

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

APL NO 92 OF 2021

Dated: 27th April, 2021

**Present: Hon'ble Mr. Ravindra Kumar Verma, Technical Member
Hon'ble Mr. Justice R.K. Gauba, Judicial Member**

In the matter of:

**Srikalahasti Pipes Limited Appellant(s)
Rachagunneri- 51764 1, Srikalahasti
Mandal Chittoor District,
Andhra Pradesh, India.**

Vs.

- 1. Andhra Pradesh State Power Distribution
Company Limited Respondent No.1
No. 19-13-65/A, Srinivasapuram,
Tiruchanoor Road, TIRUPATI - 517 503,
Chittoor Dist A. P., INDIA**

- 2. Andhra Pradesh Electricity Regulatory
Commission Respondent No.2
4th Floor, Singareni Bhavan, Red Hills,
Lakdi-K a-Pul, Hyderabad - 50 000 4**

**Counsel for the Appellant (s) : Mr. Sajan Poovayya, Sr. Adv.
Mr. Sanjay Jhanwar
Mr. Mukund Rao
Mr. Rajat Sharma**

**Counsel for the Respondent (s) : Mr. Ardhendumauli Kumar Prasad
Mr. Ushasri Gavarraju for R-1
Mr. Sridhar Potaraju
Ms. Shivani Tushir for R-2**

JUDGMENT

The captioned appeal was heard by this bench but the Members differ in opinion on issues raised and the end-result. The separate opinions are set out below, the first commencing hereinafter and the other from page 33 onwards.

PER HON'BLE MR. RAVINDRA KUMAR VERMA, TECHNICAL MEMBER

1. This Appeal is filed against the order dated 10.02.2020 passed by the Andhra Pradesh Electricity Regulatory Commission, (hereinafter referred to as “**the State Commission/ APERC**”) in the O.P. No. 68/2019 determining the tariff for retail sale of electricity during financial year 2020-21, on the basis of the Aggregate Revenue Requirement (**ARR**) and Proposed Tariff (**FPT**) in respect of the individual retail supply businesses for various consumer categories for financial year 2020-21.
2. Srikalahasti Pipes Limited, the Appellant herein, is engaged in the business of manufacturing and supply of ductile iron pipe. The Appellant Company also offers public utility services for water infrastructure development.
3. The Respondent No.1, the Andhra Pradesh State Power Distribution Company Limited, a distribution licensee is supplying electricity in the southern part of Andhra Pradesh.

4. The Respondent No.2, Andhra Pradesh Electricity Regulatory Commission, is the State Electricity Regulatory Commission for the State of Maharashtra exercising powers and discharging functions under the provisions of the Electricity Act, 2003.

5. **Prayer of the Appellant**

- i) Allow the present Appeal and set aside/modify/alter the Impugned Order dated 10.02.2020 passed by the Respondent Commission;
- ii) Pass appropriate directions and guidelines for calculating the CSS;
- iii) Ferro Alloy Industry be permitted to open access;
- iv) Pass such further or other order(s) as this Hon'ble Tribunal may deem fit in the facts and circumstances of the case.

6. In the instant appeal, the Appellant has raised two issues, namely

- i) Whether the component 'T' should include both demand charges and energy charges for the purposes of computation of cross subsidy surcharge?
- ii) Whether the restriction imposed by the State Commission on seeking open access by the Ferro Alloy Industries consumers is right?

During the course of hearing before this Tribunal on 11.03.2021, the Appellant submitted that they do not wish to agitate the first issue since the same is pending adjudication before the Hon'ble

Supreme Court. Accordingly only the second issue regarding the ban on open access has been dealt with in this Appeal.

Facts of the case:

7. The Appellant is an existing consumer of the Respondent 2 and is engaged in the business of manufacturing and supply of ductile iron pipe. The Appellant Company also offers public utility services for water infrastructure development.
8. For carrying out its business requirements, the Appellant Company is presently functioning on two electricity connections with the capacity of 132 KV wherein one is HT-III A Industry General connection with a contracted demand of 13 MVA and the other is HT-III-C Energy Intensive Industry connection for its Ferro Alloys Plant with contracted demand of 17 MVA.
- 9.. The relevant excerpts of the Impugned Order dated 10.02.2020 capturing objections of the Appellant, Comments of the DISCOM and the decision of the State Commission concerning the issues are reproduced herein below:

BAN ON FERRO ALLOY INDUSTRY TO OBTAIN POWER FROM OPEN ACCESS

Sri Suresh Khandelwal, Sri Srikalahasthi Pipes Limited, Chief Operating Officer, Srikalahasthi (M), Chittoor District has stated in the public hearing held at Tirupati that the Ferro Alloys units should be given permission to draw power through Open Access whenever they have the opportunity to reduce their power cost. With this relaxation, the Ferro Alloys units can

improve their financial viability to some extent and may contribute to the economic development of the State by providing employment and contribution to Government's exchequer through taxes.

DISCOMs' Response: *Considering the continuous encouragement, as well as*

considering the licensees' universal supply obligation and despite the obligation of

licensees to pay fixed charges to the committed PPAs, the licensees are committed to continuing supply at a lower Tariff, in particular to Ferro Alloys, the licensees are expecting them to draw their entire requirement of power from DISCOMs only by availing the benefit of lower Tariff with No demand Charges. Thus, the claim of the Ferro Alloy Industries who are benefitting with such privileges for being given option to avail open access is unreasonable.

Commission's view: *The Commission accepts the view of DISCOMs and finds no reason to accept the request of the objectors*

10. The Appellant aggrieved by the findings and directives of the Respondent No. 1 has approached this Tribunal by way of the present Appeal.

Submissions of the Appellant

11. The Respondent Commission by way of impugned order has banned the ferro alloys industry to purchase power from open access and made it mandatory to procure power only through DISCOM. The Respondent 2, among other energy intensive industries i.e. PV ingots, Cell manufacturing units, Polly Silicon

Industry and Aluminium Industry restricted only the Ferro Alloys Industry from purchasing power through open access thereby making unreasonable differentiation within a class. It is not only against the principles of equality as the same also violates the statutory right of the Appellant of open access besides being anti-competitive.

13. The Electricity Act, 2003 aims at bringing about competition with the ultimate objective of ensuring efficiency gains resulting from competition for the consumers. Competition with regulatory oversight is the hallmark of the legislation and it recognized the important role of the regulatory commissions in the wake of the challenges that opening of the sector poses for consumers and other stakeholders and thus, Open Access was considered as an important tool of introducing competition in the electricity industry and ensuring choice to buyers and suppliers of electricity. The legislature upon realizing the need, introduced the open access which is very well acknowledged in the very objects of the Electricity Act. The relevant excerpt of the Statement of objects is reproduced herein below:

“3.....There is also need to provide newer concepts like power trading and open access....”

