IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO.103 OF 2012

Dated: 24th March, 2015

Present: Hon'ble Smt. Justice Ranjana P. Desai, Chairperson.
Hon'ble Shri Rakesh Nath, Technical Member.
Hon'ble Shri Justice Surendra Kumar, Judicial Member.

IN THE MATTER OF:

Maruti Suzuki India Limited,
Plot No.1, Nelson Mandela Marg,
Vasant Kunj, New Delhi 110 070. ... Appellant

Versus

1. **Haryana Electricity Regulatory Commission, Bays No.33-36, Sector – 4, Panchkula – 134 112.**

2. **Dakshin Haryana Bijli Vitran Nigam Limited, Vidyut Nagar, Hissar, Haryana – 125 005. ... Respondents**

Counsel for the Appellant(s) : Mr. M.G. Ramachandran
Ms. Anushree Bardhan
Ms. Poorva Saigal
Mr. Pulkit Agarwal

Counsel for the Respondent(s) : Ms. Shikha Ohri
Ms. Meghana Aggarwal for **R.1**

Mr. G. Sai Kumar
Mr. Varun Patnaik
Ms. Sowmya Saikumar for **R.2**

J U D G M E N T

PER HON'BLE (SMT.) JUSTICE RANJANA P. DESAI - CHAIRPERSON

1. The Appellant – Maruti Suzuki India Limited, is a company incorporated under the provisions of the Companies Act, 1956, having its registered office at New Delhi. The Appellant is, *inter alia*, engaged in the business of manufacture and sale of passenger vehicles in India under the brand name '*Maruti-Suzuki*'. The Appellant has manufacturing facilities in the State of Haryana. Respondent No.1 is the Haryana State Electricity Regulatory Commission ("**the State Commission**"). Respondent No.2 is one of the distribution licensees in the State of Haryana. It is an unbundled utility and a successor entity of the erstwhile Haryana State Electricity Board. It undertakes distribution and retail supply activities in the State of Haryana.

2. For the purposes of its business activities, the Appellant has established a captive power plant having the present capacity of 46 MW at its industrial plot primarily for the captive use by the Appellant. The Appellant consumes more than 51% of the total electricity generated. It is the case of the Appellant that it fulfills the other conditions as prescribed to qualify as a captive power plant under Section 2(8) read with Section 9 of the Electricity Act, 2003 ("**the said Act**") and Rule 3 of the Electricity Rules, 2005 ("**the said Rules**") as notified by the Central Government.

3. After consuming electricity for its own need, the Appellant also supplies the excess electricity from the captive power plant to the ancillary units located within the premises of the Appellant. The said supply is effected by the Appellant through dedicated transmission lines which is permitted under the provisions of the said Act. It is the case of the Appellant that such lines being internal lines of the Appellant within its own

premises, there is no prohibition for laying such lines under the said Act or the said Rules.

4. Respondent No.2 raised objections as regards the use of the said lines by the Appellant within its own premises and the legality of supply by a generator to non-captive consumers. Issues were also raised about the captive consumption and non-captive consumption and the dedicated transmission lines. Grant of safety approval for the said lines of the Appellant was withheld. The Appellant, therefore, filed an application being Case No.5 of 2010 before the State Commission for declaration and clarification regarding supply of electricity by the Appellant from its captive generating plant to ancillary industries within its own premises.

5. By order dated 2/8/2010, the State Commission decided Case No.5 of 2010. The State Commission clarified and held that the Appellant was entitled to supply electricity to its ancillary industries within its own premises using its own dedicated lines

and no license was required for the said purpose. It was further held that the supply to ancillary industries being non-captive consumption, cross-subsidy surcharge, if applicable and determined by the State Commission, would be required to be paid for the non-captive consumption of electricity from the Appellant's power plant.

6. It is the case of the Appellant that on 2/8/2010 when the Order was passed by the State Commission, there was no liability to pay the cross-subsidy surcharge existing and implemented in the State of Haryana. The existing tariff order of the State Commission dated 4/12/2009 applicable to the tariff year 2009-10 had quantified the cross-subsidy surcharge at 72 paise per unit for the HT industry category based on the then existing data, for the year 2009-10. However, on account of the policy decision of the State Government to exempt cross-subsidy surcharge being levied in the State, the State Commission did not levy the cross-subsidy surcharge in the State of Haryana. It is the case of the Appellant, therefore, that in terms of Order dated

4/12/2009 passed by the State Commission, no cross-subsidy surcharge was payable by the ancillary units of the Appellant during the tariff period 2009-10.

7. The State Commission vide Order dated 13/09/2010 determined the annual revenue requirements and tariff for Respondent No.2 for the tariff year 2010-11. The Tariff Order dated 13/09/2010 was made applicable by the State Commission with effect from 1/10/2010 to the consumers in the State of Haryana. According to the Appellant, in the proceedings for determination of the revenue requirements and tariff for the year 2010-11, Respondent No.2 did not provide any details with regard to the cost of supply for different categories and voltage levels to determine the cross-subsidy applicable in the State of Haryana. The State Commission did not determine, quantify or implement any cross-subsidy surcharge for tariff year 2010-11. On account of failure on the part of Respondent No.2 to satisfy the basic requirement to determine the cross-subsidy surcharge namely, providing the requisite data on the cost of supply

including category and voltage level data, the State Commission took a view not to determine, quantify or apply the cross-subsidy surcharge for the consumers in the year 2010-11. The Government of Haryana had also taken a policy decision to waive cross-subsidy. According to the Appellant, however, during the course of the year 2010-11, Respondent No.2 started unilaterally demanding cross-subsidy surcharge from the Appellant on the alleged ground that the State Government had withdrawn the waiver of cross-subsidy surcharge and, therefore, the cross-subsidy surcharge was payable immediately without any order to be passed by the State Commission or proceedings to be held for amendment of the Tariff Order dated 13/9/2010. The Appellant protested against the unilateral demand made by Respondent No.2 for the year 2010-11.

8. The State Commission initiated proceedings for approval of the revenue requirements and determination of tariff for Respondent No.2 for the year 2011-12. The State Commission vide Order dated 27/5/2011 applicable from 1/6/2011,

approved the revenue requirements and determined the tariff of Respondent No.2 for the year 2011-12. In the said order, the State Commission determined, quantified and imposed the cross-subsidy surcharge on the consumers for the year 2011-12 with effect from 1/6/2011. The State Commission quantified the cross-subsidy surcharge applicable for the Appellant's category at 58 paise per unit for the year 2011-12.

9. The grievance of the Appellant is that the State Commission after coming to a finding that Respondent No.2 had not provided sufficient data for determination of cross-subsidy surcharge, proceeded to determine and quantify the same. According to the Appellant, the State Commission completely ignored the formula provided for determination of cross-subsidy surcharge in the National Tariff Policy and applied its own methodology to impose the cross-subsidy surcharge. The State Commission had also imposed the cross-subsidy surcharge retrospectively from 30/11/2009 when the State Government had decided that cross-subsidy surcharge should be waived.

10. The Appellant challenged the said order dated 27/5/2011 passed by the State Commission in Appeal No.200 of 2011 before this Tribunal. The said appeal was partly allowed by the Tribunal on 4/10/2012. The Tribunal concluded as under:

> *"i. While discharging its statutory functions under Section 86(1) and 86(3) of the Act, the Commission is bound by its own Regulations framed under Section 181 of the Act.*
>
> *ii. This Tribunal has no jurisdiction to decide the validity of the Regulations framed by the Commission under Section 181 of the Act. The validity of the Regulations may, however, be challenged by seeking judicial review under Article 226 of the Constitution of India.*
>
> *iii. The term 'shall be guided' used in Section 61, 86 and 79 of the Act cannot be termed as mandatory and any direction hampering the statutory functions of the Commission cannot be considered as binding upon the Commission.*
>
> *iv. The Commission decided to adopt the provisions of the Tariff Policy relating to reduction of CSS at linear rate of 20% with effect from 2010-11 and has reduced the CSS for 2011-12. In the light of our findings that determination of CSS is a statutory function assigned to the Commission under Section 42 of the Act and any policy hampering the statutory functions of the Commission cannot be binding, we*

do not find any infirmity in the approach of the Commission.

v. The Commission in its Tariff Order for FY 2011-12 has merely stated that after withdrawal of the waiver to levy CSS by the Government of Haryana and on the request of distribution licensees, the Commission had allowed levy of CSS at the rate as determined by it for the year 2009-10 from the date of withdrawal of waiver by the Government. The issue now arises is that can the above statement be termed as determination of open access surcharge as envisaged in Section 42(2) of the Act in accordance with the Commission's own Regulations? The answer is NO. Despite the State Government's waiver of CSS till 31.3.2011, the Commission was required to determine the CSS in accordance with the provisions of Tariff Regulations 2008 and could have kept the CSS, so determined, in abeyance in view of Government's waiver subject to condition that loss of the licensee would have to be compensated by the Government.

vi. We are of the view that the Commission did not determine the CSS for the year 2010-11 in accordance with provisions of Act and also in accordance with its own Regulations. Accordingly, this part of the impugned Order regarding levy of CSS for the period 1.11.2010 to 31.3.2011 is set aside. The Commission is directed to issue consequential order directing the licensee to refund the CSS collected from the open access consumer for this period."

11. The Appellant has filed appeal in the Supreme Court against the above order. It is admitted. However, the operation of the judgment is not stayed.

12. For the subsequent years, 2012-13, the State Commission initiated separate proceedings for approval of annual revenue requirements, and determination of retail supply tariff of Respondent No.2. It is the case of the Appellant that in the said proceedings also Respondent No.2 did not provide the data regarding the cost of supply details and voltage wise data, before the State Commission could undertake the process of determination of the cross-subsidy aspect. According to the Appellant, Respondent No.2 did not provide any such data to the State Commission on the cost of supply to various categories of consumers or the applicable voltage wise loss levels etc. and, therefore, the State Commission ought to have rejected Respondent No.2's petition with regard to determination of cross-subsidy surcharge. However, by Order dated 31/3/2012, the State Commission disposed of Respondent No.2's tariff petition

for 2012-13 and determined the retail supply tariff for the consumers in the State of Haryana. The State Commission also determined, quantified and made applicable the cross-subsidy surcharge in the State. The cross-subsidy surcharge applicable for the Appellant's category of consumers for the year 2012-13 was determined at the rate of 91 paise per unit which was in fact higher than the rate of 58 paise per unit determined by the State Commission for the year 2011-12. Aggrieved by the said order, the Appellant has filed this appeal.

