OERC (Terms and Conditions for Determination of Tariff) (Fifth Amendment) Regulations, 2011. It became applicable on the date of publication of the said amendment in the Official Gazette i.e. on 10.8.2011. The said provisions reads as under:

“(i) These Regulations may be called the OERC (Terms and Conditions for Determination of Tariff) (Fifth Amendment) Regulations, 2011.

(ii) It shall come into force on the date of its publication in the Official Gazette.”

(e) We are concerned with the orders passed by the State Commission in respect of the period for the Financial Year 2010-11 and 2011-12 on the basis of the Regulations prevalent then. Hence, for the period for Financial Year 2010-11 and 2011-12, the State Commission is obliged in law to implement the orders of this Tribunal which was confirmed by the Hon'ble Supreme Court in relation to the date of respective impugned tariff orders. In other words, the State Commission is obliged in law to decide the issue on the basis of then prevalent Regulations 7 (c) (iii) of the OERC Tariff Regulations, 2004, since the then Regulations are binding on the State Commission. The proposed amendment which was yet to be published, was not binding on the State Commission. To put it in nutshell, at the time of passing of the judgment dated 30.5.2011 and 2.9.2011 in which the orders dated 20.3.2010 and 18.3.2011 of the State Commission were dealt with and set aside, this Tribunal was not bound to consider the impending amendment of the Regulations 7 (c) (iii) of the OERC Tariff Regulations, 2004 notified on 10.8.2011, which was not prevalent when those impugned orders were passed. On the other hand, this Tribunal was to consider the

Regulations prevalent then as the date of impugned orders in those Appeals i.e. on 20.3.2010 and 18.3.2011. Every statute is prima facie prospective unless it is expressly or by necessary implication made to have a retrospective operation.

(f) In the following judgments, the said principles have been laid down:

- (i) Secretary (Estt) Railway Board and another vs. D Francis Paul, etc., (1996) 10 SCC 134 para 4
- (ii) S.L. Srinivasa Jute Twine Mills P. Ltd. vs Union of India (UOI) and Anr (2006) 2 SCC 740 paras 12-19;
- (iii) Union of India & Ors vs P.C Mishra with Union of India & Ors vs. M.N. Mathur 1994 Supp (1) SCC 39;
- (iv) Shree Sidhballi Steels Ltd., vs State of UP (2011) 3 SCC 193 para 38, 40;
- (v) Anil Chandra vs Radha Krishan Gaur (2009) 9 SCC 454 para 19
- (vi) Union of India vs Kartick Chandra Mondal (2010) 2 SCC 422 para 14-15
- (vii) Shakti Tubes Ltd., vs State of Bihar (2009) 7 SCC 673 para 24-26
- (viii) Kusumam Hotels Private Ltd vs Kerala State Electricity Board & Ors (2008) 13 SCC 213 paras 23,24, 36

84. The principles laid down in these judgments relating to retrospective **operation are as follows:**

(a) There is no doubt that the vested rights or benefits under the legislation could be retrospectively taken away by legislation, but then the statute taking away such rights or benefits must expressly reflect its intention to that effect.

(b) It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have retrospective operation. But the rule in general is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations. Unless there are words in the statute sufficient to show the intention of the legislature to affect existing rights, it is deemed to be prospective only.

(c) If a rule/notification/circular claims to be retrospective in nature, has to expressly specify, as per the rules of interpretation of statutes in the instant petition, the Appellants have failed to establish the nature with regard to retrospective effect of the notification/rules.

(d) There is nothing in the contents or in the language of the said office memorandum which would

indicate that there was an intention to give a retrospective effect to the contents of the said notification. Instead, the language used in the aforesaid notification clearly shows that the same was intended to be prospective in nature and not retrospective.

(e) It is well settled principle in law that the court cannot read anything into a statutory provision which is plain and unambiguous. The language employed in a statute is the determinative factor of the legislative intent. If the language of the enactment is clear and unambiguous, it would not be proper for the courts to add any words thereto and evolve some legislative intent not found in the statute.

(f) In our constitutional scheme, however, the statute and/or any direction issued there under must be presumed to be prospective unless the retrospectivity is indicated either expressly or by necessary implication. It is a principle of the rule of law. A presumption can be raised that a statute or statutory rule has prospective operation only.

(g) Though retrospectivity is not to be presumed and rather there is presumption against retrospectivity, according to Craies (Statute Law, 7th Edn), it is open for

the legislature to enact laws having retrospective operation. This can be achieved by express enactment or by necessary implication from the language employed. If it is a necessary implication from the language employed that the legislature intended a particular section to have a retrospective operation, the courts will give it such an operation. In the absence of a retrospective operation having been expressly given, the Courts may be called upon to construe the provisions and answer the question whether the legislature had sufficiently expressed that intention giving the statute retrospectivity.

- 85.** In view of the settled principles of law as laid down by the Hon'ble Supreme Court, the State Commission ought to have complied with the directions given by this Tribunal by deciding the issue on the basis of the Regulations then prevalent as on the date of the said impugned orders passed _____ by _____ the State Commission on 20.3.2010 and 18.3.2011 and not on the Regulations which was yet to come into force.
- 86.** Thus, the State Commission has not followed this settled principle of law but violated the directives of this Tribunal while deciding the issue. Hence, the finding given by the State Commission on the new Regulations which was not

prevalent on the date of earlier impugned orders is patently wrong. The same is liable to be set aside.