The Objects further support open access in the main features of the Electricity Act which provides for introduction of open access in transmission. The relevant excerpt of the main features is reproduced herein below for ready reference:

“(iv) there would be open access in transmission from the outset with the provision for surcharge for taking care of current level of cross subsidy with the surcharge being gradually phased out.”

14. Further Section 2(47) of the Electricity Act defines open access as follows:

*“**non-discriminatory** provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission”.*

The Electricity Act itself defines ‘open access’ as non-discriminatory provision for the use of transmission lines or distribution system crystalizing the fact that in no circumstances, there could be any discrimination in open access provided to consumers.

15. That such ban on the ferro alloys industry is also in vehement contravention of the Section 42 of the Electricity Act which categorically provides for right of nondiscriminatory open access which cannot be curtailed for any reason whatsoever. Relevant excerpt of the section 42 is reproduced herein below:

42. (Duties of distribution licensee and open access)

(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:*

First proviso to section 42 (2) of the Electricity Act, 2003 (before amendment) was as follows:

*"Provided that such open access **may** be allowed before the cross subsidies are eliminated, on payment of a surcharge in addition to the charges for wheeling as may be determined by the State Commission".*

16. The said proviso has been amended with effect from 15.06.2007. The amended proviso reads as follows:

*"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."*

17. Further the Fifth proviso to section 42 (2) of the Electricity Act reads as follows:

*Provided also that the **State Commission shall**, not later than five years from the date of commencement of*

the Electricity (Amendment) Act, 2003, by regulations, provide such open access to all consumers who require a supply of electricity where the maximum power to be made available at any time exceeds one megawatt.

18. At first, amended first proviso has done away with the option of providing open access prior to elimination of cross subsidies. It has since been made mandatory for the Commissions to allow open access on payment of a surcharge/wheeling charges etc.
19. Conjoint reading of Section 42(2) along with its first and fifth provisos sufficiently suggests that as a category, all consumers of more than 1 MW are to be treated as open access consumers who do not require any further permission or approval of the Commission to exercise their right of open access.
20. The Appellant has clarified that while sub-section (2) requires the State Commission to introduce open access within one year of the appointed date the fifth proviso makes it mandatory for the State Commission to provide open access to all consumers who require supply of electricity where the maximum power to be made available at any time exceeds 1MW. Despite such unequivocal provision, Appellant having connection of 17 MVA could not have been restricted from purchasing power through open access. Respondent has completely failed to appreciate that non-discriminatory Open access to the power grid is an essential element of introducing competition to electricity markets and increasing their efficiency.

28. The claim of the Respondent that the tariff levied on ferro alloy industry being energy intensive industry is much lower than other industries is bizarre as the other energy intensive industries such as PV ingots, Cell manufacturing units, Polly Silicon Industry and Aluminium Industry having same tariff for the year are not the ones subjected to such restriction. Imposing embargo only upon the Ferro Alloys Industry from purchasing electricity from an open access leaving no choice but to procure power only from the DISCOM at a higher rate which is not only unjust and arbitrary being violative of article 14 of the Constitution of India, 1950 but also prejudicial to the interest of a particular industry. Even otherwise, in no circumstances Commission could go beyond powers to curtail the right enshrined under the Electricity Act.
29. The other claim of the Respondent (while placing reliance on several government orders) that some extra incentives on tariff are being offered to the ferro alloy industry, hence they are treated differently from other industries and imposed a condition to purchase power only from DISCOM is completely misconceived and misleading.

The Appellant has clarified that the orders relied upon by the Respondent relates to the previous years and have no concern whatsoever with the year under consideration before this Tribunal therefore no such incentives, as mentioned in the letters annexed with the reply are offered to the Appellant under the year concerns the instant Appeal.

The Appellant commenced its ferro alloys plant only in January 2020 and this being the first year, such incentives were provided to the Appellant. It is further submitted that even when such incentives were offered to the ferro alloys industry in previous years, even then there was no blanket restriction on the ferro alloys industry to purchase power only from the DISCOM.

Even otherwise if it is assumed but not admitted that some incentives are offered to ferro alloys industry, same does not confer any power to the Respondent Commission to take away the statutory right of the Appellant as the same is against the spirit of Section 42 of the Electricity Act which categorically provides for an unfettered right of non-discriminatory open access which cannot be curtailed for any reason whatsoever.

Submissions of Respondent No.1/ APSPDCL

41. As per the provisions contained under first proviso to Section 42 (2), open access shall be allowed on payment of a surcharge i.e. Cross Subsidy Surcharge (CSS). Relevant portion of the aforesaid provision is reproduced herein below:

“Section 42. (Duties of distribution licensee 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:”

42. A perusal of the above mentioned proviso clearly specifies that open access shall be allowed to a consumer subject to payment of CSS. However, in the present case, the Average Cost of Supply for the relevant category of consumers i.e. Ferro Alloys Industry is more than the Tariff applicable to the said category of consumers.
43. The average cost of supply is Rs. 6.47 per unit, whereas the Tariff applicable to the said category of consumers is Rs. 4.95 per unit. As such, when the formula for computation of CSS is applied in the instant case, then the CSS amount is computed as NIL.
44. **The right to avail open access is not absolute and the same is subject to payment of CSS.** However, the APERC vide the impugned tariff order has designed the Tariff in such a manner that the Appellant is already being incentivized after taking into

consideration that the Ferro Alloys Industry Consumers are energy intensive industries.

45. Further, considering the nature of consumption by the said Industries, the APERC has only fixed the Energy Charges i.e. Rs. 4.95 per unit and no demand charges are payable by the said category of consumers. **Therefore, if the said consumers are allowed to avail open access then Discoms will have no recourse for recovery of fixed charges which are payable by the Discoms to the generators vis-à-vis the arrangement for procurement of power qua the category of consumers, such as the Appellant herein.**
46. The Electricity Act, 2003 clearly provides that the appropriate commission can differentiate the tariff based various factors. In this regard, the relevant portion of Section 62 of the Electricity Act, 2003 is reproduced herein below:

“62. (3) The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required.”

47. From the above, it can be said that keeping the above factors in mind the impugned order has been passed. All these factors are sufficient to treat the Ferro Alloy industry as a class separate from the other Energy Intensive Industries, **and as such, the tariff has been designed in a manner which accommodates the said consumers to procure power from the Discoms only.** Hence, the challenge by the Appellant with regard to restrictions on open access does not merit any indulgence of this Tribunal.
48. In light of the submissions made herein above, the instant Appeal merits dismissal and the humble Respondent prays as such.

