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HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment Reserved on: 15/11/2019****Judgment Delivered on : 11/02 /2020****Writ Petition (C) No. 1084 of 2017**

Bharat Aluminium Company Limited, a Company incorporated under the relevant provisions of Companies Act, 1956 having its registered office at Balco Nagar, Korba, Tahsil and District Korba, Chhattisgarh Pin Code 495684.

---- Petitioner**Versus**

1. Chhattisgarh State Electricity Regulatory Commission, Irrigation Colony, Shanti Nagar, Raipur, Chhattisgarh Pin Code 492001
2. Chhattisgarh State Power Distribution Company Limited, Registered Office: Vidyut Sewa Bhawan, Daganiya, Raipur, Chhattisgarh Pin Code 492013

---- Respondents

For Petitioners	:	Shri Sajan Poovayya, Senior Advocate with Shri Sachin Singh Rajput, Shri Hemant Singh and Shri Pribhanu Singh Kharola, Advocate.
For Respondents No. 1	:	Shri Raj Kumar Mehta, Shri Rakesh Jha and Ms. Himanshi Andley, Advocates
For Respondents No. 2	:	Shri K.R.Nair and Ms. Veena Nair, Advocates

Hon'ble Shri P.R. Ramachandra Menon, Chief Justice
Hon'ble Shri Parth Prateem Sahu, Judge

C.A.V. Judgment**Per P.R. Ramachandra Menon, Chief Justice**

1. Vires of the Regulation No. 33(6)(b)(iii) of the CERC (Connectivity and Intra-State Open Access) Regulations, 2011 (Annexure P/4) (*for short 'the Regulations'*) framed by the 1st Respondent-Chhattisgarh State Electricity Commission (*for short, 'the Commission'*) in exercise of the power under Section 181 of the Electricity Act, 2003 (*for short 'the Act, 2003'*) is put to challenge in this writ petition. It is contended that the said Regulation is *ultra vires* to the Act, 2003; contrary to the Tariff Policy notified by the Central

Government under Section 3 of the Act, 2003 and also violative of Part III of the Constitution of India. The Petitioner also seeks to issue an appropriate writ or order directing the 1st Respondent-Commission to determine the 'voltage-wise' cost of service of the 2nd Respondent Distributor Company/Licencee in the area for the purpose of computation of Retail Supply Tariff and Cross Subsidy Surcharge.

2. The pleadings and prayers are sought to be rebutted by filing separate returns by both the Respondents. The Petitioner has filed a rejoinder as well.

3. We have heard Shri Sajan Poovayya, learned Senior Counsel supported by Shri Sachin Singh Rajput for the Petitioner, whereas the version of the 1st and 2nd Respondents was put forth by Shri Raj Kumar Mehta and Shri K.R. Nair, respectively. In fact, the matter was heard elaborately on different dates, including the final hearing held on 15.11.2019. Written notes of argument were presented by the Petitioner as well as the 1st Respondent.

4. The Petitioner Company is an Extra High Voltage (EHV) consumer of electricity, also having a Captive Power Plant (CPP) with a capacity of 1410 MW at Korba in Chhattisgarh. The field of generation and supply of electricity in the pre-independence India was governed by the provisions of the Electricity Act, 1910, which also provided for growth of Electricity Industry through private licencees. After independence, the Electricity (Supply) Act, 1948 came into force, which provided for constitution of a State Electricity Board vested with the responsibility of arranging supply of electricity in the States. Later, on finding that the performance was going down and there was failure in the matter of taking decision on tariffs in an independent manner and that the cross-subsidies had reached untenable levels, Electricity Regulatory Commission Act was enacted in the year 1998. On finding the

necessity to have the fields covered by all the above three enactments under a common umbrella, the 'Act, 2003' was enacted with a significant addition of newer concepts like 'power trading' and 'open access'.

5. The term 'open access' is defined under Section 2(47) of the Act, 2003. The said concept implies freedom to procure power from any source of choice of the consumer, other than the distribution licensee of the area of the consumer by using the distribution system of such distribution licensee, subject to satisfaction of wheeling charges and cross-subsidy surcharge, as specified. The scope of the said concept has been explained by the Apex Court in ***SESA Sterlite Limited v. Orissa Electricity Regulatory Commission & Others***; {(2014) 8 SCC 444}. The Petitioner company is stated as procuring electricity from the State of Maharashtra availing the facility of open access. The 1st Respondent-Commission passed Annexure P/9 order dated 12.06.2014 determining the cross-subsidy charges (CSC) at the rate of Rs. 1.278 per kwh for EHV category of consumers like the Petitioner, in terms of Annexure P/4 Regulations. This was sought to be challenged by filing review petition under Section 94(1)(f) of the Act, 2003 before the 1st Respondent. Pursuant to the order passed by the 1st Respondent, 50% of the amount covered by CSC bills/invoices is stated as satisfied by the Petitioner. However, after considering the merits, the 1st Respondent dismissed the review petition and upheld the cross-subsidy charges as per the order dated 27.07.2016. This has been challenged by the Petitioner by filing an appeal before the Appellate Tribunal and the appeal is stated as pending.

6. The Petitioner contends that since proper relief can be obtained by the Petitioner only by challenging the Regulation No. 33(6)(b)(iii) and hence the Petitioner is constrained to approach this Court, as there is no alternative remedy. It is also pointed out that by virtue of the law declared by the

Constitution Bench of the Apex Court in ***PTC India Ltd. v. Central Electricity Regulatory Commission*** {(2010) 4 SCC 603, paragraph 93} that the Appellate Tribunal for Electricity has no jurisdiction to decide the validity of the Regulations framed by the Regulatory Commission, it can be done only by invoking the power under Article 226 of the Constitution of India. The grievance of the Petitioner is in respect of the manner of computation of cross subsidy surcharge as provided under Regulation 33(6)(b)(iii) of the Regulations, which is to the following effect:

Cross Subsidy Surcharge (CSS)	=	average tariff of the consumer availing open access (Component 'T')	minus (- the average cost of supply of the distribution licensee (Component 'C')
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7. According to the Petitioner, the said computation is wrong insofar as there is no provision in the Act or the Tariff Policy framed by the Central Government to reckon 'average tariff' to arrive at the Component 'T' or the 'average cost' to arrive at the Component 'C', which ought to have been 'actual tariff' or 'actual cost', respectively. The Petitioner contends that as per scheme of the Act, 2003 in relation to open access, the statement of objects and reasons of the Act, facilitating the private sector participation in generation, transmission and distribution, is to be adopted as a matter of policy; the generation is being delicensed and there would be open access in transmission from the outside, with provision for surcharge for taking care of current level of cross subsidy and to have it 'gradually phased out'. In the said circumstances, the 1st Respondent-Commission ought to have provided for open access distribution phases with surcharge in a gradually decreasing manner and to have it eliminated, instead of increasing the burden of the consumers like the Petitioner. The Petitioner contends that the scheme of the statute is discernible from various provisions, right from the definition clause of 'open access' under Section 2(47), read with Sections 3, 43, 61, 61(g),

62(3), 65, and 86(4) of the Act, 2003 which gives a clear idea as to the vision of the law makers while providing for open access, to have it implemented in a non-discriminatory manner and the surcharge to be paid for making use of the transmission lines of the distributor licensee in the area, for bringing power procured from other sources, subject to payment of wheeling charges for using the lines/accessories and also the payment of the surcharge known as 'cross subsidy surcharge' to be progressively reduced and eliminated.