87. Accordingly the issue is decided against the State Commission.

88. The **5th Issue** involves the following question:

“Whether the tariff policy issued by the Central Government in the year 2006 has overriding effect of the Commission’s own Regulations?”

89. While dealing with this issue, we have to take note of the state of object of the Electricity Act, 2003. The object for enactment of the Electricity Act, 2003 are as follows:

(a) To distance the Government from determination of tariff on two grounds: (i) State Electricity Boards were unable to take decisions on tariffs in a professional and independent manner and invariably the tariff in fact, have been determined only by the State Governments and (ii) Due to the failure of the Electricity Boards to take effective steps, the cross subsidies have reached unsustainable levels.

(b) To take measures conducive to development of the electricity industry; rationalization of electricity tariff;

(c) To lay down the statutory principles to mandatorily guide regular tariff determination requiring

cost-reflective and viable tariff determination in terms of Section 61 (a), (b), (c), (d), (g) and (i) of the Electricity Act, 2003 read with Para 8.3 of the Tariff Policy.

- 90.** On perusal of the Electricity Act, 2003 as a whole, the State Commissions have been given independent delegated legislative powers in addition to the adjudicative powers and powers of determination of tariff.
- 91.** All the State Regulatory Commissions by virtue of this Act, 2003, have exercised their delegated legislative powers in terms of Section 61 and Section 181 of the Electricity Act, 2003 to notify the Regulations after prior publication. As per the Act, these Regulations framed by the State Commissions, are required to be placed before the respective State legislature. These Regulations are binding on the State Commissions as a delegated legislation. The Regulatory Commissions are obliged to determine the tariff by exercising its powers only in accordance with the Regulations.
- 92.** The binding nature of the Regulations on the Commissions has been dealt with and decided by the Hon'ble Supreme Court as well as this Tribunal. Those decisions are as follows:

(i) PTC India Vs.CERC: (2010)4 SCC 603 Para 53-58; as under:

“53. Applying the abovementioned tests to the scheme of 2003 Act, we find that under the Act, the Central Commission is a decision-making as well as regulation-making authority, simultaneously. Section 79 delineates the functions of the Central Commission broadly into two categories –mandatory functions and advisory functions. Tariff regulation, licensing (including inter-State trading licensing), adjudication upon disputes involving generating companies or transmission licensees fall under the head “mandatory functions” whereas advising Central Government on formulation of National Electricity Policy and tariff policy would fall under the head “advisory functions”. In this sense, the Central Commission is the decision-making authority. Such decision-making under Section 79(1) is not dependant upon making of regulations under Section 178 by the Central Commission. Therefore, functions of Central Commission enumerated in Section 79 are separate and distinct from function of Central Commission under Section 178. The former is administrative/adjudicatory function whereas the latter is legislative.

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

electricity, to issue licenses, to adjudicate upon disputes, to levy fees, to specify the Grid Code, to fix the trading margin in inter-State trading of electricity, if considered necessary, etc.. These measures, which the Central Commission is empowered to take, have got to be in conformity with the regulations under Section 178, wherever such regulations are applicable. Measures under Section 79(1), therefore, have got to be in conformity with the regulations under Section 178.

55. To regulate is an exercise which is different from making of the regulations. However, making of a regulation under Section 178 is not a pre-condition to the Central Commission taking any steps/measures under Section 79(1). As stated, if there is a regulation, then the measure under Section 79(1) has to be in conformity with such regulation under Section 178. This principle flows from various judgments of this Court which we have discussed hereinafter. For example, under Section 79(1)(g) the Central Commission is required to levy fees for the purpose of the 2003 Act. An Order imposing regulatory fees could be passed even in the absence of a regulation under Section 178. If the levy is unreasonable, it could be the subject matter of challenge before the Appellate Authority under Section 111 as the levy is imposed by an Order/decision making process. Making of a regulation under Section 178 is not a pre-condition to passing of an Order levying a regulatory fee under Section 79(1)(g). However, if there is a regulation under Section 178 in that regard then the Order levying fees under Section 79(1)(g) has to be in consonance with such regulation.

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

determination of tariff even in the absence of the regulations under Section 178. However, if a regulation is made under Section 178, then, in that event, framing of terms and conditions for determination of tariff under Section 61 has to be in consonance with the regulation under Section 178.

57. One must keep in mind the dichotomy between the power to make a regulation under Section 178 on one hand and the various enumerated areas in Section 79(1) in which the Central Commission is mandated to take such measures as it deems fit to fulfil the objects of the 2003 Act. Applying this test to the present controversy, it becomes clear that one such area enumerated in Section 79(1) refers to fixation of trading margin. Making of a regulation in that regard is not a pre-condition to the Central Commission exercising its powers to fix a trading margin under Section 79(1)(j), however, if the Central Commission in an appropriate case, as is the case herein, makes a regulation fixing a cap on the trading margin under Section 178 then whatever measures a Central Commission takes under Section 79(1)(j) has to be in conformity with Section 178.