Submissions of Respondent No.2/ State Commission

I. Section 42(2) read with fifth proviso thereto only confers a right to be considered for open access

51. A plain reading of section 42 as a whole clearly demonstrates the legislative intent qua open access. The Appellant herein has argued that open access is a statutory right, which is absolute and the State Commission has erred in not giving effect to the statutory right in its Tariff order to Ferro Alloys industries.
52. It is submitted that section 42(2) mandates the State Commission to introduce open access in such phases and subject to such conditions including the cross-subsidies and other operational constraints. It is further provided that the State Commission 'shall'

have due regard to all relevant factors including such cross-subsidies, and other operational constraints.

53. A perusal of the substantive provision makes it evident that the statute has not conferred any absolute right to open access as has been contended.

54. Further, the Appellant has sought to interpret fifth proviso to section 42(2) to buttress their argument of absolute right to open access as being the legislative mandate. In this regard, it is submitted that the fifth proviso only mandates that the State Commission shall not later than 5 years by regulation provide open access to all consumers who require supply of electricity exceeding one megawatt.

55. It is submitted that the right of consumers seeking open access is a right for consideration upon meeting the eligibility criteria of having a maximum power requirement exceeding one megawatt. Neither section 42(2), nor the fifth proviso thereto confer any absolute right on any consumer for grant of open access.

56. It is submitted that in the present case the request for open access was duly considered and **having regard to the relevant factors mentioned in the tariff order, the same was denied** by accepting the contentions of the DISCOMs.

57. It is submitted that the impugned tariff order for the year 2020-2021 has continued the decision in the previous tariff order for the year 2019-2020 qua open access.

58. The Tariff order is a result of a comprehensive exercise undertaken having regard to views expressed by all stakeholders. The various conflicting interests placed before the Commission were considered and the Tariff order is prepared having regard to all issues. The reasons for sake of convenience on various issues are recorded separately, however the final decision is made having regard to all issues having the public interest as the paramount consideration.

II. “All Relevant Factors” are to be considered for grant of open access under section 42(2) of the Electricity Act, 2003

59. It is submitted that Section 42(2) of the Act provides the State Commission shall introduce open access in such phases and subject to such conditions (including the cross subsidies, and other operational constraints).....**having due regard to *all relevant factors including such cross subsidies and other operational constraints***.

60. It is submitted that the use of the words “all relevant factors” followed by the words “including” (and not “means”) is of utmost importance and is clearly indicative of the intention of the Legislature. It is submitted that the legislature has mandated and made the Commission duty bound to keep each and every relevant factor in mind while granting or even refusing to grant open access to consumers. It is further submitted that the word “**all**” is a word of very wide meaning which does not warrant exclusion of any ‘**relevant factors**’.

61. It is submitted that the use of the word “including” makes it clear that that “cross subsidies” and “operational constraints” are only illustrative factors, in the section itself, to be kept in mind by the State Commissions. However, the conscious choice of the words “all relevant factors” used by the Legislature denotes that factors different and apart from “cross subsidies and operational constraints” are also required to be considered by the State Commissions when a request to grant open access is made. It is trite law that the use of the word “including”/ “includes” is only illustrative and not exhaustive. The intention of the legislature is clearly to make “relevant factors” wide and extensive. (Reliance is placed on *DDA v. Bhola Nath Sharma* – reported at (2011) 2 SCC 54 Paras 25 – 28 for “including”).
62. It is submitted that the ‘**relevant factors**’ are to be determined having regard to the other provisions of the Electricity Act, 2003. The contention that section 42(2) read with fifth proviso has to be given effect unconditionally without reference to the other provisions of the Electricity Act, 2003 is liable to be rejected as it is contrary to all settled rules of statutory interpretation. The argument is premised as if open access is a standalone right which overrides all the other provisions of the Electricity Act, especially section 61 and 62.
63. It is submitted that if the legislature had so intended, the language of section 42 would have clearly given such interpretation by use of well known legal expressions such as ‘Notwithstanding anything contained in any other provisions of this Act’. However, the legislature has in its wisdom chosen to use the language it did and

all authorities under the said enactment are bound to give effect to the statutory intent.

64. It is submitted that the commission is duty bound to consider not only technical constraints like lack of infrastructure etc. but all factors which are relevant. It is submitted that what qualifies as relevant factors is to be determined by the State Commission on a case by case basis. In the present case the said exercise has been done as reflected in the impugned tariff order and further explained in the reply filed by the Commission.

III. Relevant factors to be considered by the State Commissions include those mentioned in section 61 & 62

65. It is submitted that Sections 61 and 62, found in PART VII of the Electricity Act, 2003 under the heading "TARIFF" highlight the relevant factors to be considered by the State Commission for grant of open access. Broadly, these factors include

- i) Section 61 (b) - supply of electricity on commercial principles,
- ii) Section 61 (c) - efficiency and economical use of resources,
- iii) Section 61(d) - safeguarding of consumers interest and recovery of cost of electricity in a reasonable manner,
- iv) Section 61 (f) multi-year tariff principles.

66. Further, Section 62(3) clearly provides that the State Commission may, while determining tariff, **differentiate according to the consumer's** load factor, power factor, voltage, total consumption of electricity during any specified period, the nature of supply **and the purpose for which supply is required.**
67. It is submitted that keeping the above factors in mind the impugned order has been passed. All these factors are sufficient to treat the Ferro Alloy industry as a class separate from the other Energy Intensive Industries.
68. It is submitted that commercial principles mandate that there must be an assurance of consumption of power which is not fulfilled by the Ferro-Alloy industry. This is clear from the Appeal wherein it is recorded that while the DISCOM had recommended 85% load factor, it was been submitted by the Appellant itself that they are operating at 50-60% and therefore 85% load utilization from them is not practical. The Commission taking note of volatile market conditions of the Ferro Alloy Industries and other problems faced by the sector, rejected the imposition of such a condition as requested by the DISCOMs.
69. Further, the Commission is also mandated to keep in mind multi-year tariffs. In this regard it is submitted that as stated in the APERC's Counter Affidavit the APERC had from FY 2004-05 to FY 2012-13 had directed Ferro Alloys to draw entire power requirement from DISCOMS. These orders were never challenged by the industry. Subsequently in FY 2013-14 this condition was deleted due to inability of DISCOMS to meet continuous supply.