13. Following questions of law are raised in the present appeal.

> *"A. Whether the State Commission is justified in determining and imposing cross-subsidy surcharge without the requisite details being provided by the Respondent No.2 as directed by the State Commission?*
>
> *B. Whether the State Commission has followed the applicable provisions and principles of law in the determination, quantification and application of cross-subsidy surcharge for the year 2012-13?*
>
> *C. Whether the State Commission is justified is determining and imposing the cross-subsidy surcharge contrary to the provisions of and the formula prescribed in the National Tariff Policy?"*

14. After the appeal was heard for sometime by the Bench presided over by Mr. Justice M. Karpaga Vinayagam, learned counsel for the parties filed a statement giving the details of various issues which, it was urged, are required to be decided by the Bench. The Bench felt that the said issues ought to be decided by the Full Bench. By its Order dated 31/5/2013, the Bench referred the following issues to the Full Bench.

> *"A) Whether the term "shall be guided" used in Section 61, 79 and 86 means appropriate Commission has to mandatorily follow Tariff Policy and National Electricity Policy ignoring Regulations framed by it?*
>
> *B) Whether in view of the decisions the decision of the Hon'ble Supreme Court in PTC India Limited V. Central Electricity Commission (2010) 4 SCC and RVK Energy Private Limited V. Central Power Distribution Co. of Andhra Pradesh Ltd. 2007 ELR (APTEL) 1222:*
>
> *i) A Tariff Policy framed under Section 3 of the Electricity Act, 2003 can override Regulations framed under Section 61 read with Section 178/181 of the Electricity Act, 2003?*
>
> *ii) The Regulations notified by the State Commission under Section 181 of the Electricity Act can specify any different*

methodology or formula for calculation of cross subsidy surcharge?

C) *Whether in the fact and circumstances of the present case Regulation 33 of the Haryana Electricity Regulatory Commission (terms and conditions for Determination of Wheeling Tariff and Distribution and Retail Supply Tariff) Regulations, 2008 specifies a methodology for determination of cross subsidy surcharge contrary to the methodology provided under the Tariff Policy?*

D) *Whether in the facts of the case the Appellant can seek adjudication upon the issue(s) which have already been decided in light of the Judgment dated 04.10.2012 passed in Appeal No. 200 of 2011 which now are the subject matter of Civil Appeal Nos. 13 of 2013 (by Maruti Suzuki on 06.12.2012) and D-3684 of 2013 (by DHBVN on 31.01.2013)?*

E) *Whether the cross-subsidy determined by Ld. Haryana Commission in the impugned Order is contrary to the provisions of the Electricity Act, 2003?*

15. We shall, therefore, proceed to record the rival contentions and deal with the above issues.

16. We have heard Mr. M.G. Ramachandran, learned counsel for the Appellant in support of the appeal. We have also carefully perused the written submissions filed by him.

17. It would be necessary to state, at the outset, that learned counsel Mr. M.G. Ramachandran has made a statement that the Appellant does not dispute that it has to pay the cross-subsidy surcharge as may be determined by the State Commission under the provisions of the said Act and consistent with the National Tariff Policy and that the Appellant is confining this Appeal to the contention that the cross-subsidy surcharge has not been determined in accordance with applicable law. Drawing our attention to the relevant paragraphs of the impugned order, counsel submitted that though the impugned order determining cross-subsidy surcharge states that the National Tariff Policy was being followed, it omits the crucial part of the National Tariff Policy i.e. the methodology to decide on the 'cost to supply' specified in the National Tariff Policy. Counsel heavily relied on the Full Bench judgment of this Tribunal in ***R.V.K. Energy Private Limited & Ors. v. The Central Power Distribution Co. Ltd.***[1] and contended that in this judgment it is conclusively

[1] 2007 ELR (APTEL) 1222

held that the methodology specified in the National Tariff Policy for calculation of 'cost to supply' is binding on the State Commission and is required to be followed. Counsel submitted that considering the object of the cross-subsidy surcharge, the need to promote competition and the provisions of the National Tariff Policy in this regard, the Tribunal has given a mandatory direction to all the Regulatory Commissions to determine the cross-subsidy surcharge accordingly and a specific finding is recorded in this judgment that the formula specified in the National Tariff Policy is consistent with the purpose and object of the said Act and needs to be followed by all Regulatory Commissions in the country. In this connection, the counsel also relied on the following judgments of this Tribunal:

(a) ***SIEL Limited v. Punjab Electricity Regulatory Commission & Ors.***[2];

(b) ***M/s. Vishal Ferro Alloys Ltd. & Ors. v. Orissa Electricity Regulatory Commission***[3];

(c) ***M/s. Tata Steel Limited v. Orissa Electricity Regulatory Commission***[4]

[2] 2007 ELR (APTEL) 931
[3] Order dt. 2/9/2011 in Appeal No.57, 67, etc. of 2011

18. Counsel submitted that in ***R.V.K. Energy***, the Full Bench of this Tribunal has recorded a finding that the formula specified in the National Tariff Policy is consistent with the said Act and directed all Regulatory Commissions to follow the same. However, in Appeal No.200 of 2011, the Division Bench of this Tribunal has reached a conclusion that the Regulations of the State Commission provide for a different methodology which is inconsistent with the National Tariff Policy and, therefore, directions issued in ***R.V.K. Energy*** will not be binding on the State Commission. Counsel submitted that in the instant case, the Regulations of the State Commission do not provide any formula for calculation of the 'cost of supply' for the purposes of determination of the cross-subsidy surcharge. However, the same is provided in the National Tariff Policy. The principle of inconsistency would apply only when different formulas are specified in the Regulations and the National Tariff Policy. Then the question would arise whether the Regulations need to be applied or Full Bench decision in ***R.V.K. Energy*** would apply

[4] 2011 ELR (APTEL) 1022

which directs all Regulatory Commissions to follow the formula specified in the National Tariff Policy. The question of deviation from the Regulations of the State Commission does not arise as there is no inconsistency between the Regulations of the State Commission and the National Tariff Policy. Counsel submitted that under both, the Regulations and the National Tariff Policy, the cross-subsidy surcharge is the difference between (a) the average tariff per unit of the consumer category and (b) cost to serve the consumer category. The National Tariff Policy provides for the methodology for calculation of the 'cost to supply' for the purposes of determination of cross-subsidy surcharge and the surcharge formulae, which have been directed to be followed in ***R.V.K. Energy***. This methodology of how cost to supply is to be calculated for the purposes of cross-subsidy is not provided in the Regulations of the State Commission. Thus, there is no question of any inconsistency between the two.

19. On the applicability of the judgment of the Supreme Court in ***P.T.C. India Limited v. Central Electricity Regulatory***

Commission and Ors.[5], counsel submitted that the said judgment does not say that ***R.V.K. Energy*** does not lay down the correct law. It has not been overruled. ***P.T.C. India Limited,*** on the contrary, supports the Appellant's case. Counsel submitted that in that case, the Supreme Court was dealing with the question whether the Regulations framed by the Central Commission under Section 178 of the said Act could be challenged in appeal under Section 111 of the said Act or taken up in a proceeding under Section 121 of the said Act. The Supreme Court was not dealing with the issue whether the Tariff Policy notified by the Central Government under Section 3 of the said Act can be ignored or whether the same will have to give way to any Regulations notified under Section 181 of the said Act. Counsel drew our attention to paragraphs 18 and 19 of the said judgment which, according to him, indicate that the Regulations shall be subservient and need to be consistent with the National Electricity Policy or the National Tariff Policy. Counsel submitted that in the face of above observations of the Supreme Court, it is

[5] (2010) 4 SCC 603

fallacious to argue that Regulations notified under Section 181 by the State Commission supersede the Tariff Policy.

20. On the binding nature of the Full Bench decision in ***R.V.K. Energy***, counsel urged that the directions issued by the Tribunal in this decision are definitely binding on the State Commission unless the Supreme Court overrules the said decision. Till then, the said decision is binding on the State Commission and on co-ordinate and smaller benches of the Tribunal. Learned counsel pointed out that in ***Hindalco Industries Limited v. Uttar Pradesh Electricity Regulatory Commission***[6], the Tribunal has directed the Uttar Pradesh Electricity Regulatory Commission to implement the decision of the Tribunal and relax the Regulations for the purpose. Thus, when there is inconsistency in the Regulations and the direction issued by the Tribunal, the State Commissions are required to relax the Regulations to ensure that the direction of the superior appellate

[6] 2013 ELR (APTEL) 0845

authority is followed and implemented. In this case, since there is no inconsistency, the said question does not arise.

21. On the question of interpretation of the term "shall be guided" as appearing in Sections 61, 79 and 86 of the said Act and whether in view of the use of those words, appropriate Commission has to mandatorily follow Tariff Policy ignoring Regulations framed by it, counsel relied on ***Food Corporation of India & Ors. v. Bhanu Lodh & Ors***.[7]; ***Kusumam Hotels (P) Ltd. v. K.S.E.B.***[8]; ***Real Food Products v. Andhra Pradesh State Electricity Board***[9]; ***Naresh Kumar Madan v. State of Madhya Pradesh***[10]; ***Delhi Electricity Regulatory Commission v. BSES Yamuna Power Ltd***.[11] and ***Chhitoor Zilla Vyavasay Adarula Sangham v. Andhra Pradesh State Electricity Board & Ors.***[12] and contended that the State Commission is bound to follow the methodology in the calculation of 'cost to supply' given under the Tariff Policy and cannot determine 'cost

[7] (2005) 3 SCC 618
[8] (2008) 13 SCC 213
[9] (1995) 3 SCC 295
[10] (2007) 4 SCC 766,
[11] (2007) 3 SCC 33
[12] (2001) 1 SCC 396

to supply' in a different manner. Counsel submitted that since in ***R.V.K. Energy***, the Full Bench of the Tribunal has returned a finding that the formula in the National Tariff Policy is in consonance with the said Act, the question of the formula being *ultra vires* the parent Act and, therefore, not binding does not arise.

22. Referring to Regulation 33(2) of the Haryana Electricity Regulatory Commission (Terms & Conditions of Wheeling Tariff & Distribution & Retail Supply Tariff) Regulations, 2008 ("**Tariff Regulations**"), counsel submitted that it does not provide any formula for determination of 'cost to serve' and the subsequent cross-subsidy surcharge. It merely states that the cross-subsidy surcharge shall be the difference between the cost of supply and the tariff. The Regulation is consistent with the provisions of the National Tariff Policy in regard to what is cross-subsidy. The National Tariff Policy further provides the methodology for calculation of 'cost of supply' for the purposes of calculating cross-subsidy surcharge. Since the Regulations of the State

Commission do not provide for the methodology for calculation of 'cost of supply' or the formula for cross-subsidy surcharge, the same needs to be determined so as to be in terms of the National Tariff Policy.