58. One must understand the reason why a regulation has been made in the matter of capping the trading margin under Section 178 of the Act. Instead of fixing a trading margin (including capping) on a case to case basis, the Central Commission thought it fit to make a regulation which has a general application to the entire trading activity which has been recognized, for the first time, under the 2003 Act. Further, it is important to bear in mind that making of a regulation under Section 178 became necessary because a regulation made under Section 178 has the effect of interfering and overriding the existing contractual relationship between the regulated entities. A regulation under Section 178 is in the nature of a subordinate Legislation. Such

subordinate Legislation can even override the existing contracts including Power Purchase Agreements which have got to be aligned with the regulations under Section 178 and which could not have been done across the board by an Order of the Central Commission under Section 79(1)(j)."

(ii) Uttar Pradesh Power Corporation Ltd., Vs NTPC (2009) 6 SCC 235 at Para 46; as under:

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

(iii) Maharashtra Electricity Regulatory Commission vs Reliance Energy Limited; (2007) 8 SCC 381 at paras 9, 11, 14 to 18 and 20, holding that the Regulatory Commissions have complete powers to impose license conditions, frame regulations and issue directions as also enforce them.

(iv) In Madhya Pradesh Power Generation Company Limited vs Madhya Pradesh Electricity Regulatory Commission and Ors: 2011 ELR (APTEL) 1041, this Tribunal was of the following view.

"24. If we analyze different provisions of this Act, which are relatable to the appropriate Commission it would appear that the regulatory Commission is a peculiar statutory body having within in itself four functions, (a) Administrative, (b) Legislative and (c) Judicial and (d) Advisor.

.....

Similarly, the State Commission has been vested with the power to make regulations to carry out the purpose of the Act under Section 181 and all such regulations made by the State Commission are required to be laid before each House of the State Legislature, Unicameral or bicameral as the case may be. The Regulations framed by the State Commission or the Central Commission do partake the character of subordinate or delegate legislation under the law and all such subordinate legislations have the force of the statutory law. Therefore, the regulations framed by an appropriate Commission are deemed to be legislative enactments having the approval of Legislature when it is put to use by notification.”

(v) In BRPL vs DERC & Ors: 2010 ELR (APTEL) 0404 paras 8, 20-25, 31 has held that tariff policy cannot whittle down the scope of the statutory powers conferred to a State Commission, as extracted below:

22. In the light of the above rationale laid down by the Supreme Court, Clause 5.1 of the NTP which is a subordinate legislation would not restrict or whittle down the scope of the statutory powers conferred to a State Commission under Section 62(1)(a) especially when it is noticed that Clause 5.1 of NTP would apply to Section 63 only and not to Section 62 which is a substantive provision. As stated above, Section 63 is an exception to Section 62 and the same cannot be taken away by way of a policy document like guidelines - Clause 5.1 of NTP.

23. Secondly it has been held that Clause 5.1 of the NTP which is a policy direction cannot be held to control or override Section 62 of the Act and when these two provisions cannot be reconciled, Section 62 alone must prevail.”

93. In view of the law laid down in various authorities referred to above, the State Commission is bound to follow its own Regulations. However, while framing the Regulations, the Commission has to be guided by the Tariff Policy. In this case we do not find any conflict between the Tariff Policy and the Regulations as existed at the time of passing the earlier tariff orders for Fy-2010-11 and 2011-12 by the State Commission.

94. So, the finding by the State Commission on this issue is wrong. This also is liable to be set aside. So, this issue is decided accordingly.

95. The last issue involves the following question:

“When the Tariff order passed by the State Commission while exercising the Tariff Fixation carried out through quasi legislative function, whether this Tribunal has the jurisdiction to review the tariff order passed by the State Commissions?”

96. This question was constrained to be framed by the Division Bench of this Tribunal while referring the matter to the Full

Bench due to the unfortunate situation where the State Commissions went to the extent of observing in the impugned order that the tariff orders being passed under quasi-legislative function of the Commission cannot be reviewed or set aside by this Tribunal. According to the State Commission, this Tribunal has no jurisdiction to entertain the Appeals as against the Tariff orders.

- 97.** The assertion of the State Commission to the effect that this Tribunal has no jurisdiction to go into the legality and propriety of the tariff orders is nothing but expression of lack of legal understanding of the State Commission about both the Electricity Act, 2003 as well as the decisions rendered by the Hon'ble Supreme Court on this issue.
- 98.** This Tribunal has been set-up u/s 110 of the Electricity Act, 2003. The powers and functions of this Tribunal are dealt with u/s 111 of the Electricity Act, 2003. It provides that it is an Appellate Authority to examine the orders passed by the appropriate Commissions. The Central Commission and the State Commissions pass the order under part VII of the Electricity Act, 2003. These orders are appealable u/s 111 of the Electricity Act, 2003.
- 99.** Even though the tariff fixation exercise is being found as a quasi-legislative function delegated by the Act, the tariff

orders have been made Appealable before this Tribunal u/s 111 of the Electricity Act.