From FY 2009-10 to FY 2015-16, some conditions relating to deemed consumption were imposed. However, these minimum energy off take and deemed consumption conditions have been deleted from FY 2016-17. **Keeping these factors in mind, open access was denied to Ferro Alloys Industry in the order of FY 2019-20 also.**

70. **Therefore it is submitted that the Commission has balanced the non-imposition of an 85% load factor and other benefits being enjoyed by the Ferro-Alloy industry (namely, being charged tariff rates lower than the actual cost of service, the operation of this industry at a level of 50-60% only and further not paying any minimum energy take off and deemed consumption conditions) on one hand with the predicament of the DISCOM of not being able to recover fixed charges mandatorily paid to generators on account of Power Purchase Agreement and network transmission charges etc. on the other hand and has ultimately decided to deny open access to the Ferro Alloy Industry as a whole. It is also necessary that there is also a requirement for recovery of the cost of electricity in a reasonable manner.**

71. It is submitted that the State Commission considered all 'relevant factors', some of which are highlighted in Sections 42(2), 61 and 62. These factors would also include technical constraints which is only one of several factors to be considered by the Commission which would also include larger public interest. The *fifth proviso* to Section 42(2) has to be read harmoniously with all of the and not in isolation as sought to be contended by the Appellant.

72. **It is submitted that tariff determination is a complex exercise wherein the Commission has to keep in mind all relevant factors. The exercise of tariff determination is a comprehensive integrated process to harmonise various conflicting claims, having regard to the statutory mandate. It is respectfully submitted that keeping in mind these factors the impugned tariff order was passed holding that the Ferro-Alloy Industry as a whole would not be entitled to open access.**
73. It is submitted that the Commission has passed the impugned order qua Ferro-Alloys keeping in mind all relevant facts as per the mandate of Section 42(2) read with Section 61 and 62 of the Electricity Act, 2003. **To hold that the *fifth proviso* to Section 42(2) provides an absolute right to consumers would be contrary to the statutory mandate given to the State Commissions by other provisions of the Act and would also be contrary to the express provisions in the statute.**
74. The Regulations framed by the APERC under Section 42 are herewith enclosed. It is submitted that the same are in consonance with Section 42 to give effect to the statute. The Regulations merely follow the same eligibility criteria as per the provisions of Section 42.
75. That in light of the submissions hereinabove made, it is submitted that the present Appeal may kindly be dismissed by this Tribunal with costs.

Findings and analysis

76. Having gone through the appeal, submissions made by the Appellant, Respondent and also the material/document placed before us, we are of the opinion that following issue emerge for our consideration:

“Whether the decision of APERC, as per the Impugned Order dated 10/02/2020, to ban the Appellant from seeking open access, and to force it to procure power from the distribution licensee only is correct ?

80. From the reading of the Section 42 of the Electricity Act our observations are as under:

- State Commission shall provide open access in a phased manner and the open access will be subject to conditions, (including the cross subsidies, and other operational constraints). The conditions and the phasing will be specified later.
- While 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.

- In the first proviso it 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.
- In the second proviso it provides 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 :
- In third proviso it provides that such surcharge and cross subsidies shall be progressively reduced in the manner as may be specified by the State Commission:
- In fourth proviso it provides that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use:
- In fifth proviso it provides the State Commission shall, not later than five years from the date of commencement of the Electricity (Amendment) Act, 2003, **by regulations, provide such open access to all consumers who require a supply of electricity where the maximum power to be made available at any time exceeds one megawatt.]**

81. Section 42 (3) provides that where any person, whose premises are situated within the area of supply of a distribution licensee, (not being a local authority engaged in the business of distribution of electricity before the appointed date) requires a

supply of electricity from a generating company or any licensee other than such distribution licensee, such person may, by notice, require the distribution licensee for wheeling such electricity in accordance with regulations made by the State Commission and the duties of the distribution licensee with respect to such supply shall be of a common carrier providing non-discriminatory open access .

82. Section 42(4) provides that where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply.
83. Section 42(8) provides that the provisions of sub-sections (5),(6) and (7) shall be without prejudice to **right which the consumer may have** apart from the rights conferred upon him by those sub-sections.
81. From the readings of Section 42 it is obvious that the State Commission shall provide the open access in a phased manner subject to specified conditions as per the Regulation notified by the State Commission.
82. As per the last proviso of Section 42 the State Commission shall by Regulation provide such open access to all such consumers whose maximum demand exceeds 1 MW.

83. Accordingly the State Commission has notified the APERC (Terms and Conditions of Open Access) Regulation, 2005 on 01.07.2005. The Regulation covers all aspects related to open access including the relevant conditions. The relevant portion regarding criteria for allowing open access is reproduced below:

“6. Criteria for allowing open access to transmission and/or distribution systems

6.1 The long-term open access shall be allowed in accordance with the transmission planning criterion and distribution planning criterion stipulated in the State Grid Code and/or the Distribution Code and/ or Indian Electricity Rules as the case maybe.

6.2 The short-term open access shall be allowed, if the request can be accommodated by utilizing:

- (a) Inherent design margins; . .*
- (b) Margins available due variations in power flows and unutilised capacity, if any; and*
- (c) Margins available due to in-built spare capacity in transmission and/or distribution system(s) created to cater to future load growth.”*

84. As per the eligibility criteria as given in the Open Access Regulation notified by the State Commission the long term open access shall be allowed in accordance with the transmission and distribution planning criterion and the short term open access shall be allowed utilising the available margins. Primarily the open access is dependent on the adequacy of the transmission/ distribution system. There is no mention of any other condition

giving the slightest of hint regarding banning of open access to a consumer.

We have also noted that the Appellant is an existing consumer and is being supplied power by DISCOM through existing transmission and distribution system and there is no mention of any constraints in supplying power to the Appellant.

84. Given the fact that the State Commission has notified a Regulation of open access which apply to open access to intra-State transmission and distribution systems of licensees, including when such systems are used in conjunction with intra-State transmission system, the State Commission cannot take any other view different from the provisions of these Regulations.

84. The provision of the open access has been made primarily with a view to inculcate competition in the power sector. By providing open access, the consumer is being given a choice to procure power from a source other than the distribution licensee.

86. The Appellant through his suggestions/ objections sought permission to draw power through Open Access from sources selling power at a tariff lower than the tariff charged by Distribution Licensee. By this request the Appellant sought the freedom to select the supplier so as to reduce his cost of procurement of power and improve his financial viability.

87. The Appellant is a consumer and wants to have the freedom of selection to procure power from the market at a price best suited to

him. To be able to procure power through open access is an option which will be exercised by him depending on the market.