23. Counsel laid stress on the important factor to be considered and calculated for the determination of the cross-subsidy surcharge in the National Tariff Policy namely, the top 5% of the power purchase cost of the distribution licensee and the voltage wise cost adjustment which according to him, would further the aims and objects of the said Act. Counsel added that when a consumer takes supply of electricity from a generator directly, the distribution licensee has the benefit of avoiding the purchase of the most expensive power which would have otherwise been purchased and to that extent its cost of power purchase is reduced. It is for this reason that the formula specified in the National Tariff Policy prescribes taking into account the top 5% of the power purchase cost of the distribution licensee (excluding only liquid fuel and renewable energy sources) for the purpose of

determination of cross-subsidy surcharge. Counsel submitted that since the Regulations of the State Commission do not provide for methodology of 'cost of supply' or the formula for cross-subsidy surcharge, the same needs to be determined as per the formula prescribed in Tariff Policy which is in consonance with the said Act. The impugned order imposes cross-subsidy surcharge contrary to the formula prescribed in Tariff Policy and hence it needs to be set aside.

24. Ms. Shikha Ohri, learned counsel for Respondent No.1 has supported the impugned order.

25. We have heard Mr. G. Saikumar, learned counsel appearing for Respondent No.2, the distribution licensee. We have carefully perused the written submissions filed by him.

26. At the outset, learned counsel Mr. G. Saikumar raised the bar of *res-judicata*. Counsel submitted that on 27/5/2011, the State Commission passed the Tariff Order for 2011-12

determining the cross-subsidy surcharge in accordance with Regulation 33 of the Tariff Regulations. Tariff Order dated 27/5/2011 was challenged by the Appellant in Appeal No.200 of 2011 in the Tribunal. During the pendency of the said appeal, by the impugned order dated 31/3/2012, the State Commission determined cross-subsidy surcharge for 2012-13 in accordance with the methodology adopted in earlier Tariff Order. On 15/5/2012, the Appellant filed the present appeal challenging Order dated 31/3/2012. The Tribunal by its Judgment dated 4/10/2012 partly allowed Appeal No.200 of 2011, however, it upheld the methodology followed by the State Commission in determining cross-subsidy surcharge. Admittedly, the appeals filed by the Appellant and Respondent No.2 against Order dated 4/10/2012 are pending in the Supreme Court. We are informed that the Appellant has not filed any stay application in the Supreme Court. Respondent No.2's application for stay was made returnable within four weeks on 7/5/2013. In the meantime, the direction with regard to refund is stayed. It is urged that the issues raised in the present appeal were raised

and decided by the Tribunal in Appeal No.200 of 2011 and, therefore, principles of *res-judicata* will be applicable to the present case. On that ground alone, the present appeal is liable to be dismissed. In this connection, reliance is placed on ***Radhasoami Satsang v. Commissioner of Income-tax***[13]***; M. Nagabhushana v. State of Karnataka***[14]***; Parashuram Pottery Works Co. Ltd. V. I.T.O.***[15]***; Darayo v. State of U.P.***[16] and ***Hoystead v. Commissioner of Taxation***[17].

27. It is then submitted that ***R.V.K. Energy*** is not applicable to this case as facts of the present case differ from the facts of the said case. In ***R.V.K. Energy***, there were no Regulations framed by the State Commission and, therefore, the State Commission was bound to follow the National Tariff Policy. This difference in *factual matrix* is aptly highlighted by the Tribunal in its judgment dated 4/10/2012 in Appeal No.200 of 2011 wherein it is held that the said judgment is inapplicable. Counsel submitted that it

[13] *(1992) 1 SCC 659*
[14] *(2011) 3 SCC 408*
[15] *(1977) 1 SCC 408*
[16] *AIR 1961 SC 1457*
[17] *1926 AC 155 (PC)*

is well settled that the ratio of any decision must be understood in the background of the facts of that case and even a little difference in facts may make a lot of difference in the precedential value of a decision. In this connection counsel relied on ***Ispat Industries Ltd. v. Commissioner of Customs, Mumbai***[18]. Counsel submitted that even otherwise, the issue raised in the present appeal is pending in Civil Appeal No.13 of 2013 filed by the Appellant in the Supreme Court challenging Judgment dated 4/10/2012 passed by this Tribunal in Appeal No.200 of 2011. The Appellant cannot, therefore, agitate the same issue in this appeal.

28. Drawing our attention to clauses 8.5, 8.5.1, 8.5.2, 8.5.3, 8.5.4, 8.5.5 and 8.5.6 of the National Tariff Policy, counsel urged that the National Tariff Policy is not in conformity with the said Act and, as such, cannot be followed completely by the State Commission as urged by the Appellant. Counsel submitted that the National Tariff Policy, 2006 was notified in the year 2006. It

[18] *(2006) 12 SCC 583*

was passed prior to the year 2007. It was passed prior to the amendment of the said Act. Certain aspects of the Tariff Policy are contrary to the said Act. Counsel relied on the judgment of the Tribunal in ***Tata Steel Ltd.*** in which it is held that the said Act will override the Tariff Policy to the extent the Tariff Policy does not take into account the amendments introduced in the said Act. Counsel submitted that with the amendment of the said Act, cross-subsidy surcharge cannot be arbitrarily reduced without reduction in the cross-subsidies. Cross-subsidy surcharge cannot be reduced by 20% with actual reduction in the amount of subsidy as well. Counsel submitted that to this extent, the National Tariff Policy is contrary to the provisions of the said Act. As regards the interpretation of the term "shall be guided", counsel submitted that the same term has been held to be not mandatory but only directory. In this connection, counsel relied on ***P.T.C. India Ltd.*** where it is held that a Regulation made under Section 178/181 of the said Act is higher in the hierarchy of delegated legislation than one made under Section 61 of the said Act and a Tariff Order. Regulation

under Sections 178 and 181 of the said Act is required to be consistent with the said Act and it must carry out provisions of the said Act. National Tariff Policy framed under Section 3 has no role to play here. Counsel submitted that the National Electricity Policy and Tariff Policy do not control or limit jurisdiction of Appropriate Commissions but are mere guiding factors under Sections 61, 79, 86, 107 and 108 of the said Act. They are not relevant consideration or factors for Regulation making under Sections 178 and 181 of the said Act.

29. Counsel submitted that Section 61 read with Section 62 of the said Act makes it clear that the State Commission shall determine the tariff in accordance with the provisions of the said Act, including the terms and conditions which may be specified, through Regulations under Section 61 of the said Act. Relying on the judgment of the Tribunal in ***Haryana Power Generation Corporation Limited v. Haryana Electricity Regulatory Commission***[19], learned counsel submitted that once the State

[19] 2012 ELR (APTEL) 0633

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 said Act and, factors mentioned in Section 61 of the said Act including Central Commission's Regulations have no relevance.

30. As regards superiority of the Regulations framed under Section 181 of the said Act over the orders passed by the State Commission in discharge of its functions enumerated in Sections 79 and 86 of the said Act, counsel relied on ***P.T.C. India Ltd.*** where the Supreme Court has held that the Central Commission is empowered to take steps / measures in discharge of its functions enumerated in Section 79(1). Those functions have to be in conformity with the Regulations made under Section 178 of the said Act. Counsel submitted that ratio of ***P.T.C. India Ltd.*** applies to the present case on all fours. The State Commission is required to determine the cross-subsidy surcharge in terms of Section 42(2) and Section 86(1)(k) and Section 86(3) of the said Act. The State Commission has framed Regulations specifying

the method to compute the cross-subsidy surcharge. Therefore, the determination of such surcharge has to be in conformity with the Regulations. Again referring to ***P.T.C. India Ltd.***, counsel submitted that in this case, the Supreme Court has observed that the Regulatory Commissions are empowered to frame policy in the form of Regulations. They are to be guided by the National Electricity Policy, the Tariff Policy and the National Electricity Plan in terms of Section 79(4) and 86(4) of the said Act. Counsel also referred to the judgment in ***Transmission Corporation of Andhra Pradesh Limited v. Sai Renewable Power Pvt. Ltd.***[20]. He contended that in that judgment the Supreme Court has held that the Regulatory Commission is not bound by any policy directions issued by the Government under the said Act if such directions hamper the statutory functions of the Regulatory Commission. Relying on the judgments of the Tribunal in ***Polyplex Corporation Ltd. v. Uttrakhand Electricity Regulatory Commission***[21] *and* ***BSES Rajdhani Power Ltd. v.***

[20] (2011) 11 SCC 34
[21] 2011 ELR (APTEL) 0195

Delhi Electricity Regulatory Commission[22], learned counsel submitted that the Commissions are independent statutory authorities and are not bound by any policy or direction which hamper its statutory functions and that the term "shall be guided" has no mandatory flavor and its character would depend upon facts of each case.

31. Counsel submitted that the method used by the State Commission to calculate cross-subsidy surcharge has been upheld by the Tribunal in its judgment in Appeal No.200 of 2011 dated 4/10/2012. In that judgment, it is held that merely because there is no determination of voltage/category wise 'cost of supply', the entire exercise of calculating cross-subsidy surcharge undertaken by the State Commission does not become illegal. Counsel submitted that the methodology/formula framed by the State Commission under Section 181 of the said Act is in the nature of subordinate legislation and is, therefore, binding. The determination of cross-subsidy surcharge by the

[22] 2010 ELR (APTEL) 0404

Regulation framed under Section 181 is done after taking into account the current level of cross subsidy and operational constraints. There is no infirmity in the calculations made according to the Regulations framed under Section 181 and hence no interference is called for with the same. Counsel submitted that it is settled by the Full Bench of this Tribunal in a *suo moto* petition being ***O.P. No. 1 of 2011 decided on 11/11/2011***[23] that the State Commissions have *suo moto* power of determination of tariff. Counsel also relied on this Tribunal's judgments in ***Faridabad Industries Association & Ors. v. Haryana Electricity Regulatory Commission & Ors.***[24] and in ***Northern Railway v. Haryana Electricity Regulatory Commission & Ors.***[25]

32. Having narrated the gist of rival contentions, we shall now proceed to deal with them and answer the issues referred to us. We must first deal with issue 'D', which in our opinion, can be termed as a preliminary issue. It reads thus:

[23] 2011 ELR (APTEL) 1742
[24] 2011 ELR (APTEL) 1527
[25] 2012 ELR (APTEL) 0407

D) Whether in the facts of the case the Appellant can seek adjudication upon the issue(s) which have already been decided in light of the Judgment dated 04.10.2012 passed in Appeal No. 200 of 2011 which now are the subject matter of Civil Appeals Nos. 13 of 2013 (by Maruti Suzuki on 6.12.2012) and DFR No. 3684 of 2013 (by DHBVN on 31.01.2013.)?

33. It is submitted that the State Commission passed Tariff Order on 27/05/2011 for 2011-2012 determining the cross-subsidy surcharge in accordance with Regulation 33 of the Tariff Regulations. Tariff Order, dated 27/05/2011, was challenged by the Appellant in Appeal No. 200 of 2011 in this Tribunal. During the pendency of the said appeal, by the impugned Order dated 31/03/2012, the State Commission determined cross-subsidy surcharge for 2012-2013 in accordance with the methodology adopted in the earlier Tariff Order. On 15/05/2012, the Appellant filed the present appeal challenging Order dated 31/03/2012. The Tribunal by its judgment dated 04/10/2012, partly allowed Appeal No.200 of 2011, but it upheld the methodology followed by the State Commission in determining surcharge. It is urged that the said methodology having been

approved by the Tribunal and the issues raised in this appeal having been raised and decided in Appeal No.200 of 2011, the principles of *res-judicata* will be applicable to the present case.

