Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 200 of 2011

Dated: 4th October, 2012

Present: MR. JUSTICE P. S. DATTA, JUDICIAL MEMBER
MR. V J TALWAR, TECHNICAL MEMBER,

IN THE MATTER OF:
M/s Maruti Suzuki India Ltd.
Maruti Suzuki India Ltd. Plot No. 1,
Nelson Mandela Marg,
Vasant Kunj, New Delhi- 110070. ……Appellants

VERSUS

1. Haryana Electricity Regulatory Commission
Bays Nos. 33-36, Sector -4
Panchkulla - 134112

2. Dakshi Haryana Bijli Vitran Nigam Ltd.
C-Block, Vidyut Sadan,
Vidhyut Nagar, Hissar – 125005 …..Respondents

Counsel for the Appellant: Mr M.G. Ramachandran
Ms Swapana Sheshadari

Counsel for the Respondent : Mr Amit Kapur
Mr Vishal Anand for R-2
Ms Shikha Ohri for R-1

JUDGMENT

PER MR. V J TALWAR TECHNICAL MEMBER

1. The Appellant, M/s Maruti Suzuki India Ltd. is engaged in the business of manufacture and sale of passenger vehicles and has a manufacturing facility at Manesar, Haryana. For the purposes of its business activities, Appellant has established a captive power plant having a capacity of 66 MW within the premises of its facility at Manesar, Haryana.

2. Haryana Electricity Regulatory Commission (Commission) is the 1st Respondent herein. 2nd Respondent, Dakshin Haryana Bijli Vitran Nigam Limited (DHBVNL) is one of the distribution licensees in the state of Haryana having Southern Haryana as its area of supply. The premises of the Appellant at Manesar fall within the area of supply of the 2nd Respondent (DHBVNL).

3. The Commission has passed the impugned tariff order on 27th May 2011 determining the Annual Revenue Requirement of the 2nd Respondent and retail tariff for the year 2011-12. The Appellant got aggrieved by the impugned order to the extent that cross subsidy surcharge has been imposed upon him for the energy it has been supplying to its ancillary units situated within its premises. Hence this Appeal.

4. In this Appeal the Appellant has alleged that the Commission has imposed cross subsidy surcharge (CSS) upon the Appellant for the period from 1.11.2010 to 31.3.2011 retrospectively without determining such surcharge for the year 2010-11 and also that while determining the CSS for the year 2011-12, the Commission did not follow the provisions of Tariff Policy notified by the Central Government.

5. In order to fully appreciate the issue at hand, it would be desirable to set out complete background of the case as under :

a. The Appellant Maruti Suzuki India Limited is a Company incorporated under the provisions of the Companies Act, 1956 and are engaged in the business of manufacture and sale of passenger vehicles under the brand name 'Maruti – Suzuki' having manufacturing facilities at Gurgaon and in IMT Manesar, in the State of Haryana. The Appellant has been allotted by the Haryana State Industrial Infrastructural Development Corporation Limited industrial plots measuring about 600 acres in IMT Manesar, Haryana for setting up a project for manufacture of passenger cars. In the industrial plots the Appellant has established all the facilities relating to manufacture of passenger cars.

b. The entire industrial plot measuring 600 acres has been developed by the Appellant at its own cost including infrastructure facilities i.e. roads, water supply, electric lines and systems and sewage. The Appellant has also allowed other persons to establish ancillary units within its premises for the purpose of developing components, parts and equipment for the use by the Appellant in the manufacture of passenger cars. The Appellant provides all the infrastructure facilities to such ancillary units within the industrial plot.

c. For the purpose of facilitating its business, the Appellant has established a fully owned Captive Power Plant of 66 MW capacity at the industrial plot primarily for its own captive use.

d. Apart from supplying electricity for its own use, the Appellant is also supplying electricity to the ancillary units located within its premises through the electricity supply lines laid down by the Appellant entirely within its own premises and there is no public street or any area belonging to any other person through which the electricity supply lines laid down by the Appellant passes through and entire system lies wholly within the premises of the Appellant.

e. On 10.4.2009 the Chief Electrical Inspector of Haryana sent a notice to the Appellant that distribution of electricity from the Appellant's Captive Power Plant (CPP) to consumers other than the captive use is not permissible under Indian Electricity Act, 2003 and accordingly the Appellant should either take distribution license from the Commission under section 12 or seek exemption under section 13 of the Electricity Act, 2003. The Chief Electrical Inspector further directed the Appellant that till the license is obtained from the Commission, the Appellant must stop supplying power to other consumers in violation of the Act.

f. Aggrieved by the directions of Chief Electrical Inspector the Appellant approached the Commission through petition no. 5 of 2010 seeking clarification and appropriate orders. In its petition before the Commission, the Appellant submitted that since the power plant is wholly owned by the Appellant and it also consumes more than 51% of the total electricity generated at the Plant, it qualifies to be a captive user of the electricity generated at the Plant within the meaning of Section 2 (8) read with Section 9 of the Electricity Act, 2003

and Rule 3 of the Electricity Rules, 2005 notified by the Central Government and, accordingly, it does not requires a licence to supply surplus electricity from the said plant to its ancillary units situated within its premises by virtue of 2nd proviso to Section 9 of the Electricity Act 2003.

g. In its petition no. 5 of 2010 before the Commission, the Appellant had submitted that the Appellant would not be using any part of the 2nd Respondent's grid to effect the supply of electricity to its ancillary units, therefore, it would not be subjected to payment of any cross-subsidy surcharge and additional surcharge under Section 42(2) and 42(4) of the Electricity Act, 2003. However, during proceedings before the Commission in that matter, the Appellant had given an undertaking to the Commission to the effect that the Appellant had always been and was willing to and undertakes to pay such charges as applicable and determined by the Commission.

h. The Commission passed an order dated 2.8.2010 declaring that M/s Maruti Suzuki India Ltd (the Appellant herein) did not require any license to lay down and operate electrical lines within its own premises and was also free to supply electricity through its dedicated lines to its ancillary units on certain conditions including that the cross subsidy surcharge and additional surcharge as and when determined by the Commission under Section 42(2) of the Electricity Act, 2003 shall be payable by the Appellant herein.

i. It was noted that some time during 2007-08 the Government of Haryana had waived off the levy of CSS upon the open access consumers for the year 2007-08 and 2008-09 and extended the waiver of CSS till 31.3.2011 in its subsequent orders. The Commission in its Tariff Orders dated 4.12.2009 and 13.9.2010 approving the ARR for the distribution licensees for the years 2009-10 and 2010-11 respectively had recorded this direction of the Government of Haryana and had observed that the licensee would have to be compensated by the Government for such waiver of CSS.

j. The State Government on a proposal submitted by STU of the State, decided to withdraw the waiver on levy of cross-subsidy surcharge w.e.f 01.11.2010 as per the approval given on 29.11.2010 on the file. Consequent to the withdrawal of waiver by the Government, the 2nd Respondent requested the Commission vide letter dated 28th December, 2010 to quantify the cross subsidy surcharge for FY 2010-11. It was also intimated by the 2nd Respondent in the said letter that in view of withdrawal of waiver on levy of cross subsidy surcharge by the Government, it has started the levy of cross subsidy surcharge @ 72 paise on the open access consumers as per the last notified charges by the Commission in the ARR/ Tariff order dated 04.12.2009. The Respondent also issued sales circular No. D-14 / 2010 dated 30th November, 2010 levying cross subsidy surcharge at the rates as approved by the Commission for FY 2009-10 with immediate effect. Through another circular No. D-7 / 2011 dated 14th March, 2011 the 2nd respondent further clarified

that the cross- subsidy surcharge would be levied w.e.f 01.11.2010 instead of 'with immediate effect'.

k. In the mean time the 2nd Respondent sought certain clarifications from the Commission on 2.11.2010 about the status of the Appellant. The Commission, through a communication dated 3.2.2011 signed by one of Commission's officers with the approval of the Commission, informed the DHBVNL (R-2) that CSS shall be payable by the Appellant in accordance with the Commission's order dated 2.8.2010 w.e.f. the date of withdrawal of the waiver of CSS by the State Government, at the rate determined by the Commission in its Tariff order for FY 2009-10. Copy of this communication was also sent to the Appellant.

l. The Commission passed Impugned Order on 27.5.2011 approving ARR and retail tariff along with wheeling charges and CSS for open access consumers for the year 2011-12. In this Impugned Order the Commission also clarified that the CSS for FY 2010-11 would be payable by the open access consumers with effect from date of withdrawal by the State Government at the rate determined by the Commission in its Tariff Order dated 4.12.2009 for the year 2009-10.

m. Aggrieved by the Impugned order dated 27.5.2010, the Appellant has filed this Appeal

6. Assailing the Impugned Order of the Commission, Mr M G Ramachandran, the learned Counsel for the Appellant has made very elaborate and detailed submissions in support of its

contentions. The gist of the submissions made by Mr M G Ramachandran is given below:

a. The Commission while determining cross-subsidy surcharge for FY 2011-12, has not followed the formula specified in the Tariff Policy notified by the Central Government under Section 3 of the 2003 Act.

b. The formula specified in the Tariff Policy is required to be followed by the Commission for determination of cross-subsidy surcharge as held by Full Bench of this Tribunal in the case of RVK Energy Ltd. Vs CPDCL: 2007 ELR (APTEL) 1222.

c. The Regulations framed by Haryana Commission should be consistent with the provisions of the Electricity Act, 2003 including Section 61, 79 (4) and 86 (4) .

d. Hon'able Supreme Court in Para 18 and 19 of its judgment in PTC India Ltd. (2010) 4 SCC 603 has held that Regulations shall be subservient and needs to be consistent with the National Electricity Policy and Tariff Policy.

e. The term "*shall be guided*" in Section 61(2) and Section 86(4) of the 2003 Act requires the Commission to follow the Tariff Policy as a mandate as held in the following judgments:-

(i) RVK Energy Ltd. Vs CPDCL: 2007 ELR (APTEL) 1222
(ii) Kusumam Hotels (P) Ltd. Vs KSEB: (2008) 13 SCC 213

(iii) Real Food Products Vs APSEB: (1995) 3 SCC 295
(iv) Naresh Kumar Madan Vs State of MP: (2007) 4 SCC 766
(v) DERC Vs BYPL: (2007) 3 SCC 33

f. Regulation 33 (2) of the Commission's Tariff Regulations, 2008 does not provide for any formula for determination of the Cost to Serve and the consequent cross-subsidy surcharge.

g. The Regulation does not specify the method to calculate cost of supply which in such circumstance has to be consistent with the Tariff Policy.

h. There is no basis for the argument that the cross-subsidy determined were under eclipse and got revived when the State Government withdrew its waiver.

i. The Commission has retrospectively levied cross-subsidy surcharge with effect from 01.11.2010 by impugned Tariff Order dated 27.05.2011.

j. Cross-subsidy was neither determined nor made applicable for FY 2010-11 in tariff order dated 13.09.2010

k. Cross-subsidy was not determined for FY 2010-11 since authenticated and updated CoS was not provided by the distribution licensee despite repeated reminders.

l. No order was passed by the Commission modifying the tariff order dated 13.09.2010 which made applicable the cross-subsidy surcharge for FY 2010-11.

m. Haryana Commission is not justified in levying cross-subsidy surcharge retrospectively merely on the ground that State Government has decided upon the same in the absence of necessary data.

n. In the tariff order dated 13.09.2010 the Haryana Commission did not consider any revenue to be received from distribution licensee from cross-subsidy surcharge.

o. The communication dated 03.02.2011 was by the officer of the Commission and therefore was not a judicial order from the Commission to levy cross subsidy surcharge as held by this Tribunal in order dated 23.03.2009 passed in Appeal No. 49 of 2009, NDPL Vs DERC.

p. The letter of the officer of the Commission cannot amend the tariff order of the Commission.