88. Respondent Commission has submitted that the Commission has balanced the non-imposition of an 85% load factor and other benefits being enjoyed by the Ferro-Alloy industry (namely, being charged tariff rates lower than the actual cost of service, the operation of this industry at a level of 50-60% only and further not paying any minimum energy take off and deemed consumption conditions) on one hand with the predicament of the DISCOM of not being able to recover fixed charges mandatorily paid to generators on account of Power Purchase Agreement and network transmission charges etc. on the other hand and has ultimately decided to deny open access to the Ferro Alloy Industry as a whole. It is also necessary that there is also a requirement for recovery of the cost of electricity in a reasonable manner.
89. State Commission has further submitted that considering the nature of consumption by the said Industries, the State Commission APERC has only fixed the Energy Charges i.e. Rs. 4.95 per unit and no demand charges are payable by the said category of consumers. Therefore, if the said consumers are allowed to avail open access then DISCOM will have no recourse for recovery of fixed charges which are payable by the DISCOM to the generators vis-à-vis the arrangement for procurement of power qua the category of consumers, such as the Appellant herein.
90. State Commission has submitted that tariff determination is a complex exercise wherein the Commission has to keep in mind all

relevant factors. The exercise of tariff determination is a comprehensive integrated process to harmonise various conflicting claims, having regard to the statutory mandate. Keeping in mind these factors the impugned tariff order was passed holding that the Ferro-Alloy Industry as a whole would not be entitled to open access.

91. The argument of the DISCOM is that the Appellant is already being supplied power at a lower tariff and the DISCOM expects Appellant to draw their entire requirement of power from DISCOMs only by availing the benefit of lower Tariff with No demand Charges. DISCOM is therefore of the opinion that the demand of the Appellant to draw power through Open Access is unreasonable. The State Commission has accepted the views of the DISCOM and have found no reason to accept the request of the Appellant. The whole discussion is about the cost of procurement of power by Appellant and the tariff being charged by the DISCOM.
89. The State Commission by this decision has decided that the tariff being charged from the Appellant is the lowest and there is no need for the Appellant to explore the market through open access, for availability of power at a tariff lower than the tariff being charged from him by the DISCOM. Question which arises for our consideration is: Can the State Commission take such commercial decision on behalf of the consumer?
92. The argument that the Commission has exercised its power as a regulator to ban open access to the Appellant is in view of the fact that if the open access is allowed then DISCOMs will not be able

to recover their fixed charges which also means that the State Commission has banned the open access to the Appellant to help the DISCOM to recover their fixed charges.

However, while doing so the State Commission has ignored the request of the Appellant to procure power through open access from sources other than the DISCOM where the tariff is low. The Commission has completely ignored the request of the Appellant that the open access is required to procure the power from other sources at a tariff lower than the tariff being charged by the DISCOM. The Appellant made the request to reduce the cost of procurement and improve the financial viability.

The State Commission has interpreted the provisions of open access as given in Section 42 of the Electricity Act, 2003 that the open access will be subject to payment of cross subsidy and also other relevant factors. It emerges from the submission of the DISCOM that the other relevant factor is the fact that if open access is allowed then DISCOM will not be able to recover fixed charges. The question which arises for our consideration is that whether the State Commission can take a decision in the interest of DISCOM at the cost of the consumer? Obviously the answer is 'No' .

88. The Appellant is a consumer and as consumer he is free to exercise the right to select the supplier of power, whether it should procure the power from the DISCOM or from other source through open access. The selection exercise is a commercial decision which the consumer would make after considering all aspects in

his favour. In this case the Appellant has submitted that the permission for open access is required to procure power at time from the market when it is available at tariff lower than the tariff being charged by DISCOM. This is matter of his choice and as a consumer he has this right to select the supplier.

89. The decision of the State Commission to force the consumer to procure power only from the distribution licensee is therefore against the very spirit of the Electricity Act, 2003 and is therefore illegal and bad in law.

82. Section 62 (Determination of Tariff) sub section (3) of the Electricity Act, 2003 reads as under:

*(3) The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity **but may differentiate** according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required.*

This provision is in the context of determination of tariff i.e regarding preference to any consumer and therefore should not be construed in any other manner in any other context.

87. As per the definition of open access given in Section 2 (47) the 'open access' means **non-discriminatory** provision for the use of

transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission”.

The State Commission has differentiated between the energy intensive industries and the Ferro Alloy industry for the purpose of application of open access. The State Commission by the Impugned Order has banned open access for Ferro Alloy Industries out of the category of energy intensive industries.

In view of the above the discrimination in allowing open access to consumers by the State Commission is against the Electricity Act, 2003.

91. The provision of the open access have been made primarily with a view to inculcate competition in the power sector by providing open access the consumer is being given a choice to procure power from a source other than the distribution licensee. The decision of the State Commission to force the consumer to procure power only from the distribution licensee is therefore against the very spirit of the Electricity Act, 2003 and is therefore illegal and bad in law.

Conclusion

92. In view of the foregoing I do not agree with the opinion given by Hon'ble Mr. Justice R.K.Gaubha, Judicial Member, APTEL that, no interference by this tribunal is called for, the view taken by the

State Commission being correct in law and prevailing factual matrix.

I am of the opinion that the decision of the State Commission to ban the open access to Appellant and to force it to procure power from DISCOM only is not as per the Electricity Act, 2003, the open access regulation notified by the State Commission and the Laws of the land and is therefore illegal, mischievous and bad in law and needs to be set aside.

93. Accordingly I set aside the Impugned Order dated 10/02/2020 to the extent it bans the open access to the Appellant and forces it to procure power from the DISCOM only.
94. Accordingly, I remit the matter back to the State Commission to consider the matter afresh and issue directions in view of the opinion expressed in this judgment and as per law within three months from the date of pronouncement of this judgment. The Appellant is directed to approach the State Commission on 10/05/2021.
95. The appeal is disposed of in above terms. No order as to costs.

(Ravindra Kumar Verma)
Technical Member

PER HON'BLE MR. JUSTICE R.K. GAUBA, JUDICIAL MEMBER

1. I have had the advantage of going through the opinion separately prepared by my learned brother Mr. Ravindra Kumar Verma, Technical Member, taking a divergent view in the matter, disagreeing with my opinion which was shared with him earlier. I am unable to agree to the logic, reasoning and conclusions reached by him. Hence, I proceed ahead by voicing my views as set out hereinafter.
2. This appeal was filed to impugn certain directions issued by order dated 10.02.2020 passed by the second respondent, Andhra Pradesh Electricity Regulatory Commission (hereinafter referred to as "APERC" or "the State Commission" or "the Commission"), in O.P. No. 68 of 2019 relating to the determination of the Aggregate Revenue Requirements (ARR) and proposed tariff of the distribution licensees in the State of Andhra Pradesh for the Financial Year (FY) 2020-21. The challenge by the appeal, as presented, was limited to two issues; (i) miscalculation of Cross-Subsidy Surcharge (CSS) it allegedly being in contravention of the formula provided under National Tariff Policy, 2016 for such computation – to be specific position

the question as to whether the component 'T' (*the tariff payable by the relevant category of consumers, including reflecting the Renewable Purchase Obligation*) should include both demand charges and energy charges for the purposes of computation of CSS - and (ii) on denial of open access to the appellant. As was, however, submitted by the appellant on 11.03.2021, the first issue of CSS has not been agitated for consideration before this tribunal it statedly being pending before Supreme Court, the appeal having been pressed and argued only on the restriction imposed against seeking open access.