34. It is true that the issues involved in this appeal and in Appeal No.200 of 2011 are the same and have been decided in Appeal No.200 of 2011. We find that the judgment of this Tribunal in Appeal No.200 of 2011 was rendered by a two-Member Bench. It would be binding on a co-ordinate Bench i.e., Bench comprising two Hon'ble Members. There can be no doubt about the principle that decision rendered by a co-ordinate Bench is binding on another co-ordinate Bench of the same Tribunal until it is set aside by a superior court. The Bench is expected to follow the decision of the co-ordinate Bench unless it comes to the conclusion that it is unable to follow the same for some reasons. In the event, the Bench is unable to follow the decision of the co-ordinate Bench propriety demands that the Bench refers the matter to the larger Bench by assigning reasons. In this connection, we may usefully refer to the

judgment of the Supreme Court in **Sub-Inspector Rooplal & Anr. v. Lt. Governor through Chief Secretary, Delhi & Ors.,**[26] where the Bench of Central Administrative Tribunal had overruled earlier judgment of other co-ordinate Bench. Disapproving this approach the Supreme Court observed as under:-

> *"12. At the outset, we must express our serious dissatisfaction in regard to the manner in which a Coordinate Bench of the Tribunal has overruled, in effect, an earlier judgment of another Coordinate Bench of the same Tribunal. This is opposed to all principles of judicial discipline. If at all, the subsequent Bench of the Tribunal was of the opinion that the earlier view taken by the Coordinate Bench of the same Tribunal was incorrect, it ought to have referred the matter to a larger Bench so that the difference of opinion between the two Coordinate Benches on the same point could have been avoided. It is not as if the latter Bench was unaware of the judgment of the earlier Bench but knowingly it proceeded to disagree with the said judgment against all known rules of precedents. Precedents which enunciate rules of law form the foundation of administration of justice under our system. This is a fundamental principle which every presiding officer of a judicial forum ought to know, for consistency in interpretation of law alone can lead to public confidence in our judicial system. This Court has laid down time and again that precedent law must be followed by all concerned; deviation from the*

[26] (2000)1 SCC 644

same should be only on a procedure known to law. A subordinate court is bound by the enunciation of law made by the superior courts. A Coordinate Bench of a Court cannot pronounce judgment contrary to declaration of law made by another Bench. It can only refer it to a larger Bench if it disagrees with the earlier pronouncement. This Court is the case of Tribhovandas Purshottamdas Thakkar V. Ratilal Motilal Patel while dealing with a case in which a Judge of the High Court had failed to follow the earlier judgment of a larger Bench of the same Court observed thus:

"The judgment of the Full Bench of the Gujarat High Court was binding upon Raju, J. If the learned Judge was of the view that the decision of Bhagwati, J., in Pinjare Karimbhai case and of Macleod, C.J., in Haridas case did not lay down the correct law or rule of practice, it was open to him to recommend to the Chief Justice that the question be considered by a larger Bench. Judicial decorum, propriety and discipline required that he should not ignore it. Our system of administration of justice aims at certainty in the law and that can be achieved only if Judges do not ignore decisions by courts of coordinate authority or of superior authority. Gajendragadkar, C.J., observed in Bhagwan v. Ram Chand:

> *'It is hardly necessary to emphasise that considerations of judicial propriety and decorum require that if a learned Single Judge hearing a matter is inclined to take the view that the earlier decisions of the High Court, whether of a Division Bench or of a Single Judge, need to be reconsidered, he should not embark upon that inquiry sitting as a Single Judge, but should refer*

the matter to a Division Bench, or, in a proper case, place the relevant papers before the Chief Justice to enable him to constitute a larger Bench to examine the question. That is the proper and traditional way to deal with such matters and it is founded on healthy principles of judicial decorum and propriety.' "

13. We are indeed sorry to note the attitude of the Tribunal in this case which, after noticing the earlier judgment of a Coordinate Bench and after noticing the judgment of this Court, has still thought it fit to proceed to take a view totally contrary to the view taken in the earlier judgment thereby creating a judicial uncertainty in regard to the declaration of law involved in this case. Because of this approach of the latter Bench of the Tribunal in this case, a lot of valuable time of the Court is wasted and the parties to this case have been put to considerable hardship."

35. Reference could also be made to the judgment of the Supreme Court in ***Collector of Central Excise, Kanpur v. Matador Foam and others***[27]. In that case, the Customs, Excise and Gold (Control) Appellate Tribunal had not followed earlier judgment of a co-ordinate Bench. The Supreme Court expressed its displeasure in the following manner:-

[27] (2005) 2 SCC 59

> "16. *Before we part, one other aspect must be mentioned. As stated above, earlier judgments of the Tribunal in the case of J.K. Foam Products v.CCE and CCE v.Ajay Rubber were cited. These judgments are directly on the point. It has been held that such goods are classifiable under Tariff Heading 94.01. These being judgments of coordinate Benches were binding on the Tribunal. Judicial discipline required that the Tribunal follow those judgments. If the Tribunal felt that those judgments were not correct, it should have referred the case to a larger Bench."*

36. Again in ***Union of India & Ors. v. Colonel G.S. Grewal,***[28] the Supreme Court was dealing with a case where the Chandigarh Bench of the Armed Forces Tribunal had ignored the judgment of the Principal Bench and had taken a different view. It was argued that if the Chandigarh Bench felt that Principal Bench's view was not correct as a co-ordinate Bench, it should have referred the matter to a larger Bench. The Supreme Court accepted this argument. Referring to its earlier view in ***Sub-Inspector Rooplal,*** the Supreme Court observed that in such a situation if the Chandigarh Bench wanted to charter a different course than the one adopted by the Principal Bench, the only course open to it was to refer the matter to a larger Bench.

[28] (2014)7 SCC 303

37. So far as the question of *res-judicata* is concerned in ***Uttar Pradesh Power Corporation Limited v. National Thermal Power Corporation Limited & Ors.***[29] while dealing with the question of the power of the Central Commission to make tariff and to revise the same at the instance of a generating company, the Supreme Court held that there cannot be any doubt whatsoever that while a tribunal or a court exercises adjudicatory power, although provisions of Section 11 of the Code of Civil Procedure are not applicable, the general principles of *res-judicata* may be applicable.

38. There can be no dispute about the doctrine of *res-judicata* which in substance means that an issue or a point which is decided and which has attained finality should not be allowed to be re-opened and re-agitated twice over. Hence, judgments of the Supreme Court on which reliance is placed in this connection

[29] (2009) 6 SCC 235

need not be referred to. In our opinion, though principles of *res-judicata* will be applicable to matters which are heard by this Tribunal, where a Bench of this Tribunal comes to a conclusion that it is unable to follow a coordinate Bench judgment because it is *per incuriam or for any other sound reason*, the doctrine of *res-judicata* will not be applicable. The Bench may refer the matter to a larger Bench by a reasoned order. In view of the above, we are of the considered opinion that the judgment of the two-Member Bench of this Tribunal dated 04/10/2012 is binding on a co-ordinate Bench of this Tribunal. It is, however, open to the Appellant to urge that for some sound reasons it ought not to be followed. In such a situation, if this submission is found acceptable propriety demands that the co-ordinate Bench refers the matter to a larger Bench by a reasoned order. We must however note that this issue has mere academic relevance because the issues which we are called upon to decide cover the entire controversy and being a larger Bench we can decide those issues. We shall advert to this a little later .

39. It is also submitted that appeal carried from the judgment of the Tribunal in Appeal No.200 of 2011 is pending in the Supreme Court and the direction with regard to refund is stayed by the Supreme Court. It is urged that therefore this Tribunal should not decide the Reference. Admittedly, the Supreme Court has merely stayed the order with regard to refund. It has not stayed the entire order. In this connection, we may usefully refer to the judgment of the Supreme Court in ***Shree Chamundi Mopeds Ltd. v. Church of South India Trust Assn.***[30] In that case, while considering the effect of the order passed by the Delhi High Court staying the order passed by the Board and the Appellate Authority under the Sick Industrial Companies (Special Provisions) Act, 1985 holding that the Appellant therein was not commercially viable, on the winding up petition pending in the Karnataka High Court, the Supreme Court observed that quashing of the order results in the restoration of the position as it stood on the date of passing of the order which has been

[30] (1992) 3 SCC 1

quashed. The stay of operation of an order, however, does not lead to such a result. It only means that the order, which has been stayed, would not be operative from the date of the passing of the stay order. It does not mean that the said order has been wiped out from existence. It continues to exist in law and so long as it exists, it cannot be said that the appeal, which has been disposed of by the said order has not been disposed of and is still pending. The Supreme Court concluded that the stay order did not create any impediment in way of the High Court in dealing with the winding up petition filed by the respondents therein. In view of this clear enunciation of law by the Supreme Court, we are of the view that this Tribunal can decide the present appeal. We also find no force in the Respondents' submission that this Full Bench should not decide the Reference. We must state the obvious that the decision of the Supreme Court will undoubtedly be the last word on the issues which have been referred to us and it will hold the field. It is, therefore, not necessary to adjourn the Reference sine die on the ground that appeal

challenging judgment of the Tribunal in Appeal No.200 of 2011 is pending in the Supreme Court.

40. We shall now turn to issue 'A', which reads as follows:

> ***A. Whether the term "shall be guided" used in Sections 61, 79 & 86 means appropriate Commission has to mandatorily follow Tariff Policy & National Policy ignoring Regulations framed by it?***

Section 61 refers to Tariff Regulations. It states that the Appropriate Commission shall subject to the provisions of the said Act specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the factors enumerated at Sections 61(a) to (i). At Sub-section (i) of Section 61 is the National Electricity Policy and Tariff Policy. Thus, for specifying the terms and conditions for determination of tariff, the Appropriate Commission shall be guided *inter alia* by the National Electricity Policy & Tariff Policy. Section 79 refers to the functions of the Central Commission. The functions are enumerated at Sections 79(1) (a) to (k). The functions, *inter alia,* are to regulate the tariff of generating companies owned or

controlled by the Central Government, to regulate the tariff of other generating companies if they enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State; to determine tariff for inter-State transmission of electricity. Sub-section (4) of Section 79 states that in discharge of its functions, the Central Commission shall be guided by the National Electricity Policy, the National Electricity Plan and the Tariff Policy published under Section 3. Section 86 refers to the functions of the State Commission. They are enumerated at Section 86 (1) (a) to (k). The functions of the State Commission *inter alia* are to determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail as the case may be within the State, to regulate electricity purchase and procurement process of distribution licensees, including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreement for purchase of power for distribution and supply within the State. Sub-Section (4) of Section 86 states that in discharge of its functions, the State Commission shall be guided

by the National Electricity Policy, National Electricity Plan and Tariff Policy published under Section 3. Section 3 of the said Act refers to National Electricity Policy, Tariff Policy and National Electricity Plan.