8. The very purpose of the introduction of 'cross subsidy surcharge' was to replenish the probable loss of the distributor/licensee in the area because of the loss of revenue, when a consumer is permitted to procure electricity from such other sources, utilising the transmission lines of the distributor/licensee. In the given area, there may be various types of consumers like agriculture, domestic, industrial, commercial *etc.* Electricity may be supplied to agriculture or the domestic consumers at a subsidized level and the differential portion is sought to be realised from the other consumers in the industrial/commercial segments which is termed as cross-subsidy. Once the number of industrial/ commercial consumers gets reduced by virtue of availing the 'open access', bringing electricity from such other sources where it may be cheaper, the distributor/licensee may be finding it difficult to meet the obligation of supplying electricity to the agriculture/domestic segment at a subsidized rate. This is sought to be remedied by stipulating payment of 'wheeling charges' for making use of the transmission lines of the distributor/licensee and also by providing for 'cross subsidy surcharge'. A mere look at the various provisions of the statute clearly shows that the Central Government declares the National Electricity Policy and Tariff Policy in terms of Section 3 of the Act, 2003 in consultation with the State Government. The development of power system, based on optimal utilisation of resources such as coal, natural gas, nuclear substances

of materials, hydro and renewable sources of energy, could be renewed from time to time in consultation with the State Government.

9. Section 40 of the Act, 2003 deals with duties of transmission licensees; whereas Section 41 deals with other business of transmission licensee. Though Section 61 of the Act, 2003 states that the Appropriate Commission shall specify the terms and conditions for the determination of tariff, subject to the provisions of the Act and guided by various aspects mentioned under clause (a) to (i) {clause (g) of which stipulates that the tariff progressively reflects the cost of supply of electricity and also reduces cross-subsidies in the manner specified by the Appropriate Commission), no such effort has been taken for the 1st Respondent to issue Tariff Regulation in terms of Section 61 of the Act, 2003.

10. Reference is also made to Section 62(3) of the Act, 2003 dealing with the determination of tariff, to show that while doing the said exercise, the Appropriate Commission shall not 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. It is also the case of the Petitioner that the formula provided by the 1st Respondent-Commission under Regulation No. 33(6)(b)(iii) is quite onerous and that Section 65 of the Act, 2003 itself mandates that, if the State Government requires to grant any subsidy to any consumer or class of consumers in a tariff determined by the State Commission, it can be determined by the State Government under Section 62. It can be given directly and the said provision contains a *non-obstante* clause as well, in relation to Section 108 of the Act, 2003 dealing with the directions given by the State Government.

11. Section 86(1) of the Act, 2003 deals with the functions of the State Commission, among which, sub-section 1(a) is with regard to the determination of tariff for generation, supply, transmission and wheeling of electricity. The proviso thereunder says 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 therein for any of the said category of consumers. It is the contention of the Petitioner that, as held by the Constitution Bench of the Apex Court in ***PTC India Ltd.*** (supra) (paragraph 18), the Regulatory Commissions are empowered to frame policy in the form of regulations, as guided by the general policy framed by the Central Government, making it clear that they have 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 Act, 2003. It is contended that the provision to recover the difference/loss incurred while providing a subsidized tariff to the subsidized category of consumers, the same distribution licensee would charge a higher tariff from the subsidized consumers, like the Petitioner herein. If the cross subsidy surcharge is incorrectly, arbitrarily or unreasonably inflicted, it would not only make the open access scheme to become commercially unviable, which is contrary to the scheme of the statute, but also would force/compel the consumer to avail power only from the distribution licensee and this will make the relevant provision otiose. Hence, it is contended that the charges sought to be levied from an open access consumer shall not be higher than the charges payable by a consumer procuring electricity from the distributor/licensee in the area, had he not availed the benefit of open access; which otherwise will render the open access power to be more expensive and uncompetitive and it will be alien to the scheme of the statute. The issue of open access surcharge is very crucial and implementation of the provision of open access depends on a judicious determination of surcharge by the State

Commissions and it is in the said context that the Petitioner is constrained to challenge the fixation of the component 'T' and 'C' in relation to the formula under Regulation 36(6)(b)(iii) of the Regulations.

12. As pointed out already, Section 62(3) of the Act, 2003 enables and empowers the State Commissions to determine categories of consumers; but it is contended that the Respondent-Commission has not framed any Regulations or guidelines as to what protocol is to be followed for such determination of slabwise tariff. It is contended that absence of any Regulation/guidelines in this regard is virtually being used by the Commission to wrongly inflate the slab tariff applicable to the subsidizing category of consumers. It is the case of the Petitioner, that in the absence of Regulations, it is obligatory to go by the statutory tariff policy framed by the Central Government under Section 3 of the Act and reference is made to clause 8.3(ii) of the Tariff Policy, 2006 and clause 8.3(ii) of the Tariff Policy 2016 in this regard, which clearly provides that the tariffs have to be within a range of $\pm 20\%$ of the average cost of supply. When Section 86(4) of the Act, 2003 stipulates that the Commission shall be guided by the provisions of the Tariff Policy, it is having binding effect and it cannot be watered down by the Commission. Reliance is sought to be placed on the verdict passed by the Apex Court in ***Energy Watchdog v. Central Electricity Regulatory Commission & Others*** {(2017) 14 SCC 80 (paragraphs 28 and 29)}. to contend that Tariff Policy is a statutory Policy under Section 3 of the parent Act and hence, the above policy would prevail and act as a guiding principle, more so, in the absence of Regulations to be framed by the Commission with reference to Section 61 or 62(3) of the Act, 2003.