100.When the question with regard to the powers of this Tribunal u/s 111 of the Electricity Act, 2003 to go into the validity of the tariff orders passed by the State Commissions was raised before the Hon'ble Supreme Court in the case of PTC India Limited Vs Central Electricity Regulatory Commission reported in (2010) 4 SCC 603, the Constitution Bench of the Hon'ble Supreme Court has categorically held that the tariff orders can be reviewed and set aside by the Appellate Tribunal u/s 111 of the Electricity Act, 2003. The relevant portion of the observation are as follows:

*“26..... If one reads Section 61 with Section 62 of the 2003 Act, it becomes clear that the Appropriate Commission shall determine the actual tariff in accordance with the provisions of the Act, including the terms and conditions which may be specified by the Appropriate Commission under Section 61 of the said Act. **Under the 2003 Act, if one reads Section 62 with Section 64, it becomes clear that although tariff fixation like price fixation is legislative in character, the same under the Act is made appealable vide Section 111.**”*

.....

“50. Applying the above test, price fixation exercise is really legislative in character, unless by the terms of a particular statute it is made quasi-judicial as in the case of Tariff fixation under Section 62 made appealable

under Section 111 of the 2003 Act, though Section 61 is an enabling provision for the framing of regulations by CERC

“92 (v) If a dispute arises in adjudication on interpretation of a regulation made under Section 178, an appeal would certainly lie before the Appellate Tribunal under Section 111.....”

101. This Tribunal relying upon the Constitution Bench judgment in the PTC India case has specifically held that the tariff fixation though legislative in character, it takes a quasi judicial colour since an Appeal is provided u/s 111 of the Electricity Act, 2003 before this Tribunal. This principle has been laid down in the case of **NTPC Limited Vs. MP State Electricity Board and Ors reported as 2011 ELR (SC) 1485** Para-30 which reads as under:

“Price fixation is legislative in character, but since an appeal is provided under Section 111 of the Electricity Act, 2003 it takes a quasi-judicial colour.”

102. In view of the legal position already set-out by the Constitution Bench, it cannot be contended that tariff determination is under legislative functions and therefore, the same cannot be disturbed by the Tribunal by invoking the powers under Appeal provisions u/s 111 of the Electricity Act, 2003.

103. In this context, we have to refer to the necessity which had arisen for the Hon'ble Supreme Court to direct the

Government to constitute an effective Appellate Forum as against the order of the State Commission under 1998 Act. In WB Electricity Regulatory Commission vs CESC Ltd., 2002 (8) SCC 715, the Hon'ble Supreme Court citing various aspects and directed and recommended to the Central Government to constitute Appellate Tribunal to go into the validity and legality of the orders including the Tariff orders passed by the State Commissions. The relevant observations are as follows:

“Re: An effective appellate forum:

*102. We notice that the Commission constituted under Section 17 of the 1998 Act is an expert body and the **determination of tariff which has to be made by the Commission involves a very highly technical procedure**, requiring working knowledge of law, engineering, finance, commerce, economics and management. ... **we think it would be more appropriate and effective if a statutory appeal is provided to a similar expert body, so that the various questions which are factual and technical that arise in such an appeal, get appropriate consideration in the first stage also.** From Section 4 of the 1998 Act, we notice that the Central Electricity Regulatory Commission which has a Judicial Member as also a number of other Members having varied qualifications, is better equipped to appreciate the technical and factual questions involved in the appeals arising from the orders of the Commission. Without meaning any disrespect to the Judges of the High Court, **we think neither the High Court nor the Supreme Court would in reality be appropriate appellate forums in dealing with this type of factual and technical matters.** Therefore, we*

recommend that the appellate power against an order of the State Commission under the 1998 Act should be conferred either on the Central Electricity Regulatory Commission or on a similar body. We notice that under the Telecom Regulatory Authority of India Act, 1997 in Chapter IV, a similar provision is made for an appeal to a special Appellate Tribunal and thereafter a further appeal to the Supreme Court on questions of law only. We think a similar appellate provisions may be considered to make the relief of appeal more effective.”

104. Only on the basis of this direction and recommendation given by the Hon'ble Supreme Court in the above judgment, Chapter XI of the Electricity Act, 2003 has been enacted thereby this Appellate Tribunal has been constituted to exercise the Appellate powers to go into all the orders including the Tariff Orders passed by the State Commission and the Central Commission.

105. Hence, the State Commissions cannot have any jurisdiction to question the jurisdiction of the Appellate Tribunal to go into the validity of the orders passed by the State Commission inclusive of the orders relating to tariff determination.

106. This **issue is also decided accordingly** as against the finding of the State Commission.

107. Incidentally, it has been argued by the Respondent including the State Commission that the judgment of the High Court of Orissa which has been rendered on

30.3.2012 in WP No.8409 of 2011, in regard to average cost of supply etc., is binding on the State Commission and the State Commission's finding in the impugned order dated 21.1.2012 is in line with the said judgment of High Court dated 30.3.2012. This submission deserves outright rejection for the following reasons:

(a) Firstly, we are only concerned with the question whether the remand orders with directions which have been passed by this Tribunal on 30.5.2011 and 2.9.2011 have been complied with in letter and spirit by the State Commission while passing the impugned order dated 21.1.2012. On the date of the impugned order i.e. 21.1.2012, the High Court did not pronounce any order in that Writ Petition. The said WP had been disposed of only on 30.3.2012.