41. Now the question is whether the words "shall be guided" found in the above sections impose a mandatory obligation. In this connection, we must first refer to the Constitution Bench judgment of the Supreme Court in ***P.T.C. India Ltd***. The Constitution Bench was *inter alia* considering whether capping of trading margins could be done by Central Electricity Regulatory Commission ("**Central Commission**") by making a Regulation in that regard under Section 178 of the said Act or by an order under Section 79 (1) (j) of the said Act. While answering this question, the Constitution Bench considered the scheme of the said Act and observed that the said 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. The Constitution Bench observed that the said Act contains separate provisions for the performance of dual functions by the Appropriate Commission. Section 61 is the enabling provision for framing of Regulations by the Central Commission. Determination of terms and conditions of tariff has been left to the domain of the Central Commission under Section 61 of the said Act, whereas actual tariff determination by the Central Commission is covered by Section 62 thereof. Specifying the terms and conditions for determination of tariff is an exercise which is different and distinct from actual tariff determination in accordance with the provisions of the said Act. The Constitution Bench further clarified that the said Act contemplates three kinds of delegated legislation, firstly, under Section 176, the Central Government is empowered to make Rules to carry out the provisions of the said Act. Correspondingly, the State Governments are also given powers under Section 180 to make Rules. Secondly, under Section 177, the Central Electricity

Authority is also empowered to make Regulations consistent with the said Act and the said Rules to carry out the provisions of the said Act. Thirdly, under Section 178, the Central Commission can make Regulations consistent with the said Act and the said Rules to carry out the provisions of the said Act. The State Commissions have a corresponding power under Section 181. The Constitution Bench further observed that the Rules and Regulations have to be placed before Parliament and the State Legislatures as the case may be, under Sections 179 and 182. Parliament has the power to modify the Rules/Regulations. This power, however, is not conferred upon the State Legislatures. The Constitution Bench concluded that a holistic reading of the said Act leads to the conclusion that Regulations can be made as long as they are consistent with the said Act and are made for carrying out the provisions of the said Act. The Constitution Bench further observed that 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) etc., fall under

the head 'mandatory functions', whereas advising the Central Government on formulation of National Electricity Policy and Tariff Policy would fall under the head 'advisory functions'. Decision making under Section 79(1) is not dependent upon making of Regulations under Section 178 by the Central Commission. The Constitution Bench clarified that the functions of the Central Commission enumerated in Section 79 are separate and distinct from functions of the Central Commission under Section 178. The former are administrative/adjudicatory functions whereas the latter are legislative and therefore measures under Section 79(1) have got to be in conformity with the Regulations under Section 178. As an example, the Constitution Bench referred to Section 79(1)(g) whereunder the Central Commission is required to levy fees and observed that making of a Regulation under Section 178 is not a precondition 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, levying fees under Section 79(1)(g) has to be in consonance with such Regulation. The Constitution Bench then

referred to Section 61. It was observed that while exercising the power to frame the terms and conditions of tariff under Section 178, the Central 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 a Regulation 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 such Regulation. While emphasizing the primacy of Regulations, the Constitution Bench observed that a Regulation can even override existing contracts which could not have been done across the board by an order of the Central Commission under section 79(1)(j). In its summary of findings, the Constitution Bench noted that in the hierarchy of regulatory powers and functions under the said Act, Section 178 which deals with making of Regulations by the Central Commission, under the authority of subordinate legislation is wider than Section 79(1) of the said Act, which enumerates the regulatory functions of the Central Commission, in specified

areas, to be discharged by orders (decisions). In our opinion, the same reasoning covers Section 61 which pertains to powers of the Appropriate Commission to specify the terms and conditions of tariff and Section 86, which refers to functions of the State Commission. It would also be advantageous to refer to paragraph 18 of the judgment where the Constitution Bench has considered the status of National Electricity Policy and the Tariff Policy in relation to Regulations framed by Regulatory Commission. It reads thus:

> *"18. Section 3 of the 2003 Act requires the Central Government, in consultation with the State Governments and the Authority, to prepare the National Electricity Policy as well as tariff policy for development of the power system based on optimum utilization of resources. The Central and the State Government are also vested with rule-making powers under Sections 176 and 180 respectively, while the "Authority" has been defined under Section 2 (6) as the regulation-making power under Section 177. On the other hand, the Regulatory Commissions are vested with the power to frame policy, in the form of regulations, under various provisions of the 2003 Act. However, the Regulatory Commissions are empowered to frame policy, in the form of regulations, as guided by the general policy framed by the Central Government. They are to be guided by the National Electricity policy, the tariff policy as well as the National Electricity Plan*

in terms of Sections 79 (4) and 86 (4) of the 2003 Act (see also Section 66)."

42. These observations must be read keeping in mind the observations made by the Constitution Bench in the earlier paragraphs that the said Act has distanced the Government from all forms of regulations, namely, licensing, tariff regulation, specifying Grid Code, facilitating competition through open access. This distance cannot be bridged by this Tribunal by holding that the National Electricity Policy or the Tariff Policy is binding on the Regulatory Commission. They can be only guiding factors. If the Regulatory Commissions have to be independent and transparent bodies, they are expected to frame Regulations under Sections 178 &181 independently. They can take guidance from National Electricity Policy or the Tariff Policy but are not bound by them.

43. ***P.T.C. India Ltd.*** leads us to conclude that Regulations framed under Sections 178 and 181 of the said Act have a primacy. Being subordinate legislation they rank above orders

issued by the Regulatory Commissions in discharge of their functions under Section 61 read with Sections 62, 79 and 86. They will have to be followed unless struck down by a Court in judicial review proceedings. Regulations made under Sections 178 and 181 have to be consistent with the said Act. Tariff Policy and National Electricity Policy are mentioned in Sections 61, 79 & 86 merely as guiding factors. They do not control or limit the jurisdiction of the Appropriate Commission.

44. It would also be appropriate at this stage to refer to the judgment of the Supreme Court in ***Transmission Corporation of Andhra Pradesh Limited.*** In that case, the Supreme Court was *inter alia* considering the question of jurisdiction and fixation of tariff by the Regulatory Commission. The Supreme Court was concerned with the Andhra Pradesh Electricity Regulatory Commission which was constituted under the Andhra Pradesh Electricity Reform Act, 1998 ('the Reform Act') and which continued to be a Commission within the meaning of the said Act by virtue of Section 185 thereof. The Supreme Court considered

Section 12 of the Reform Act which vested the State Government with the power to issue policy directions on matters concerning electricity in the State including the overall planning and coordination. The Supreme Court referred to ***P.T.C. India Ltd.*** The relevant paragraph of the said judgment reads as under:

> *"Section 12 of the Act vests the State Government with the power to issue policy directions on matters concerning electricity in the State including the overall planning and coordination. All policy directions shall be issued by the State Government consistent with the objects sought to be achieved by this Act and, accordingly, shall not adversely affect or interfere with the functions and powers of the Regulatory Commission including, but not limited to, determination of the structure of tariffs for supply of electricity to various classes of consumers. The State Government is further expected to consult the Regulatory Commission in regard to the proposed legislation or rules concerning any policy direction and shall duly take into account the recommendation by the Regulatory Commission on all such matters. Thus the scheme of these provisions is to grant supremacy to the Regulatory Commission and the State is not expected to take any policy decision or planning which would adversely affect the functioning of the Regulatory Commission or interfere with its functions. This provision also clearly implies that fixation of tariff is the function of the Regulatory Commission and the State Government has a minimum role in that regard."*

45. It is clear from the above observations of the Supreme Court that the policy framed by the State cannot hamper the functions of the Regulatory Commission. It is implicit in the above observations that the National Electricity Policy or the Tariff Policy are to only serve as guiding factors. If there are Regulations in the field framed by the Appropriate Commission, the Appropriate Commission will have to follow them. Supremacy of Regulatory Commissions in this regard is acknowledged by the Supreme Court.

46. In our opinion, reliance placed by the Appellant on the Full Bench decision of this Tribunal in ***R.V.K. Energy*** is totally misplaced. In that case two orders of the State Commission were under challenge. By one order, method for determination of cross-subsidy surcharge and additional surcharge payable by consumers of various categories was laid down for the year 2005-2006. By another order, cross-subsidy surcharge for open access consumers of various categories was laid down for the year 2006-2007. The basis of both the orders was the same. Embedded Cost Methodology was required to be applied for

estimating the quantum of cross-subsidy. The question was whether the State Commission had adopted the correct principle for determining the cross-subsidy surcharge. In the facts of that case, the Tribunal observed that by taking recourse to Embedded Cost Methodology to work out surcharge, the State Commission had ignored the object of the said Act, namely to give impetus to competition. Consumer will not be willing to buy expensive power. The Tribunal was of the view that the formula detailed in the National Tariff Policy was based on the principle that cross-subsidy surcharge should not be so hefty that the consumers will be discouraged from utilizing the source of power of their choice. The Tribunal expressed that the surcharge formula detailed in the National Tariff Policy needs to be adopted as it was more in tune with the object of the said Act than the Embedded Cost Methodology adopted by the State Commission and must therefore be adopted and followed by all the Commissions. The Tribunal in the circumstances gave a direction to the State Commissions to compute cross-subsidy surcharge for open access in accordance with the surcharge formula given in the

National Tariff policy. In our opinion, this judgment is not applicable to the present case because in that case no Regulations were framed by the State Commission prescribing methodology to determine the cross-subsidy surcharge. After the judgment of the Constitution Bench in ***P.T.C. India Ltd.*** to which we have made reference in great detail, this issue should not detain us any longer.

47. We may also usefully refer to the Full Bench decision of this Tribunal in ***Polyplex Corporation Limited***. In that case, one of the contentions raised by the Appellant therein was that the policy directions, dated 25/09/2009, issued by the State Government for allocating cheaper power to the subsidized category in the matter of determination of tariff are not legal and the State Commission should not have blindly accepted the same holding that they are binding on it. The Full Bench held that the State Commission is an independent statutory body. Therefore, the policy directions issued by the State Government are not binding on the State Commission, as these directions cannot curtail the power of the State Commission in the matter of

determination of tariff. The Full Bench further observed that the State Government may give such policy directions in order to cater to the popular demand made by the public. While determining tariff, the State Commission may consider those directions or suggestions but it is for the State Commission which has statutory duty to perform either to accept the suggestions or to reject them taking note of the various circumstances. Whether to accept the directions issued by the State Government or not is a matter purely of the discretion of the State Commission. It is clear therefore that policy decisions of the Government will not bind the Appropriate Commission in discharge of its functions. It may take guidance from them in the circumstances of a case, but they are not to be mandatorily followed.