3. The appellant is a company incorporated under the Companies Act, 1956 having its registered office at Rachagunneri-517641, Srikalahasti Mandal, Chittoor District, Andhara Pradesh, India. It is engaged in the business of manufacturing and supply of ductile iron pipe and, for carrying out its business requirements, it has been functioning on the strength of two electricity connections with the capacity of 132 KVA, one being HT-III A Industry General connection with a contracted demand of 13 MVA and the other an HT-III-C Energy Intensive Industry connection for its Ferro Alloys Plant with contracted demand of 17 MVA.

4. By the impugned order dated 10.02.2020, the Commission while approving the ARR and FPT for FY 2020-21, determining tariff, *inter alia*, for category of consumers classified as *Energy Intensive Industry* rejected the objection of the appellant against continuance of the inhibition for the Ferro Alloys Industries (included in said class of consumers) from procuring power through open access.
5. The appellant had rooted for removal of the above-noted restrictions arguing (as noted in impugned order) thus:

“Sri Suresh Khandelwal, Sri Srikalahasthi Pipes Limited, Chief Operating Officer, Srikalahasti (M), Chittoor District has stated in the public hearing held at Tirupati that the Ferro Alloys units should be given permission to draw power through Open Access whenever they have the opportunity to reduce their power cost. With this relaxation, the Ferro Alloys units can improve their financial viability to some extent and may contribute to the economic development of the State by providing employment and contribution to Government's exchequer through taxes.”

(emphasis supplied)

6. The above request was resisted by the respondent distribution licensee Andhra Pradesh Sothern Power Distribution Company Limited (“APSPDCL” or “the Distribution Licensee”) and rejected by the Commission observing in impugned order as under:

“DISCOMs’ Response: Considering the continuous encouragement, as well as considering the licensees’ universal supply obligation and despite the obligation of

licensees to pay fixed charges to the committed PPAs, the licensees are committed to continuing supply at a lower Tariff, in particular to Ferro Alloys, the licensees are expecting them to draw their entire requirement of power from DISCOMs only by availing the benefit of lower Tariff with No demand Charges. Thus, the claim of the Ferro Alloy Industries who are benefitting with such privileges for being given option to avail open access is unreasonable.

Commission’s view: The Commission accepts the view of DISCOMs and finds no reason to accept the request of the objectors.”

(emphasis supplied)

7. The order is assailed by the appellant, *inter alia*, on the ground it is in teeth of an absolute unbridled right to *open access* guaranteed by the law, the restrictions imposed having the effect of curtailing it arbitrarily. It is defended by the respondents, including the respondent APSPDCL, arguing that the impugned direction is part of the dispensation on tariff issued after taking into account all relevant factors for balancing the competing interests within the discretion vested in, and in due discharge of

responsibilities entrusted to, the regulatory authority, the right to open access granted by the Electricity Act not being absolute.

8. I have given anxious consideration to the submissions made by all sides and am of the opinion that no interference by this tribunal is called for, the view taken by the State Commission being correct in law and prevailing factual matrix.
9. But before I set out my reasons for rejecting the challenge by this appeal, I must observe with due deference that the viewpoint endorsed by learned Technical Member on the subject is not acceptable to me because it reflects skewed application of the extant regime governing Electricity sector. The logic inherent therein is not appreciative of the delicate balancing exercise that the regulatory authority is enjoined to undertake. Tinkering with the same by the appellate authority in the present case has the potential to produce results that would be violative of the letter and spirit of the public policy voiced and adopted through the statute.
10. The right to *open access* undoubtedly is a reform that was ushered in by the Electricity Act, 2003. But it has not been created as an absolute right. It definitely cannot be claimed as a right that must be guaranteed and secured

even if it were to deny to the other stakeholders what is their legitimate due, not the least so as to bleed or starve them, or to feed on them as to turn into parasitical. The words “*non-discriminatory*” appearing in the definition of *open access* given in Section 2(47) do not connote that such right is to be enforced unexceptionally. The conditions that may be put in position for availing such right would have to be adhered to. Subject to compliance with such conditions, there can be no discrimination.

11. It is not correct to say that the Commission by the impugned order has taken “*commercial decision on behalf of the consumer*”. There is no compulsion. The order under challenge, as the later discussion would demonstrate, is a package. If the consumer wishes to avail of the same, it must accept it fully. It is not fair to assert that only what is beneficial can be enforced leaving the consumer to leave the supplier high and dry in aspects that concern the legitimate financial interests of the latter. There is no “*ban*” on open access. The consumer is free to avail of *open access* but is expected to support, collaborate and cooperate with the supplier in such matter if the tariff for the category in question is to be availed for mutual advantage.

12. No doubt, the regulatory commission is to take care of the interests of the consumers at large. But in doing so, it has to look after the interests of *all* categories of consumers. One category cannot claim superior rights over others. If one category is called upon to bear with some abridgment of its rights so that there is a balance created and the legitimate commercial interests of supplier and generator are also protected, the regulatory authority is within its jurisdiction to reject the objection as selfish. I am unable to subscribe to the view that such approach of the Commission is illegal, least of all attribute motive to the Commission by unfairly and unjustifiably terming its decision as *mischievous*.

13. There is no dispute as to the fact that by virtue of the impugned order, the ferro-alloys industry as a consumer seeking to avail of the tariff thereby determined for the category named "*energy intensive industries*" is inhibited from purchasing power through open access ("OA"), it being mandatory for them to procure power only through the second respondent (Discom). The ferro-alloys industry is one amongst several industries falling under the category of "*energy intensive industries*", the other similarly-placed manufacturing activities falling in same club being PV ingots,

Cell manufacturing units, Polly Silicon Industry and Aluminum Industry. Concededly, by the impugned decision, the restrictions qua OA have been imposed only against the Ferro Alloys Industry which cannot purchase power from any source but the Distribution Licensee (second respondent) operating in the area and, therefore, denied the right to open access. This, according to the appellant, is in breach of statutory right expressly conferred universally on one and all and arbitrary because it makes unreasonable differentiation within a class and, thus, against the principles of equality, besides being anti-competitive.