(b) Secondly, the observation of the High Court of Orissa in the order dated 30.3.2012 in the public interest litigation, in relation to the computation of cross subsidy in tariff can not be used now to justify the decision of the State Commission in the impugned order dated 21.1.2012 as the High Court itself in its order dated 30.3.2012 had categorically stated that the correctness of the fixation of tariff was not a matter on which it was not inclined to exercise the jurisdiction and

further directed the Writ Petitioners to approach the appropriate statutory forum for the same.

108. To discuss the issue further, we need to state some more facts. The Writ Petition was filed as a Public Interest Litigation in WP No.8409 of 2011 before the Orissa High Court in the context of news report dated 19.3.2011 stating that the Electricity tariff had sky rocketed by virtue of the tariff order dated 18.3.2011 for the Financial Year 2011-12. Similarly, another Writ Petition had been filed in WP No.8451 of 2011 by Utkal Chambers of Commerce. But, this Writ Petition No.8451 of 2011 was withdrawn and the same had been dismissed as withdrawn. Thereupon, WP No.8409 of 2011 was taken up for enquiry and the judgment was pronounced on 30.3.2012, i.e. two months after the present impugned order which had been passed by the State Commission on 21.1.2012.

109. In this context it is to be stated that the Odisha High Court itself while passing the order in WP No.8409 of 2011 referred to the said withdrawal of the WP No.8451 of 2011 filed by the Utkal Chamber of Commerce and mentioned that the High Court would not exercise its jurisdiction under Articles 226 and 227 of the Constitution of India to go into the validity of the Tariff Orders and that therefore, they did not incline to entertain the WP so far as the correctness of

the fixation of tariff is concerned and the same could be agitated by the parties before appropriate authority.

110. Having allowed the withdrawal of the Writ Petition and having held that the tariff issue which includes cross subsidy, the High Court passed some observation in relation to the computation of cross subsidy by the State Commission.

111. Let us now refer to the relevant observations made by the High Court dated 30.3.2012 in WP No.8409 of 2011. The same are as under:

5. We are of the view that in a matter of fixation of tariff, this Court should not exercise its jurisdiction under Articles 226 and 227 of the Constitution of India and, therefore, we are not inclined to entertain the writ application, so far as the correctness of the fixation of tariff is concerned and it is open to the petitioners to raise the same before the appropriate statutory forum.

6. As the present writ application has been filed in the shape of a Public Interest Litigation highlighting the irregularities and inefficiencies as pointed out in the report of the CAG under Annexure-1 and the inept attitude of the distribution companies and as there is no improvement to the quality of supply of electricity in the Hydro Electricity Sector despite a huge amount of capital is being dumped into these sectors, in the interest of the public, all these failures on the part of public sector undertakings and apathetic attitude of private companies managing the distribution system require a close scrutiny of this Court, and this Court has the jurisdiction to go into all those issues.

7. Much debated question of computation of cross-subsidy has been raised by Mr. Pitamber Acharya, learned counsel for the Utkal Chambers of Commerce. Though he ultimately withdrew the writ application, since the said issue is likely to arise in future pertaining to interpretation of the provisions relating to computation of cross-subsidy, we heard Mr. Acharya on the said issue at great length.

.....

10. So, a reading of Section 61(g) and Clause 8.3(2) of the National Tariff Policy makes it clear that cross-subsidies in tariffs should be in conformity with the National Tariff Policy. In other words, the cross-subsidy is for open access in which subsidy was taken from the banks of Industrial consumer to subsidise the domestic and agriculture consumers from that money. Once it is open access, one has to pay surcharge. So surcharge is over and above tariff. The computation of surcharge is different from computation of tariff as rightly indicated above. Regulation 7(c)(iii) has no application to fixation of tariff.

We may state here that a conjoint reading of Section 61 (g) of the Electricity Act and Paragraph-8.3(2) of the National Tariff Policy makes it clear that it does not provide for any category of consumers and it is also an admitted fact that there is no methodology provided for computing cross-subsidy. Such computation may be the average cost of supply or cost of supply voltage wise or cost of supply to various consumer categories.

At present the OERC is guided by the notion of subsidy by average cost of supply for the State as a whole, which has been recommended by the Forum of Regulator (FOR) and, in our considered opinion also,

the same is a practical solution, at least in the present context of the Indian Power Sector.

11. At last, we may make it very clear that computation of surcharge is totally different from computation of tariff and Regulation-7.3(c), as it stood prior to amendment and as it stands at present, is only applicable to surcharge and surcharge is only levied on wheeling consumers.

Hence, though the writ application filed by Utkal Chambers of Commerce was withdrawn, the argument advanced by Mr. Pitamber Acharya is fallacious and the computation made by the OERC on the basis of average cost of supply to the State as a whole is not illegal but the same is in accordance with the National Tariff Policy”

112. The High Court has held in Para-10 that the computation of cross subsidy would follow any of the three methods (i) Average Cost of supply; (ii) Cost of Supply Voltage-wise, and (iii) Cost of Supply to various consumer categories.

113. Having held so, the High Court observed that the computation on the basis of average cost of supply to the State as a whole is a practical solution. In this context, it is to be stated that on this issue, there are catena of judgments rendered by this Tribunal since *SIEL v Punjab State Electricity Regulatory Commission* wherein the scheme of the Act and Policy had been interpreted in detail and thereafter ratio decided by this Tribunal has been implemented across the sector by almost all the State Commissions. However, the High Court did not appear to

have the benefit of examining those ratio decided in various judgments rendered by this Tribunal.