48. In this connection, it is also necessary to refer to the judgment of this Tribunal in ***Haryana Power Generation Corporation Limited.*** In that case, contention of the Appellant therein was that the State Commission had neither followed the principles and methodology specified by the Central Commission

nor followed the provisions of the Tariff Policy and the National Electricity Policy. The Tribunal held that Section 61 of the said Act mandates the State Commissions to frame Regulations fixing terms and conditions for determination of tariff and in doing so it is to be guided by the principles and methodology specified by the Central Commission, National Electricity Policy and Tariff Policy etc., but once the State Commission has framed the Regulations it shall determine tariff in accordance with its own Regulations. The relevant paragraph of the said judgment reads as under:

> *"Bare reading of section 61 would make it clear that the State Commission 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 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 and the Central Commission's Regulations have no*

relevance in such cases. However, the State Commission may follow the Central Commission's Regulations on certain aspects which had not been addressed in the State Commission's own Regulations. The Haryana Electricity Regulatory Commission has framed Terms and Conditions for determination of tariff for generation in the year 2008 and the State Commission is required to fix tariff as per these Regulations."

49. The above observations of this Tribunal support our conclusion that the word "shall" appearing in the term "shall be guided" used in Sections 61, 79 and 86 of the said Act is not to be read as "must". It has a persuasive flavour. The National Electricity Policy and the Tariff Policy can only be guiding factors. If there are Regulations framed under Sections 178 and 181 in the field, they will rank above them being subordinate legislation.

50. Several decisions of the Supreme Court have been cited on the question of the interpretation of the words "shall be guided". It is not necessary to refer to all those decisions for, in our opinion, they reiterate the same view. We may only refer to ***Chittoor Zilla***. In that case the Supreme Court was concerned

inter alia with the question whether Andhra Pradesh Electricity Board ('the Board') was competent to put an end to the policy decision of the State to supply electricity to the agricultural sector at subsidized uniform flat rate and convert the same into multi- different tariff rates discarding the principle of fixation of uniform tariff as contemplated in Section 59 of the Electricity (Supply) Act, 1948, which laid down the general principles for Board's finance. It appears that on the basis of assurance given by the then Chief Minister, the tariff was reduced. Subsequently, the Board revised the tariff. Section 78(A) of the Electricity (Supply) Act 1948 related to the direction which could be given by the State Government. It reads thus:

> *"78.A Directions by the State Government*
>
> *(1) In the discharge of its functions, the Board shall be guided by such directions on questions of policy as may be given to it by the State Government. (emphasis supplied).*
>
> *(2) If any dispute arises between the Board and the State Government as to whether a question is or is not a question of policy, it shall be referred to the Authority whose decision shall be final.*

51. While dealing with the question raised before it, the Supreme Court examined the periphery of the statutory field within which the Board and the State Government have to function. The Supreme Court observed that admittedly both were statutory functionaries under the Electricity (Supply) Act 1948. They have to perform their obligations within the limits they have been entrusted with. Referring to Section 78(A), the Supreme Court observed that it empowered the State Government to issue directions to the Board on the question of policy, on the other hand, the Board has to perform its statutory obligations under the Act and with reference to fixation of tariff it has to act in terms of Sections 49 and 50 thereof. The Supreme Court clarified that the field of policy decision is not unlimited. There cannot be any policy direction which pushes the Board to perform its obligations beyond the limits of Sections 49 & 50. The Supreme Court further observed that any policy direction, which in its due performance keeps the Board within its permissible statutory limitations would be binding on the Board and both the State and the Board have to maintain their

cordiality and coordination in terms of the statutory sanctions. If any policy direction pushes the Board in its compliance beyond statutory limitations, it cannot be a direction within the meaning of Section 78(A). It is significant, observed the Supreme Court, that the opening words of Section 78(A) are "in the discharge of its functions, the Board shall be guided by such directions". So, the direction of the State is for the guidance to the Board in the discharge of its functions and such direction has a limitation, that is, it has to be a direction which will subserve the Board's performance of its statutory obligations. So observing, the Supreme Court upheld the decision of the Board, which had revised the tariff. It is pertinent to note that in this decision the Supreme Court referred to its decision in ***Real Food Products Limited*** on which reliance is placed by the Appellant and observed that in that case the direction of the State was only approved by the Court because it was held to be acceptable by the Board, as there was no material to indicate that the flat rate at Rs. 50 per HP per annum was so unreasonable that it could not have been considered appropriate by the Board. Referring to

the facts before it, the Supreme Court observed that the Board had broadly accepted the policy of the State Government to supply electricity to the ryots at the subsidized and concessional rate, but could not have accepted the rate at Rs. 50 per HP per annum as it could have been contrary to Section 59. The Supreme Court further observed that for the year 1996-97, according to the Board its fixed assets were Rs. 135 crores and after taking into consideration all the expenses, the net amount to be harnessed by the Board was to the tune of Rs. 1668 crores in terms of Section 59, which could not have been achieved if the State's direction was applied. Thus, the Supreme Court made it clear that directions of the State are expected to be in sync with the law. The Board is required to perform its statutory obligations. If the policy decisions help the Board to perform its statutory obligations, if they are in tune with statutory obligations, they will be guiding factors which the Board will take into consideration. But policy decisions which travel beyond the statutory limits, which are in breach of statutory requirements and which are in contravention of the statutory provisions

cannot be treated as mandatory factors and followed. Applying the same logic, we have no hesitation in holding that the words "shall be guided" appearing in the sections in question do not impose a mandatory obligation on the State Commission to follow the National Electricity Policy or Tariff Policy. However, the Appropriate Commission has to take guidance from the National Electricity Policy and Tariff Policy in carrying out its statutory functions as these policies have been notified by the Central Government in consultation with the State Governments and the Authority for development of the power system based on optimal utilization of the resources.

52. We shall now turn to Issue 'B'. It reads thus:

B) Whether in view of the decisions, the decision of the Hon'ble Supreme Court in PTC India Limited V. Central Electricity Commission (2010) 4 SCC and RVK Energy Private Limited V. Central Power Distribution Co. of Andhra Pradesh Limited (2007 ELR (APTEL) 1222) :

(i) A Tariff policy framed under Section 3 of the Electricity Act, 2003 can override Regulations framed under Section 61 read with Section 178/181 of the Electricity Act, 2003 ?

(ii) The Regulations notified by the State Commission under Section 181 of the Electricity Act can specify any different methodology or formula for calculation of cross subsidy surcharge ?

We have already extensively referred to the Constitution Bench judgment in ***P.T.C. India Ltd.*** We have held that judgment of this Tribunal in ***R.V.K. Energy*** is not applicable to the present case. ***P.T.C. India Ltd.*** has clarified the legal position. At the cost of repetition we may state that Regulations framed under Sections 178 and 181 of the said Act have a primacy over the orders passed by the Regulatory Commissions in discharge of their functions enumerated in Section 61 read with 62, 79 and 86 of the said Act because they are framed under the authority of subordinate legislation. Hence, National Electricity Policy and Tariff Policy framed under Section 3 of the said Act cannot override Regulations framed under Section 61 read with Sections 178/181 of the said Act. Ideally, National Electricity Policy, Tariff Policy and the Regulations are expected to be in tune with the provisions of the said Act. Regulations notified by the State Commission under Section 181 of the said

Act can specify methodology or formula for calculation of cross-subsidy surcharge which is different from the one mentioned in the Tariff Policy. But it must be in consonance with the provisions of the said Act. Further, if the State Commission is specifying a different formula than that stipulated in the Tariff Policy, it should give reason for adopting a different formula and why the formula given in the Tariff Policy was not adopted in the context of the tariff determination of the concerned distribution licensee.

53. We shall now turn to Issue 'C'. It reads thus:

> ***C) Whether in the fact and circumstances of the present case Regulation 33 of the Haryana Electricity Regulatory Commission (terms and conditions for Determination of Wheeling Tariff and Distribution and Retail Supply Tariff) Regulations, 2008 specifies a methodology for determination of cross subsidy surcharge contrary to the methodology provided under the Tariff Policy?***

In order to answer this question we must first turn to the Tariff Policy. Clause 8.5 pertains to cross-subsidy surcharge and additional surcharge for open access. It would be advantageous to quote Clause 8.5:

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, 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) 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 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.

The cross-subsidy surcharge should be brought down progressively and, as far as possible, at a linear rate to a maximum of 20% of its opening level by the year 2010-11.

Regulation 33 of the Tariff Regulations reads as under:-

> *33. Surcharge/additional surcharge (1) The Commission shall determine surcharge to compensate for the loss of cross-subsidy from the consumers or category of consumers who opts for "open access" to take supply from a 'person' other than the distribution licensee of his area.*
>
> *(2) Unless the Commission otherwise decides, the difference between the cost to serve/supply(COS) as estimated/allowed by the Commission and the average revenue per unit pertaining to the respective consumer category shall be the cross-subsidization surcharge payable to the concerned distribution licensee for use of the distribution system by consumers. The revenue so generated shall be utilized to meet the requirement of current level of cross-subsidy so that the entire amount of revenue from cross subsidy lost by the distribution licensee(s) is compensated through the revenue generated from surcharge. However, such surcharge shall not be applicable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use.*

54. The question posed before us is whether Regulation 33 of the Tariff Regulations specifies a methodology for determination of cross-subsidy surcharge contrary to the methodology provided

under the Tariff Policy. Our answer is in the negative. Regulation 33 says that the cross-subsidization surcharge payable to the concerned distribution licensee for use of the distribution system by consumers would be the difference between the cost to serve/supply (COS) as estimated/allowed by the Commission and the average revenue per unit pertaining to the respective consumer category. Clause 8.5.1. of the Tariff Policy recognizes and accepts this basic method. It says that when open access is allowed the surcharge would be computed for the purpose of Sections 38, 39, 40 and sub section 2 of Section 42 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.

55. In our opinion, a bare reading of Regulation 33 of the Tariff Regulations and Clause 8.5.1 of the Tariff Policy reveals that there is no difference between the two so far as the basic

principle underlying computation of cross-subsidy surcharge is concerned. Difference between the tariff and the 'cost to supply' is the basis. In Clause 8.5.1 of the Tariff Policy additionally only the cost component is analysed to balance the interest of the distribution licensee and the consumer. It says that cost of supply to the consumer may be computed as the aggregate of weighted average of power purchase costs of top 5% at the margin adjusted for voltage wise loss and distribution charges. In case of a consumer opting to avail open access, the distribution licensee avoids the purchase of most expensive power which would have been purchased and to that extent its cost of power purchase is reduced. This furthers the object of the said Act by balancing the interests of the stakeholders. We find no inconsistency between Regulation 33 of the Tariff Regulations and the Tariff Policy so far as methodology for determination of cross-subsidy surcharge is concerned. However, the Tariff Policy specifies a formula for surcharge wherein the cost of supply to the consumer of the applicable class has been worked out on the basis of the avoidable power

purchase cost and loss level for the applicable voltage level. The Regulation of the State Commission only gives the methodology without giving any formula

56. We shall now turn to Issue 'E'. It reads thus:

E) Whether the cross-subsidy determined by Ld. Haryana Commission in the impugned Order is contrary to the provisions of the Electricity Act, 2003?