14. It is argued by the appellant that the claim of the Respondent Discom (placing reliance on several government orders) that some extra incentives on tariff are being offered to the ferro-alloys industry and hence they are treated differently from other industries and imposed a condition to purchase power only from Discom is completely misconceived and misleading. It is submitted that the orders relied upon by the Respondent relate to the previous years and have no concern whatsoever with the year under consideration, no such incentives having been offered to the appellant. It is argued in the alternative that even if some

incentives were offered to ferro-alloys industry, such fact would not confer any power on the Commission to take away the statutory right of open access since it would be against the spirit of Section 42 of the Electricity Act which categorically provides for an unfettered right of non-discriminatory open access that cannot be curtailed for any reason whatsoever.

15. The submission of the parties vis-à-vis special reliefs or promotional measures designed for ferro-alloys industry afforded by the State Government need not detain us for discussion since nothing turns on it either way, the respondents not having refuted the case of the appellant that it was not a beneficiary.

16. I would now focus on the other argument, which seems attractive on first blush, that the expression “*non-discriminatory*” in respect of right to *open access* is pointer to its inviolability and absolute unexceptional character.

17. The Electricity Act, 2003 was enacted with the aim, *inter alia*, of bringing about competition with the ultimate objective of ensuring efficiency gains resulting from competition for the consumers. The promotion of competition under regulatory oversight is the hallmark of the legislation.

An important role is conferred by the statute on the regulatory commissions in the wake of the challenges that opening of the sector poses for consumers and other stakeholders. It is one of the highlights of the reforms ushered in by this law that under the legislative scheme, *Open Access* has been considered as an important tool for infusing competition in the electricity industry thereby creating choice to buyers and suppliers of electricity. The legislature, having recognized the need, introduced the open access in transmission which is one of the main features set out in the Objects & Reasons of the Electricity Act, and for weighty reasons, as extracted (to the extent relevant) hereunder:

“3... There is also need to provide newer concepts like power trading and open access....”

4. ... (iv) there would be open access in transmission from the outset with the provision for surcharge for taking care of current level of cross subsidy with the surcharge being gradually phased out. ...”

18. Crucially, the provision contained in Section 2(47) of the Electricity Act defines *open access* as under:

“non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or

consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission”

(emphasis supplied)

19. A plain reading of the definition of the expression “*open access*” given in the enactment shows that the intendment and public policy thereby declared is to afford “*non-discriminatory ... use of*” transmission lines or distribution system crystalizing the fact that breach by discriminatory policy against the letter and spirit of the law on subject of *open access* to consumers will not be permitted.

20. The right to *open access* is given shape by Section 42 of Electricity Act. It is necessary to extract (to the extent germane) the said provision (Section 42, as amended by Act 57 of 2003 and Act 26 of 2007) - the provisos also quoted herein below being first and fifth - to the extent germane, as under:

42. (Duties of distribution licensee 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 also that the State Commission shall, not later than five years from the date of commencement of the Electricity (Amendment) Act, 2003, by regulations, provide such open access to all consumers who require a supply of electricity where the maximum power to be made available at any time exceeds one megawatt."

(emphasis supplied)

21. Pertinent to note here that prior to its amendment in 2007, the first proviso to Section 42 stipulated that "... *such open access may be allowed before the cross subsidies are eliminated, on payment of a surcharge in addition to the charges for wheeling as may be determined ...*". There can be no doubt that non-discriminatory Open access to the power grid is an essential element of introducing competition to electricity markets and increasing their efficiency. Clearly, the amended first proviso leaves no option in the matter of providing open access prior to elimination of cross subsidies.

It has since been made mandatory for the Commissions to allow open access on payment of a surcharge/wheeling charges etc. A conjoint reading of Section 42(2) along with its first and fifth provisos does suggest that as a category, all consumers of more than one MW are to be treated as eligible open access consumers. It does appear that sub-section (2) requires the State Commission to introduce open access within one year of the appointed date but the fifth proviso makes it mandatory for provision to be made for such open access to all consumers as require supply of electricity where the maximum power to be made available at any time exceeds 1MW. Indisputably, the appellant, having connection of 17 MVA, is one such entity (falling in Ferro-Alloy industry) that subscribes to the basic qualification in law for claiming the benefit.

22. But it would be wrong to say that Section 42(2) read with fifth proviso confers an absolute right to open access. As would be demonstrated by the discussion that follows, the right created by the extant law is only to be *considered* for open access, it being within the domain of the regulatory authority to introduce open access in such phases and subject to such conditions including the cross-subsidies as

are found necessary and proper and operational constraints, the statute itself clarifying the mandate that the State Commission '*shall*' have due regard to all relevant factors including such cross-subsidies, and other operational constraints. The effect of the fifth proviso to section 42(2) is only to specify the timeline (five years) within which regulatory framework for open access to all consumers that require supply of electricity exceeding one megawatt is to be put in position, such being the eligibility criteria as must be met.

23. The Commission seeks to point out that the impugned tariff order is not a new dispensation on the subject (qua open access) for the control period of Financial Year (FY) 2020-2021 thereby covered, it having adopted, by continuation, the decision in the previous tariff order for FY 2019-2020. The submission is that since there was no challenge to the previous order, the challenge cannot be entertained now, the dispensation having attained finality. I reject this preliminary objection for the simple reason that each tariff order is distinct from the other and would give rise to a new cause of action in favour of a party thereby aggrieved to assail it in accordance with law (by exercising

remedy of appeal). The appellant has explained that it is a new entity on the block (having commenced its ferro-alloys plant only in January 2020) and there was no occasion for it earlier to question the propriety or legality of the dispensation on the subject.

24. It is necessary at this stage to take note of some parts of Sections 61 and 62 of the Electricity Act:

“61. 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:

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

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

...

(3) The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required."

25. Tariff determination is an exercise that is guided by Sections 61 and 62 which delineate the relevant factors to be considered including the mandate that supply of electricity

must be organized on *commercial principles* [Section 61 (b)], there is efficiency and economical use of resources [Section 61 (c)], consumers' interest is safeguarded and cost of electricity is recovered in a reasonable manner [Section 61(d)], it being permissible for the State Commission, while determining tariff, to differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period, the nature of supply and the purpose for which supply is required [Section 62(3)]. The statute clearly permits and provides that the regulatory commission can differentiate in the matter of tariff based on various factors.