13. Similar to the challenge raised in respect of the component 'T', the Petitioner also challenges the component 'C' in the formula under Regulation 33(6)(b)(iii) of the Regulations as to reckoning of the average cost of supply,

instead of the actual cost. It is pointed out that the cost of supply at high voltage is lower than the cost of supply at lower voltage. Since the voltage wise cost of supply for different subsidizing consumers connected at different voltage levels would be different, the effect has virtually been nullified by the Commission by reckoning the average cost for computation of CSS. It is stated that Section 61(g) of the Act, 2003 does not use the word 'average' before the words 'cost of supply' and hence, the provision only refers to the actual cost of supply. It is further pointed out that the actual cost of supply can only be determined when the same is considered 'voltage wise'. Reliance is sought to be placed by the Apex Court in ***Punjab State Power Corpn. Ltd. v. Punjab State Electricity Regulatory Commission*** {(2015) 7 SCC 387, paragraphs 13 and 14} in this regard. The word 'average' appearing in Tariff Policy 2006 and 2016 before the words 'cost of supply' appearing in clause 8.3(ii) are stated as interpreted in the above judgment and hence the 'actual' or 'voltage wise' cost of supply has to be taken for computing the component 'C'.

14. Yet another contention taken by the Petitioner is that Regulation 33(6)(b)(iii) is inconsistent with Regulation 33(6)(a) which requires the Commission to specify cross subsidy surcharge, voltage wise/slab wise/individual category of consumers, separately. After accepting the said principle under Regulation No. 33(6)(a), there cannot be any deviation when it comes to Regulation No. 33(6)(b)(iii) for reckoning average tariff and average cost for working out the CSS.

15. It is the contention of the Petitioner that, by virtue of the settled position of law rules cannot be framed in matters which are not provided under the Act and it must conform to the legislative policy, apart from the fact that it shall not be contrary to the other provisions of the statute and shall not be in contravention of the constitutional mandate. Reliance is sought to be

placed on ***Kerala Samsthana Chethu Thozhilali Union v. State of Kerala*** {(2006) 4 SCC 327, paragraphs 26, 28, 44 and 58}. It is further pointed out that the delegatee (1st Respondent-Commission) cannot legislate on the field covered by the Act as the subordinate legislation cannot widen or restrict the parent Act. This submission is with reference to the law declared by the Supreme Court in ***Agricultural Market Committee v. Shalimar Chemical Works***, {(1997) 5 SCC 516, paragraphs 22 and 26}. Referring to the law declared by the Apex Court in ***State of Kerala v. Unni***, {(2007) 2 SCC 365, paragraphs 32, 34, 36 and 39}, it is pointed out that the subordinate legislation must be workable, definite and not vague; adding that the subordinate legislation must be a result of intelligible care and deliberation. It is further contended, without prejudice to the contentions raised already, that even if the actual or voltawise cost on supply is ignored, still the cross subsidy surcharge would work out only to Rs. 0.792 per unit, instead of Rs. 1.278 per unit determined by the Commission in its Tariff Order dated 12.06.2014 for the financial year 2014-2015. It is in the said circumstances, that Regulation No. 33(6)(b)(iii) of the CSERC (Connectivity and Intra-State Open Access) Regulations, 2011 is sought to be declared as *ultra vires*.

16. The crux of the submissions made by the 1st Respondent-Commission is that there is absolutely no merit or bonafides in the writ petition filed by the writ petitioner, challenging Regulation No. 33(6)(b)(iii) after its notification and commencement six years ago, from the year 2011. The writ petition is highly belated and is liable to be dismissed on this score alone, and that too, when a statutory appeal against the said order is pending consideration before the Tribunal. With regard to the merits, the learned counsel submits that there is a conscious deviation as to the course to be pursued in respect of cross subsidies, even though Section 61(g) of the Act, 2003 as originally enacted, envisaged elimination of cross subsidies. As per

the 2007 Amendment of the statute, the stipulation for elimination of cross subsidy in Section 61(g) was omitted, by virtue of which the Petitioner is not justified in placing undue reliance on the 'objects and reasons' given at the time of enactment of the Act in 2003. Section 61(g) of the Act as originally enacted and the said provision after the amendment in the year 2007, reads as follows:

Section 61(g) of the Act, 2003:

At the time of enactment		After amendment
(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.		(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.

17. There have been amendments to various other relevant provisions of the Act, 2003 as well; which are to the following effect:

Second and third proviso to Section 38 (2) of the Act, 2003:

At the time of enactment		After amendment
Provided that such surcharge and cross subsidies shall be progressively reduced and eliminated in the manner as may be specified by the Central Commission:		Provided that such surcharge and cross subsidies shall be progressively reduced in the manner as may be specified by the Central Commission:
Provided also that such surcharge may be levied till such time the cross subsidies are not eliminated.		Omitted

Second and third proviso to Section 39 (2) of the Act, 2003:

At the time of enactment		After amendment
Provided that such surcharge and cross subsidies shall be progressively reduced and eliminated in the manner as may be specified by the State Commission:		Provided that such surcharge and cross subsidies shall be progressively reduced in the manner as may be specified by the State Commission:
Provided also that such surcharge may be levied till such time the cross subsidies are not eliminated.		Omitted

Second and Third proviso to Section 40 of the Act, 2003:

At the time of enactment		After amendment
Provided further that such surcharge and cross subsidies shall be progressively reduced and eliminated in the manner as may be specified by the Appropriate Commission.		Provided further that such surcharge and cross subsidies shall be progressively reduced in the manner as may be specified by the Appropriate Commission.
Provided also that such surcharge may be levied till such time the cross subsidies are not eliminated.		Omitted

Third proviso to Section 42(2) of the Act, 2003:

At the time of enactment		After amendment
Provided also that such surcharge and cross subsidies shall be progressively reduced and eliminated in the manner as may be specified by the State Commission:		Provided also that such surcharge and cross subsidies shall be progressively reduced in the manner as may be specified by the State Commission:

Section 178(2)(k) of the Act, 2003:

At the time of enactment		After amendment
(k) reduction and elimination of surcharge and cross subsidies under second proviso to sub-clause (ii) of clause (d) of sub-section (2) of section 38;		(k) reduction of surcharge and cross subsidies under second proviso to sub-clause (ii) of clause (d) of sub-section (2) of section 38;

Section 178(2)(m) of the Act, 2003:

At the time of enactment		After amendment
(m) reduction and elimination of surcharge and cross subsidies under the second proviso to sub-clause (ii) of clause (c) of section 40;		(m) reduction of surcharge and cross subsidies under the second proviso to sub-clause (ii) of clause (c) of section 40;

Section 181 (2)(j) of the Act, 2003:

At the time of enactment		After amendment
(j) reduction and elimination of surcharge and cross subsidies under second proviso to 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;

Section 181(2)(m) of the Act, 2003:

At the time of enactment		After amendment
(m) reduction and elimination of surcharge and cross subsidies under second proviso to 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;

Section 181 (2)(p) of the Act, 2003:

At the time of enactment		After amendment
(p) reduction and elimination of surcharge and cross subsidies under the third proviso to sub-section (2) of section 42;		(p) reduction of surcharge and cross subsidies under the third proviso to sub-section (2) of section 42;

From the above, it is quite obvious that the law makers, though intended to have the cross subsidy phased out progressively when the statute was enacted in the year 2003, later, considering the facts and circumstances, the statute was amended in the year 2007, whereby the stipulation to have it eliminated was consciously deleted, however, retaining the provision to have it progressively reduced, and that's all.