7. Refuting the contentions raised by the Appellant, Mr Amit Kapur, learned Counsel for the 2nd Respondent DHBVNL made extensive submissions in support of the Impugned Order. Mr Amit Kapur's submissions are summarised as under:

i. The Commission has framed the Tariff Regulations 2008 in exercise of powers under Section 181(2)(zd) of the Electricity Act, 2003. Hon'ble Supreme Court in PTC India Ltd. vs. CERC: (2010) 4 SCC 603 has held that once regulations have been framed by the Regulatory Commission under Section 181 of the Electricity Act, 2003, the terms and conditions for determination of tariff under Section 61 have to

be in consonance with the Regulations framed under Section 181 of the Electricity Act, 2003.

Learned counsel has referred to the following authorities in support of his contention:-

- PTC India Ltd. vs. CERC: (2010) 4 SCC 603 (paras 54-56)
- BRPL vs. DERC & Ors.: 2009 ELR (APTEL) 880 (Para 31)
- NDPL vs. DERC & Ors.: 2011 ELR (APTEL) 944 (Para 56)
- State of MP & Ors. vs. Gopal D. Thirthani & Ors.: (2003) 7 SCC 83 (Para 7)

ii. Factors specified under Section 61, including the Tariff Policy are guiding factors, which the Appropriate Commission must consider while framing Tariff Regulations. It has been held in a catena of cases by the Hon'ble Supreme Court of India that whenever, the term "***shall***" as used in Section 61 of Electricity Act, 2003 is followed by the term "***guided***", the provision is merely directory in nature and cannot be termed as mandatory, as held in the following cases:**-**

(a) The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindta Thirtha Swamiar of Sri Shirut Mutt: (1954) 1 SCR 1005
(b) Chittor Zilla Vyavasayadarula Sangham v APSEB: (2001) 1 SCC 396**,**
(c) Real Food Product Ltd. v APSEB: (1995) 3 SCC 295
(d) Rakesh Ranjan Verma Vs State of Bihar: 1992 supp(2) SCC 343 (Paras 10 and 11)

iii. Accordingly, the factors specified in Section 61 of the Electricity Act, 2003 are not mandatory and do not constrain/limit the powers of the Commission in formulating its Tariff Regulations in terms of Section 181(2) .

iv. The reliance placed by Appellant to argue that "*shall be guided*" means mandatory is incorrect and the judgments relied upon by the Appellant have no relevance in the facts of present case. Also, the Appellant has failed to take into consideration the law laid down by the Constitution Bench of Hon'ble Supreme Court in the *PTC Case (Supra)*.

v. It is settled position of law, as enunciated by the Hon'ble Supreme Court in UPPCL Vs NTPC: (2009) 6 SCC 235, that a validly made subordinate legislation becomes part of the main Act and should be read as such.

vi. The Commission has correctly determined the cross-subsidy pursuant to Regulation 33 (2) of the Tariff Regulations 2008, which provides that:

"***33. Surcharge / additional surcharge. -*** *…*

(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****."*

vii. Since there is no decision "otherwise" by the Commission, the methodology for computation of cross subsidy surcharge in terms of Regulation 33 is binding on the Commission. The Regulation constitutes a subordinate legislation which has NOT been challenged by the Appellant.

viii. The cross-subsidy surcharge as applicable for FY 2010-11 became applicable by application of ***Doctrine of Eclipse.***

The Government of Haryana withdrew the waiver on the levy of cross-subsidy surcharge with effect from 01.11.2010. As soon as the Government of Haryana withdrew the waiver, the cross-subsidy surcharge as applicable for FY 2010-11 became applicable by application of Doctrine of Eclipse as held by Hon'ble Supreme Court in the case of Dularey Lodh Vs Third Addl. District Judge, Kanpur : (1984) 3 SCC 99.

ix. The Commission by the Impugned Order dated 13.09.2010 has merely clarified that the cross-subsidy surcharge determined for FY 2009-10 shall also be applicable for FY 2010-11.

x. The allegation in regard to retrospective application of CSS has no basis as can be seen from the facts of the present case which amongst others are as follows:

(a) Haryana Commission extended the cross-subsidy surcharge determined for FY 2009-10 in FY 2010-11 also.

(b) Cross-subsidy surcharge became payable by Appellant with effect from 01.11.2010 i.e. the date from which the Government of Haryana withdrew the waiver on the levy of cross-subsidy surcharge .

(c) On 18.01.2011, DHBVN issued notice to Appellant informing that the Govt. of Haryana has withdrawn the waiver on cross-subsidy surcharge and accordingly, the Appellant will have to pay the cross subsidy surcharge.

(d) The Commission by its order dated 03.02.2011, directed Appellant to pay cross-subsidy surcharge with effect from 01.11.2010 in accordance with the rates determined by the Commission for FY 2009-10.

xi. In light of the above, including order dated 03.02.2011 issued by the Commission, the entire case of the Appellant that the Impugned Tariff Order dated 27.05.2011 has been given effect to retrospectively is wrong and misleading.

xii. The absence of authentic data to determine voltage-wise cost of supply does not automatically render determination of cross-subsidy surcharge invalid as held by this Hon'ble Tribunal in its judgment dated 17.01.2012 in Appeal No. 11 of 2011: Northern Railways Vs HERC

xiii. The case of the Appellant that the cross-subsidy surcharge was levied by DHBVN (R-2) on the behest of Government of Haryana is wrong and baseless. The cross-subsidy surcharge was determined by the Commission for FY 2009-10 which was also applicable for FY 2010-11 and as soon as the Government of Haryana withdrew the waiver granted by it, the Appellant become liable to pay the same to DHBVN (R-2). Accordingly, the Commission by its order dated 03.02.2011 directed Appellant to pay cross subsidy surcharge with effect from 01.11.2010 in accordance with the rates determined by Haryana Commission for FY 2009-10. The said order was issued by the officer of the Haryana Commission as per the approval of the Haryana

Commission. The said direction was never challenged by the Appellant.

xiv. Under Regulation 16 (1) and (2) of the HERC (Conduct of Business) Regulations, 2004, the Commission can delegate to any officer any function required under the Regulation.

xv. In similar circumstances this Tribunal in the case of B. M. Verma Vs UERC: 2010 (ELR) APTEL 108 read with ELR (APTEL) 800, has held that the letter dated 09.01.2007 issued by Secretary of Uttrakhand Commission was a valid order.

xvi. It is settled principle of law that the judgment/ order is binding and enforceable until and unless the same is set aside or stay is granted against the same by the Superior Court as has been held by the Hon'ble Supreme Court in the following cases:

(a) Kunhayammed and Ors. v. State of Kerala and Anr.: (2000) 6 SCC 359.
(b) Atma Ram Properties (P) Ltd. vs. Federal Motors Pvt. Ltd.: (2005) 1 SCC 705 (Para 9 & 10)
(c) Madan Kumar Singh vs. District Magistrate Sultanpur: (2009) 9 SCC 79 (Para 14)

xvii. The Appellant at this stage cannot challenge the validity of order dated 03.02.2011 and is liable to make payment towards cross-subsidy surcharge from 01.11.2010 since:-

(a) Order dated 03.02.2011 was validly issued by the Commission; and

(b) Undertaking given by the Appellant before the Haryana Commission was recorded in order dated 02.08.2010 in Petition No. 5 of 2010, which granted the Appellant certain benefits and which has been acted upon.

xviii. The present appeal is liable to be dismissed as the Appellant has approbated and reprobated at the same time. This can be gauged from the following:

(a) On the one hand, the Appellant is alleging that by the Impugned Tariff Order, the cross subsidy surcharge has been made applicable retrospectively and on the other hand, the Appellant seeks to challenge the communication issued by the Commission whereby, the Commission directed the Appellant to make payments towards the cross-subsidy surcharge for the year 2010-11.

(b) In June 2010, Appellant (Petition No. 5 of 2010) admitted to the Commission that it is ready and willing to make payments towards cross-subsidy surcharge as applicable and determined by the Commission. On that basis, having obtained order dated 02.08.2010 and acted upon it, now the Appellant seeks to renege by challenging the levy of cross-subsidy surcharge as determined by the Commission by its order dated 03.02.2011 and impugned order dated 27.05.2011.

8. We have heard the Learned Counsel for the parties on these issues and given our thoughtful consideration to their submissions.

In the light of the rival submissions, the following questions may arise for consideration:

i. Whether the Commission has to follow various provisions of the Tariff Policy while determining the tariff under Section 62(1)(d) and also while discharging its functions enumerated under section 86(1) and/or 86(3) of the Electricity Act, 2003, disregarding its own Regulations framed under Section 181 of the Act?

ii. Whether the term 'shall be guided by' used in Section 61 and 79(4) of the Act is to be interpreted as 'shall follow'?

iii. Whether the Commission has determined the cross subsidy surcharge in accordance with its own Regulations?

iv. Wh**ether** the Commission has erred in imposing cross subsidy surcharge upon the Appellant retrospectively?

9. We shall now consider each of the questions framed above. First question for our consideration is as to whether the Commission is bound to follow various provisions of Tariff Policy while determining the retail tariff under Section 62(1) (d) and the cross subsidy surcharge under proviso to section 86(1) of the Electricity Act, 2003, disregarding its own Regulations framed under Section 181 of the Act?

10. The learned Counsel for the Appellant made very elaborate submissions as under:

i. Central Government has framed the Tariff Policy in accordance with Section 3 of the 2003 Act and, therefore,

has attained statutory flavour. Section 61 of the 2003 Act requires the Commission to follow the Tariff Policy framed by the Central Government.

ii. Cross Subsidy Surcharge determined by the State Commission in the impugned Order is contrary to the National Tariff Policy notified by the Central Government under Section 3 of the Electricity Act, 2003 and is, therefore, not valid.

iii. Para 8.5.1 of Tariff Policy specifies certain formula for calculation of cross subsidy surcharge. The Commission has not followed this formula for determination of CSS in the Impugned Order and, therefore, the CSS determined by the Commission in the Impugned order is not enforceable and liable to be set aside.

iv. Sections 178 and 181 dealing with the framing of Regulations have to be read with Section 61 in matters of tariff. Section 181 (2) (zb) cannot be interpreted independently as giving power to notify Regulations without the need to follow the National Tariff Policy or the National Electricity Policy.

v. The Regulations framed by the Commission should be consistent with the provisions of the Electricity Act, 2003 including Section 61, 79 (4) and 86 (4) .

vi. The Hon'ble Supreme Court in Para 18 and 19 of its judgment in PTC India Ltd. (2010) 4 SCC 603 has held that

Regulations shall be subservient and needs to be consistent with the National Electricity Policy and Tariff Policy.

vii. In support of this contention, the learned Counsel for the Appellant has relied heavily on full bench judgment in RVK vs Chhatisgarh Electricity Regulatory Commission.