114. Be that as it may, as mentioned earlier, as on 21.1.2012, i.e. the date of issuance of the impugned order, the State Commission had acted in violation of the directions of this Tribunal by not complying the said directions. The present defence on the basis of the order dated 30.3.2012 of the Orissa High Court cannot be a valid one in as much as the State Commission while passing the impugned order dated 21.1.2012 did not have the benefit of the judgment which was rendered by the Orissa High Court later on 30.3.2012. Further, the mere observation of the judgment with reference to the cross subsidy cannot be construed to be ratio binding on the State Commission as well as on this Tribunal. On the other hand, the State Commissions are bound to follow the directions of this Tribunal on the basis of the settled principles of law laid down in various decisions rendered by this Tribunal interpreting various provisions of the Electricity Act, 2003.

115. That apart, the High Court disposed of the Writ petition filed by some other party in public interest litigation in which the present Appellants were not the parties in those proceedings before the High Court. That apart, as quoted above, the High Court itself in Para-5 of the judgment had

held that it would not go into the merits of the tariff determination.

116. To appreciate the impact of the judgment of Orissa High Court, the following position of law can be taken note of:

(a) A judgement has to be read as a whole and the observation therein have to be considered in the light of the questions which were before the court. This has been decided in the case of Commissioner of Income tax vs Sun Engineering Works Pvt Ltd., (1992) 4 SCC 363 and State of Punjab vs Baldev Singh (1999) 6 SCC 172 .

(b) Judicial decision is an authority for what it actually decided and not for what can be read into it by implication or by assigning an assumed intention to the Judges, and inferring from it a proposition of law which the Judges have not specifically laid down in the pronouncement.” This principle has been laid down in the case of Amrendra Pratap Singh Vs Tej Bahadur Prajapati (2004) 10 SCC 65 at Para-28.

(c) With regard to Doctrine of precedent and ratio decidendi, the Hon’ble Supreme Court has expressed the legal position in so many decisions which are as under:

(i) ***In the case of Krishena Kumar V Union of India (1990) 4 SCC 207, the Hon'ble Supreme Court reiterated the doctrine of precedents and ratio decidendi and inter-alia, held as under:***

“18. The basic question of law that has to be decided, therefore, is what was the ratio decidendi in Nakara case and how far that would be applicable to the case of the PF retirees.

19. The Doctrine of precedent, that is being bound by a previous decision, is limited to the decision itself and as to what is necessarily involved in it. It does not mean that this Court is bound by the various reasons given in support of it, especially when they contain “propositions wider than the case itself required”. This was what Lord Selborne said in Caledonian Railway Co. v. Walker’s Trustees and Lord Halsbury in Quinn v Leatham. Sir Frederick Pollock has also said : “Judicial authority belongs not the exact words used in this or that judgment, nor even to all the reasons given, but only to the principles accepted and applied as necessary grounds of the decision”.

20. In other words, the enunciation of the reason or principle upon which a question before a court has been decided is alone binding as precedent. The ratio decidendi is the underlying principle, namely, the general reasons or the general grounds upon which the decision is based on the test or abstract from the specific peculiarities of the particular case which gives rise to the decision. The ratio decidendi has to be ascertained by an analysis of the facts of the case and the process of reasoning involving the major premise consisting of a pre-existing rule of law, either statutory or judge-made, and a minor

premise consisting of the material facts of the case under immediate consideration. If it is not clear, it is not the duty of the court to spell it out with difficulty in order to be bound by it. In the words of Halsbury (4th edn., Vol 26 para 573)

“The concrete decision alone is binding between the parties to it but it is the abstract ratio decidendi, as ascertained on a consideration of the judgment in relation to the subject matter of the decision, which alone has the force of law and which when it is clear it is not part of a tribunal’s duty to spell out with difficulty a ratio decidendi in order to bound by it, and it is always dangerous to take one or two observations out of a long judgment and treat them as if they gave the ratio decidendi of the case. If more reasons than one are given by a tribunal for its judgment, all are taken as forming the ratio decidendi.”

(ii) In this regard, the Hon’ble Supreme Court in the case of **Bhavnagar University v Palitana Sugar Mills (P) Ltd.**, (2003) 2 SCC 111 has held as under:

“59. A decision, as is well known, is an authority for which it is decided and not what can logically be deduced therefrom. It is also well settled that a little difference in facts or additional facts may make a lot of difference in the per cental value of a decision. (See Ram Rakhi v Union of India, Delhi Admn (NCT of Delhi) v Manohar Lal, Haryana Financial Corpn. V Jagdamba Oil Mills and Nalini Mahajan (Dr) v. Director of Income Tax (Investigation)).

(iii) The Hon’ble Supreme Court has, in the case of **Amrendra Pratap Singh v. Tej Bahadur Prajapati**, (2004) 10 SCC 65 held as under:

“28.....A judicial decision is an authority for what it actually decided and not for what can be read into it by implication or by assigning an assumed intention to the judges, and inferring from it a proposition of law which the judges have not specifically laid down in the pronouncement....”.