18. With regard to the concept of cross subsidy explained by the Apex Court as per the decision in **SESA Sterlite Limited** (supra), besides paragraphs 22, 23, 25 to 28 referred to from the part of the Petitioner, 'paragraph 30' is also relevant, as pointed out by the 1st Respondent-Commission. This Court finds it appropriate to extract all the above paragraphs for easy reference:

“Special feature of the 2003 Act

22. Before adverting to this central issue, it would be apt to understand conceptually the rationale of payment of such CSS to the distribution company, under the scheme of the Electricity Act. The first enactment to govern electricity supply in India was passed in the year 1910 viz. the Electricity Act, 1910. This Act envisaged growth of electricity industry through private licences. It created the legal framework for laying down of wires and other works relating to the supply of electricity. Thereafter, the Electricity (Supply) Act, 1948 mandated the creation of a State Electricity Board. The Board assigned the responsibility of arranging the supply of electricity in the

State. It was experienced that over a period of time the performance of the State Electricity Boards had deteriorated on account of various factors. The main failure on the part of these Electricity Boards was to take decision on tariffs in independent manner and cross-subsidies had reached untenable levels. To address this issue and also to distance governance from determination of tariffs, the Electricity Regulation Commission Act was enacted in the year 1998. This Act created regulatory mechanism. Within few years, it was felt that the three Acts of 1910, 1948 and 1998 which were operating in the field needed to be brought in a new self-contained comprehensive legislation with the policy of encouraging private sector participation in generation, transmission and distribution and also the objectives of distancing the regulatory responsibilities from the Government and giving it to the Regulatory Commissions. With these objectives in mind the Electricity Act, 2003 has been enacted. Significant addition is the provisions for newer concepts like power trading and open access. Various features of the 2003 Act are outlined in the Statement of Objects and Reasons to this Act. Notably, generation is being delicensed and captive generation is being freely permitted. The Act makes provision for private transmission licensees. It now provides open access in transmission from the outset.

(2) Open access and Cross-Subsidy Surcharge (CSS)

23. Open access implies freedom to procure power from any source. Open access in transmission means freedom to the licensees to procure power from any source. The expression “open access” has been defined in the Act to mean:

“the 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”.

24. xxx xxx xxx

25. While open access in transmission implies freedom to the licensee to procure power from any source of his choice, open access in distribution with which we are concerned here, means freedom to the consumer to get supply from any source of his choice. The provision of open access to consumers, ensures right of the consumer to get supply from a person other than the distribution licensee of his area of supply by using the distribution system of such distribution licensee. Unlike in transmission, open access in distribution has not been allowed from the outset primarily because of considerations of cross-subsidies. The law provides that open access in distribution would be allowed by the State Commissions in phases. For this purpose, the State Commissions are required to specify the phases and conditions of introduction of open access.

26. However open access can be allowed on payment of a surcharge, to be determined by the State Commission, to take care of the requirements of current level of cross-subsidy and the fixed cost arising out of the licensee's obligation to supply. Consequent to the enactment of the Electricity (Amendment) Act, 2003, it has been mandated that the State Commission shall within five years necessarily allow open access to consumers having demand exceeding one megawatt.

(3) Cross-Subsidy Surcharge (CSS)—Its rationale

27. The issue of open access surcharge is very crucial and implementation of the provision of open access depends on judicious determination of surcharge by the State Commissions. There are two aspects to the concept of surcharge — one, the cross-subsidy surcharge i.e. the surcharge meant to take care of the requirements of current levels of cross-subsidy, and the other, the additional surcharge to meet the fixed cost of the distribution licensee arising out of his obligation to supply. The presumption, normally is that generally the bulk consumers would avail of open access, who also pay at relatively higher rates. As such, their exit would necessarily have adverse effect on the finances of the existing licensee, primarily on two counts — one, on its ability to cross-subsidise the vulnerable sections of society and the other, in terms of recovery of the fixed cost such licensee might have incurred as part of his obligation to supply electricity to that consumer on demand (stranded costs). The mechanism of surcharge is meant to compensate the licensee for both these aspects.

28. Through this provision of open access, the law thus balances the right of the consumers to procure power from a source of his choice and the legitimate claims/interests of the existing licensees. Apart from ensuring freedom to the consumers, the provision of open access is expected to encourage competition amongst the suppliers and also to put pressure on the existing utilities to improve their performance in terms of quality and price of supply so as to ensure that the consumers do not go out of their fold to get supply from some other source.

29. xxx xxx xxx

30. Therefore, in the aforesaid circumstances though CSS is payable by the consumer to the distribution licensee of the area in question when it decides not to take supply from that company but to avail it from another distribution licensee. In a nutshell, CSS is a compensation to the distribution licensee irrespective of the fact whether its line is used or not, in view of the fact that, but for the open access the consumer would pay tariff applicable for supply which would include an element of cross-subsidy surcharge on certain other categories of consumers. What is important is that a consumer situated in an area is bound to contribute to subsidising a low end consumer if he falls in the category of subsidising consumer. Once a cross-subsidy surcharge is fixed for an area it is liable to be paid and such payment will be used for meeting the

current levels of cross-subsidy within the area. A fortiori, even a licensee which purchases electricity for its own consumption either through a “dedicated transmission line” or through “open access” would be liable to pay cross-subsidy surcharge under the Act. Thus, cross-subsidy surcharge, broadly speaking, is the charge payable by a consumer who opt to avail power supply through open access from someone other than such distribution licensee in whose area it is situated. Such surcharge is meant to compensate such distribution licensee from the loss of cross-subsidy that such distribution licensee would suffer by reason of the consumer taking supply from someone other than such distribution licensee.”

(emphasis given)

In paragraph 30, the Apex Court has observed that once the cross subsidy surcharge is fixed “for an area”, it is liable to be paid and such payment will be used for making current levels of cross subsidy “within the area”.