11. Learned Counsel for the 2nd Respondent urged that Section 61 of the Act requires the Commission to frame the terms and conditions for determination of tariff and while doing so it is to be guided by, inter alia, the Tariff Policy. Section 62 mandates the Commission to determine the tariff in accordance with the provisions of the Act. The Commission has framed Tariff Regulations 2008 in exercise of its powers under Section 181(2) (zd) of the Electricity Act, 2003. The term 'shall be guided by National Electricity Policy and Tariff Policy' dose not figure in Section 181 of the Act. Hon'ble Supreme Court in PTC India Ltd. vs. CERC: (2010) 4 SCC 603 has held that once regulations have been framed by the Commission under Section 181 of the Electricity Act, 2003, the terms and conditions for determination of tariff under Section 61 have to be in consonance with such Regulations framed under Section 181 of the Act. This Tribunal in catena of judgments and finally by the Hon'ble Supreme Court in PTC judgment (supra) has held this Tribunal does not have powers to examine the *vires* of the Regulations framed by the Commission.

12. In order to appreciate the issue in hand we need to set out relevant provisions of the 2003 Act which read as under:

42. Duties of distribution licensees and open access.— *(1) It shall be the duty of a distribution licensee to develop*

and maintain an efficient co-ordinated and economical distribution system in his area of supply and to supply electricity in accordance with the provisions contained in this Act.

(2) The State Commission shall 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:

Provided 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:

Provided further that such surcharge shall be utilised to meet the requirements of current level of cross subsidy within the area of supply of the distribution licensee:

Provided also that such surcharge and cross subsidies shall be progressively reduced in the manner as may be specified by the State Commission:

...

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

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

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

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

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

(e) the principles rewarding efficiency in performance;

(f) multi-year tariff principles;

(g) that the tariff progressively, reflects the cost of supply of electricity, and also, reduces and eliminates cross-subsidies within the period to be specified by the Appropriate Commission;

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

(i) the National Electricity Policy and tariff policy:

...

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

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

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

(b) transmission of electricity;

(c) wheeling of electricity;

(d) retail sale of electricity:

...

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

(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:

Provided that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;

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

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

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

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

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

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

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

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

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

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

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

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

(ii) promotion of investment in electricity industry;

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

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

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

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

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

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

(a) period to be specified under the first proviso of section 14;

(b) the form and the manner of application under sub-section (1) of section 15;

(c) the manner and particulars of application for licence to be published under sub-section (2) of section 15;

(d) the conditions of licence under section 16;

(e) the manner and particulars of notice under clause (a) of sub-section (2) of section 18;

(f) publication of the alterations or amendments to be made in the licence under clause (c) of sub-section (2) of section 18;

(g) levy and collection of fees and charges from generating companies or licensees under sub-section (3) of section 32;

(h) rates, charges and the terms and conditions in respect of intervening transmission facilities under proviso to section 36;

(i) payment of the transmission charges and a surcharge under sub-clause (ii) of clause (d) of sub-section (2) of section 39;

(j) reduction of surcharge and cross subsidies under second proviso to sub-clause (ii) of clause (d) of sub-section (2) of section 39;

(k) manner and utilisation of payment of surcharge under the fourth proviso to sub-clause (ii) of clause (d) of sub-section (2) of section 39;

(l) payment of the transmission charges and a surcharge under sub-clause (ii) of clause (c) of section 40;

(m) reduction of surcharge and cross subsidies under second proviso to sub-clause (ii) of clause (c) of section 40;

(n) the manner of payment of surcharge under the fourth proviso to sub-clause (ii) of clause (c) of section 40;

(o) proportion of revenues from other business to be utilised for reducing the transmission and wheeling charges under proviso to section 41;

(p) reduction of surcharge and cross-subsidies under the third proviso to sub-section (2) of section 42;

(q) payment of additional charges on charges of wheeling under sub-section (4) of section 42;

(r) guidelines under sub-section (5) of section 42;

(s) the time and manner for settlement of grievances under sub-section (7) of section 42;

(t) the period to be specified by the State Commission for the purposes specified under sub-section (1) of section 43;

(u) methods and principles by which charges for electricity shall be fixed under sub-section (2) of section 45;

(v) reasonable security payable to the distribution licensee under sub-section (1) of section 47;

(w) payment of interest on security under sub-section (4) of section 47;

(x) electricity supply code under section 50;

(y) the proportion of revenues from other business to be utilised for reducing wheeling charges under proviso to section 51;

(z) duties of electricity trader under sub-section (2) of section 52;

(za) standards of performance of a licensee or a class of licensees under sub-section (1) of section 57;

(zb) the period within which information to be furnished by the licensee under sub-section (1) of section 59;

(zc) the manner of reduction of cross-subsidies under clause (g) of section 61;

(zd) the terms and conditions for determination of tariff under section 61;

(ze) details to be furnished by licensee or generating company under sub-section (2) of section 62;

(zf) the methodologies and procedures for calculating the expected revenue from tariff and charges under sub-section (5) of section 62;

(zg) the manner of making an application before the State Commission and the fee payable therefor under sub-section (1) of section 64;

(zh) issue of tariff order with modifications or conditions under sub-section (3) of section 64;

(zi) the manner by which development of market in power including trading specified under section 66;

(zj) the powers and duties of the Secretary of the State Commission under sub-section (1) of section 91;

(zk) the terms and conditions of service of the secretary, officers and other employees of the State Commission under sub-section (2) of section 91;

(zl) rules of procedure for transaction of business under sub-section (1) of section 92;

(zm) minimum information to be maintained by a licensee or the generating company and the manner of such information to be maintained under sub-section (8) of section 128;

(zn) the manner of service and publication of notice under section 130;

(zo) the form of preferring the appeal and the manner in which such form shall be verified and the fee for preferring the appeal under sub-section (1) of section 127;

(zp) any other matter which is to be, or may be, specified.

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

13. If one reads Section 61 with Section 62 of the Act, it becomes clear that the Commission shall determine the tariff in accordance with the provisions of the Act, including the terms and conditions which may be specified, through Regulations under Section 61 of the Act. This Tribunal in Appeal no. 131 of 2011 has held that 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 factors mentioned in Section 61 of the Act including the Central Commission's Regulations have no relevance. Relevant portion of the judgment of this Tribunal in Appeal no. 131 of 2011 is quoted below:

"…the State Commissions have been mandated to frame Regulations for fixing tariff under Section 62 of the Act and while doing so i.e. while framing such regulations, State Commissions are required to be guided by the principles laid down in by the Central Commission, National Electricity Policy, Tariff Policy etc. It also provide that while framing the regulations the State Commissions shall ensure that generation, transmission and distribution are conducted on commercial principles; factors which would encourage

competition and safe guard consumer's interest. Once the State Commission has framed and notified the requisite Regulations after meeting the requirement of prior publication under Section 181(3) , it is bound by such Regulations while fixing Tariff under Section 62 of the Act 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.

14. In the present case the Commission has framed the Terms and Conditions for determination of retail tariff in the year 2008. Regulation 33 of these Regulations specifies the methodology to determine the cross subsidy surcharge and the Commission is bound by it. It is settled law that this Tribunal has no jurisdiction to examine the legality of the Regulations framed by the Commission. The question as to whether, while framing the Regulations, the Commission has followed provisions of the Tariff Policy or not cannot be raised before this Tribunal.

15. The learned Counsel for the Appellant pointed out that Section 86 of the Act enumerates the functions to be discharged by the Commission. Proviso to Section 86(1) requires the Commission to determine the cross subsidy surcharge and Section 86(4) of the Act mandates the Commission follow the provisions of the Tariff Policy while discharging its functions. The learned Counsel of the Appellant has relied on the full bench judgment of this Tribunal in RVK case in which this Tribunal has held that the Formula for calculation of cross subsidy surcharge specified in para 8.5.1 of

The Tariff Policy is mandatory and all Commission are required to follow the same. The relevant portion of the judgment is quoted below:

> *44. In the circumstances, therefore, we direct the the Andhra Pradesh Commission to compute the cross subsidy surcharge, which consumers are required to pay for use of open access in accordance with the Surcharge Formula given in para 8.5 of the Tariff Policy, for the year 2006-07 and for subsequent years. Page 47 of 48 Appeal nos. 169,170,171,172 of 2005 & 248 and 249 of 2006*
>
> *45. In future all the Regulatory Commissions while fixing wheeling charges, cross subsidy surcharge and additional surcharge, if any, shall have regard to the spirit of the Act as manifested by its Preamble. The charges shall be reasonable as would result in promoting competition. They shall be worked out in the light of the above observations made by us. This direction shall also apply to the the Andhra Pradesh Commission for computing the cross subsidy surcharge for the year 2005-06 as well."*

16. The above ratio of RVK case cannot be applied to present case as the facts of RVK case are totally different from the present case. In RVK case, the Regulations framed by the Andhra Pradesh Commission did not specify the methodology to determine the cross subsidy surcharge. Accordingly, the Andhra Pradesh Commission in its order dated 21.9.2005 laid down the basis for determining the cross subsidy surcharge in respect of FY 2005-05. Similarly, the Andhra Pradesh Commission in its order dated 29.8.2006 laid down the methodology for computing the cross subsidy surcharge payable by the open access consumers. Thus the Andhra Pradesh Commission, the respondent Commission in RVK case laid down the methodology through its orders and those orders were challenged before this Tribunal. In the present case the Haryana Commission has specified the methodology to

determine the cross subsidy surcharge in its Tariff Regulations 2008 and the Commission is bound to follow its own Regulations framed under Section 181 of the Act while performing the assigned functions under the Act. Thus the facts of the two cases are different. Therefore, the 'ratio' of RVK case would not be applicable to the present case.

17. On application of decisions of the courts in one case to other similar cases, the Hon'ble Supreme Court in Bharat Petroleum Corporation Ltd. Vs N. R. Vairamani (2004) 8 SCC 579 has observed that:

> *"9. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. …*
>
> *10. …And, in Herrington v. British Railways Board (1972 (2) WLR 537) Lord Morris said:*
>
> *"There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances made in the setting of the facts of a particular case."*
>
> *11. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two*

cases. Disposal of cases by blindly placing reliance on a decision is not proper.

12. The following words of Lord Denning in the matter of applying precedents have become locus classicus:

"Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive."

*** *** ***

"Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it."