26. It cannot be disputed that the guidance provided by Section 42(2) of the Electricity Act (“.....having due regard to all relevant factors including such cross subsidies and other operational constraints”) is of wide amplitude. The use of the word “including” does show what is set out expressly amongst the relevant considerations is only illustrative [*DDA v. Bhol Nath Sharma* (2011) 2 SCC 54]. More than that, however, the qualifying word “all” preceding the words “relevant factors” makes it abundantly clear that the factors of cross-subsidies and operational constraints are mere

examples, only two out of myriad considerations, germane to feasibility of open access being provided universally. The *fifth proviso* to Section 42(2) has to be read harmoniously with all of the provisions and not in isolation. Clearly, the *relevant factors* to be taken into consideration include the overall scheme and other provisions of the Electricity Act, particularly Sections 61 and 62, it being incorrect to project *open access* as a standalone right that overrides all other provisions of the statute.

27. I, thus, endorse the submission of the State Commission that it is obliged to consider all 'relevant factors' and that some of such relevant factors are highlighted in Sections 42(2), 61 and 62. These factors would, undoubtedly, also include technical constraints but they are only one of several considerations to be factored in, the overarching consideration being the larger public interest.

28. The appellant contends that the claim of the Respondent that the tariff levied on ferro-alloys being energy intensive industry is much lower than other industries is bizarre since the other energy intensive industries such as PV ingots, Cell manufacturing units, Polly Silicon Industry and Aluminum Industry having same tariff for the year are

not the ones subjected to such restriction. It argues that imposing embargo only upon the Ferro-Alloys Industry from purchasing electricity from an open access leaving no choice but to procure power only from the Discom at a higher rate which is not only unjust and arbitrary being violative of Article 14 of the Constitution of India, 1950 but also prejudicial to the interest of a particular industry. The submission is that there is absolutely no justification for the Commission to have curtailed the right enshrined under the Electricity Act.

29. On careful scrutiny of materials presented, I find that the prevailing facts justify the ferro-alloys industry to be considered as a separate class within the larger group known as the energy intensive industry. The State Commission has submitted that it is under a statutory mandate to keep in mind the multi-year tariffs. It points out that it had been directing from FY 2004-05 to FY 2012-13 the Ferro-Alloy Industry to draw entire power requirement from Discom, such orders having not been challenged. It is conceded that in FY 2013-14 this condition was deleted due to inability of Discom to meet continuous supply. From FY 2009-10 to FY 2015-16, some conditions relating to deemed consumption were imposed. However, these minimum

energy off-take and deemed consumption conditions were done away with from FY 2016-17. It is explained that keeping these factors in mind, open access was denied to Ferro Alloys Industry in the order of FY 2019-20 also.

30. It is the argument of the respondent Discom that in terms of the legislative scheme of Electricity Act, 2003 the privilege of open access is allowed to a consumer subject to payment of CSS. It is pointed out that the Average Cost of Supply (Rs. 6.47 per unit) for the relevant category of consumers i.e. Ferro Alloys Industry is more than the Tariff applicable (Rs.4.95 per unit) for the said category of consumers. It is further highlighted that in terms of the tariff determined by APERC, having regard to the nature of consumption by the said Industries, only fixed Energy Charges i.e. Rs. 4.95 per unit are payable there being no addition of demand charges. On this basis it is submitted that the calculation by the formula specified for computation of CSS reveals the CSS payable to be NIL. It is urged that the impugned decision be not interfered with since the State Commission has designed the Tariff by the impugned order in such a manner that the Ferro-Alloy Industry – whose cause is represented by the appellant - is duly incentivized

after taking into consideration that this category of consumers (Ferro Alloys Industry) are energy intensive industries. It is pointed out that if such category of consumers is allowed to avail open access the distribution licensees will have no recourse for recovery of fixed charges which are payable by them (the Discoms) to the generators vis-à-vis the arrangement for procurement of power qua the concerned category of consumers. It is submitted that sufficient reasons exist to treat the Ferro Alloy industry as a class separate from the other Energy Intensive Industries, and as such, the tariff has been designed in a manner that it accommodates the said consumers to procure power from the Discoms only.

31. I am satisfied that the impugned Tariff order is the product of a comprehensive exercise that was undertaken having regard to views expressed by all stakeholders representing various conflicting interests, public interest being taken as the paramount consideration. In determining the various components of tariff – energy charges, fixed charges, wheeling charges, subsidy or CSS - for different classes of consumers, there is always a need for balancing the interests, though being guided by commercial principles

which include an assurance of consumption of power. It is shown to the satisfaction of judicial conscience of this tribunal that this was not fulfilled by the Ferro-Alloy industry. In this context, reference may be made to the facts borne out from pleadings and documents showing that while the Discom had recommended 85% load factor, the appellant had taken the position that they are operating at 50-60% and therefore 85% load utilization by them is not practical. It may be noted that the Commission factored in the volatile market conditions of the Ferro Alloy Industries and other problems faced by the sector, rejected the imposition of such a condition as requested by the Discoms. Indeed, against such backdrop, sufficient ground had been made out to treat the Ferro Alloy industry as a class separate from the other Energy Intensive Industries.

32. The impugned decision is part of exercise of tariff determination which is a complex, comprehensive and integrated process wherein the Commission is expected not only to keep in mind all relevant factors but also harmonize various conflicting claims, having regard to the statutory mandate. I am satisfied that the Commission has taken all relevant factors into consideration while passing the

impugned order holding that in order to be the beneficiary of special dispensation for energy intensive industry, the Ferro-Alloy Industry must correspondingly shoulder the burden of sourcing its entire power requirements from State Discoms and thereby forfeit the entitlement to open access.

33. I, thus, have no hesitation in accepting the justification offered by the Commission that it has balanced the non-imposition of an 85% load factor and other benefits being enjoyed by the Ferro-Alloy industry (namely, being charged tariff rates lower than the actual cost of service, the operation of this industry at a level of 50-60% only and further not paying any minimum energy take-off and deemed consumption conditions) on one hand with the predicament of the Discom of not being able to recover fixed charges mandatorily paid to generators on account of Power Purchase Agreement and network transmission charges etc. on the other. In this view, I find the impugned condition imposed on Ferro Alloy Industry to be fully justified, it also being necessary to ensure recovery of the cost of electricity in a reasonable manner.

34. For the foregoing reasons, I find no merit in the contentions of the appellant. I would, thus, dismiss the appeal and the pending application filed therewith.

(Justice R.K. Gauba)
Judicial Member

COMMON ORDER

In view of the above, there being no unanimity, each of us being of differing opinion on the core issues, and the end result, the appeal at hand needs to be dealt with in terms of the provision contained in Section 123 of the Electricity Act. We, thus, make a reference to Hon'ble the Chairperson of this tribunal for appropriate further directions in accordance with law. The appeal be laid before her on **30th April 2021**.

**PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO
CONFERRING ON THIS 27th DAY OF APRIL, 2021.**

(Justice R.K. Gauba)
Judicial Member

(Ravindra Kumar Verma)
Technical Member

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REPORTABLE/NON-REPORTABLE
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