We have now to answer the question whether the cross-subsidy determined by the State Commission in the impugned order is contrary to the provisions of the said Act. In this connection we must first refer to Section 42 of the said Act which enumerates the duties of distribution licensee and speaks of open access. Sub-section (1) of Section 42 states that it shall be the duty of a distribution licensee to develop and maintain an efficient coordinated and economical distribution system in his area of supply and supply electricity in accordance with the provisions of the said Act. Sub Section 2 requires the State Commission to introduce open access in such phases and

subject to such conditions(including the cross-subsidies and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross-subsidies, and other operational constraints. The first proviso to sub section 2 states that such open access shall be allowed on payment of a surcharge in addition to the charges for wheeling as may be determined by the State Commission. The second proviso states that such surcharge shall be utilized to meet the requirement of current level of cross-subsidy within the area of the distribution licensee. The third proviso expresses Parliament's desire to ensure that such surcharge and cross-subsidies are progressively reduced in the manner as may be specified by the State Commission. The fourth proviso states that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use. Sub section (4) of Section 42 states

that where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to pay. Section 42 thus gives an insight into the concept of cross-subsidy surcharge and additional surcharge.

57. We have already noted that we do not find that the methodology for determination of cross subsidy surcharge specified in Regulation 33 of the Tariff Regulations is contrary to the methodology provided in the Tariff Policy. We have quoted extensively the relevant provisions of the Tariff Policy and Regulation 33. We will examine the impugned order against the above backdrop.

58. In the impugned order the State Commission has stated that as per Regulation 24 of the Tariff Regulations, the distribution licensees are under statutory obligation to provide

requisite information and data to enable the Commission to work out wheeling charges but they have again failed to supply the same for the FY 2012-13. The State Commission noted that in absence of requisite information and data it is constrained to continue to adopt the same approach as adopted by it for determination of wheeling charges, cross-subsidy surcharge and additional surcharge in its immediate previous ARR/Tariff orders of distribution licensees. The State Commission then quoted the table containing computational details of wheeling charges for the FY 2012-13 and adopted it to work out wheeling charges. The State Commission then referred to Regulation 33 of the Tariff Regulations and Section 42 of the said Act which provides that the surcharge and cross-subsidies shall be progressively reduced. The State Commission also referred to the relevant portion of the Tariff Policy which states that the computation of cross-subsidy surcharge needs to be done in a manner that while it compensates the distribution licensee, it does not constrain introduction of competition through open access. The State Commission also referred to

another vital statement contained in the Tariff Policy that the cross-subsidy surcharge should be brought down progressively and, as far as possible at a linear rate to a maximum of 20% of the opening level of 2010-11. Having regard to the above provisions the State Commission determined the cross-subsidy surcharge. We must now quote the relevant paragraph of the impugned order which indicates how cross-subsidy surcharge was determined.

> *"Keeping in view the above provisions the Commission ordered in its ARR/Tariff order of distribution licensees for FY 2011-12 that rates of the cross subsidy surcharge shall be reduced @ 20% every year from the opening level i.e. rates of cross subsidy approved for FY 2010-11 and accordingly the cross subsidy surcharge for FY 2011-12 was determined. However, neither the tariffs nor the cost of service to the relevant category are constant over the years. In view of the substantial change in the cost of supply in FY 2012-13 as compared to FY 2010-11 and the average revenue in view of the revision in tariff in the last three years, the Commission observes that the cross subsidy generated by different categories has undergone a change. The Commission, however, has to take into consideration the relevant provisions of the Electricity Act, 2003 which mandates that the cross subsidy surcharge shall be progressively reduced. Therefore continuing with the principle of reduction of cross subsidy surcharge by 20% each year*

beginning from FY 2010-11, the Commission has limited the cross subsidy surcharge to 60% of the cross subsidy generated by the relevant consumer category for FY 2012-13. The details of the surcharge approved for 2012-13 are as given in the table below:

Table 5.2 – Cross subsidy surcharge for FY 2012-13(paise/kWh)

		Average revenue	COS	Cross subsidy generated	Cross subsidy surcharge limited to 60% of cross subsidy
		1	2	3=1-2	3*60%
1	HT industry	602	449	153	92
2	NDS HT	566	433	133	80
3	Bulk Supply other than domestic	626	473	153	92
4	Railways	567	437	130	78

59. From the above reasoning it is clear that the State Commission was mindful of the mandate of Section 42 that surcharge and cross-subsidies have to be progressively reduced. Section 42 has left it to the State Commission to devise the manner in which the said reduction is to take place. Having regard to the Tariff Policy which states that the cross-subsidy

surcharge should be brought down progressively and as far as possible at a linear rate to a maximum of 20% of the opening level of 2010-2011, the State Commission has continued with the principle of reduction of cross-subsidy surcharge by 20% each year beginning from FY 2010-2011 and limited the cross-subsidy surcharge to 60% of the cross-subsidy generated by the relevant consumer category for FY 2012-2013.

60. We are of the opinion that in the absence of specific formula given in Regulation 33 the State Commission ought to have determined the cross-subsidy surcharge as per the formula given in the Tariff Policy because as already noted by us, the principle followed in Regulation 33 and the Tariff Policy is the same. The said formula is based on the principle that in case a consumer opts to avail open access, the distribution licensee avoids purchase of most expensive power which it would have purchased if consumer would have continued to avail supply from the distribution licensee. The formula prescribes that the cost of supply may be computed as summation of (a) Weighted Average Power Purchase cost of top 5% power at the margin

excluding liquid fuel generation & renewable power generation in the merit order adjusted for average distribution loss for the relevant voltage level and (b) the distribution charges. The method applied by the State Commission does not reflect the cost of supply at different voltage levels. While the tariff has been fixed on the basis of overall average cost of supply, for determining the cross-subsidy surcharge, the State Commission has considered the cost of service based on category-wise average cost of service as per its own estimates which does not reflect cost of supply. The State Commission has not determined voltage-wise distribution loss. The State Commission has noted that the distribution licensees have not furnished the desired data. Unfortunately the State Commission has taken the non compliance of the distribution licensees very lightly. In **Tata Steel Limited** this Tribunal has given simple procedure for determining the voltage-wise cost of supply. The State Commission ought to have followed the said method. In the circumstances we are of the opinion that the State Commission has not determined the cross-subsidy in light of the judgments of

this Tribunal, which aim at achieving the object of the said Act. Formula mentioned in the Tariff Policy is in tune with them and is not contrary to Regulation 33. The State Commission has therefore defeated the object of the said Act by determining cross-subsidy surcharge contrary to the provisions of the said Act.

61. We shall now give a summary of our conclusions. We have already noted that issue 'D' is in the nature of preliminary issue. We therefore begin with issue 'D'.

D) Whether in the facts of the case the Appellant can seek adjudication upon the issue(s) which have already been decided in light of the Judgment dated 04.10.2012 passed in Appeal No. 200 of 2011 which now are the subject matter of Civil Appeal Nos. 13 of 2013 (by Maruti Suzuki on 06.12.2012) and D-3684 of 2013 (by DHBVN on 31.01.2013)?

The judgment of the two-Member Bench of the Tribunal dated 4/10/2012 in Appeal No.200 of 2011 is binding on a co-ordinate Bench of the Tribunal. It is however open to the Appellant to distinguish the said judgment on facts. It is open to

the Appellant to point out to the co-ordinate Bench that the said judgment ought not to be followed because it does not take into consideration relevant legal provisions or relevant precedents and is therefore *per incuriam* or for any other sound reason. If the co-ordinate Bench is in agreement with this submission and feels that a different view is required to be taken, judicial propriety demands that the co-ordinate Bench refers the matter to a larger Bench by giving reasons. Doctrine of *res-judicata* will have no application to such a case. Against the judgment dated 4/10/2012 appeal has been filed by the Appellant and by Respondent No.2 in the Supreme Court. The appeals are admitted. However, the Supreme Court has not stayed the judgment dated 4/10/2012. The Appellant can therefore persuade the Tribunal to hear the instant appeal and the Reference. Needless to say that the Tribunal can hear the present appeal and the Reference (See ***Shree Chamundi Mopeds Ltd.***).

> ***"A) Whether the term "shall be guided" used in Section 61, 79 and 86 means appropriate Commission has to mandatorily follow***

Tariff Policy and National Electricity Policy ignoring Regulations framed by it?

Regulations framed under Sections 178 and 181 of the said Act have a primacy over the orders passed by the Appropriate Commissions in discharge of their functions enumerated in Section 61 read with Sections 62, 79 and 86 of the said Act because they are framed under the authority of subordinate legislation. The words "shall be guided" used in Sections 61, 79 and 86 do not have a mandatory flavour. They do not impose a mandatory obligation on the Appropriate Commission to follow the National Electricity Policy or a Tariff Policy, ignoring the Regulations framed by it. National Electricity Policy and the Tariff Policy can only be guiding factors. They do not control or limit the jurisdiction of the Appropriate Commission.

B) Whether in view of the decisions the decision of the Hon'ble Supreme Court in PTC India Limited V. Central Electricity Commission (2010) 4 SCC and RVK Energy Private Limited V. Central Power Distribution Co. of Andhra Pradesh Ltd. 2007 ELR (APTEL) 1222:

i) A Tariff Policy framed under Section 3 of the Electricity Act, 2003 can override Regulations framed under Section 61 read with Section 178/181 of the Electricity Act, 2003?

ii) The Regulations notified by the State Commission under Section 181 of the Electricity Act can specify any different methodology or formula for calculation of cross subsidy surcharge?

i) In view of the decision of the Supreme Court in ***P.T.C. India Ltd.***, a Tariff Policy framed under Section 3 of the said Act cannot override the Regulations framed under Section 61 read with Sections 178/181 of the said Act.

ii) The Regulations notified by the State Commission under Section 181 of the said Act are expected to be in consonance with the said Act. The Tariff Policy can be a guiding factor. The Regulations can specify methodology or formula for calculation of cross-subsidy surcharge which is different from the one mentioned in the Tariff Policy. But it must be in

consonance with the provisions of the said Act. Further, if the State Commission is specifying a different formula than that specified in the Tariff Policy, it should give reason for adopting a different formula and why the Tariff Policy formula was not adopted in the context of tariff determination of the concerned distribution licensee.

C) Whether in the fact and circumstances of the present case Regulation 33 of the Haryana Electricity Regulatory Commission (terms and conditions for Determination of Wheeling Tariff and Distribution and Retail Supply Tariff) Regulations, 2008 specifies a methodology for determination of cross subsidy surcharge contrary to the methodology provided under the Tariff Policy?