18. The issue in regard to superiority of the Regulations framed under Section 181 of the Act over the orders passed by the Commission in discharge of its functions enumerated in Section 79 and Section 86 of the Act has been put to rest by the Hon'ble Supreme Court in PTC vs CERC; 2010 (4) SCC 603 where in the Hon'ble Supreme Court has held that the Central Commission is empowered to take steps /measures in discharge its function enumerated in Section 79(1). These measures which the Central Commission is empowered to take have got to be in conformity with the Regulations made under Section 178 of the Act. In order to have better understanding of the findings of the Hon'ble Supreme Court it would be desirable to reproduce the relevant portion of the judgment as below:

"40. As stated above, the 2003 Act has been enacted in furtherance of the policy envisaged under the Electricity Regulatory Commissions Act, 1998 as it mandates establishment of an independent and transparent Regulatory Commission entrusted with wide ranging responsibilities and objectives inter alia including protection of the consumers of electricity. Accordingly, the Central Commission is set up under Section 76(1) to exercise the powers conferred on, and in discharge of the functions assigned to, it under the Act. On reading Sections 76(1) and 79(1) one finds that Central Commission is empowered to take measures/steps in discharge of the functions enumerated in Section 79(1) like to regulate the tariff of generating companies, to regulate the inter-State transmission of electricity, to determine tariff for inter-State transmission of electricity, to issue licenses, to adjudicate upon disputes, to levy fees, to specify the Grid Code, to fix the trading margin in inter-State trading of electricity, if considered necessary, etc.. These measures, which the Central Commission is empowered to take, have got to be in conformity with the regulations under Section 178, wherever such regulations are applicable. Measures under Section 79(1), therefore, have got to be in conformity with the regulations under Section 178. To regulate is an exercise which is different from making of the regulations. However, making of a regulation under Section 178 is not a pre-condition to the Central Commission taking any steps/measures under Section 79(1). As stated, if there is a regulation, then the measure under Section 79(1) has to be in conformity with such regulation under Section 178. This principle flows from various judgments of this Court which we have discussed hereinafter. For example, under Section 79(1)(g) the Central Commission is required to levy fees for the purpose of the 2003 Act. An Order imposing regulatory fees could be passed even in the absence of a regulation under Section 178. If the levy is unreasonable, it could be the subject matter of challenge before the Appellate Authority under Section 111 as the levy is imposed by an Order/decision making process. ***Making of a regulation under Section 178 is not a pre-condition to passing of an Order levying a regulatory fee under Section 79(1)(g). However, if there is a regulation under Section 178 in that regard then the Order levying fees under Section 79(1)(g) has to be in consonance with such regulation.***

Similarly, while exercising the power to frame the terms and conditions for determination of tariff under Section 178, the Commission has to be guided by the factors specified in Section 61. It is open to the Central Commission to specify terms and conditions for determination of tariff even in the absence of the regulations under Section 178. However, if a regulation is made under Section 178, then, in that event, framing of terms and conditions for determination of tariff under Section 61 has to be in consonance with the regulation under Section 178. *One must keep in mind the dichotomy between the power to make a regulation under Section 178 on one hand and the various enumerated areas in Section 79(1) in which the Central Commission is mandated to take such measures as it deems fit to fulfil the objects of the 2003 Act. Applying this test to the present controversy, it becomes clear that one such area enumerated in Section 79(1) refers to fixation of trading margin. Making of a regulation in that regard is not a pre- condition to the Central Commission exercising its powers to fix a trading margin under Section 79(1)(j), however, if the Central Commission in an appropriate case, as is the case herein, makes a regulation fixing a cap on the trading margin under Section 178 then whatever measures a Central Commission takes under Section 79(1)(j) has to be in conformity with Section 178. One must understand the reason why a regulation has been made in the matter of capping the trading margin under Section 178 of the Act. Instead of fixing a trading margin (including capping) on a case to case basis, the Central Commission thought it fit to make a regulation which has a general application to the entire trading activity which has been recognized, for the first time, under the 2003 Act. Further, it is important to bear in mind that making of a regulation under Section 178 became necessary because a regulation made under Section 178 has the effect of interfering and overriding the existing contractual relationship between the regulated entities. A regulation under Section 178 is in the nature of a subordinate Legislation. Such subordinate Legislation can even override the existing contracts including Power Purchase Agreements which have got to be aligned with the regulations under Section 178 and which could not have been done across the board by an*

Order of the Central Commission under Section 79(1)(j)." ***{Emphasis added}***

19. The above findings of the Hon'ble Supreme Court in PTC case squarely fit in the present case in hand. The Commission is required to determine the cross subsidy surcharge in terms of section 42 (2) and Section 86(1)(k) and section 86(3). Framing of regulation is not a precondition to determine the surcharge. However, the Commission has framed Regulations specifying the method to compute the cross subsidy surcharge and therefore determination of such surcharge has to be in conformity with the Regulations. A comparison showing parallelness of the two cases is drawn in table below:

PTC case	**Present Case**
Section 79 enumerates functions of the Central Commission	Section 86 enumerates the functions of the State Commission
Section 178 provides the powers of the Central Commission to make regulations	Section 181 provides the powers of the State Commission to make regulations
Required to determine trading margin under Section 79(1)(g).	Required to determine the cross subsidy surcharge under Section 86(1)(k).
No precondition of regulations under Section 178. Section 178 does not require the Central Commission to frame Regulations to fix trading margin	No precondition of regulations under Section 181. Section 181 does not require the State Commission to frame Regulations for determination of cross subsidy surcharge
Central Commission has framed regulations under Section 178 fixing the trading margin	State Commission has framed regulations under section 181 specifying method to compute the cross subsidy surcharge
Instead of fixing a trading margin (including capping) on a case to case basis, the Central Commission thought it fit to make a regulation which has a general application to the entire trading activity which has been recognized, for the first time, under the 2003 Act.	Instead of determining cross subsidy on a case to case basis, the State Commission thought it fit to make a regulation which has a general application to the entire open access regime, which has been recognized, for the first time, under the 2003 Act.

20. The learned Counsel for the Appellant had further submitted that Hon'ble Supreme Court in Para 18 and 19 of its judgment in PTC India Ltd. (2010) 4 SCC 603 has held that Regulations shall be subservient and needs to be consistent with the National Electricity Policy and Tariff Policy.

21. The above contention of the Appellant is not correct. The Hon'ble Supreme Court in its judgment 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 as well as the National Electricity Plan in terms of section 79(4) and 86(4) of the 2003 Act. The relevant extract of Hon'ble Supreme Court is reproduced below:

> *"18. Section 3 of the 2003 Act requires the Central Government, in consultation with the State Governments and the Authority, to prepare 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 Governments are also vested with rule-making powers under Sections 176 and 180 respectively, while the "Authority" has been defined under Section 2(6) as 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) after the 2003 Act*** *(see also Section 66).*
>
> *19 In this connection, it may also be noted that the Central Government has also, in exercise of its powers under Section 3 of the 2003 Act, notified the Tariff Policy with effect from 6.1.2006. One of the primary objectives of the Tariff Policy is to ensure availability of electricity to consumers at*

reasonable and competitive rates. The Tariff Policy tries to balance the interests of consumers and the need for investments while prescribing the rate of return. It also tries to promote training in electricity for making the markets competitive. Under the Tariff Policy, there is a mandate given to the Regulatory Commissions, namely, to monitor the trading transactions continuously and ensure that the electricity traders do not indulge in profiteering in cases of market failure. The Tariff Policy directs the Regulatory Commissions to fix the trading margin in a manner which would reduce the costs of electricity to the consumers and, at the same time, they should endeavour to meet the requirement for investments."

22. From the above reproduction of the judgment it is clear that the Hon'ble Supreme Court has not held that the Regulations are subservient and needs to be in consonance with the Tariff Policy. It has merely observed that the Commissions are to be guided by the Tariff Policy while framing the regulations under Section 181 of the Act

23. For the aforesaid reasons, we answer the question as follows:

i. While discharging its 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. The Commissions are to be guided by the Tariff Policy while framing the Regulations.

iii. 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.

24. The Second question before us for consideration is as to whether the term 'shall be guided by' used in Section 61 and 86(4) of the Act is to be interpreted as 'shall follow'?

25. In view of our findings to first question above, this question has become pure academic as answer to this would not have any impact on the outcome of this case. However, to set the records straight, we would like to make few observations on the contentions raised by the learned counsel for the Appellant.

26. The learned Counsel for the Appellant has contended that the term `*shall be guided*' used in Sections 61, 79 (4) and 86 (4) is mandatory as held by the Hon'ble Supreme Court in the following cases:

i. Full Bench decision of this Tribunal in the case of RVK Energy Power Limited v The Central Power Distribution Company Limited 2007 ELR (APTEL) 1222;

ii. Kusumam Hotels (P) Ltd. v. KSEB, (2008) 13 SCC 213, the Hon'ble Supreme Court held as under:

> "*37. The State of Kerala in this case did not grant any concession by itself. The Central Government took a large policy of treating tourism as an industry. A wide range of concessions were to be granted by way of one-time measure; some of them however, had a recurring effect. So far as grant of benefits which were to be recurring in nature is concerned, the State exercises its statutory power in the case of grant of exemption from payment of building tax wherefor it amended the statute.* ***It issued directions which were binding upon the Board having regard to the provisions contained in Section 78-A of the 1948 Act. The Board was bound thereby****. The Board, having regard to its financial constraints, could have brought its financial stringency to the notice of the State. It did so. But the State*

could not have taken a unilateral decision to take away the accured and vested right. The Board's order dated 1-10-1999 in law could not have been given effect to. The Board itself kept the said notification in abeyance by reason of the order dated 8-11-1999"

iii. Real Food Products v Andhra Pradesh State Electricity Board, (1995) 3 SCC 295, the Hon'ble Supreme Court has held as under:

"*8. The only surviving question is with regard to the nature and effect of the direction given by the State Government under Section 78-A of the Act. The question has to be examined in the context of the facts of the present case which is confined to the charging of a flat rate per H.P. for agricultural pump-sets. The nature of the function of the Board in fixing the tariffs and the manner of its exercise has been considered at length in the earlier decisions of this Court and it does not require any further elaboration in the present case.* ***Section 78-A uses the expression "the Board shall be guided by such directions on questions of policy as may be given to it by the State Government". It does appear that the view expressed by the State Government on a question of policy is in the nature of a direction to be followed by the Board in the area of the policy to which it relates. In the context of the function of the Board of fixing the tariffs in accordance with Section 49 read with Section 59 and other provisions of the Act, the Board is to be guided by any such direction of the State Government. Where the direction of the State Government, as in the present case, as to fix a concessional tariff for agricultural pump-sets as a flat rate per H.P., it does relate to a question of policy which the Board must follow.*** *However, in indicating the specific rate in a given case, the action of the State Government may be in excess of the power of giving a direction on the question of policy, which the Board, it its conclusion be different, may not be obliged to be bound by. But where the Board considers even the rate suggested by the State Government and finds it to be acceptable in the discharge of its function of fixing the tariffs, the ultimate decision of the Board would be vitiated merely*

because it has accepted the opinion of the State Government even about the specific rate. In such a case the Board accepts the suggested rate because that appears to be appropriate on its own view. If the view expressed by the State Government in its direction exceeds the area of policy, the Board may not be bound by it unless it takes the same view on merits itself."