(iv) The **Hon’ble Supreme Court**, has in the **case of Municipal Corpn of Delhi V Gurnam Kaur**, (1989) 1 SCC 101 held as under:

“12. In Geard v Worth of pairs Ltd. (k), the only point argued was on the question of priority of the claimant’s debt, and, on this argument being heard, the court granted the order. No consideration was given to the question whether a garnishee order could properly be made on an account standing in the name of the liquidator. When, therefore, this very point was argued in a subsequent case before the Court of Appeal in Lancaster Motor Co. (London) Ltd., V Bremith Ltd., the Court held itself not bound by its previous decision. Sir, Wilfrid Greene, M.R., said that the could not help thinking that the point now raised had been deliberately passed Sub Silentio by Counsel in order that the point of substance might be decided. He went on to say that the point had to be decided by the earlier court before it could make the order which it did; nevertheless, since it was decided “without argument, without reference to the crucial words of the rule, and without any citation of authority”, it was not binding and would not be followed. Precedents sub silentio and without argument are of no moment. This rule ahs ever since been followed. One of

the Chief reasons for the doctrine of precedent is that a matter that has once been fully argued and decided should not be allowed to be reopened. The weight accorded to dicta varies with the type of dictum. Mere casual expressions carry no weight at all. Not every passing expression of a judge, however eminent, can be treated as an ex cathedra statement, having the weight of authority.”

(v) The Hon'ble Supreme Court has, in the case of **Union of India v Chajju Ram** (2003) 5 SCC 568 held as under:

“23. It is now well settled that a decision is an authority for what it decides and not what can logically be deduced there from. It is equally well settled that a little difference in facts or additional facts may lead to a different conclusion.”

117.In view of the above settled position of law, the mere observation made by the High Court of Orissa without considering the ratio decided by this Tribunal on the basis of the judgments of Hon'ble Supreme Court cannot be considered to be binding precedent. Therefore, the justification of the impugned order made by the State Commission on the basis of the subsequent orders passed by the Odisha High Court cannot be accepted to be valid in law.

118.Therefore, we are unable to hold that the observations of the High Court are binding precedent especially when the

Appellants were not the parties in those Writ Petitions before High Court and the benefit of High Court's judgment was not available to the State Commission at the time of the pronouncement of the impugned order.

119.In view of the above discussions, we conclude as follows:

(a) The OERC has, by passing the impugned order, acted in defiance of the principles of judicial discipline which demand that the directions of this Tribunal in the Remand Orders should have been given effect to. Failure to implement the same cannot be justified on the ground of pendency of similar proceedings before other for a, as the principles of judicial discipline demand following orders of the higher authorities unless and until the said orders of the higher authorities have been interfered with. This principle of judicial discipline is enshrined in Section 111 of the Act, by providing that the first Appeal from the state Commissions lies before this Tribunal. Unless an order of this Tribunal is set aside or interfered with by the Supreme Court of India, which is vested with the right of second appeal under Section 125 of the Act, the principles of judicial discipline demand that the State Commissions abide by and give effect to the orders and directions of this Tribunal. Moreover, the stay order issued by the High Court of Orissa which

pertained exclusively to the tariff of LT category of consumers could not have affected the ability of the OERC to implement and give effect to the Remand Orders.

(b) The observations of the High Court of Orissa on 30.3.2012 in the Public Interest Litigation in relation to the computation of cross subsidy in tariff may not be used to justify the decision of the State Commission in the impugned order as the High Court has categorically stated itself that the correctness of fixation of tariff was not a matter on which it was inclined to exercise jurisdiction, and directed the Petitioners to approach the relevant statutory for the same. Therefore, the observations of the High Court in relation to the computation of cross subsidy in tariff were obiter dicta which do not have authoritative effect under the well established doctrine of stare decisis.

(c) The scheme of tariff determination under the Act support the principle of determining cross subsidy on the basis of “actual cost of supply” (in other words ‘voltage wise cost of supply’) and the principle of determination of cross-subsidy on the basis of “average cost of supply’ as seemingly espoused by OERC is not in consonance with the Act, the Tariff Policy, the

Electricity Policy or the applicable provisions of the OERC Tariff Regulations.

120. From our above conclusion, it is apparent that the State Commission has not followed the judicial discipline by declining to implement our orders and directions given in the judgments and thereby committed serious violation of our directions issued while remanding the matter. This conduct on the part of the State Commission is highly condemnable and reprehensible.

121. It is an essential requirement of law as settled that the concerned authorities carry out their statutory functions and comply with the orders of the Superior Courts in letter and spirit. Otherwise, the contempt proceedings may be initiated against them by the Superior authority.

122. This principle has been laid down in the following authorities:

(a) Bhopal Sugar Industries Ltd., v. Income Tax Officer, Bhopal: AIR 1961 SC 182 (Paras 7,8, 10 and 12) (Constitution Bench)- Income Tax Appellate Tribunal;

(b) RBF Rig Corporation, Mumbai v. Commissioner of Customs (Imports), Mumbai: (2011) 3 SCC 573 (Paras 17-19, 23 to 27) – Customs, Excise and Gold (Control), Appellate Tribunal;

(c) Smt Kausalya Devi Bogra & Ors. V Land Acquisition Officer: (1984) 2 SCC 324 (Paras 6,7, 8 & 14)-Land Acquisition Authority;

(d) Maninderjit Singh Bitta v. UOI: (2011) 11 SCC 315 (Para 16)

(e) Shri Baradakant Mishra v. Bhimsen Dixit (1973) 1 SCC 446 (Paras 1,10-12, 15-17).