19. In response to the contention of the Petitioner that there is no presumption of constitutional validity of subordinate legislation, it is pointed out from the part of the Respondents that, it is devoid of any merit in view of the ruling rendered by the Supreme Court in ***State of T.N. v. P. Krishnamurthy*** {(2006) 4 SCC 517}; paragraph 15 of which says that there is a presumption in favour of the constitutionality or validity of the subordinate legislation and the burden is upon the person who attacks it to show that it is invalid. The same is reproduced hereunder:

"15. There is a presumption in favour of constitutionality or validity of a sub-ordinate Legislation and the burden is upon him who attacks it to show that it is invalid. It is also well recognized that a sub-ordinate legislation can be challenged under any of the following grounds :

- a) Lack of legislative competence to make the sub-ordinate legislation.
- b) Violation of Fundamental Rights guaranteed under the Constitution of India.
- c) Violation of any provision of the Constitution of India.
- d) Failure to conform to the Statute under which it is made or exceeding the limits of authority conferred by the enabling Act.

e) Repugnancy to the laws of the land, that is, any enactment .

f) Manifest arbitrariness/unreasonableness (to an extent where court might well say that Legislature never intended to give authority to make such Rules).

(emphasis given)

20. The Apex Court in **P. Krishnamurthy** (supra) has alerted all courts as to the need to maintain caution while considering the validity of the subordinate legislation, as contained in 'paragraph 16', which is reproduced below:

“16. The court considering the validity of a subordinate legislation, will have to consider the nature, object and scheme of the enabling Act, and also the area over which the power has been delegated under the Act and then decide whether the subordinate legislation conforms to the parent statute. Where a rule is directly inconsistent with a mandatory provision of the statute, then, of course, the task of the court is simple and easy. But where the contention is that the inconsistency or non-conformity of the rule is not with reference to any specific provision of the enabling Act, but with the object and scheme of the parent Act, the court should proceed with caution before declaring invalidity.”

(emphasis given)

21. This was further highlighted by the Apex Court in **Hinsa Virodhak Sangh v. Mirzapur Moti Kuresh Jamat & Others**; {(2008) 5 SCC 33}, paragraph 39 of which is sought to be relied on by the 1st Respondent. It is in the following terms:

"39. We have recently held in *Govt. of A.P. v. P. Laxmi Devi* {(2008) 4 SCC 720}, that the court should exercise judicial restraint while judging the constitutional validity of statutes. In our opinion, the same principle also applies when judging the constitutional validity of delegated legislation and here also there should be judicial restraint. There is a presumption in favour of the constitutionality of statutes as well as delegated legislation, and it is only when there is a clear violation of a constitutional provision (or of the parent statute, in the case of delegated legislation) beyond reasonable doubt that the court should declare it to be unconstitutional."

(emphasis given)

The above principle was reiterated in ***Hindustan Zinc v. Rajasthan Electricity Regulatory Commission***, {(2015) 12 SCC 611, paragraphs 31 and 32} holding that the presumption while considering the vires of the subordinate legislation is that, it is *intra vires* and if it gives two constructions, one which would make it valid and the other one which makes invalid, the Courts must adopt the construction which makes the provision 'valid'.

22. It is pointed out by the 1st Respondent that the Regulations are essentially matter of policy and this being the position, there cannot be any interference by way of judicial review, unless the Regulation is patently arbitrary or discriminatory. The financial burden of the Petitioner cannot be a ground to seek for judicial review. There is no challenge with regard to the competency or the power of the Commission to frame the Regulations and since the said Regulations have been framed in exercise of its powers and in conformity with the provisions of the Act. It having a nexus with the purpose and object of the statute, no judicial interference is possible to decide on the efficacy of such Rules and Regulations. Reliance is sought to be placed on the judgment passed by the Supreme Court ***Association of Industrial Electrical Users v. State of A.P. & Others*** {(2002) 3 SCC 711} in this regard; paragraph 11 of which is reproduced below:

"11. We also agree with the High Court that the judicial review in a matter with regard to fixation of tariff has not to be as that of an Appellate Authority in exercise of its jurisdiction under Article 226 of the Constitution. All that the High Court has to be satisfied with is that the Commission has followed the proper procedure and unless it can be demonstrated that its decision is on the face of it arbitrary or illegal or contrary to the Act, the court will not interfere. Fixing a tariff and providing for cross-subsidy is essentially a matter of policy and normally a court would refrain from interfering with a policy decision unless the power exercised is arbitrary or ex facie bad in law."

(emphasis given)

23. The latest ruling rendered by the Apex Court on the point in ***Reliance Infrastructure Ltd. v. State of Maharashtra & Others***; {(2019) 3 SCC 352, paragraphs 37 to 41} , is also sought to be relied on by the 1st Respondent in this context. We find it appropriate to extract the said paragraphs as well, for easy reference and understanding the correct position, as given below:

“37. Tariff fixation is a complex exercise involving a careful balance between numerous considerations. The “shall be guided” prescription under Section 61 requires the appropriate Commission to bear those considerations in mind. Deducing past performance on the basis of historical data, balancing diverse policy objectives and evaluating the comparative weight to be ascribed to the interests of stakeholders is a scientific exercise which is carried out by the Commission. The nature of judicial review that is exercisable in a given subject area depends in a significant measure on the nature of the area and the body which is entrusted with the task of framing subordinate legislation. In *A.P. TRANSCO v. Sai Renewable Power (P) Ltd.* {(2011) 11 SCC 34} a two-Judge Bench of this Court held thus: (SCC pp. 56-57, paras 36, 38 and 40)

“36. Fixation of tariff is, primarily, a function to be performed by the statutory authority in furtherance to the provisions of the relevant laws. We have already noticed that fixation of tariff is a statutory function as specified under the provisions of the Reform Act, 1998; the Electricity Regulatory Commissions Act, 1998 and the Electricity Act, 2003. These functions are required to be performed by the expert bodies to whom the job is assigned under the law...

* * *

38. ... The functions assigned to the Regulatory Commission are wide enough to specifically impose an obligation on the Regulatory Commission to determine the tariff. The specialised performance of functions that are assigned to Regulatory Commission can hardly be assumed by any other authority and particularly, the courts in exercise of their judicial discretion. The Tribunal constituted under the provisions of the Electricity Act, 2003, again being a specialised body, is expected to examine such issues, but this Court in exercise of its powers under Article 136 of the Constitution would not sit as an appellate authority over the formation of opinion and determination of tariff by the specialised bodies. ...

* * *

40. ... This Court has consistently taken the view that it would not be proper for the Court to examine the fixation of tariff rates or its revision as these matters are policy matters outside the purview of judicial intervention. The only explanation for judicial intervention in tariff fixation/revision is where the person aggrieved can show that the tariff fixation was illegal, arbitrary or ultra vires the Act. It would be termed as illegal if statutorily prescribed procedure is not followed or it is so perverse and arbitrary that it hurts the judicial "conscience" of the court making it necessary for the court to intervene. Even in these cases the scope of jurisdiction is a very limited one."