iv. Naresh Kumar Madan v. State of Madhya Pradesh (2007) 4 SCC 766, the Hon'ble Supreme Court held as under:

"14. Section 15 of the 1948 Act empowers the Board to appoint a Secretary and such other officers and employees as may be required to enable it to carry out its functions under the said Act. Appointment of a Secretary of the Board is subject to the approval of the State Government. Section 65 of the 1948 Act provides for the power of the Board to borrow funds for the purposes mentioned therein wherefor however, previous sanction of the State Government would be required to be obtained. Section 66 thereof provides for furnishing of guarantee in respect of such loan advanced by the State Government to make rules for the purposes mentioned therein. ***Section 78-A empowers the State Government to issue directions upon the Board in the discharge of its functions. Such directions are binding upon the Board****. The State, therefore, exercises a deep and pervasive control over the affairs of the Board."*

v. Delhi Electricity Regulatory Commission v. BSES Yamuna Power Limited,(2007) 3 SCC 33 considered the effect of a policy directive issued by the Government of Delhi under Section 12 of the Delhi Electricity Reforms Act, 2000 and has held that the said policy was binding on the State Commission. The Hon'ble Supreme Court has, inter-alia, held as under:

"42. Secondly, we may refer to the provisions of DERA. The said Act was enacted, inter alia, to restructure the electricity industry by increasing the participation of private section in the electricity industry. Today public-private participation is a

key element to develop infrastructure in our economy. DERA was enacted keeping in mind the concept of public-private enterprise. It was enacted to encourage such joint ventures. ***Under Section 12, DERC was required to be guided by directions in matters of policy involving public interest as the Government may issue from time to time. The Government was the final authority regarding such directions****. Section 28 of DERA came under Part VII which dealt with fixation of tariffs. Under Section 28, the licensee was required to observe the methodologies specified by the Commission (DERC) from time to time in the matter of calculating the expected revenue from charges which the licensee was permitted to recover under the terms of its licences. Under Section 28(2), DERC was entitled to prescribe the terms and conditions for determination of the licensee's revenues and tariffs in such manner as DERC considers appropriate. However, Section 28(2) was subject to the proviso which stated that DERC shall be guided in the matter of determination of revenues for the licensees by the financial principles mentioned in the Sixth Schedule to the said 1948 Act read with Sections 57 and 57-A of the said Act. This was one of the parameters mentioned in the proviso. The second parameter prescribed in the proviso states that in fixing of revenues and tariffs, DERC shall keep in mind economic use of resources, good performance, optimum investment and other matters. This was the second parameter. The third parameter mentioned in the proviso states that DERC shall keep in mind the interest of the consumer. Under Section 28(3), DERC is entitled to depart from the factors mentioned in the Sixth Schedule to the 1948 Act while determining the licensee's revenues and tariffs. However, DERC was required to record reasons for such departure. In the present case, we are of the view that DERC was certainly entitled to make a departure from the principles set out in the Sixth Schedule to the said 1948 Act.* ***However, that departure, in the facts and circumstances of the case, had to be within the framework of the Policy Directions issued by GoNCTD under Section 12****. Further, in any event, the departure from the principles under the 1948 Act was required to be based on proper reasoning. In the present case, DERC was required to consider the effect of its decision……."*

27. We have already dealt with the full bench judgment of this Tribunal in RVK case. All other judgments relied upon by the Appellant relate to the 'Policy Directions' issued by the appropriate Government under Section 78A of Electricity (Supply) Act 1948 and Delhi Electricity Reforms Act 2000 (DERA 2000).

28. Section 78A of Electricity (Supply) Act 1948 and Section 12 of DERA 2000 were similar to Section 108 of the 2003 Act. These sections are set out as under:

Section 78A of the Electricity (Supply) Act, 1948

> ***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.*
>
> *(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 thereon shall be final.*

Section 12 of the DERA 2000

> ***12 General powers of the Government*** *(1) In the discharge of its functions, the Commission* ***shall be guided*** *by such directions in matters of policy involving public interest as the Government may issue from time to time*
>
> *If any question arises as to whether any such direction relates to a matter of policy involving public interest, the decision of the Government thereon shall be final.*

Section 108 of the Electricity Act, 2003

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

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

29. The Hon'ble Supreme Court in APTRANSCO vs Sai Renewable Energy Pvt. Ltd.: (2011)11SCC34 has held that State Commission is not bound by any policy directions issued by the Government under the Act if such directions hamper the statutory functions of the Commission. The relevant extracts of the Hon'ble Supreme Court's judgment delivered on 8.7.2010 is quoted below:

"27. The Reform Act, 1998 was enacted, primarily, with the object of constituting two separate corporations; one for generation and other for transmission and distribution of electrical energy. The essence was restructuring, so as to achieve the balance required to be maintained in regard to competitiveness and efficiency on the one part and the social objective of ensuring a fair deal to the consumer on the other. This Act is also intended for creation of a statutory regulatory authority. Section 3 of the Act requires the State Govt. to establish by notification a Commission to be known as Andhra Pradesh Electricity Regulatory Commission. This was done by notification dated 3rd April, 1999. As already noticed, Section 11 detailed the functions of the Regulatory Commission and primarily it had advisory as well as regulatory functions. In terms of Section 11(1)(c) it was required to issue licenses in accordance with the provisions of the Act and determine the conditions to be included in the license. However, 11(1)(e) gave it much wider power and duty to regulate the purchase, distribution, supply and utilization of electricity, the quality of service, the tariff and charges payable keeping in view both the interest of the consumer as well as the consideration that the supply and distribution cannot be maintained unless the charges for the electricity supplied are adequately levied and duly collected. In terms of Section 11(1)(l) it was to undertake all incidental or ancillary things to the functions assigned to it under the provisions of the Act. ***Section 12 of the Act vests the State Govt. with the power to issue policy directions on matters concerning electricity in the State including the***

overall planning and co- ordination. All policy directions shall be issued by the State Govt. 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 Govt. 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 Govt. has a minimum role in that regard. *Chapter VII of this Act deals with tariff. In terms of Section 26(2), the Regulatory Commission, in addition to its power of issuing licence, is entitled to fix terms and conditions for determination of the licensee's revenue and tariffs by regulations which are to be duly published. The expression 'tariff' has not been defined in any of the Acts, with which we are concerned in the present appeals, despite the fact that the expression 'tariff' has been used repeatedly in both the Acts. Under the Electricity Act, 2003 'tariff' has neither been defined nor explained in any of the provisions of the Act. Explanation (b) to Section 26 of the Reform Act, 1998 states what is meant by 'tariff'. This provision states that 'tariff' means a schedule of standard price or charges or specified services which are applicable to all such specified services provided to the type or types of customers specified in the 'tariff' notification. This is an explanation to Section 26 which deals with licenses, revenues and tariffs. In other words, this explanation may not be of greater help to the Court in dealing with the case of generating companies. Similarly, the expression 'purchase price' has neither been defined nor explained in any of the afore-stated Acts." {Emphasis added}*

30. Thus, the judgments cited by the Appellant as above have been overruled by the Hon'ble Supreme Court in APTRANSCO vs Sai Renewable Energy Pvt. Ltd.: (2011)11SCC 34.

31. Further, this Tribunal in Polyplex Corporation vs Uttrakhand Electricity Regulatory Commission in Appeal no. 41,42 and 43 of 2010 has held that

> *"The State Commission is independent statutory body. Therefore the policy directions issued by the State Government are not binding on the State Commission, as those directions cannot curtail the power of the State Government (sic Commission) in the matter of determination of tariff. The State Government may have given any such policy direction in order to cater to the popular demand made by the public but while determining tariff the State Commission may take those directions or suggestions for consideration but it is for the State Commission which has statutory duty to perform either to accept the suggestion or reject those directions taking note of the various circumstances. It is purely discretionary on the part of the State Commission on acceptability of the directions issued by the State Government in the matter of determination of tariff."*

32. As regards to mandatory nature of Tariff Policy issued by the Central Government under Section 3 of the Act, this Tribunal in Appeal no. 106 & 107 of 2008 has held that the clause 5.1 of Tariff Policy is not binding on the State Commission and the State Commission has discretionary powers to adopt any of two alternatives i.e. Section 62 or Section 63. In order to fully understand the import of this judgment, it would be desirable to quote Clause 5.1 of Tariff Policy along with relevant extracts of the judgment. Clause 5.1 of Tariff Policy reads as under:

> *".…….All future requirement of power should be procured competitively by distribution licensees except in cases of*

expansion of existing projects or where there is a State controlled/owned company as an identified developer and where regulators will need to resort to tariff determination based on norms provided that expansion of generating capacity by private developers for this purpose would be restricted to one time addition of not more than 50% of the existing capacity……."

33. Relevant extracts of this Tribunal's judgment in Appeal no 106 & 107 of 2008 is quoted below:

"30. As a matter of fact, in the present case the State Commission gave conditional approval to the PPA as far as other terms and conditions were concerned. In other words, the State Commission did not embark upon the exercise of determination of tariff as the same is wholly in the domain of the Central Commission. It is also noticed from the impugned order that the State Commission has made it amply clear in its order that the PPA will be effective only after the tariff has been fixed by the Central Commission. ***As referred to above, the State Commission has rightly pointed out that Section 62(1)(a) and Section 63 are alternative methods available to the Appropriate Commission for determination of tariff and therefore, it is open to the Appropriate Commission to adopt either of the procedures prescribed under Section 62(1) and under Section 63 of the Act in relation to the determination of tariff.***

31. ***In regard to the third aspect it is to be stated that clause 5.1 of the NTP which relates to the power under Section 63 of the Act cannot be read to debar the State Commission from exercising its statutory power for determination of tariff under Section 62(1) of the Act for all future procurement of power.***

32. In the light of the above discussions, the argument advanced by the Ld. Counsel for the Appellants that resort to tariff determination under Section 62(1)(a) without adopting the Competitive Bidding Process will render clause 5.1 of the NTP redundant as the distribution licensees in the future will procure power from the generating companies only through

the negotiated route, cannot be accepted as ***it is always open to the State Commission to direct the distribution licensee to carry out power procurement through Competitive Bidding Process only in case where the rates under the negotiated agreement are high. In other words, the State Commissions have been given discretionary powers either to chose Section 62, 62(1)(a) to give approval for the PPA or to direct the distribution licensee to resort to the Competitive Bidding Process as per clause 5.1 of the NTP read with Section 63 of the Act.*** *As such, the main contention urged by the Ld. Counsel for the Appellant would fail.*