123. Following authorities has laid down the principle of judicial discipline to be maintained by the subordinate authority:

(a) Union of India v. Kamalkshi Finance Corporation Limited (1992) Supp (1) SCC 443 @ para6

(b) Haryana Vidyut Prasaran Nigam Limited v Haryana Electricity Regulatory Commission in Appeal No.27 of 2007 para 11.

(c) Kashi Viswanath Steels Ltd., Vs Uttaranchal Electricity Regulatory Commission & Ors in Appeal No.169 of 2006;

(d) West Bengal Electricity Regulatory Commission Vs CESC , 2002 (8) SCC 715

124. In regard to the principle of judicial discipline, the following principles have been laid down:

(a) The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the Appellate authority is not acceptable to the department-in itself an objectionable phase – and is the subject matter of an appeal can not furnish any ground for not following it unless its operation has been suspended by a competent court.

(b) The Regulatory Commissions are bound by the principle of judicial discipline. The Regulatory Commissions should not forget that their orders are appealable under Section 111 of the Electricity Act, 2003. Any order giving directions passed in the Appeal by the Appellate Authority is required to be carried out by the Regulatory Commission unless and until the order of the Appellate Authority is stayed, set-aside or modified by the Apex Court to which the second Appeal lies under Section 125 of the Act.

(c) If the directions given in the Appeal u/s 111 of the Electricity Act are not followed by the State Commission, then this Tribunal would be empowered to take suitable action by resorting to the imposition of exemplary cost or fine on the State Commission by

resorting to the penal provisions like Section 146 etc., of the Electricity Act, 2003.

125. The perusal of the authorities and principles laid down referred to above, it is clear that the State Regulatory Commissions are bound to implement the directions of this Tribunal unless and until the said directions have been stayed, set aside or modified by the Hon'ble Superior Court. The mere fact that the subject matter of the proceedings was pending before another Forum, is of no consequence unless the decision of this Tribunal has been interfered with by the Hon'ble Supreme Court in the manner aforesaid.

126. From the above, it is clear that on 21.1.2012 i.e. the date of issuance of the impugned order, the State Commission had acted in violation of the directions of this Tribunal which has got the powers to execute their own orders, directions and judgments u/s 120 (3) of the Act, 2003 as a decree of Civil Court by exercising the powers of Civil Courts particularly Sections 36, 37, 42, 51 (e), and 74 read with Order XXI Rules 11, 17 (1A), 18 and 28.

127. In addition to these powers, this Tribunal, u/s 146 of the Act, 2003 have powers to punish those Commissions who have disobeyed the orders or directions by imposing fine on them. Thus, when this Tribunal has come to a conclusion

that there is a deliberate violation of our directions by the State Commission, this Tribunal is vested with the powers to impose adequate cost or fine on the State Commission. However, we feel, before resorting to those penal action, it would be appropriate issue notice to the State Commission for hearing them in the matter of imposition of cost or fine.

128. As discussed above, we have given categorical finding that the State Commission has not only failed to comply with the directions but also criticised our orders as if the directions given by this Tribunal are legally wrong.

129. One more preposterous feature that we notice in the impugned order is that the State Commission has gone to the extent of questioning the jurisdiction of this Tribunal by observing that the tariff order which is a quasi legislative function, cannot be set aside or reviewed in an Appeal filed by any part as against those tariff orders passed by the State Commission.

130. This indifferent attitude makes us to feel that this is a clear case of violation of propriety and judicial discipline which has to be condemned by invoking the penal provisions u/s 146 of the Act, 2003.

131. In view of the fact that we have come to the conclusion that the directions given in our judgments rendered in the Appeals u/s 111 of the Act, 2003 have been violated, we

deem it fit to issue show cause notice u/s 146 of the Act to the State Commission as to why exemplary cost or adequate fine should not be imposed on the State Commission for having committed such a serious violation. Therefore, the Chairman of the Odisha State Commission or any one of the Members of the State Commission who have signed the impugned order, are directed to appear before this Tribunal and to file an Affidavit explaining the circumstances as to why the cost or fine should not be imposed on the State Commission.

132. Since we summon the State Commission, a quasi judicial authority through Chairman or Member to appear before us and to show cause as to why the penal provision should not be invoked, we feel that the camera inquiry on this aspect can be made in the Chamber of the Chairperson of this Tribunal. Hence the Chairman or one of any Members of the Commission shall appear before this Full Bench in the Chamber of Chairperson and to make submissions showing the circumstances and to file an Affidavit as to why the fine or cost should not be imposed on the State Commission.

133. So, the above named person should appear before this Full Bench at **01.00 p.m.** on **07th Oct.2013** to file the affidavit and to make submission on the above show cause notice.

(V.J. Talwar)
Technical Member

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 23rd Sept. 2013

✓ ~~REPORTABLE/NON-REPORTABLE~~