38. MERC is an expert body which is entrusted with the duty and function to frame regulations, including the terms and conditions for the determination of tariff. The Court, while exercising its power of judicial review, can step in where a case of manifest unreasonableness or arbitrariness is made out. Similarly, where the delegate of the legislature has failed to follow statutory procedures or to take into account factors which it is mandated by the statute to consider or has founded its determination of tariffs on extraneous considerations, the Court in the exercise of its power of judicial review will ensure that the statute is not breached. However, it is no part of the function of the Court to substitute its own determination for a determination which was made by an expert body after due consideration of material circumstances.

39. In *Assn. of Industrial Electricity Users v. State of A.P.* {(2002) 3 SCC 711} a three-Judge Bench of this Court dealt with the fixation of tariffs and held thus: (SCC p. 717, para 11)

"11. We also agree with the High Court {(2000) 6 ALD 217} that the judicial review in a matter with regard to fixation of tariff has not to be as that of an appellate authority in exercise of its jurisdiction under Article 226 of the Constitution. All that the High Court has to be satisfied with is that the Commission has followed the proper procedure and unless it can be demonstrated that its decision is on the face of it arbitrary or illegal or contrary to the Act, the court will not interfere. Fixing a tariff and providing for cross-subsidy is essentially a matter of policy and normally a court would refrain from interfering with a policy decision unless the power exercised is arbitrary or ex facie bad in law."

40. We commenced our discussion by emphasising, in our prefatory observations, that the power to frame regulations is of a legislative nature. The CPRI report was an input before MERC in carrying out that exercise. MERC followed the statutory procedures laid down for the determination of tariffs. It took into account factors which it is mandated by the statute to consider. The National Tariff Policy, suggestions of stakeholders as well as the assessment carried out by CPRI were duly considered. Hence, the

present case does not fall in the paradigm of manifest unreasonableness or arbitrariness to warrant the interference of this Court. It would be rather formulaic for the Court to accept that merely because DTPS was placed on a par in the immediately previous period (2006-07) and the period immediately succeeding (2016-20), that this must necessarily be extrapolated to the intervening period governed by the MYT Regulations, 2011. A body which is entrusted with the task of framing subordinate legislation has a range of options including policy options. If on an appraisal of all the guiding principles, it has chosen a particular line of logic or rationale, this Court ought not to interfere.

41. For the reasons which we have recorded in this judgment, we have come to the conclusion that Regulation 44.2(d) of the MERC (Multi Year Tariff) Regulations, 2011 does not suffer from any constitutional or statutory infirmity. We have, however, furnished reasons of our own for affirming the ultimate decision of the High Court to dismiss the writ petition. We have disapproved of the view of the High Court that the writ petition under Article 226 was not maintainable and accordingly set aside the direction on the imposition of costs. However, we hold that there is no infirmity in the impugned regulation and accordingly affirm the ultimate conclusion of the High Court to dismiss the writ petition under Article 226. The civil appeal is, accordingly, disposed of. There shall be no order as to costs.”

It is contended by the 1st Respondent in the above background that, it is the duty of the Commission to balance the interest of all stake holders in the field, including the open access consumers and also the large body of consumers of such utilities who do not and cannot avail open access. This being the scheme of the statute, the Regulations framed by the 1st Respondent seek to achieve the said objective and hence are within the frame work of the statute. As it stands so, the contention of the Petitioner that the Regulations, even though may not be contrary to any specific provision of the Act, 2003, contravenes the scheme of the Act, 2003, is wrong and misconceived.

24. With regard to the contention of the Petitioner that a wrong formula has been deployed by the 1st Respondent to work out the 'CSS' under Regulation 33(6)(b)(iii) by stipulating average tariff/average cost insofar as the Act, 2003 does not specify the 'average cost' but for the cost of supply in Section 61(g); it is pointed out that the said provision also does not say any

categorywise or voltagewise cost of supply. It is further pointed out that the whole concept of cross subsidy surcharge brought into effect, to benefit the low end consumers, will get defeated if the 'average cost' of supply is not reckoned and the failure in this regard will make the cross subsidy redundant and illusory.

25. It is submitted on behalf of the Respondents that the version of the Petitioner that the word 'average' does not precede the words 'cost of supply of electricity' in section 61(g) of the Act, 2003 and therefore, it should be interpreted as 'voltagewise cost of supply' does not have any legal or factual footing. This is moreso, since if the word 'average' cannot be read into Section 61(g), the term 'voltagewise' also cannot be read into the said provision. Similarly, it is contended that the reliance sought to be placed by the Petitioner on Section 62(3) of the Act, 2003 is rather misconceived. The said provision only provides that, while determining the tariff, no undue preference shall be shown by the Commission, but it provides that, it may differentiate according to the consumer's load factor, power factor, voltage, geographical position, nature of supply and purpose for which the supply is required etc. As such, it enables the Commission to fix different tariffs for different categories of consumers and as a matter of fact, the Commission has been fixing different tariffs for different categories of consumers.

26. The 1st Respondent-Commission has pointed out that Regulation 33(6)(b)(iii) is in conformity with the National Tariff Policy 2016. Specific reference is made to clause/paragraph 8.3 of the Tariff policy dated 06.01.2006, besides clause 8.5 of the very same policy. With reference to clause 8.3 of the Tariff Policy 2006 and 2016, it is pointed out that the above provision recommends that the tariff of retail consumers could be designed in such a manner that the tariffs are within $\pm 20\%$ of the average cost of supply which would virtually mean that the retail tariff of subsidizing consumers of

distribution licencees should not be more than 20% of the average cost of supply and the tariff of subsidized consumers of distribution licencees should not be less than 20% of the average cost of supply. At the same time, Tariff Policy 2016 virtually recognizes the hard reality that the cross subsidy surcharge formula mentioned therein may not be suitable in case of all the licencees. In the said circumstance, it has been recommended that the State Electricity Regulatory Commission may review it based on the particular facts and circumstances prevailing in the State. The above stipulation is also in view of the fact that 'electricity' is an entry in the Concurrent List i.e. List III of the VIIth Schedule to the Constitution of India and the State Commission has to deal with the cross subsidy surcharge based on the specific situation prevailing in the State. The above prudent outlook in the Tariff Policy 2016, unfortunately, was not made in the Tariff Policy 2006 (i.e. different States may be having different factual context/situations).