33. Nextly, it was contended by the Ld. Counsel appearing for the Appellant that by approaching the State Commission for the approval of the PPA, MPL (R-3) and NDPL (R-2) have achieved and obtained orders indirectly from the State Commission what they could not achieve directly before the Central Commission in respect of claim for exemption from the applicability of clause 5.1 of NTP. This contention also, in our view, lacks substance. The MPL (R-3) has merely approached the Central Commission to seek a clarification for the question as to whether it will fall within the exempted category from clause 5.1 of NTP as it is state owned by virtue of the nature of control exercised by the Damodar Valley Corporation, a Central Government company. In the said petition the Central Commission did not give any findings with regard to the issues concerning the determination of tariff of MPL (R-3). It is clear from the order dated 17.01.2007 passed by the Central Commission that the Central Commission carefully refrained from finding any issue relating to clause 5.1 of NTP and instead the Central Commission directed the MPL (R-3) to approach the Central Government to seek such clarification as it felt that it does not have the jurisdiction in adjudication of such matters. This order cannot be treated as one relating to tariff determination. As a matter of fact, the Central Government has clearly observed in its order dated 28.08.2006 that it is for the Central Government to interpret its policy to determine whether a particular utility falls outside the scope of clause 5.1 of the NTP. Such an observation cannot be construed to be a finding nor a direction of the Central Commission. As such the observation does not have a

binding effect. ***Nowhere in the order the Central Commission observed that clause 5.1 of the NTP will be binding on the State Commission while exercising their powers under Section 86(1)(b) to approve all future procurement of power by the distribution licensee.*** *The fact that MPL (R-3) did not chose to approach the Central Government as directed by the Central Commission for a clarification cannot prevent the MPL (R-3) from entering into any contract with a distribution licensee through negotiated route nor would it prevent the NDPL (R-2) to procure power from the MPL (R-3), the generating company through a contract to be approved by the State Commission. It cannot be said that MPL (R-3) has done anything which it otherwise is restricted in law to do. So far as NDPL (R-2) is concerned, it is purely a decision of the State Commission to decide whether to approve a negotiated tariff for the NDPL (R-2) under Section 62 or to direct the licensee to adopt the Competitive Bidding Process under Section 63 read with clause 5.1 of the NTP. Therefore, the principle that a person cannot be allowed to do something indirectly that he cannot do directly is not applicable to the present facts of the case."*

34. Conjoint reading of the above observations of this Tribunal would make it amply clear that this Tribunal has held that the clause 5.1 of the Tariff Policy is not binding on the Commission as well as on the distribution licensee as it hampers with the statutory functions of the Commission i.e. determination of tariff under Section 62 and adoption of tariff under Section 63 of the Act.

35. In view of the judgment of Hon'ble Supreme Court in APTRANSCO case and this Tribunal judgment in Polyplex case, Appeal no. 41,42 and 43 of 2010 and in BRPL vs DERC Appeal no. 106 & 107 of 2008 following inferences can be made:

i. The commissions are independent statutory authorities and are not bound by any policy or direction which hampers with its statutory functions.

ii. The term ‘shall be guided’ is not mandatory and its character would depend upon case to case.

36. The Appellant has relied heavily on the full bench judgment in RVK case to press the point that formula specified in the Tariff Policy is binding on the Commission. Bare reading of the complete judgment of full bench of this Tribunal would reveal that in this case the Tribunal has laid emphasis on providing open access to transmission and distribution system and proceeded to observe in para 42 of judgment that the formula for calculating surcharge given in the Tariff Policy is in tune with the spirit of the Electricity Act and must be adopted and followed by the Andhra Pradesh Commission and all the Regulatory Commissions. The Full Bench has observed s under:

> “**even dehors the Tariff Policy, the Surcharge Formula needs to be adopted as we find that it is more in tune with the object of the Act than the Embedded Cost Method as adopted by the Andhra Pradesh Commission.”**

37. The full bench of this Tribunal has also observed in para 30 of the judgment that the Regulatory Commission is required to abide by the National Electricity Policy and Tariff Policy issued by the Central Government as long as they are in consonance with the Act.

38. Like determination of tariff under Section 61 and Section 86(1) of the Act, determination of cross subsidy surcharge is also statutory function of the Commission under Section 42(2) read with proviso to Section 86(1)(a) and Section 86(1)(k). The formula for computation of surcharge specified in the Tariff Policy restricts this

statutory function of the Commission and, therefore, cannot be binding on the Commission in view of Hon'ble Supreme Court's judgment in APTRANSCO Vs Sai Renewable Energy Pvt Ltd case followed by this Tribunal in BRPL vs DERC and also in Polyplex Vs UERC referred to above.

39. Now, let us examine the usage of term 'shall be guided' in Section 61 as reproduced below:

> ***"61. Tariff regulations.***—*The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and* ***in doing so, shall be guided*** *by the following, namely:—*
>
> *(a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;*
>
> *(b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;*
>
> *(c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;*
>
> *(d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;*
>
> *(e) the principles rewarding efficiency in performance;*
>
> *(f) multi-year tariff principles;*
>
> *(g) that the tariff progressively, reflects the cost of supply of electricity, and also, reduces cross-subsidies in the manner specified by the Appropriate Commission;*
>
> *(h) the promotion of co-generation and generation of electricity from renewable sources of energy;*
>
> ***(i) the National Electricity Policy and tariff policy:"***

40. Bare reading of the above section would make it amply clear that the factors given in clauses (a) to (i) are guiding in nature and

cannot be held to be mandatory. For example, clause (i) refers to multi-year tariff principles. What are multi-year tariff principles? These are not defined or prescribed anywhere in the Act or Rules made thereunder. If the term 'shall be guided' is to be construed as 'shall be followed', then which are the multi-year tariff principles the Commissions are expected to follow? Each Commission has framed multi-year tariff Regulations depending upon specific requirements of the respective state.

41. Further, Section 61(a) states that the Appropriate Commission shall be guided by the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees. Section 61 is equally applicable to the Central Commission. Thus, for the Central Commission, the Section 61(a) would imply that the Central Commission shall follow the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees. Naturally, this provision cannot be made mandatory for the Central Commission. Again, if the principles and methodology laid down by the Central Commission for determination of tariff applicable to generating stations and transmission licensee has to be followed by the State Commissions, as contended by the Appellant, then there was no need to give powers to State Commissions to make Regulations under Section 61. The Parliament could have simply stated that the State Commissions shall follow the Regulations laid down by the Central Commission under Section 61. Every State Commission has framed Tariff Regulations under Section 61 specifying various normative parameters which may or may not be

in conformity with the normative parameters specified by the Central Commission.

42. In view of above discussions, we are of the opinion that the term 'shall be guided' used in Section 61, 86 and 79 of the Act cannot be considered to be mandatory in nature and any direction hampering the statutory functions of the Commission cannot be considered as binding upon the Commission.

43. Next question for consideration is as to whether the Commission has determined the cross subsidy surcharge in accordance with its own Regulations?

44. The learned Counsel for the Appellant submitted that the Regulation 33(2) of Tariff Regulations of the State Commission does not provide for any formula for determination of the Cost to Serve and the consequent cross subsidy surcharge. It merely provides 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 Tariff Policy in regard to what is cross subsidy. The Tariff Policy further provides the methodology for calculation of the cost of supply for the purposes of calculating cross subsidy surcharge. The Regulations of the Commission not providing for the methodology for calculation of the cost of supply or the formula for cross subsidy surcharge, the same needs to be in terms of the National Tariff Policy.

45. Countering the above contentions of the Appellant the learned Counsel for the Respondent made following submissions:

i. The Commission has correctly determined the cross subsidy

surcharge in accordance with the Regulation 33 (2) of the Tariff Regulations, 2008 which provides that "***Unless the Commission otherwise decides…"*** Since there is no decision "otherwise" by the Commission, the computation of cross subsidy surcharge in terms of Regulation 33 is binding on the Commission.

ii. The absence of authentic data to determine voltage-wise cost of supply does not automatically render determination of cross-subsidy surcharge invalid. This Hon'ble Tribunal in its judgment dated ***17.01.2012 in Appeal No. 11 of 2011 Northern Railways Vs HERC***, held as under:-

"49. ***Determination of category wise cost of supply is what is contemplated in the Act, and definitely this has not been done by the State Commission; but for this the entire exercise done by the State Commission does not become illegal****. In fact, following reforms initiated in the power sector there has been going on evolution and so far none of the State Commissions could be able to complete the task of determination of category wise cost of supply which does not necessarily mean average cost of supply but the processes have been launched to accomplish the job and we are told by the learned counsel for the State Commission that a study has been initiated for the purpose. In this connection it is profitable to reproduce what this Tribunal has said and ruled in the matter of determination of category wise cost of supply."*

iii. In accordance with Regulation 33(2) of the Tariff Regulations 2008, the Commission in its tariff order dated 04.12.2009 for FY 2009-10 determined the cross-subsidy surcharge by adopting the same approach as it did in tariff/ ARR Orders for 2008-09 i.e. by taking the difference between the cost of supply and current tariffs in respect of the categories of

consumers who are paying cross-subsidy.

46. The Commission has framed the Haryana Electricity Regulatory Commission (Terms and conditions for Determination of Wheeling Tariff and Distribution & Retail Supply Tariff) Regulations, 2008 in terms of Section 181(2)(zd) of the 2003 Act. Regulation (33) of these Regulations deals with cross subsidy surcharge 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. "*

47. Perusal of the Regulation 33(2) reproduced above would indicate that the cross subsidy surcharge would be computed as difference between category wise cost of supply and average revenue recovery rate from that particular category. The methodology for computing cross subsidy surcharge provided in the Regulation 33(2) can be represented mathematically as under:

$$S = T - C ;$$

Where S is cross subsidy surcharge payable by the open access consumer;

T is average tariff for the category of said consumer;

C is average cost of supply for that category.

48. The Commission computed the cross subsidy surcharge for the year 2008-09 and also for 2009-10 in accordance with the methodology for computing cross subsidy surcharge provided in the Regulation in the Tariff Orders for 2008-09 and 2009-10 respectively. Relevant extracts of Tariff Order for year 2009-10 dated 4.12.2009 is quoted below:

"B. Cross subsidy surcharge

In accordance with the provisions of regulations 33 of the Haryana Electricity Regulatory Commission (Terms and Conditions for Determination of Wheeling Tariff and Distribution & Retail Supply Tariff) Regulations, 2008, the cross subsidy surcharge shall be payable by all intra-state open access consumers except those persons who have established captive generating station and availing open access for carrying the electricity to a destination for their own use.

As per aforesaid regulations, the difference between the average cost of supply and current tariffs in respect of the categories of consumers who are paying cross subsidy represents cross subsidy. The details are presented in the table below:

Cross Subsidy Surcharge

S. No	*Consumer Category*	*Average cost of supply in respect of DHBVN and UHBVN (Paise/unit)*	*Current tariff (Paise/unit)*	*Cross subsidy (Paise/unit)*
1	*HT Industry*	*337*	*409*	*72*
2	*Street Lighting*	*378*	*415*	*37*
3	*Railway Traction*	*310*	*385*	*75*

4	*Bulk Supply*	*311*	*409*	*98*

The Commission approves the cross subsidy as shown in the table above, as the cross subsidy surcharge for the respective consumer category. The surcharge shall be utilized by the distribution licensees to meet the requirements of current level of cross subsidy within their area of supply.