Regulation 33 of the Tariff Regulations does not specify a methodology for determination of cross subsidy surcharge contrary to the methodology provided under the Tariff Policy.

E) Whether the cross-subsidy determined by Ld. Haryana Commission in the impugned Order is contrary to the provisions of the Electricity Act, 2003?

The cross-subsidy determined by the Haryana Commission in the impugned order is contrary to the provisions of the said Act and the Regulations as the Commission has not determined the cost of supply for the different consumer categories correctly. It is not in consonance with it.

62. The questions which were referred to us and which we have just answered are not just legal questions. They touch merits of the case also. They cover the entire controversy. Having answered those questions it would be now appropriate to dispose of the appeal.

63. We will now proceed to answer the questions raised in this appeal which are reproduced as under;

A. Whether the State Commission is justified in determining and imposing cross-subsidy surcharge without the requisite details being provided by the Respondent No.2 as directed by the State Commission?.

B. *Whether the State Commission has followed the applicable provisions and principles of law in the determination, quantification and application of cross-subsidy surcharge for the year 2012-13?*

C. *Whether the State Commission is justified in determining and imposing the cross-subsidy surcharge contrary to the provisions of and the formula prescribed in the National Tariff Policy?*

64. Since all the above questions are interconnected, we shall deal with them together.

65. We have already held that the methodology for determination of cross subsidy surcharge in Regulation 33 of the Tariff Regulations of the State Commission is in consonance with the methodology provided under the Tariff Policy. Regulation 37 specifies that cross subsidy surcharge would be the difference between the cost to serve/supply as estimated/allowed by the Commission and the average revenue power unit pertaining to the respective consumer category. Clause 8.5.1 of the Tariff

Policy also stipulates the same method. However, the Tariff Policy additionally gives a formula for determination of cross subsidy surcharge. In this formula the basic assumption in determining the cost of supply to the consumer availing open access is that in case a consumer opts to avail open access, the distribution licensee avoids purchase of most expensive power which it would have purchased if the consumer would have continued to avail supply from the distribution licensee. The cost of supply to the consumer category in the formula has been computed as summation of Weighted Average Power Purchase Cost of top 5% power at margin excluding liquid fuel based and renewable energy generation in the merit order adjusted for average distribution loss for the relevant voltage level and the distribution charges.

66. In the present case, the distribution licensees did not submit data for consumer category-wise cost of supply. However, the State Commission has made an estimate of cost of supply for different consumer categories for determining cross subsidy

surcharge. We find that the method used by the State Commission to estimate the cost of supply to different consumer categories is not a correct method and it does not reflect the cost of supply for different consumer categories. The Commission has divided the total ARR of the distribution licensees into demand related, energy related and consumer related cost. These costs have been apportioned to various categories of consumers connected on HT/LT voltage levels in proportion to total demand of the respective consumer category, energy drawl and number of consumers respectively. This method does not reflect the cost of supply for different consumer categories as it does not even consider the loss levels at different voltage levels, which is a major factor for determination of cost of supply for different consumer categories.

67. We also find that in the impugned order the State Commission has determined average cost of supply of Rs. 5.33 per kWh for the distribution licensee as a whole and the tariffs for the different categories of consumers was fixed within ±20% of

the average cost of supply i.e. within the band of Rs. 4.26 per kWh and Rs. 6.40 per kWh. The State Commission has not considered voltage-wise cost of supply and has not determined cross subsidies for different categories of consumers on the basis of voltage-wise cost of supply.

68. This Tribunal in the various judgments from the year 2006 onwards has repeatedly stated that the tariffs have to be determined considering both the overall average cost of supply of the distribution licensees and the voltage-wise cost of supply. The principles laid down by this Tribunal are as under:-

"i) The cost of supply referred in Section 61(g) is the cost of supply to the consumer category and not overall average cost of supply.

ii) The cross subsidy for a consumer category is the difference between cost to serve that category of consumer and average tariff realization for that category of consumer.

iii) The State Commission has to determine the category wise cost of supply as well as overall average cost of supply to all the consumers of the distribution licensee.

iv) While the cross subsidies have to be reduced progressively and gradually in the manner specified by the Appropriate Commission so as to avoid tariff shock to the subsidized categories

of consumers, it is not the intention of the legislation that cross subsidies have to be eliminated. Therefore, it is not necessary that the tariff should be the mirror image of actual cost of supply to the concerned category of consumer and to make the cross subsidy zero.

v) The subsidizing consumers should not be subjected to disproportionate increase in tariff so as to subject them to tariff shock.

vi) The State Commission should fix a limit of consumption for the subsidized consumer categories and once a consumer exceeds that limit he has to be charged at normal tariff.

vii) Tariff for consumer below the poverty line will be at least 50% of the average cost of supply. Tariffs for all other categories should be within ±20% of the overall average cost of supply for the distribution licensee by the end of 2010-11.

viii) The tariffs can be differentiated according to consumer's load factor, voltage, total consumption of electricity during specified period or the time or the geographical location, the nature of supply and the purpose for which electricity is required. For example, the consumers in domestic category can be differentiated from the consumers in Industrial category or commercial category on the basis of purpose for which electricity is required.

ix) The Tribunal in Appeal no. 102 of 2010 and batch in Tata Steel case has also given a formulation for determination of voltage-wise cost of supply in the absence of availability of detailed data."

69. This Tribunal in **Tata Steel Ltd.** gave a method for determination of cost of supply for different consumer categories. It was held that in the absence of segregated network costs, it

would be prudent to work out voltage-wise cost of supply taking into account the distribution losses at different voltage levels as a first major step in the right direction. As power purchase cost is a major component of tariff, apportioning the power purchase cost at different voltage levels taking into account the distribution loss at the relevant voltage level and the upstream system will facilitate determination of voltage-wise cost of supply. Thus, a practical method was suggested to reflect the consumer-wise cost of supply. However voltage-wise cost of supply would also require determination of distribution loss at different voltage levels of the distribution system.

70. This Tribunal vide judgment dated 17.01.2012 in **Northern Railway** had given a direction to the State Commission to undertake a serious exercise for determination of cost of supply. The distribution licensees were also directed to assist the Commission by furnishing all relevant and reliable data. It was expected that at least in future the State Commission assisted by the distribution licensee, would determine the tariffs after

considering overall average cost of supply and voltage-wise cost of supply as per this Tribunal's directions in **Tata Steel Ltd.** and other judgments. However, the State Commission has failed to implement the directions given in judgment dated 17/01/2012. The conduct of the State Commission being a subordinate authority tentamounts to denial of justice and is against the basic principles of the administration of justice and majesty of courts.

71. The State Commission in the impugned order determined retail supply of tariffs based on composite average cost of the distribution licensee without any consideration of the voltage-wise cost of supply for different consumer categories. On the other hand, the State Commission made an estimate of cost of supply for different consumer categories by its own formulation which we have held is not a correct method for determination of cost of supply. The State Commission then determined the cross subsidy surcharge as difference between the average tariff of the Appellant's category based on the revenue recovery and its

estimate of cost of supply. Thus, the determination of cross subsidy surcharge for FY 2012-13 is not as per its own Regulations and the Tariff Policy and the same will have to be set aside.

72. We feel that in the absence of a specific formula for cross subsidy surcharge in the Tariff Regulations, the State Commission ought to have determined the cross subsidy surcharge using the Tariff Policy formula. No reason has been given for not using the Tariff Policy formula in the impugned order.

73. The source-wise power purchase cost has already been determined in the Tariff Order. However, the voltage-wise distribution loss is required to be considered in Tariff Policy formula. In the present case, the State Commission has not determined voltage-wise loss level as the data was not furnished by the distribution licensees. Therefore, application of the Tariff Policy formula would require the State Commission to further

carry out a study for determination of voltage-wise loss levels. This will bring in an element of uncertainty and will further result in delay in fructification of justice to the Appellant in the matter for a Financial Year which is long over.

74. In the circumstances of the present case where only overall average cost of supply of the distribution licensee is available, it would be prudent to determine the cross subsidy surcharge for FY 2012-13 as the difference of the average tariff of the Appellant's category (based on average revenue realization from the Appellant's category) and the average cost of supply for the distribution licensee on the basis of which the retail supply tariffs have been determined by the State Commission. This will also not be contrary to the Regulations as both tariff of the Appellants category and cost of supply are based on the same parameter viz. the average cost of supply of the distribution licensee.

75. In the impugned order the average revenue per unit for the Appellant's category is Rs. 6.02 per unit and the average cost of supply for the distribution licensee on the basis of which the retail supply tariff was determined is Rs. 5.33 per unit. Therefore, the cross subsidy surcharge for the Appellant would be Rs. 0.69 per unit (6.02-5.33) and not Rs. 0.92 per unit as determined in the impugned order.

76. To sum up:

a) The methodology for determination of cross subsidy surcharge in Regulation 33 of the Tariff Regulations of the State Commission is in consonance with the methodology provided under the Tariff Policy. However, the Tariff Policy gives a formula for determination of cross subsidy surcharge whereas the Regulation does not give any formula.

b) The State Commission has not determined the cost of supply for different categories of consumers or voltage-wise cost of supply. The retail supply tariffs for different consumer

categories have been determined on the basis of average cost of supply for the distribution licensee as a whole.

c) The State Commission has not determined the cross subsidy surcharge as per its Regulations and the Tariff Policy and hence the said determination is set aside. The impugned order is set aside to this extent.

d) In the absence of specific formula for cross subsidy surcharge in the Tariff Regulations, the State Commission ought to have determined the cross subsidy surcharge using the Tariff Policy formula. However, the use of the Tariff Policy formula will require determination of distribution loss at different voltage levels, which would involve a fresh study to be conducted by the State Commission for determination of cross subsidy surcharge for FY 2012-13. This will bring in an element of uncertainty and will further result in delay in fructification of justice to the Appellant in the matter for a Financial Year which is long over.

e) In the circumstances of the case where only average cost of supply of the distribution licensee is available, it would be prudent to determine cross subsidy surcharge for FY 2012-13, as

a difference of average tariff as applicable to the Appellant's category and the average cost of supply for the Distribution licensee. This will not be contrary to the Regulation as both the retail supply tariff and cost of supply is based on overall average cost of supply of the distribution licensee. Accordingly, the cross subsidy surcharge for the Appellant's category is decided as 69 paise per unit as against 92 paise per unit decided in the impugned order. Accordingly, the Appellant will be entitled to claim refund from Respondent No.2 if payment had been made by the Appellant for cross subsidy surcharge @ 92 paise per unit for FY 2012-13.

77. The appeal is disposed of in the afore-stated terms.

78. Pronounced in the Open Court on this **24th day of March, 2015.**

(Rakesh Nath)
Technical Member

(Justice Surendra Kumar)
Judicial Member

(Justice Ranjana P. Desai)
Chairperson

√**REPORTABLE/~~NON-REPORTABALE~~**