27. It is further pointed out by the 1st Respondent-Commission that the Tariff Policy is only having a 'guiding effect' and is not binding upon the Commission and that the contention to the contrary raised by the Petitioner is not correct. As discernible from the statement of objects and reasons for enacting the statute, it was with a view to distance the regulatory functions from the Government and as such, it cannot be contended that the Tariff Policy framed by the Government will be having a binding effect on the Commission. The Tariff Policy is, in fact, for the entire country and the Regulatory Commissions of the different States may have to cater to the needs of the consumers in the different States depending upon the facts situation prevailing therein, by virtue of which the Tariff Policy cannot be uniformly made applicable throughout the country. It is for the said reason, that the Tariff Policy 2016 itself provides that the cross subsidy surcharge formula given in the policy may not work for all the States and it is open for

the State Regulatory Commission, keeping in view the over all objective of the Act and the Policy in mind, could vary the formula taking note of the situations prevailing in the State. This is sought to be asserted with reference to the observations of the Apex Court in ***PTC India Ltd.*** (supra) {paragraphs 17, 18, 25 and 26), ***Transmission Corporation of Andhra Pradesh v. Sai Renewal Power*** {(2011) 11 SCC 54, paragraph 59} and the recent ruling in ***Reliance Infrastructure*** (supra).

28. The verdict passed by the Apex Court in ***Energy Watchdog*** (supra) cited by the Petitioner is sought to be distinguished, pointing out that the said ruling does not lay down any general principle that the Tariff Policy is having 'binding effect' on the Regulatory Commission. In fact, the said case was in connection with the change in coal policy. The Apex Court has not observed anything in the said judgment as to the issue whether the Tariff Policy is having any binding effect on the Regulatory Commission or not. Similarly, it is pointed out that the reliance sought to be placed by the Petitioner on ***Secretary, Ministry of Chemicals & Fertilizers, Government of India v. Cipla Ltd. & Others***; (2003) 7 SCC 1, is not correct and it is not attracted to the case in hand. It was a case where the policy was laid down by the Government and the delegatee was also a Governmental body. It was in the said context, that the Apex Court observed that the Government having framed the policy, its delegatee should make an attempt to stick to the policy. Coming to the instant case, the Tariff Policy has been framed by the Government; whereas the Regulations have been framed by the Regulatory Commission, in exercise of the power under Section 181 of the Act, 2003. As mentioned already, the objects and reasons of the Act clearly reveal that the enactment of the statute itself was to distance the Government from the regulatory responsibilities which were vested with the Commission and hence, the ratio of the said judgment is not attracted. The subsequent

judgment, ***Clariant International Ltd. v. Securities & Exchange Board of India***; (2004) 8 SCC 524, only follows the verdict in ***Cipla Ltd. & Others*** (*supra*).

29. It is brought to the notice of this Court by the 1st Respondent that the reliance placed by the Petitioner on ***Punjab State Power Corpn. Ltd.*** (*supra*) is misplaced. The case before the Apex Court was against the judgment passed by the Appellate Tribunal for Electricity. The Tribunal had upheld the determination of average cost of supply by the Commission; but had directed that, for future, relevant data with regard to voltage-wise supply should be laid before the Commission and the Commission should gradually proceed to determine the voltage cost of supply. The Apex Court did not find any infirmity with the direction of the Tribunal requiring the Commission to slowly move away from the average cost of supply, to determination of voltage-wise cost of supply and the Apex Court has not held that 'average cost of supply' is contrary to the scheme or any provision of the Act, 2003. However, the 1st Respondent Commission has already started the process of moving from average cost of supply to 'voltage-wise cost of supply'. It is pointed out that in the retail tariff order for the year 2016-2017, the Commission had asked the Distribution Company to submit the facts and figures in the said context. The data submitted by the Distribution Company was more based on several assumptions and in the said circumstance, the Commission felt that, in the absence of the realistic assessment of the voltage-wise losses, the determination in this line will lead to incorrect conclusions. It is asserted that the Commission has already moved towards fixation of tariff for the consumers taking the supply at higher voltage is lower in cost than that for the consumers taking supply at lower voltages and hence a voltage-wise segregation has already been initiated by rationalising the EHV and HV tariff categories. This has been sought to be given effect for the year

2017-2018 and also for 2018-2019 as well. It is asserted that the Regulations are never *ultra vires* to the Act or the provisions of the Constitution of India and there is no violation of any provisions in Part III of the Constitution. It is also pointed out that the CSS worked out by the Commission in respect of the State of Chhattisgarh is comparatively much lower than the rates as they exist in many other States.

30. The Petitioner then has made an attempt to distinguish the judgment of the Apex Court in ***Punjab State Power Corporation Ltd.*** (*supra*) contending that the said judgment pertains to tariff determination for the year 2004-2005 and 2005-2006; whereas the present case pertains to the year 2014-2015. In the said case, the Apex Court has allowed the Commission to use the 'average cost of supply' method. Similarly, even though clause 8.3.2 of the Tariff Policy 2006 provided that the Appropriate Commission would notify a road map with a target that "by the end of the year 2010-2011", the tariffs are within $\pm 20\%$ of the average cost of supply; under the new policy *i.e.* Tariff Policy 2016, the words 'by the end of the year 2010-2011' came to be omitted in clause 8.3.2. It was in addition to this, that the Tariff Policy 2016 clearly provides that the formula for cross subsidy surcharge stipulated therein may not work for all the States and the Commission may review and vary the same reckoning the factual context/circumstances prevailing in the State concerned.

31. So as to understand the meaning of the term 'shall be guided', it will be worthwhile to make a reference to paragraphs 29 to 32 (part) of the ruling rendered by the Apex Court in ***Reliance Infrastructure Ltd.*** (*supra*):

"29. Section 181 empowers the State Commissions to make regulations consistent with the Act and the Rules to carry out the provisions of the Act. Among the matters for which the regulations may provide are "the terms and conditions for the determination of tariff under Section 61" {Section 181(2)(zd)}. In specifying the terms and conditions for the determination of tariff, the appropriate Commission

(as Section 61 provides) “shall be guided” by the factors which are set out in clauses (a) to (i). The expression “shall be guided” comprises of two elements: the “shall” and, the “guidance”. Clauses (a) to (i) provide guidance to the Commission in specifying the terms and conditions for the determination of tariff. The expression “shall” indicates that the factors which are specified in clauses (a) to (i) have to be borne in mind by the appropriate Commission. As guiding factors, they provide considerations which are material to the determination of tariffs by the appropriate Commission.