It is clarified that the cross-subsidy estimates as presented in the table above is for the purpose of determining an indicative cross-subsidy surcharge for open access customers, if any. However, for the purpose of taking a view on the extent of existing cross-subsidy amount the reference point, as per the National Tariff Policy, shall be the average cost of supply. The Commission on availability of final and updated consumer category wise 'cost to serve' will then endeavour to align the tariff to the extent of +/- 20% of the average cost to serve by FY 2011-12 in line with the National Tariff Policy"

49. The Appellant has contended that the Commission in its Tariff Order for 2009-10, has acknowledged that the Respondent has not supplied authentic and updated data for computing category wise cost of serve. The Commission could not have computed the category wise cost of supply and consequently the cross subsidy surcharge in the absence of the authentic data.

50. On the issue of determination of category wise cost of supply, this Tribunal in Appeal no. 11 of 2011 has held that *Determination of category wise cost of supply is what is contemplated in the Act, and definitely this has not been done by the State Commission; but for this the entire exercise done by the State Commission does not become illegal.*

51. Perusal of the Table above showing computation of CSS for different categories of subsidizing consumers would indicate that

the Commission has estimated category wise cost of supply and determined the CSS based on such cost of supply. The same has not been challenged and has, accordingly, attained finality.

52. With regard to determination of CSS for the year 2011-12, the Commission has reduced the CSS for 2009-10 it by 20% in accordance with the provisions of Tariff Policy. Relevant extracts of the Commission's Tariff Order for 2011-12 is set out below:

> *"B. Cross subsidy surcharge*
>
> *Regulations 33 of the Haryana Electricity Regulatory Commission (Terms and Conditions for Determination of Wheeling Tariff and Distribution & Retail Supply Tariff) Regulations, 2008, provides that the cross subsidy surcharge shall be payable by all intra-state open access consumers except those persons who have established captive generating station and are availing open access for carrying the electricity to a destination for their own use.*
>
> *Accordingly, the difference between the average cost of supply and current tariffs in respect of the categories of consumers who are paying cross subsidy was ordered to be the cross subsidy surcharge for FYs 2008-09 and 2009-10. However, in the absence of an authentic and updated CoS and the fact that the State Government had waived of levy of cross subsidy surcharge for 2010-11, the Commission did not determine / quantify consumer category wise cross – subsidy surcharge in the ARR / Tariff order for FY 2010-11. But after withdrawal of waiver to levy cross subsidy surcharge by Government of Haryana and on the request of distribution licensees, the Commission allowed levy of cross subsidy surcharge at the rates as determined by it in the tariff and ARR order for 2009-10 from the date from which the State Government withdrew the waiver.*

According to provisions of section 42 of the Electricity Act, 2003 surcharge and cross subsidies shall be progressively reduced. The National Tariff Policy provides 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.....

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.

The National Tariff Policy further provides 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 its opening level by the 2010-11.

The cross subsidy surcharge approved by the Commission for FY 2009- 10 and subsequently made applicable for the FY 2010-11 from the date of withdrawal of waiver by the State Government is presented in the table below:

Table 3.2-Cross Subsidy Surcharge applicable for FY 2009-10 and part of FY 2010-11

Sr. No.	***Consumer Category***	***Average cost of supply in respect of DHBVN and UHBVN(Paise/unit)***	***Current tariff (Paise/unit)***	***Cross subsidy (Paise/Unit)***
1.	*HT industry*	*337*	*409*	*72*
2.	*Street Lighting*	*378*	*415*	*37*
3.	*Railway Traction*	*310*	*385*	*75*
4.	*Bulk supply*	*311*	*409*	*98*

The cross subsidy surcharge for the financial year 2011-12 has been determined by the Commission in accordance with the provisions of the National 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 its opening level by the 2010-11. *The Commission observes that the revenue from cross subsidy surcharge started flowing to the distribution licensees only during 2010-11 because prior to that cross subsidy surcharge was waived by the State Government, therefore the opening level cross subsidy surcharge has been taken as applicable in 2010-11.*

The Commission orders that rates of the cross subsidy surcharge shall be reduced @ 20% every year from the opening level and accordingly the cross subsidy surcharge for FY 2011-12 shall be as given in the table below:

Table 3.3- Cross subsidy surcharge for FY 2011-12

Sr. No.	***Consumer Category***	***Cross subsidy surcharge for 2010-11 (Paise/Unit)***	***Cross subsidy surcharge for 2011-12 (Paise/Unit)***
1.	*HT industry*	*72*	*58*
2.	*Street Lighting*	*37*	*30*
3.	*Railway Traction*	*75*	*60*
4.	*Bulk supply*	*98*	*78*

…….” {Emphasis added}

53. It is clear from the above that 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.

54. In Tata Steel Industries Ltd Vs OERC Appeal no. 102 of 2010 this Tribunal has held as under

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

55. Two propositions would emerge from this Tribunal's judgment in Appeal no. 102 of 2010. These are:

i. Cross subsidy computed on the basis of category wise cost of supply must not increase and;

ii. Cross subsidy should be within +/- 20% with respect to average cost of supply.

56. Let us now examine as to whether the Cross subsidy determined by the Commission for the year 2011-12 meets these two requirements. The CSS has been reduced by 20% from 2009-10 level of Rs 0.72 to Rs 0.58. Clearly there has been reduction in CSS in respect of Cost of Supply. The Commission, in its Tariff Order for FY 2011-12, has computed average cost of supply as Rs

4.69. The CSS determined by the Commission for FY 2011-12 as Rs 0.58 works out be 12.4% which is well within 20% limit recommended by the Tariff Policy. Thus, the CSS determined by the Commission for FY 2011-12 meets both the requirements.

57. Accordingly, the question is answered against the Appellant.

58. Fourth Question before us for consideration is as to whether the Commission has erred in imposing cross subsidy surcharge upon the Appellant retrospectively?

59. The learned Counsel for the Appellant made extensive submissions to contend that the Commission has imposed CSS in its Tariff Order for year 2011-12 retrospectively. The submissions of the Appellant are:

i. In the order relating to Tariff Year 2010-11, the Commission did not determine the cross subsidy at all even on indicative basis, unlike in the earlier Tariff Year 2009-10. In fact, the tariff order specifically stated that surcharge shall not be applicable till 31.3.2011. There was, therefore, no cross subsidy for the period 1.10.2010 till 31.3.2011.

ii. The entire basis of the retrospective operation of the cross subsidy surcharge by the State Commission with effect from 01.11.2010 is perverse, completely contrary to the basic principles of law and also to regulatory tariff determination. The tariff order for the year 2009-10 dated 04.12.2009 was not applicable as on 01.11.2010 for levy of cross-subsidy surcharge. The tariff order dated 4.12.2009 which was applicable till 30.09.2010 had been super-ceded by a new

tariff order dated 13.09.2010 for the year 2010-11. In the tariff order dated 13.09.2010 applicable from the period from 1.10.2010 the State Commission took a conscious view of not determining, quantifying and making applicable the cross subsidy surcharge for the period till 31.3.2011.

iii. There were no proceedings before the State Commission and an order passed by the State Commission modifying the order dated 13.09.2010 to determine the applicable cross-subsidy surcharge and making the same applicable on the consumers in the State.

iv. This being the position, there is no justification for the State Commission to impose cross-subsidy surcharge with retrospective effect on the only ground that the State Government has decided for the same to be imposed on the consumers.

v. The tariff proceedings for the tariff year 2011-12 in which the impugned order was passed was not for review or modification of the order dated 13.09.2010. The Commission does not have any such power to review the order at the stage of passing of the subsequent tariff order. In such circumstances, there is no justification whatsoever for the State Commission to hold in the impugned order that cross-subsidy surcharge is payable with retrospective effect from 1.11.2010, which is contrary to the decision of the State Commission in the order dated 13.09.2010.

vi. In the order dated 13.09.2010, the State Commission did not consider any revenue to be received by the Distribution

Licensee from cross-subsidy surcharge to be payable by the consumers. The Annual Revenue Requirements of the Distribution Licensee was considered by the State Commission without any reference to the cross-subsidy surcharge. The tariff design was determined by the State Commission accordingly. It is therefore incorrect to allow revenue for the past period by imposing cross subsidy surcharge retrospectively.

vii. In the circumstances, the impugned decision of the State Commission to levy retrospective cross-subsidy surcharge with effect from 1.11.2010 apart from being erroneous has the effect of giving a regulatory surplus in the hands of the Distribution Licensee which was not authorised or determined in the tariff order for the year 2010-11. The above is also not permissible in law.

viii. In terms of Section 45 of the Electricity Act, 2003 the Distribution Licensee cannot charge any tariff except as approved by the State Commission.

60. The learned Counsel for the 2nd Respondent DHBVNL vehemently refuted the above contentions of the Appellant and stated that the Commission did not compute the CSS retrospectively. The Commission had suspended the CSS for 2009-10 and for 2010-11 also, in view of the Government of Haryana's directive on waiver of CSS. The learned Counsel for 2nd Respondent made the following submissions in support of his contentions.

i. The Commission in its tariff order dated 13.09.2010 for FY 2010-11 has not determined/ quantified consumer category

wise cross-subsidy surcharge. However, the Commission in the said tariff order has specifically observed that**:-**

a) In absence of requisite information /data the Commission is constrained to adopt the same approach for determination of cross-subsidy surcharge for FY 2010-11 as it did in its orders for FY 2008-09 and FY 2009-10***.***

(b) The cross-subsidy surcharge shall not be levied subject to the condition that DHBVN is compensated to the extent of loss of cross-subsidy suffered by them.

ii. Proviso to Regulation 6(1) of the Tariff Regulations specifically provides that the tariff will be charged for such period as may be specified by a notification, without prejudice to the powers of the Commission to take up any matter relating to tariff. The Commission in the tariff order for FY 2010-11 did not quantify the cross-subsidy surcharge. However, from the perusal of the above quoted paras, read with proviso to Regulation 6 (1), it is evident that the cross-subsidy surcharge determined for FY 2009-10 was also be applicable for FY 2010-11. The cross-subsidy surcharge was not levied on Appellant till 01.11.2010 on account of the fact that the waiver was granted by Government of Haryana. Therefore, the entire case of the Appellant that no cross-subsidy charge was applicable for FY 2010-11 is erroneous and misconceived.

iii. The cross-subsidy surcharge as applicable for FY 2010-11 became applicable by application of ***Doctrine of Eclipse.*** The Government of Haryana withdrew the waiver on the levy

of cross-subsidy surcharge with effect from 01.11.2010. The same was communicated by Haryana Vidyut Prasaran Nigam Ltd. by its communication dated 30.11.2010. As soon as the Government of Haryana withdrew the waiver, the cross-subsidy surcharge as applicable for FY 2010-11 became applicable by application of Doctrine of Eclipse.

iv. In view of the Hon'ble Supreme Court observations in the case of ***Dularey Lodh Vs Third Addl. District Judge, Kanpur : (1984) 3 SCC 99***, the Appellant was liable to pay the cross-subsidy surcharge since 01.11.2010 immediately after withdrawal of the waiver by Government of Haryana.

v. The case of the Appellant that the cross-subsidy surcharge was levied by 2nd Respondent on the behest of Government of Haryana is wrong and baseless. The cross-subsidy surcharge was determined by the Commission for FY 2009-10 which was also applicable for FY 2010-11 and as soon as the Government of Haryana withdrew the waiver granted by it, the Appellant become liable to pay the same to 2nd Respondent. Accordingly, The Commission by its order dated 03.02.2011 directed Appellant to pay cross subsidy surcharge with effect from 01.11.2010 in accordance with the rates determined by the Commission for FY 2009-10. The said order was issued by officer of the Commission as per the approval of the Commission. The said direction was never challenged by the Appellant.