30. The National Tariff Policy has multi-faceted objectives. Significant among them is the need to ensure to consumers the availability of electricity at reasonable and competitive rates. The policy also seeks to ensure the financial viability of the sector and underlines the need to attract investments. A financially sustainable electricity sector is an important facet of the overall regulatory framework. The objectives of the policy emphasise the need to promote transparency, consistency and predictability in regulatory approaches across jurisdictions. The policy emphasises the need to minimise perceptions of regulatory risk. Finally, the policy recognises the need to promote competition, efficiency in operations and improvements in the quality of supply. In designing and formulating the regulatory framework for tariffs, the delegate of the legislature has to bring about a balance between the competing goals which the Tariff Policy incorporates.

31. As part of the process, the delegate has to bear in mind the interests of diverse stakeholders including consumers and producers. The process of framing tariffs is of equal significance, for it is through the procedural framework that norms of consistency, transparency and predictability can be enforced. Competition, efficiency and quality of supply are key components of the policy framework in designing tariffs. Clause 5.3(f) of the Tariff Policy speaks of the need to evolve performance norms which incorporate incentives and disincentives and provide an appropriate arrangement that fosters the sharing of gains of efficiency in operations with consumers. Operating parameters in tariffs are required to be pegged only on a “normative level” and not at the “lower of normative and actuals”, save and except in those cases referred to in para 5.3(h)(2). Para 5.3(h)(2) deals with those cases where operations have been much below the norm for several previous years. In those cases, the initial starting point in determining the revenue requirement and the trajectories are fixed at a relaxed level and not at desired levels. Under clause 5.3(f), the operating norms must fulfill several parameters. They must be (i) efficient; (ii) relatable to past performance; (iii) capable of achievement; and must progressively reflect increased efficiencies. They *may* also take into consideration latest technological advances, fuel, vintage of equipment, nature of operations, level of service to be provided to consumers, among other factors. Continuous and proven inefficiency has to be controlled and penalised. The operating norms must be designed to promote efficiency and to ensure that the gains which accrue

on account of efficient operations are shared with the consumers of electricity. The operating norms will, therefore, have due regard to the performance in the past as well as capacities for future achievement. These must be dovetailed with all relevant considerations, bearing on the requirements of the policy.

32. The Tariff Policy provides guidance to the appropriate Commission when it frames regulations. The power to frame regulations is legislative in nature. It is conferred upon the appropriate Commission. The Commission weighs numerous factors. Its discretion in carrying out a complex exercise cannot be constrained. The delegate of the legislature is therefore under a mandate to bring about a fair and equitable balance between competing considerations. Standing at the forefront of those considerations is above all the need to ensure efficiency and to protect the interests of consumers. The submission which has been urged on behalf of the appellant would reduce tariff fixation to a rather simplistic process of bringing about equality between generating units which have the same design and manufacturing origin. Such an approach overlooks the complex factors which have to be borne in mind in the determination of tariffs.

xxx	xxx	xxx
xxx	xxx	xxx
xxx	xxx	xxx"

Paragraphs 37 to 41 of the above verdict are also quite relevant in this context; which have already been extracted in a different context.

32. There is a contention for the Petitioner that the 1st Respondent-Commission has not framed Regulations under Section 62(3) of the Act, which is stated as fatal in respect of the course and proceedings sought to be pursued by the Commission. It is settled law, that framing of any Rules or Regulation is not a *sine qua non* so as to give effect to the provisions of the Act and the framing of the Rules/Regulations is only in aid or support for the steps in this regard. This has been explained by the Constitution Bench of the Apex Court in **PTC India Ltd (supra)**. The relevant observations as contained in paragraph 53, 55, 56 and 57 are extracted below for easy reference:

“53. Applying the abovementioned tests to the scheme of the 2003 Act, we find that under the Act, the Central Commission is a decision-making as well as regulation-

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

54. xxx xxx xxx

55. To regulate is an exercise which is different from making of the regulations. However, making of a regulation under Section 178 is not a precondition 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 precondition to passing of an order levying a regulatory fee under Section 79(1)(g). However, if there is a regulation under Section 178 in that regard then the order levying fees under Section 79(1)(g) has to be in consonance with such regulation.

56. Similarly, while exercising the power to frame the terms and conditions for determination of tariff under Section 178, the Commission has to be guided by the factors specified in Section 61. It is open to the Central Commission to specify terms and conditions for determination of tariff even in the absence of the regulations under Section 178. However, if a regulation is made under Section 178, then, in that event, framing of terms and conditions for determination of tariff under Section 61 has to be in consonance with the regulations under Section 178.

57. One must keep in mind the dichotomy between the power to make a regulation under Section 178 on the 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 precondition 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 the Central Commission takes under Section 79(1)(j) have to be in conformity with Section 178."

It is pointed out that there is no contradiction or inconsistency between Regulation 33(6)(b)(iii) and Regulation 36(b)(a) of Annexure P/4 Regulations. The whole concept of cross subsidy surcharge is for the benefit of the 'law end' consumers, which may get defeated, if it is not based on average cost of supply.

33. The version of the Petitioner that the 'cross subsidy surcharge' is a stop gap arrangement, to be gradually phased out is not correct. There is absolutely no basis for the contention raised by the Petitioner that if the State wants to extend the subsidy, it could be done directly, by virtue of the mandate of Section 65 of the Act, 2003 is not correct. The subsidy to be provided by the State Government as envisaged under Section 65 of the Act, 2003 is entirely different from the cross subsidy contemplated under Section 39, 40, 42 and 61(g) of the Act, 2003. In fact, the direct subsidy envisaged under Section 65 is in addition to and not a substitute for the cross subsidy envisaged under Section 61(g) of the Act, 2003.

34. Considering the pleadings and proceedings and after hearing the submissions made by the learned counsel for the parties on both sides, in the light of the relevant provisions of law and the binding precedents as referred to above, this Court is of the view that the Petitioner has not demonstrated as to how Regulation 33(6)(b)(iii) of the Regulations is *ultra vires* to the provisions of the Act, 2003, the Tariff Policy framed by the Government or Part III of the Constitution of India. The pleadings and prayers in this regard are rather vague or ill conceived. Since the statutory appeal preferred against

the order passed by the 1st Respondent-Commission is stated as still pending before the Tribunal, the facts and figures with regard to the quantification of the amount is not subjected to scrutiny by this Court, but for considering the validity/vires of the particular regulation. We hold that the writ petition is devoid of any merit and none of the grounds raised in support of the same could be held as tenable.

35. The writ petition stands dismissed accordingly, without prejudice to the issue pending consideration in the statutory appeal preferred before the Tribunal. No costs.

Sd/-
(P.R. Ramachandra Menon)
CHIEF JUSTICE

Sd/-
(Parth Prateem Sahu)
JUDGE