61. We have heard the learned Counsels for the parties. We have also examined the records of the case laid before us. In order to come

to any conclusion it would be desirable to reproduce the relevant portions of Tariff Orders for FY 2010-11 and FY 2011-12. Relevant extracts of Tariff order for 2010-11 relating to CSS read as under:

> ***"4.1 Wheeling Charges, Cross Subsidy Surcharge & Additional Surcharge:***
>
> *In its previous ARR / Tariff order(s) of the Distribution licensee(s) the Commission observed that determination of wheeling charges, cross subsidy surcharge and additional surcharge needs segregated accounts including voltage wise assets and losses for the distribution and retail supply business. Consequently, the distribution licensees were directed to submit the same along with the next ARR petition. The Commission notes with serious concern that despite repeated directives the distribution licensees have neither submitted requisite data nor any comments / suggestions. The distribution licensees are under statutory obligation to provide specific data for working out wheeling charges as per regulation 24 of Haryana Electricity Regulatory Commission (Terms and Conditions for Determination of Wheeling Tariff and Distribution & Retail Supply Tariff) Regulations, 2008, but it is regretted to note that requisite details have still not been made available to the Commission.* ***Therefore, in absence of requisite information / data the Commission is constrained to adopt the same approach for determination of wheeling charges, cross subsidy surcharge and additional surcharge for FY 2010 -11, as it did in tariff / ARR orders of the distribution licensees for FY 2008-09 and FY 2009-10.*** *The computational details are presented in the following table:*
>
> ***A. Wheeling charges:***
>
> ***.....***
>
> ***B. Cross Subsidy***

"In accordance with the provisions of regulations 33 of the Haryana Electricity Regulatory Commission (Terms and Conditions for Determination of Wheeling Tariff and Distribution & Retail Supply Tariff) Regulations, 2008, the cross subsidy surcharge shall be payable by all intra-state open access consumers except those persons who have established captive generating station and are availing open access for carrying the electricity to a destination for their own use.

As per aforesaid regulations, the difference between the average cost of supply and current tariffs in respect of the categories of consumers who are paying cross subsidy represented cross subsidy. ***However, in the absence of an authentic and updated COS and the fact that the Government of Haryana, in order to encourage purchase of power by the consumers through open access mechanism and thereby augment availability power in Haryana which witnesses peaking as well as base load power shortages, has waived of cross – subsidy surcharge in FY 2010-11. Hence, the Commission has not determined / quantified consumer category wise cross- subsidy in the ARR / Tariff Order under consideration."***

.....

4.2 Govt. of Haryana notification:

In order to encourage customers to avail open access the Govt. of Haryana had waived cross subsidy surcharge and additional surcharge. As per HVPNL the Government has further extended the waiver till 31/03/2011. ***Thus the surcharge, wherever applicable shall not be levied till 31/03/2011 subject to the condition that the distribution licensees are compensated to the extent of the loss of cross-subsidy suffered by them.***

In line with its earlier directives given in the ARR/Tariff determination of wheeling charges, cross subsidy surcharge and additional surcharge needs segregated accounts including voltage wise assets and losses for the distribution

and retail supply business, the distribution licensees are directed to submit the same in accordance with the provisions of Haryana Electricity Regulatory Commission (Terms and Conditions for Determination of Wheeling Tariff and Distribution & Retail Supply Tariff) Regulations, 2008 along with the next ARR. ***As these charges have been determined in absence of detailed data, the Commission provides another opportunity to the stake holders and again invites objections/suggestions from the stake holders, duly supported with the documentary evidence, so as to enable the Commission revise/review the same, if need be****."*

(emphasis supplied)

62. Bare reading of above would reveal the following important aspects having bearing on the issue.

i. The Commission proposed to adopt the same approach for determination of wheeling charges, cross subsidy surcharge and additional surcharge for FY 2010 -11, as it did in tariff / ARR orders of the distribution licensees for FY 2008-09 and FY 2009-10.

ii. However, the Commission did not quantify the CSS due to absence of an authentic and updated COS and the fact that the Government of Haryana's waiver of cross subsidy surcharge for the FY 2010-11 to encourage purchase of power by the consumers through open access mechanism thereby augmenting availability power in Haryana.

iii. The surcharge, wherever applicable, shall not be levied till 31/03/2011 subject to the condition that the distribution licensees are compensated to the extent of the loss of cross-subsidy suffered by them.

iv. The Commission has reserved the right to review the charges upon receiving the requisite data.

63. One of the reasons for the Commission for not determining the CSS was the Government of Haryana's waiver on CSS. The question now arises that Government of Haryana's waiver existed even during 2009-10, then why did the Commission determine CSS for 2009-10? The answer lies in Tariff Oder for FY 2009-10 as reproduced below:

> *"In order to encourage customers to avail open access the Govt. of Haryana had waived cross subsidy surcharge and additional surcharge for FY 2007-08 and 2008-09.* ***The above approved surcharge shall not be levied if the same is waived by the Govt. of Haryana for the FY 2009-10 as well subject to the condition that the distribution licensees are compensated to the extent of the loss of cross subsidy suffered by them.****" {Emphasis added}*

64. It is clear from above that the Government of Haryana did not waive off the CSS for the year 2009-10 till 5.12.2010 i.e. before the issue of the Tariff Order for FY 2009-10. Contrary to this, the Government of Haryana had waived the CSS till 31.3.2011 prior to issue of Tariff Order 2010-11. Accordingly, the Commission, being under the impression that the CSS has been waived off till 31.3.2011, the Commission avoided determination of the CSS afresh for the year 2010-11considering it to be an academic exercise.

65. After recording that the Commission has not quantified the CSS for the year 2010-11 due to Government of Haryana's waiver to the CSS, the Commission has observed that the surcharge, wherever applicable, shall not be levied till 31/03/2011 subject to the

condition that the distribution licensees are compensated to the extent of the loss of cross-subsidy suffered by them. If there was no CSS for the year 2010-11, there would not be any basis for the Government of Haryana to compensate the 2nd Respondent DHBVNL for the loss it would have suffered due to waiver of CSS.

66. Clearly, there is some sort of conflict in the Commission's Tariff Order for 2010-11 as regard to CSS. At one stage it states that it constrained to adopt the approach of 2009-10 to determine the wheeling charges, CSS etc. Then it declares that it has not quantified the rate of CSS due to Government's waiver and again it observed that the surcharge, **wherever applicable**, shall not be levied till 31/03/2011 subject to the condition that the distribution licensees are compensated to the extent of the loss of cross-subsidy suffered by them. It appears that owing to the Government of Haryana's waiver of the CSS, the Commission did not quantify the CSS applicable for 2010-11 afresh and held the view that in case surcharge is made applicable the same shall be at the existing rate i.e. at the rate applicable for 2009-10.

67. However, we are of the view that if such was the case the Commission should have mentioned in the Tariff Order for FY 2010-11 that in case the CSS is made applicable during the year the same shall be charged at the rate applicable for FY 2009-10. On the contrary, the Commission has explicitly expressed that the CSS shall not be applicable till 31.3.2011. This statement might have caused confusion among the prospective open access consumers. There could be instances where some consumers have sought short term open access considering the fact that CSS would not be charged at least till 31.3.2011. The retrospective

imposition of CSS from 1.11.2010 could have prejudiced the interest of those open access consumers. In fact the Appellant in its submissions before the Commission in Petition no 5 of 2010 have stated that there was no issue of CSS in those proceedings as in terms of directions of the Commission, there was no cross subsidy in the State of Haryana.

68. Now let us examine the relevant portion of the impugned Tariff Order for the year 2011-12 quoted as under:

> *"Accordingly, the difference between the average cost of supply and current tariffs in respect of the categories of consumers who are paying cross subsidy was ordered to be the cross subsidy surcharge for FYs 2008-09 and 2009-10. However, in the absence of an authentic and updated CoS and the fact that the State Government had waived of levy of cross subsidy surcharge for 2010-11, the Commission did not determine / quantify consumer category wise cross – subsidy surcharge in the ARR / Tariff order for FY 2010-11. But after withdrawal of waiver to levy cross subsidy surcharge by Government of Haryana and on the request of distribution licensees, the Commission allowed levy of cross subsidy surcharge at the rates as determined by it in the tariff and ARR order for 2009-10 from the date from which the State Government withdrew the waiver.*

69. From the above it is clear that the Commission 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 that can the above statement be termed as determination of open access surcharge as envisaged in Section 42(2) of the Act and in accordance with the Commission's own Regulations? The answer is NO. The Hon'ble

Supreme Court in APTRANSCO case and this Tribunal in BRPL case and in Polyplex case (supra) has held that any direction of the Government hindering with statutory function of the Commission is not binding. 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.

70. The plea of the learned Counsel for the Respondent that as per the Doctrine of Eclipse the CSS for 2009-10 would be applicable for the FY 2010-11 from the date of withdrawal of the waiver by the State Government is misplaced. The Doctrine of Eclipse would have been applicable if the Commission had determined the CSS for the year 2010-11 and kept it in abeyance till the State Government withdraws the waiver. In that case no separate order from the Commission was required and CSS determined by the Commission would have been applicable from the date of such withdrawal. However, in the present case the Commission did not determine the CSS in accordance with Tariff Regulations, 2008 for the year 2010-11. Therefore, there was no eclipse at all.

71. In view of above discussions, we are of the view that the Commission did not determine the CSS for the year 2010-11in 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.

72. Summary of our findings:

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 198 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 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 subjecte 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.

73. In the light of our above findings, the appeal is partly allowed to the extent mentioned in para 71 above. The Commission is directed to issue consequential order directing the licensee to refund the CSS collected from the open access consumer for the period from 1.11.2010 to 31.3.2011.

74. However, there is no order as to costs.

(V J Talwar)
Technical Member

(Justice P. S. Datta)
Judicial Member

Dated: 4th October, 2012

REPORTABLE/~~NOT REPORTABLE~~